KINGSLEYBOGARD

ATTORNEYS

LEAVES

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Merit School Conference
Reno, Nevada
October 22, 2016

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This handbook is designed for general informational purposes.
This handbook should not be construed as, or substituted for, formal legal advice.
Additionally, this handbook is not intended to create an attorney-client relationship
where none had already existed, or alter the scope of any existing attorney-client relationship.

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PREFACE

This handbook is intended to help your school district or county offices of education in coping with the many leaves of absence available to public school employees in California. The goal is creation of a reference tool to assist in arriving at the proper result, as defined by statute, when faced with an employee request for leave.

Some experienced practitioners may consider this information oversimplified. To assist these individuals with the more complex cases, we have cited applicable code sections in the discussion portion of each leave.

Throughout this handbook, when the term district (or districts) is used, it also includes county offices of education unless the discussion specifically excludes county offices.

This handbook is based solely upon the requirements set forth in statutes and case law. Such law is in constant flux. Legal counsel should always be contacted in specific situations to determine whether any such changes may affect a particular case. Moreover, many districts have created additional obligations through the collective bargaining process. This handbook must be read in concert with any collective bargaining agreements of your district.

We hope you find this information useful in addressing leaves of absence.

This handbook does not constitute legal advice, nor should it be treated as a substitute for seeking the independent advice of legal counsel.

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I
MISCELLANEOUS LEAVE PROVISIONS

A. APPLICABLE LAW

- Since January 1, 1976, California has had a "permissive" Education Code. This means that school districts may "otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established." EC § 35160.

- "Moreover, in addressing their needs, common as well as unique, school districts, county boards of education, and county superintendents of schools should have the flexibility to create their own unique solution." EC § 35160.1.

- Education Code §§ 1294, 1295, 44908, 44962, 44963, 44973, 44974, 44975, 44976, 45190, 45198.

- *CSEA v. Jefferson School District*, 119 Cal. Rptr. 668 (1975).

B. DISCUSSION

1. Certificated Employees

a. General Authority

Education Code section 44962 (and section 1294 for county offices) provides broad, general authority for districts to grant leaves of absence to certificated employees. While the Education Code provides express authorization for several specific leaves of absence, a district may also grant a leave of absence for any purpose or for any period of time, with or without pay, to an employee. The only prohibition is that, in doing so, an employee may not be deprived of any leave to which he/she is entitled by law. EC § 44963.

b. Reinstatement

A certificated employee, unless otherwise agreed upon, shall be reinstated at the expiration of leave to the position held at the time the leave of absence was granted. Because of this specific protection granted in the Education Code, the flexibility of the district is more limited with regard to certificated employees than with classified employees where a leave impacts on the efficient functioning of the district. EC § 44973. (*See* Sections I.3 and I.4 below.)

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c. Liability for Death or Injury

Neither the governing board nor the district may be held liable for payment of compensation or damages provided by law for the death or injury of an employee which occurs while the employee is on any leave of absence pursuant to the Education Code. EC § 44974.

d. Probationary Employees

Leaves of absence, when granted to a probationary employee, do not break continuity of service for the purpose of satisfying the probationary period. EC § 44975.

However, the period of the leave does not count as service when computing the 75% service requirement for a year of probationary service. EC §§ 44908 and 44975.

e. Transfer of School to New District

When any school or other place of employment is transferred from one district to another, employees who transfer with that school or place of employment shall be entitled to retain leave rights accumulated by service prior to such transfer. EC § 44976.

2. Classified Employees

a. General Authority

Education Code section 45190 (and section 1295 for county offices) provides broad general authority for districts to grant leaves of absence and vacations, with or without pay, to non-certificated employees.

While the Education Code provides express authorization for several specific leaves of absence, a district may also grant a leave of absence for any purpose or for any period of time, with or without pay, to a non-certificated employee. The only prohibition is that, in doing so, an employee may not be deprived of any leave to which he/she is entitled to by law. EC § 45198.

3. Excessive Absences and Abuse of Leave Privileges

When an employee abuses his/her employer's attendance and/or leave policy, the employer must determine whether the alleged misconduct is sufficiently egregious, frequent, or repeated to justify disciplinary action, and if so, what action is appropriate under the circumstances. Of course, any disciplinary action by a school district must comply with all laws, regulations, and applicable board policies and administrative regulations. Given the many legal rights and obligations associated with employee leaves, it is strongly advised that legal counsel be consulted in connection

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with such proposed disciplinary action. Please note that the topic of discipline and termination of school district is beyond the scope of this handbook.

4. Leaves That Create Undue Hardship on the Employer

Even in the absence of wrongdoing by the employee, there are circumstances in which a given leave may so interfere with the district's functioning that an employee may not be guaranteed a return to the same position he or she held before the leave.

In *CSEA v. Jefferson School District*, 119 Cal. Rptr. 668 (1975), the court specifically addressed this situation. In *Jefferson*, the absent employee incurred 338 absences over a four-year and ten-month period. The absences consisted of industrial accident and illness leaves, paid sick leaves and unpaid leaves of absence due to two heart attacks. However, the frequency and the magnitude of the absences caused a severe hardship on other employees and made the absent employee's performance unreliable. CSEA argued that because the employee was not at fault (her absences were not willful), she could not be disciplined by means of discharge. The Court disagreed, stating that the "statutory provisions dealing with leaves of absences do not impose a limitation . . . upon the unrestricted right to dismiss certified [sic] permanent employees for inefficiency, if it reaches the degree of becoming detrimental to the service." 119 Cal. Rptr. 668 at 674.

The Court did not address how many absences an employee must have before the employer may validly transfer or terminate the employee or over what period of time these absences must occur. Therefore, employers should consider the totality of the circumstances: 1) the extent to which the employee is absent; 2) whether the employer has made significant efforts to document the absences and to accommodate the employee's absences; and 3) whether, in spite of the employer's attempts, the efficiency of the business continues to suffer. [*Note:* Under Education Code section 44973, certificated employees are granted greater protection than classified employees and so it is questionable whether *Jefferson* is applicable to certificated employees.]

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II
VACATION

A. APPLICABLE LAW

- California Education Code §§ 45197, 45200
- *Seymour v. Christiansen*, 1 Cal. Rptr. 2d 257 (1991)
- *Francisco Suastez v. Plastic Dress Up Co.*, 183 Cal. Rptr. 846 (1982)

B. DISCUSSION

1. Certificated Employees

As a general statement, certificated employees do not earn vacation. They work, and are paid, for a pre-set number of days. It is not uncommon, however, for administrative certificated employees to have provisions for vacation in their contracts of employment.

2. Classified Employees

Districts must grant vacation to regular (i.e., probationary and permanent) classified employees. The vacation is at their regular rate of pay earned at the time the vacation is commenced.

a. Accrual Rates

At a ***minimum***, the employee shall earn:

- five-sixths (5/6) of a day for each month in which the employee is in paid status for more than one-half (½) the working days in the month (provided the employee is regularly employed five (5) days per week, seven (7) to eight (8) hours per day). EC § 45197(a).
- .03846 for each hour the employee is in paid status, not including overtime, for all employees regularly employed for fewer than 35 hours a week, regardless of the number of hours or days worked per week. EC § 45197(c).

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In lieu of accrual of vacation credit on a monthly basis, the district may provide for accrual of vacation credit on any of the following bases:

- for all employees or classes of employees who work a full work week of 40 hours, the district shall provide .03846 hours of vacation credit for each hour of paid service, not including overtime.

- for all employees or classes of employees who work a full work week of 37.5 hours, the district shall provide .04087 hours of vacation credit for each hour of paid service, not including overtime.

- for all employees or classes of employees who work a full work week of 35 hours, the district shall provide .04379 hours of vacation credit for each hour of paid service, not including overtime. EC § 45197(b).

b. Time of Taking

Vacation may, with the approval of the district, be taken at any time during the school year. If the employee is not permitted to take his/her full annual vacation, the amount not taken shall accumulate for use in the next year or be paid for in cash at the option of the district. EC § 45197(d).

c. Interruption of Vacation

A district may allow an employee to interrupt or terminate vacation leave in order to begin another type of paid leave without a return to active service. The employee must supply adequate notice and relevant supporting information regarding the basis for such interruption or termination. EC § 45200.

d. Taken But Not Earned

An employee may be allowed to use vacation hours not yet earned at the time the vacation is taken. If an employee is terminated who had been allowed to take vacation which was not yet earned at the time of termination of his/her services, the district shall deduct from the employee's final check the full amount of salary which was paid for such unearned days of vacation taken. EC § 45197(f)(g).

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e. Payment Upon Separation

Upon separation from service, the employee shall be entitled to lump-sum compensation for all earned and unused vacation. (*See* Section f. below for additional information.) Employees who have not completed six months of employment in regular status shall not be entitled to such compensation. EC § 45197(h).

f. Forfeiture vs. Cessation of Accrual

On this issue, school districts are different from private sector employees. In the private sector, the right to paid vacation (when offered in an employer's policy or contract of employment) constitutes deferred wages for services rendered. Case law holds that a proportionate right to a paid vacation "vests" as the labor is rendered. Once vested, the right is protected from forfeiture by Labor Code section 227.3. *Francisco Suastez v. Plastic Dress-Up Co.,* 183 Cal. Rptr. 846 (1982).

The rule is different for school districts due to the unique wording of the enabling statute. The California Court of Appeals in *Seymour v. Christiansen*, 1 Cal. Rptr. 2d 257 (1991), held that Education Code section 45197(d) limits the amount of vacation that an employee may carry over from one year to the next.

The Court held that the statute plainly intends that vacation will be taken during the year it is earned. As a result, an employee may not carry over vacation into the following year unless the employee is ***not permitted*** to take the vacation during the year it is earned. In such cases, the governing board may either permit the employee to carry over the unused vacation or pay the employee for the unused vacation. Such carried over vacation, however, must be used or paid in cash in the succeeding year.

An employee who simply refuses to take vacation forfeits unused vacation. The employee is not permitted to carry over the unused vacation and will not be paid for the vacation upon separation of employment.

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III
SICK LEAVE

A. APPLICABLE LAW

- California Education Code §§ 44978, 44979, 44980, 45191, 45199, 45202
- Labor Code § 233, 246.5, 245.5
- Unemployment Insurance Code § 3303
- 30 California Attorney General's Opinion 78 (1957)

B. DISCUSSION

1. Certificated Employees

a. Accrual Rates

If employed five (5) days a week for a full school year, ten (10) days' leave of absence is accrued each year for illness or injury with full pay. The governing board may provide for additional days of leave for illness or injury at its discretion.

If employed less than five (5) days a week for a full school year, a proportionate amount of leave of absence for illness or injury is accrued. EC § 44978.

b. Time of Taking

This leave of absence need not have been earned prior to taking leave. Such leave may be taken at any time during the school year. Any leave not utilized shall accumulate from year-to-year without limit.

The governing board must adopt rules and regulations requiring and prescribing the manner of proof of illness or injury for the purpose of utilizing this leave. Such rules and regulations shall not discriminate against evidence of treatment, and the need therefor, by the practice of the religion of any well recognized religious sect, denomination or organization. EC § 44978.

NOTES

c. Transfer of Accumulated Sick Leave

1. Who is eligible?

A certificated employee who has completed at least one (1) school year of service in a district, and who accepts a certificated position in another district, may transfer accumulated sick leave, provided it is:

- at any time during the second or any succeeding school year of his/her employment with the first district; or

- within the school year following the school year in which employment with the prior district is terminated. EC § 44979.

2. What is transferred?

The total sick leave which he/she had "on the books" at the first district shall be transferred to the new district. A district may not adopt a policy or rule which requires a certificated employee to waive any or all of the leave of absence which he/she is entitled to have transferred.

These provisions apply to certificated employees who transfer between school districts, county superintendents of schools, the State Department of Education, Office of the Chancellor of the California Community Colleges and the Commission on Teacher Credentialing. EC § 44980.

d. Taken But Not Earned

If a teacher takes ten (10) days leave and subsequently fails to serve the district for full school year, the district may deduct an amount equivalent to the unearned leave from the final paycheck payable to the teacher. 30 Ops Cal Atty Gen 78 (1957).

If a teacher becomes ill on the first day of school and subsequent to the illness he/she severs employment with the district before the end of the school year, the district may deduct from his/her final check a prorated amount representing unearned sick leave. 30 Ops Cal Atty Gen 78 (1957).

e. Healthy Workplaces, Healthy Families

An employee may use the employee's accrued six leave, in an amount not less than the amount the employee could accrue in six months for diagnosis, care, or treatment of an existing condition or the preventive care for an employee or an employee's family member. LC § 233 and 246.5.

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f. Victims of Crimes Sick Leave

An employee may use the employee's accrued six leave, in an amount not less than the amount the employee could accrue in six months for being a victim of domestic violence, sexual assault, or stalking. LC 246.5

An employee who is aggrieved by violation of these sections is entitled to reinstatement and actual damages or one (1) day's pay, whichever is greater. LC § 233.

g. Paid Family Leave

Paid Family Leave (PFL) extends the current State Disability Insurance Compensation to individuals who take qualifying leaves of absence. PFL permits an eligible employee to use his/her available sick leave during the seven (7) day waiting period before benefits are provided. Un Ins Code § 3303(b). (*See* Section XV.)

2. Classified Employees

a. Accrual Rate

If employed five (5) days a week for a full fiscal year, twelve (12) days' leave is accrued to be used for illness or injury with full pay. The governing board may provide for additional days of leave for illness or injury at its discretion.

If employed less than five (5) days a week, or less than a full fiscal year, or both, a proportionate amount of leave of absence for illness or injury is accrued. EC § 45191.

b. Time of Taking

This leave of absence need not have been earned prior to taking leave. Such leave may be taken any time during the fiscal year. New employees, however, shall not be eligible to take more than six (6) days (or the proportionate amount to which he/she is entitled) until the first day of the calendar month after completion of six (6) months of service with the district. Unused sick leave shall accumulate from year to year without limit.

The governing board must adopt rules and regulations requiring and prescribing the manner of proof of illness or injury for the purpose of utilizing this leave. Such rules and regulations shall not discriminate against evidence of treatment, and the need therefor, by the practice of the religion of any well recognized religious sect, denomination or organization. EC § 45191.

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c. Transfer of Accumulated Sick Leave

1. Who is eligible?

A classified employee who has completed at least one (1) calendar year of service in a district[1] who subsequently accepts employment with another district within one (1) year of the termination of his/her former employment. EC § 45202.

2. What is transferred?

The total sick leave which he/she had "on the books" at the first district shall be transferred to the new district. If termination was for cause, the transfer **may** be made if agreed to by the new district.

The new district may, for seniority purposes, count all or any part of the employee's service at the first district. The service cannot have been separated by a break greater than one (1) year as of the last day of paid service. Previous service, however, may not be counted for seniority purposes when position or personnel reduction is ordered for any reason by the board. A district may not adopt a policy or rule which requires any classified employee to waive any part of the benefits which they may be entitled to have transferred. EC § 45202.

d. Taken But Not Earned

There are no codes, caselaw or Attorney General opinions on point. However, *see* section III.B.1.d., above.

e. Illness of a Family Member

A classified employee may to use up to six (6) days of accrued and available sick leave (per calendar year) for[2]:

1. Diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member.

2. For an employee who is a victim of domestic violence, sexual assault, or stalking, the purposes described in

[1] School district includes county superintendent of schools or community college district.

[2] See also Healthy Workplace Healthy Family Act. LC § 245, *et seq*. Contact Counsel for questions on this topic.

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subdivision (c) of Section 230 and subdivision (a) of Section 230.1.

LC §§ 233 and 246.5.

A family member is defined as follows:

1. A child, which for purposes of this article means a biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis. This definition of a child is applicable regardless of age or dependency status.

2. A biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child.

3. A spouse.

4. A registered domestic partner.

5. A grandparent.

6. A grandchild.

7. A sibling.

LC §§233 and 245.5.

An employee who is aggrieved by violation of this section is entitled to reinstatement and actual damages or one (1) day's pay, whichever is greater. LC § 233.

f. Other Leaves of Absence for Accident or Illness

A district may also grant leave of absence to classified employees, paid or unpaid, for absence due to accident or illness. Such absence may or may not arise out of employment, or because of quarantine which results from contact with other persons having a contagious disease while in the performance of their duties. EC § 45199.

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g. Paid Family Leave

Paid Family Leave (PFL) extends the current State Disability Insurance Compensation to individuals who take qualifying leaves of absence. PFL permits an eligible employee to use his/her available sick leave during the seven day waiting period before benefits are provided. Un Ins Code § 3303(b). (*See* Section XV.)

3. Days vs. Hours

If a district's leave tracking system can address hours, this method is preferred (particularly for classified employees). To illustrate, if an employee has "earned" 40 "days" at 3 hours per day, and the employee's assignment is increased to 8 hours per day, utilization will far exceed what was "earned."

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IV
INDUSTRIAL ACCIDENT AND ILLNESS

A. APPLICABLE LAW

- California Education Code §§ 44984, 45192

B. DISCUSSION

1. Certificated Employees

School districts must adopt rules and regulations providing leave of absence for certificated employees due to industrial accident and illness. Such rules and regulations shall include the following provisions:

- allowable leave shall be for not less than sixty (60) days during which the schools of the district are required to be in session or when the employee would otherwise have been performing work for the district in one (1) fiscal year for the same accident;

  Note: If the board fails to adopt rules and regulations, an employee shall be entitled to industrial accident or illness leave, but ***without limitation*** *as to the number of days of such leave.*

- allowable leave shall not accumulate from year-to-year;

- industrial accident or illness leave shall commence on the first day of absence;

- when absent due to industrial accident or illness, an employee shall be paid only that portion of the salary due which, when added to his/her temporary disability indemnity under the workers' compensation laws of this state, will result in not more than his/her full salary;

- industrial accident or illness leave shall be reduced by one day for each day of authorized absence regardless of a temporary disability indemnity award;

- when an industrial accident or illness leave overlaps into the next fiscal year, the employee shall be entitled to only the amount of unused leave due him and/or her for the same illness or injury.

Upon termination of industrial accident or illness leave, the employee is entitled to sick leave (EC § 44978) and difference pay (EC § 44977), and thereafter to the 39 month reemployment list. The employee's absence

shall be deemed to have commenced on the date of termination of the industrial accident or illness leave. If the employee continues to receive temporary disability indemnity, he/she may elect to take as much of his/her accumulated sick leave, which when added to his/her temporary disability indemnity, will result in payment of not more than his/her full salary. EC § 44984.

To illustrate: Robert, a certificated employee, was injured while working and is receiving workers' compensation which amounts to approximately two-thirds (2/3) of his salary. His employer must only deduct one-third (1/3) of a sick day for each day of absence so that Robert does not receive more than his normal wage. This essentially results in a "tripling" of Robert's available sick leave for as long as he is receiving workers' compensation.

The governing board may, by rule or regulation, provide for additional leave of absence for industrial accident or illness as it deems appropriate.

During any paid leave of absence, the employee may endorse to the district the temporary disability indemnity checks received on account of his/her industrial accident or illness. The district, in turn, shall issue the employee appropriate salary warrants for payment of the employee's salary and shall deduct normal retirement, other authorized contributions, and the temporary disability indemnity, if any, actually paid to and retained by the employee for periods covered by such salary warrants.

Effective January 1, 2016 an employee receiving such benefits may now travel outside the State of California. EC § 44984.

2. Classified Employees

A school district shall provide by rules and regulations for industrial accident or illness leaves of absence for classified employees. Such rules and regulations shall include the following provisions:

- allowable leave shall not be for less than sixty (60) working days in any one (1) fiscal year for the same accident;

  *Note: If the board fails to adopt rules and regulations, an employee shall be entitled to industrial accident or illness leave, but **without limitation** as to the number of days of such leave.*

- allowable leave shall not accumulate from year-to-year;

- industrial accident or illness leave will commence on the first day of absence;

- payment for wages lost on any day shall not, when added to an award granted the employee under the workers' compensation laws in this State, exceed the normal wage for the day;

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- industrial accident leave will be reduced by one (1) day for each day of authorized absence regardless of the compensation award made under workers' compensation;

- when an industrial accident or illness occurs at a time when the full sixty (60) days will overlap into the next fiscal year, the employee shall be entitled to only that amount remaining at the end of the fiscal year in which the injury or illness occurred for the same illness or injury. EC § 45192.

Industrial accident or illness leave is to be used in lieu of entitlement to sick leave. When entitlement to industrial accident or illness leave has been exhausted, entitlement to sick leave and extended illness pay will then be used. If an employee is receiving workers' compensation, the person shall be entitled to use only so much of the person's accumulated or available sick leave, accumulated compensating time off (CTO), vacation or other available leave, which, when added to the workers' compensation award, provide a full day's wage or salary. EC § 45192.

The governing board may, by rule or regulation, provide for additional leave of absence for industrial accident or illness, paid or unpaid, as it deems appropriate. During this leave, the employee may return to his/her position without suffering any loss of status or benefits (except as required by the necessities of the district. *See* I.4 above and Labor Code Section 132a). The employee shall be notified, in writing, that available paid leave has been exhausted, and shall be offered an opportunity to request additional leave. Periods of leave, paid or unpaid, shall not be considered a break in service. EC § 45192.

During all paid leaves of absence, the employee must endorse to the district wage loss benefit checks received under the workers' compensation laws of California. The district, in turn, must issue the employee appropriate warrants for payment of wages or salary and shall deduct normal retirement and other authorized contributions. EC § 45192.

In general, when all available leaves of absence (paid or unpaid) have been exhausted, and if the employee is not medically able to resume his/her duties, the employee shall, if not placed in another position, be placed on a reemployment list for a period of 39 months. If the employee is able to resume his/her duties during the 39-month period, the employee shall be employed in a vacant position in the class of his/her previous assignment. This employment shall be over all other candidates except for a reemployment list established because of lack of work or lack of funds. In that case, the employee shall be listed in accordance with appropriate seniority regulations.

An employee who has been placed on a reemployment list, who has been medically released or returned to duty and who fails to accept an appropriate assignment shall be dismissed. EC § 45192.

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There is some ambiguity in the law, however, as to whether it is permissible to place an injured employee on the 39-month rehire list when they remain temporarily disabled and unable to work (their condition is not yet permanent and stationary). To date, the courts have not definitively ruled on this issue. Accordingly, it is advised that employees who remain off work after their period of extended district industrial leave not be terminated or placed on the 39-month rehire list. Note that workers' compensation law is complex and is beyond the scope of this manual. Prior to taking any action which changes the employment status of an employee who is on an industrial injury related leave, the district should consult with legal counsel.

The governing board may require that an employee serve or have served continuously for a specified period of time with the district before such leave is made available to the employee. This period shall not exceed three (3) years.

Any employee utilizing this leave shall, during the period of injury or illness, remain within the State of California unless the governing board authorizes travel outside the State. EC § 45192.

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V
NONINDUSTRIAL ACCIDENT OR ILLNESS

A. APPLICABLE LAW

- California Education Code § 45195

B. DISCUSSION

1. Classified Employees

A permanent classified employee who has exhausted all entitlement to sick leave, vacation, compensatory overtime (CTO), or other available paid leave, and who is absent because of nonindustrial accident or illness, may be granted additional leave, paid or unpaid, not to exceed six (6) months. The employee shall be notified, in writing, that available paid leave has been exhausted, and be offered an opportunity to request additional leave.

The board may renew the leave of absence, paid or unpaid, for two (2) additional six (6) month periods (or lesser leave periods that it deems appropriate) not to exceed a total of eighteen (18) months.

If an employee on this leave is able to resume the duties of a position within the classification to which he/she was assigned, he/she may do so at any time during the leave of absence granted. Time lost shall not be considered a break in service. The employee shall be restored to his/her former position, if at all possible, with all the rights, benefits, and burdens of a permanent employee.

If, at the conclusion of all leaves of absence, paid or unpaid, the employee is still unable to resume the duties of his/her position, the employee shall be placed on a reemployment list for a period of 39 months. During the 39-month period, if the employee is able to resume the duties of his/her position, the employee shall be reemployed in the first vacancy in the classification of his/her previous assignment. The employee's reemployment will take preference over all other applicants except for those laid off for lack of work or lack of funds. In such case, the employee shall be ranked according to his/her proper seniority.

Upon resumption of his/her duties, the break in service will be disregarded and the employee shall be restored as a permanent employee.

NOTES

VI
DIFFERENCE PAY

A. APPLICABLE LAW

- California Education Code §§ 44977, 44978.1 and 45196
- *Trotter v. Los Angeles County Board of Education*, 213 Cal. Rptr. 841 (1985)
- 53 Ops Cal Atty Gen 111 (1970)

B. DISCUSSION

1. Certificated Employees

a. When Does Difference Pay Generally Apply?

Difference pay applies when a certificated employee has exhausted all available sick leave, including all accumulated sick leave, and continues to be absent from his/her duties on account of illness or accident. The absence need not arise out of or in the course of the employment of the employee. Difference pay is for an **additional** five (5) school months. EC § 44977(a).

b. How is Difference Pay Calculated?

The employee shall receive the difference between the sum that is actually paid a substitute employee employed to fill his/her position during his/her absence and their regular salary. If no substitute employee was employed, the employee will receive the difference between his/her regular salary, and the amount that would have been paid the substitute had he/she been employed.

The district shall make every reasonable effort to secure the services of a substitute employee. EC § 44977(a). Except in a district which has adopted a salary schedule for substitute employees, the amount paid the substitute shall be less than the salary due the absent employee. EC § 44977(d).

Note: Collective bargaining agreements often specify one hundred (100) working days of difference pay (as opposed to five (5) months). If difference pay is calculated using one hundred (100) working days, it may extend the leave beyond five (5) school months.

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c. Sick Leave and Difference Pay Run Consecutively

Sick leave (including all accumulated sick leave) and the five (5) month period, shall run ***consecutively***. EC § 44977(b)(1).

d. One Period Per Illness/Accident - No Yearly Renewal

An employee shall not be provided more than one (1) five- month period per illness or accident. However, if a school year terminates before the five-month period is exhausted, the employee may take the balance of the five- month period in a subsequent school year. In other words, there is no yearly renewal for the same illness/accident. EC § 44977(b).

e. Placement on the Reemployment List

If the employee continues to be absent beyond the five- month period, and the employee is not medically able to resume the duties of his/her position, the employee shall, if not placed in another position, be placed on a reemployment list for a period of twenty-four (24) months if the employee is probationary, or for a period of thirty-nine (39) months if the employee is permanent.

If the employee is medically able, during the 24- or 39- month period, the employee shall be reemployed in a position for which he/she is credentialed and qualified. The 24- or 39-month period shall commence at the expiration of the five-month period. EC § 44978.1.

f. Difference Pay During "Maternity and Paternity Leave"

Effective January 1, 2016, certificated employees are also entitled an *additional* 12 weeks of difference pay while on "maternity and paternity leave" pursuant to the CFRA. EC § 44977.5. While the CFRA does not use the term "maternity and paternity leave," the phrase refers to leave taken following the birth or adoption of a child. GC § 12945.2(c)(3)(A).

Employees are only entitled to such leave after exhausting all available sick leave. Sick leave taken for purposes of maternity/paternity leave runs *concurrently* with the 12 weeks of difference pay granted by EC 44977.5–in other words, the 12 weeks of difference pay is reduced by any period of sick leave taken for maternity/paternity leave. EC § 44977.5(b)(1).

NOTES

2. Classified Employees

a. When Does Difference Pay Apply?

Difference pay applies when a classified employee has exhausted all regular sick leave, accumulated compensating time, vacation or other available paid leave. EC § 45196.

b. How is Difference Pay Calculated?

The employee shall receive the difference between the sum that is actually paid a substitute employee employed to fill his/her position during his/her absence and the employee's regular salary. Except in a district which has adopted a salary schedule for substitute employees, the amount paid the substitute shall be less than the salary due the absent employee. EC § 45196.

c. Exceptions to Difference Pay

Difference pay does not apply to any school district which adopts a rule which provides that a regular classified employee shall once a year be credited with a total of not less than one hundred (100) working days of paid sick leave. This one hundred (100) working days includes the twelve (12) days required under Education Code section 45191. Such days of paid sick leave, in addition to those required by Section 45191, shall be compensated at no less than fifty percent (50%) of the employee's regular salary. EC § 45196.

d. Sick Leave and Difference Pay Run Concurrently

Education Code section 45196 does not address whether sick leave and difference pay run consecutively or concurrently. There is no case law on point; however, Attorney General Opinion, 53 Ops Cal Atty Gen (1970) 111 at 113, states that "the five month period runs **concurrently** with other paid leaves."

Attorney General opinions, while not binding, are persuasive in the absence of controlling authority.

e. One Period Per Illness/Accident - No Yearly Renewal

Education Code section 45196 makes no reference to what happens after the five month period is exhausted. However, Education Code sections 45192 (industrial accident and illness leaves for classified employees) and 45195 (additional leave for nonindustrial accident or illness; reemployment preference) provide that when all available leaves of absence are exhausted, if the employee is unable to medically resume his/her duties, the employee shall be placed on a reemployment list for a period of 39 months. *Trotter v. Los Angeles County Bd. Of Education,* 213 Cal.Rptr. 841 (1985), held

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that this placement is mandatory. Yearly renewal of the five-month period, for the same illness/accident, would be inconsistent with the requirement to place the employee on a 39-month reemployment list.

While this leave does not renew yearly for the same illness/accident, it probably does renew for each separate illness/accident. First, if the leave did not renew for each separate illness/accident, the employee would be entitled to difference pay only once in his/her career. This would be a very harsh result considering the ambiguity of the statute. Second, the legislature recently clarified difference pay for certificated employees (*see above*) to include renewal for each separate illness/accident. It is unlikely that the courts would interpret classified employees to have such substantially reduced rights in comparison to certificated employees.

NOTES

VII
WORKERS' COMPENSATION

The laws relating to workers' compensation benefits are beyond the scope of this handbook.

It should be noted, however, that workers' compensation does impact certain of the leave provisions. As an example, employees on leave for industrial accident or illness are entitled to use only so much of their accumulated sick leave, compensating time or vacation which, when added to the workers' compensation award, provide for a full day's wage or salary. Also, injured and disabled workers are granted special protection from discrimination related to their industrial injury and related leaves. Labor Code section 132a; Government Code section 12900, et seq.

Always consult competent legal counsel when contemplating any action that will affect the employment status of an employee on leave or returning from leave in connection with a claim of industrial injury.

NOTES

VIII
PERSONAL NECESSITY LEAVE

A. APPLICABLE LAW

- California Education Code §§ 44981 and 45207

B. DISCUSSION

1. Certificated Employees

Education Code section 44981 permits certificated employees to use up to seven (7) days of sick leave per school year in cases of personal necessity.[3]

The statute does not define personal necessity. It simply says that advance permission for the leave is not required for the following reasons:

- death or serious illness of a member of his/her immediate family[4].
- accident, involving his/her person or property, or the person or property of a member of his/her immediate family.

Each school district must adopt rules and regulations requiring and subscribing the manner of proof of personal necessity.

2. Classified Employees

Education Code section 45207 permits classified employees to use up to seven (7) days of sick leave per school year in case of personal necessity. Personal necessity includes:

- death of a member of his/her immediate family when additional leave is required beyond that provided for bereavement leave pursuant to Education Code section 45194;
- an accident involving his/her person or property, or the person or property of a member of his/her immediate family;

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[3] Unless a maximum number of days in excess of seven (7) is specified for that purpose in the bargaining unit agreement.

[4] Under Labor Code § 233, an employee is permitted to use not less than six (6) months of accrued and available sick leave (per calendar year) to attend to an illness of a child, parent, domestic partner or spouse (*see* Sick Leave, Section III of this Handbook).

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- appearance in any court or before any administrative tribunal as a litigant, party or witness under subpoena or any order made with jurisdiction;

- such other reasons which may be prescribed by the governing board.

Each school district must adopt rules and regulations requiring and subscribing the manner of proof of personal necessity. These rules and regulations may not require an employee to seek permission in advance for leave taken for the death of a member of his or her immediate family or an accident involving his/her person or property, or that of a member of his/her immediate family. EC § 45207(b).

3. Earned Leave in Excess of Seven Days

Earned leave in excess of seven (7) days may not be used in any school year unless:

- A maximum number of days in excess of seven (7) is specified for personal necessity within the collective bargaining agreement (EC § 45207(b)(1)); or

- If, where there is no exclusive representative, the district governing board, by resolution, adopts a policy allowing earned leave in excess of seven (7) days to be used in any school year for personal necessity. EC § 45207(b).

Any authorized personal necessity leave shall be deducted from an employee's sick leave. EC § 45207(c).

4. Practical Consideration

The conversion of personal necessity days to "no-tell" days effectively creates additional days of vacation.

There is considerable overlap with other collectively bargained leaves often referred to as a "personal business" leave.

Districts should restrict the use of personal necessity days (no-tell) if used for concerted activity of any kind (whether association-directed or not).

NOTES

IX
BEREAVEMENT

A. APPLICABLE LAW

- California Education Code §§ 44985, 45194

B. DISCUSSION

Both certificated and classified employees are entitled to a leave of absence if there is a death of any member of the employee's immediate family. Such leave shall not exceed three (3) days for in-state travel or five (5) days for out-of-state travel.

No deduction shall be made from the salary of such employee nor shall such leave be deducted from any leave granted by the Education Code or provided by the governing board of the district. In short, it is **free**.

A member of the immediate family includes: the mother, father, grandmother, grandfather, or a grandchild of the employee or of the spouse of the employee, and the spouse, son, son-in-law, daughter, daughter-in-law, brother or sister of the employee, or any relative living in the immediate household of the employee. EC §§ 44985, 45194.

NOTES

X
JURY SERVICE

A. APPLICABLE LAW

- California Code of Civil Procedure §§ 191 and 193
- California Education Code §§ 44036 and 44037
- Labor Code § 230
- 59 California Attorney General's Opinion 633 (1976)

B. DISCUSSION

In California, there are three (3) types of juries - trial jury, inquest jury and grand jury. CCP § 193.

1. Service on a Trial or Inquest Jury

a. Certificated Employees

For certificated employees, the Education Code is "permissive." The governing board of a school district ***may*** grant leaves of absence to certificated employees who are called for jury duty in the manner provided for by law. EC § 44036(b). There are three (3) types of juries – grand juries, trial juries and inquest juries. CCP § 193.

The Labor Code, however, is mandatory. A district ***must*** grant leave to a certificated employee to appear in court to serve on an inquest jury or a trial jury if he/she gives the district reasonable notice. This section does not, however, require leave with pay. LC § 230(a).

While not required, pay ***may be*** up to the difference between the employee's regular earnings less any jury fees. EC § 44036(c).

An employee may use vacation, personal leave, or compensatory time off that is otherwise available to the employee under the applicable terms of employment, unless otherwise provided by a collective bargaining agreement. LC § 230(g).

An employee who is discharged, threatened with discharge, demoted, suspended or in any other manner discriminated or retaliated against for taking time off to serve on a trial or inquest jury is entitled to reinstatement and reimbursement for lost wages and benefits. Willful refusal to rehire, promote, or "otherwise

restore" an employee or former employee who has been determined eligible for rehire or promotion by a grievance procedure, or hearing authorized by law, is a misdemeanor. LC § 230(e).

b. Classified Employees

For classified employees, the Education Code is mandatory. A district ***must*** grant leave to a non-certificated employee to appear in court to serve on an inquest jury or trial jury if he/she gives the district reasonable notice. EC § 44037; LC § 230(a).

Districts may not pass rules or regulations which encourage employees to seek exemption from jury duty. A district may, however, discuss with the affected employee the practicality of seeking exemption when acceptance would tend to materially disrupt the district's operations. A district may pass a rule or regulation which provides that no more than two percent (2%) of its staff shall be granted leave with pay at any one time. EC § 44037.

Leave of absence for jury duty ***shall*** be with pay up to the amount of the difference between the employee's regular earnings and any amount he/she receives as juror fees. EC § 44037.

An employee who is discriminated or retaliated against for taking such time off is entitled to reinstatement and reimbursement for lost wages and benefits. Willful refusal to rehire, promote, or "otherwise restore" an employee or former employee who has been determined eligible for rehire or promotion by a grievance procedure, or hearing authorized by law, is a misdemeanor. LC § 230(e).

2. Service on a Grand Jury

The definition of jury duty includes grand jury. CCP § 191.

a. Certificated Employees

A district ***may*** grant leaves of absence to certificated employees who are called for grand jury service. EC § 44036(b); CCP § 191; 59 Ops Cal Atty Gen 633 (1976).

A district ***may*** grant such leave with pay up to the difference between the employee's regular earnings less any jury fees. EC § 44036(c).

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b. Classified Employees

A district ***must*** grant leaves of absence to non-certificated employees who are called for grand jury service in the manner provided for by law. EC § 44037.

Districts may not pass rules or regulations which encourage employees to seek exemption from grand jury service. A district may, however, discuss with the affected employee the practicality of seeking exemption when acceptance would tend to materially disrupt the district's operations. A district may pass a rule or regulation which provides that no more than two percent (2%) of its staff shall be granted leave with pay at any one time. EC § 44037.

Leave of absence for grand jury service shall be with pay up to the amount of the difference between the employee's regular earnings and any amount he/she receives as juror fees. EC § 44037.

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XI
APPEARANCE IN COURT AS A WITNESS

A. APPLICABLE LAW

- California Education Code § 44036
- California Government Code § 68096.1
- California Labor Code § 230

B. DISCUSSION

1. Appearance in General

The Education Code is permissive. A district ***may*** grant leave to an employee to appear as a witness in court (other than as a litigant) or to respond to an official order from another governmental jurisdiction for reasons not brought about through the connivance or misconduct of the employee. EC § 44036(a).

The Labor Code is mandatory. A district ***must*** grant leave to an employee to appear in court to comply with a subpoena or court order as a witness (but not as a litigant) if he/she gives the district reasonable notice. LC § 230(a)-(b). The Labor Code does not address pay.

2. Appearance in His/Her Professional Capacity

An employee who is discriminated or retaliated against for taking such time off is entitled to reinstatement and reimbursement for lost wages and benefits. Willful refusal to rehire, promote, or "otherwise restore" an employee or former employee who has been determined eligible for rehire or promotion by a grievance procedure, or hearing authorized by law, is a misdemeanor. LC § 230(e).

Such leave of absence ***may*** be granted with pay up to the amount of the difference between the employee's regular earnings and any amount he/she receives for any witness fees. EC § 44036(a).

Government Code section 68096.1 specifically requires payment to a local agency for any employee obliged by a subpoena to attend a civil action or proceeding as a witness in litigation regarding an event or transaction which he/she perceived or investigated **in the course of his/her duties.** Additionally, the local agency cannot be named as a party in the action or proceeding. The amount of payment is One Hundred Fifty Dollars ($150) per day requested. The payment will be used for compensation of wages and travel expenses.

The local agency is responsible for an accounting of the costs. If the total daily amount is more than $150, then the party requesting the subpoena will be required to reimburse the local agency that amount. If the amount is less than $150, then the local agency is responsible for refunding the requesting party.

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XII
VICTIM OF DOMESTIC VIOLENCE OR VIOLENT CRIME

A. APPLICABLE LAW

- California Labor Code §§ 230, 230.1; 230.2; 233; 246.5
- California Family Code § 6211

B. DISCUSSION

1. Domestic Violence, Sexual Assault, and Stalking

An employer must grant leave to an employee who is a victim of domestic violence, sexual assault, or stalking for specified purposes. These purposes include:

- To obtain any form of related legal relief or protection, including, but not limited to, a temporary restraining order, restraining order, other injunctive relief, to help ensure the victim's health, safety or welfare, or that of his/her child;
- To seek medical attention for injuries caused by domestic violence, sexual assault, or stalking;
- To obtain services for injuries caused by domestic violence, sexual assault, or stalking;
- To obtain psychological counseling related to an experience of domestic violence, sexual assault, or stalking; and/or
- To participate in safety planning and to take other actions to increase safety from future domestic violence, sexual assault, or stalking, including temporary or permanent relocation. LC § 230; 230.1; 246.5.

The employee must give reasonable advance notice of the employee's intention to take time off, unless the advance notice is not feasible. In the event an unscheduled absence occurs, the employee must provide the district with certification within a reasonable time after the appearance. LC § 230(d); 230.1. Certification can be in the form of the following:

- a police report indicating the employee was a victim of domestic violence, sexual assault, or stalking;
- a court order protecting the employee from the perpetrator of an act

of domestic violence, sexual assault, or stalking, or other evidence from the court or prosecuting attorney;

- documentation from a medical professional, domestic violence counselor, sexual assault counsel, health care provider, counselor, indicating that the employee is undergoing treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence or sexual assault. LC § 230(d)(2).

To the extent allowed by law, the employer shall maintain the confidentiality of such victims.

An employee who is discriminated or retaliated against for taking such time off is entitled to reinstatement and reimbursement for lost wages and benefits. Willful refusal to rehire, promote, or "otherwise restore" an employee who has been determined eligible for rehire or promotion by a grievance procedure, or hearing authorized by law, is a misdemeanor. LC §§ 230(e); 230.1.

Employees are entitled to use their vacation, personal leave, and other compensatory time off when taking such leave. LC §§ 230(i); 230.1(e); 233.

2. Violent Crime

An employer, or an employer's agent, must grant leave to an employee who is a victim of a violent and/or serious felony, an immediate family member of a victim, a registered domestic partner of a victim, or the child of a registered domestic partner of a victim, to be absent from work in order to attend judicial proceedings related to that crime. LC § 230.2(b).

The employee must give the employer advance notice in the form of a copy of the notice of each scheduled proceeding that is provided to the victim by the agency responsible for providing notice, unless advance notice is not feasible. LC § 230.2(c).

If advance notice is not feasible or an unscheduled absence occurs, the employer shall not take any action against the employee if the employee, within a reasonable time after the absence, provides the employer with documentation from any of the following:

- the court or government agency setting the hearing;
- the district attorney or prosecuting attorney's office;
- the victim/witness office that is advocating on behalf of the victim. LC § 230.2(c)

The employee may elect to use his/her accrued paid vacation time, personal leave time, sick leave, compensatory time off, or unpaid leave time, unless

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otherwise provided by a collective bargaining agreement. The employee's rights provided under this section shall not be diminished by any collective bargaining agreement term or condition. LC § 230.2(d).

An employer shall keep confidential any records pertaining to the employee's absence. LC § 230.2(e).

An employer may not discharge from employment or in any manner discriminate against an employee, in compensation or other terms, conditions, or privileges of employment, including, but not limited to, the loss of seniority or precedence, because the employee is absent from work. LC § 230.2(f).

Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated or retaliated against in the terms and conditions of employment by his/her employer because the employee has exercised his/her rights, may file a complaint with the Division of Labor Standards Enforcement of the Department of Industrial Relations. LC § 230.2(g).

The employee has one (1) year from the date of the alleged violation to file his/her complaint. LC § 230.2(g).

NOTES

XIII
PREGNANCY LEAVE

A. APPLICABLE LAW

1. State Law

- Education Code §§ 44965 and 45193
- Government Code §§ 12943, 12945 and 12945.2
- Unemployment Insurance Code §§ 2626 and 3303
- Title 2 of the California Code of Regulations, §§ 11035 et seq.

2. Federal Law

- Title VII of the Civil Rights Act of 1964, 42 United States Code § 2000e-2 and § 2000e
- Family and Medical Leave Act, 29 United States Code §§ 2601-2654
- *Scherr v. Woodland Sch. Com. Consol. Dist. No. 50*, 867 F. 2d 974 (7th Cir., 1988)

B. DISCUSSION

1. State Law

a. Education Code

Education Code section 44965 requires that school districts provide certificated employees with a leave of absence due to pregnancy, miscarriage, childbirth, and recovery therefrom.

Education Code section 45193 permits school districts to provide (female) classified employees with a leave of absence due to pregnancy or convalescence following childbirth.

Neither section provides specific guidelines. As a result, compliance with these Education Code sections is achieved by reference to other applicable laws.

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b. Government Code - Pregnancy Disability Leave

Government Code section 12943 specifically prohibits school districts from engaging in discriminatory practices based upon pregnancy. Government Code section 12945, generally known as Pregnancy Disability Leave, sets forth specific discriminatory prohibitions, as well as a woman's pregnancy leave rights.

1. Eligibility

There are no eligibility requirements for Pregnancy Disability Leave. An employee is eligible at the time of employment. GC § 12945.

2. Length of Leave Required

An employer must give each female employee a leave of absence of up to four (4) months (eighty-eight (88) working days or seven hundred four (704) hours for a full-time employee) whenever she becomes disabled by pregnancy, childbirth, or related medical conditions. GC § 12945(b)(2); 2 CCR § 11042(a). Four (4) months is the maximum period required. A woman who is physically and mentally capable of returning to work before the expiration of four (4) months is not entitled to a full four-month leave of absence.

3. When is a Woman Disabled?

A woman is disabled by pregnancy, childbirth, or related medical conditions if, in the opinion of her health care provider, she:

- is unable to work at all;
- is unable to perform any one or more of the essential functions of her job or to perform those functions without undue risk to herself, the successful completion of her pregnancy, or to other persons;
- is suffering from severe "morning sickness;"
- needs to take time off for prenatal care. 2 CCR § 11035(g).

4. Reasonable Accommodation

An employer must provide reasonable accommodation for an employee for conditions related to pregnancy, child birth, or related medical conditions, if the employee so requests upon the advice of her health care provider. GC § 12945(a)(3)(A). *See* the discussion on reasonable accommodation under the FEHA. *See, also, Sanchez v. Swissport* (2013) 153 Cal.Rptr. 367 (finding that

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(1) FEHA may require more disability leave for a pregnant employee than the PDL; and (2) leave until childbirth is reasonable accommodation for inability to work during high risk pregnancy).

5. Intermittent or Reduced Work Schedule

Pregnancy Disability Leave may be taken intermittently or on a reduced work schedule when medically advisable, as determined by the employee's health care provider. 2 CCR § 11042(a)(4). An employer may limit leave increments to the shortest period of time that the employer's payroll service uses to account for absences or use of leave. *Id*. If an employee needs either intermittent leave or a reduced work schedule based on medical need, the employee may be transferred temporarily to an available alternative position for which she is qualified that has equivalent pay and benefits that better accommodate recurring periods of leave than the employee's regular position. 2 CCR § 11041(c).

6. Notice of Leave and Medical Certification

If the need for leave is foreseeable, an employee who plans to take a disability leave for pregnancy, childbirth, or related medical conditions must give the employer thirty (30) days' advance oral notice of the date the leave will begin and her estimated date for returning to work. 2 CCR § 11050(a). If advance notice is not possible, oral notice must be given by the employee as soon as practicable. 2 CCR § 11050(a). The employer must give its employees reasonable advance notice of any notice requirements it adopts. 2 CCR § 11049. The employer's failure to give or post such notice precludes it from taking any adverse action against the employee for failing to give the required notice. 2 CCR § 11049(c)(2). Sample notices are presented in the regulations at 2 CCR § 11051.

A physician's certification may be required to verify an employee's disability on account of pregnancy so long as physicians' certifications are required to verify other temporary disabilities. Second or third medical opinions may not be required. 2 CCR § 11050(b).

The employer may not ask the employee (or her health care provider) to provide any information other than:

- the date on which she became disabled due to pregnancy;
- the probable duration of the period or periods of disability; and
- an explanatory statement that, due to the disability, the employee is unable to work at all, or is unable to perform

one or more of the essential functions of her position without undue risk to herself, the successful completion of her pregnancy, or to other persons. 2 CCR §§ 11050(b), 11035(d).

7. Use of Sick Leave, Vacation and Personal Time Off

The employee must be allowed to use any accrued vacation time or other accrued personal time off during the otherwise unpaid portion of her disability leave period. The employer may require that the employee use, or the employee may elect to use, sick leave during the otherwise unpaid portion of her Pregnancy Disability Leave. *See* GC § 12945(a)(2); 2 CCR § 11044(a) and (b).

She is entitled to receive State Disability Insurance (SDI) benefits during the time she is unpaid because she is unable to perform her regular or customary work on account of any injury or illness resulting from the pregnancy. Un Ins Code § 2626(b)(2).

8. Other Benefits Available During Pregnancy Leave

During pregnancy disability leave, the employee is entitled to accrual of seniority and to participate in health plans, employee benefit plans (including life, short-term and long-term disability or accident insurance), pension and retirement plans, and supplemental unemployment benefit plans, to the same extent and under the same conditions as would apply to any other unpaid disability leave granted by the employer for any reason other than a pregnancy disability. 2 CCR § 11044(d).

9. Reinstatement to Same or Comparable Position

When granting Pregnancy Disability Leave, the employer must reinstate the employee to the same or comparable position upon her timely return to work. The guarantee must be placed in writing at the employee's request. 2 CCR § 11043(a). However, an employee has no greater right to reinstatement to the same position or to other benefits and conditions of employment than if the employee had been continuously employed in her position during the pregnancy leave period. 2 CCR § 11043(c)(1).

The employer may refuse to reinstate the employee to her same position if either:

- for legitimate business reasons unrelated to the employee's Pregnancy Disability Leave, she would not otherwise have been employed in her same position at the time reinstatement is requested; or

- each means of preserving the job or duties for the

employee (such as leaving her position unfilled or hiring a temporary employee to fill in) would substantially undermine the employer's ability to operate its business safely and efficiently. 2 CCR § 11043.

If the employer is excused from reinstating the employee to the same position or duties, it ordinarily must give her a comparable position if one is available. 2 CCR § 11043(c)(2).

A position is "comparable" if it is virtually identical to the employee's previous position in terms of pay, benefits and working conditions, including privileges, perquisites and status. 2 CCR § 11035(j); 11043(a). A comparable position is "available" if it is open on the employee's scheduled return date (or within ten (10) working days after that), and the employee is qualified for it or is entitled to it by company policy, contract, or collective bargaining agreement. 2 CCR § 11043(c)(2)(B)(1).

10. Employer Posting Requirements

All employers must provide notice to their employees of the right to request Pregnancy Disability Leave. Such notice must placed in a conspicuous place or a place where employees tend to congregate. If the employer publishes an employee handbook which describes other kinds of temporary disability leave, that employer must include a description of Pregnancy Disability Leave in the handbook. 2 CCR § 11049.

See Section III for appropriate posting notices.

c. California Family Rights Act

Disability due to pregnancy, childbirth or related medical conditions does not make an employee eligible for leave under the California Family Rights Act (CFRA). GC § 12945.2. However, an employee is entitled to CFRA leave for bonding with a newborn. GC §12945.2(c)(3)(A).

A California employee who becomes pregnant is, therefore, entitled to:

- up to four (4) months of Pregnancy Disability Leave (or more, if the employer provides longer leaves for other temporary disabilities);

- ***followed by*** up to twelve (12) workweeks within a twelve (12) month period of CFRA leave to care for the newborn child. (*See* PDL Chart, pg. 50.)

Note: An employee may request to take CFRA prior to the birth of the child when she has exhausted PDL, and her health

*care provider determines that a continuation of the leave is medically necessary. Under these circumstances, the employer **may**, but is not required to, grant the employee's request to utilize CFRA leave prior to the birth of her child. 2 CCR §7297.6(c)(1).*

The employee is entitled to receive employer-paid health benefits, at the same level as she would receive while not on leave, during the time she utilizes Pregnancy Disability Leave and CFRA bonding leave, for a total of four (4) months plus twelve (12) weeks. The employee must continue to make payments for any required employee contribution.

If an employee takes CFRA leave to care for her newborn child at the expiration of her Pregnancy Disability Leave, her right to reinstatement is governed by the CFRA, not by the Pregnancy Disability Leave law. 2 CCR § 11046.

2. Federal Law

a. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex. In 1977, Congress passed the Pregnancy Disability Act to insure that pregnant employees were not discriminated against by employers as a class.

The Pregnancy Disability Act did not create any new or specific employee rights. It merely ensures, as a matter of definition, that the general anti-discrimination law of Title VII is applied to pregnant female employees. *Scherr v. Woodland Sch. Com. Consol. Dist. No. 50*, (7th Cir., 1988) 867 F.2d 974 at 978-979.

b. Family Medical Leave Act

The U.S. Congress and U.S. President have determined that pregnancy, miscarriage, complications or illnesses related to pregnancy (e.g. severe morning sickness), need for prenatal care, childbirth and recovery from childbirth all qualify as a "serious health condition" which is a valid reason for which FMLA may be utilized. (S. Rep. 103-3.) A woman must also meet the FMLA eligibility requirements (*see* Section XIV.B.5.).

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In most instances, a woman who qualifies for California's Pregnancy Disability Leave will also qualify for leave under the FMLA. When this happens, the twelve (12) workweek entitlement under the FMLA will run ***concurrently*** with the four (4) month entitlement under California's Pregnancy Disability Leave.

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XIV
THE CALIFORNIA FAMILY RIGHTS ACT AND THE FEDERAL FAMILY AND MEDICAL LEAVE ACT

A. APPLICABLE LAW

1. State Law

California Family Rights Act

- Government Code §§ 12945.1, 12945.2, 12946, and 12965
- Title 2 of the California Code of Regulations, §§ 11087 et seq.

2. Federal Law

Fair Labor Standards Act

- 29 United States Code §§ 201-209

Family Medical Leave Act

- 29 United States Code §§ 2601-2654
- Code of Federal Regulations, 29 CFR Part 825

Case Law

- *Ely v. Walmart, Inc.*, 875 F. Supp. 1422 (CD Cal 1995)
- *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002)

B. DISCUSSION

1. Simultaneous Application

The California Family Rights Act (CFRA) and the federal Family and Medical Leave Act (FMLA) closely resemble one another. The CFRA and the FMLA apply simultaneously, with leave that is common to both running concurrently. The FMLA does not supersede any provision of the CFRA that provides greater family or medical leave rights than those provided by the FMLA. 29 CFR § 825.701; 2 CCR § 11090(b).

NOTES

2. Twelve Weeks of Leave

Both the FMLA and the CFRA require a covered employer to permit an eligible employee to take up to twelve (12) workweeks of leave during a 12-month period for certain specified purposes.[5] 29 USC § 2612(a); GC § 12945.2(a). The employer may select any one of the options set forth in 29 CFR § 825.200(b) for determining a 12-month period:

- calendar year;
- fiscal year;
- fixed "leave" year;
- a year measured by the employee's anniversary date;
- the 12-month period measured forward from the date the employee's first FMLA leave begins; or
- a rolling 12-month period measured backward from the date the employee uses any FMLA leave.

The option selected by the employer must, however, be applied consistently and uniformly to all employees. 29 CFR § 825.200(d)(1); 2 CCR § 11090(b). If the employer fails to select one of the above options, the one that provides the most benefit to the particular employee will be used. 29 CFR § 825.200(e).

Note: The 12-month period required under Paid Family Leave (PFL) begins on the first day of a valid claim. Additionally, the 12-month period under FMLA Military Caregiver leave begins on the first day the employee takes leave for this reason. 29 CFR § 825.200(f). Thus the 12-month periods under PFL, FMLA, and CFRA may be incompatible. See Chapter XV for PFL.

3. Reasons For Which Leave May Be Taken

a. FMLA

FMLA may be taken for any of the following reasons:[6]

- to care for the employee's newborn child;

[5] In addition to the provisions providing for 12 workweeks, the FMLA now allows up to 26 workweeks of leave during a single 12-month period to care for a "covered servicemember" with a serious injury or illness. 29 USC § 2612(a)(3).

[6] 29 USC § 2612(a).

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- to care for a child placed with the employee for adoption or foster care;
- to care for the employee's spouse, child, or parent who has a serious health condition;
- to care for the child for whom the employee stands *in loco parentis* by either providing financial support or day-to-day care. This typically occurs when the employee cares for the child of a domestic partner.[7]
- the employee's own serious health condition which renders the employee unable to perform the essential functions of the employee's position (includes a woman's disability due to pregnancy). 29 USC § 2612(a);
- because of a qualifying exigency arising out of the fact that the spouse, or a son, daughter or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces;[8] and
- to care for a seriously injured or ill covered service member.[9]

b. CFRA

Leave is permitted under the CFRA for the same reasons as under the FMLA, *except* under the following circumstances:

1. Under CFRA, the term "employee's own serious health condition" does not include the employee's disability leave

[7] This interpretation of the FMLA is based on the interpretation of the current Secretary of Labor, and could change during a different Presidential administration.

[8] As set forth in detail at 29 CFR § 825.126(a)(1)-(a)(8), qualifying exigency leave must fit into one of the following categories: short notice deployment (7 or less calendar days from the date of deployment); for military events and related activities; for child-care and school activities; for financial and legal arrangements; for counseling; to spend time with the covered servicemember on rest and recuperation breaks during deployment; for post-deployment activities; and for other purposes arising out of the call to duty, as agreed upon by the employee and employer.

[9] The term "covered servicemember" means: (A) a member of the Armed Forces (including a member of the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or (B) a veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy. 29 USC § 2611 (15)(A)-(B).

on account of pregnancy, childbirth, or related medical conditions. GC § 12945.2(c)(3)(C).

2. Under CFRA, an employee is not specifically permitted to take leave to care for a domestic partner. However, as of January 1, 2005, Family Code section 297.5 requires an employer to provide the same rights, protections and benefits for an employee's registered domestic partner[10] as it grants to spouses.

Despite the expanded applicability of CFRA, leave under FMLA may only be taken to care for a *spouse*, *child* or *parent* with a serious health condition. Because Federal does not recognize domestic partners as spouses, leave taken to care for a domestic partner would **not** count as FMLA leave. As a result, an employee could take up to twelve (12) weeks to care for his or her domestic partner as well as up to twelve (12) weeks for an FMLA qualifying reason (*e.g.* to care for his or her seriously ill parent).

4. Employers Covered by the FMLA and CFRA

The FMLA applies to public agencies regardless of the number of employees and school districts regardless of size. 29 USC § 2611(4). The CFRA also applies to all State public agencies, including school districts. 2 CCR § 11087(d).

Note: Despite the fact that <u>all</u> public agencies are covered, an employee will not be eligible unless he/she works at a site where 50 or more employees are employed by the same employer within 75 miles. See B.5. below.

5. Employees Eligible for FMLA and CFRA

In order to qualify for leave and other benefits under both the FMLA and CFRA, an employee must:

- have been employed by the employer for at least twelve (12) months (consecutive or nonconnective); and

- have worked for at least one thousand two hundred fifty (1,250) hours during the 12-month period immediately preceding the first day of leave (actual hours worked being determined under the Fair Labor Standards Act); and

[10] Family Code section 298 et seq. provides the procedure by which domestic partners may register with the Secretary of State as "Registered Domestic Partners." An employer is not required to grant the rights, protections and benefits provided by Family Code section 297.5, unless the employee and his/her partner are registered officially as "Registered Domestic Partners."

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Exception: Under the FMLA, full-time teachers in an elementary or secondary school system are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim the employee is not eligible for FMLA leave. 29 CFR §825.110 (c); Wage Hour Opinion Letter FMLA-78 (Feb. 14, 1996).

- work at a worksite where fifty (50) or more employees are employed by the employer within seventy-five (75) miles. 29 CFR § 825.110(a); GC § 12945.2(a),(b); 2 CCR § 11087.

  Example: An employee of a school in a rural area would not be eligible for leave under either the FMLA or the CFRA if the school site has fewer than 50 employees and there are no other schools under the jurisdiction of the same school board within 75 miles which would cumulatively meet the 50-employee requirement.

Determination of eligibility is made at the time the employee requests the leave. 29 CFR § 825.110(d). However, for purposes of determining whether the employee has satisfied the first two requirements, the employer must take into account the time the employee is expected to work between the date on which the leave is requested and the date on which the leave will begin. 29 CFR § 825.110(d).

The twelve-month period is defined as fifty-two (52) weeks, regardless of how many days in the week the employee worked. Every week that the employee is on payroll is counted as one week. If the employee took two (2) weeks of vacation during the previous fifty-two (52) weeks, his two (2) weeks of vacation would be included in calculating the twelve-month eligibility period. However, paid or unpaid leave, vacation, sick leave or any other leaves are not included when calculating the 1,250 hour requirement.

For an employee who takes a Pregnancy Disability Leave that is also on FMLA leave, and who then wants to take CFRA leave to care for her newborn child immediately after her Pregnancy Disability Leave, the 12-month period during which she must have worked 1,250 hours is that period immediately preceding her first day of FMLA leave based on her pregnancy, not the first day of the subsequent CFRA leave. 2 CCR § 11087.

Under the CFRA, once the employee meets the first two eligibility criteria and takes a leave for a qualifying event, he/she does not have to requalify, in terms of the numbers of hours worked, in order to take additional leave for the same or different qualifying event during the employee's 12-month leave period. 2 CCR § 11087(e)(1). In addition, once the employee meets the third eligibility criterion and takes a leave for a qualifying event, the employer may not cut short the leave or deny any subsequent leave taken for the same qualifying event during the employee's 12-month leave period, even if the total number of employees within the relevant 75-mile radius

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falls below fifty (50). 2 CCR § 11087.

6. Length of Leave Allowable

a. General Rules: Calculating and Prorating Time

The FMLA and CFRA generally require covered employers to allow eligible employees to take leave of up to twelve (12) workweeks in a 12-month period.[11]

The 12-week period means the equivalent of twelve (12) of the employee's normally scheduled workweeks. 2 CCR §§ 11087. For eligible employees who have work schedules other than five (5) eight-hour days per week, the number of working days is adjusted on a pro rata or proportional basis. 2 CCR § 11087.

Under both the FMLA and the CFRA, an employee's entitlement to leave for either the birth of an employee's child or placement of a child with an employee in connection with the adoption or foster care of that child expires at the end of the 12-month period beginning on the date of the birth or placement unless the employer permits leave to be taken for a longer period. 29 CFR § 825.201; 2 CCR § 11087.

Under the FMLA's military caregiver's leave provisions, an eligible employee may take up to 26 workweeks of leave during a single 12-month period to care for a covered servicemember. 29 USC § 2612 (a)(3). An eligible employee is entitle to a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason in this single 12-month period, provided that the employee may not take more than 12 workweeks of leave for any other FMLA qualifying reason during this period.[12] 29 USC § 2612 (a)(4).

b. Combined Leave Time for Parents or Husband/Wife

Under the CFRA and the FMLA, if both parents are employed by the same employer, the employer may limit the leave to a combined total of twelve (12) workweeks when the leave is for birth/adoption/foster care. 2 CCR § 11088; 29 CFR § 825.201. Under the FMLA the combined 12-workweek rule applies only if

[11] However, an eligible employee may take up to 26 workweeks of leave during a single 12-month period to care for a covered servicemember who is seriously injured or ill. 29 USC § 2612 (a)(3).

[12] For example, in the single 12-month period an employee could take 12 weeks of FMLA leave to care for a newborn child and 14 weeks of military caregiver leave, but could not take 16 weeks of FMLA leave to care for a newborn child and 10 weeks of military caregiver leave.

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the parents are married to each other.[13] The CFRA does not distinguish between parents who are married and those who are not. The FMLA further permits the employer to limit the leave to a combined total of twelve (12) workweeks to care for a parent with a serious health condition. *See* 29 CFR § 825.201.

c. Intermittent and Reduced-Time Leave

Intermittent leave is leave taken in separate blocks of time due to a single qualifying reason. 29 CFR § 825.202(a). A reduced-time leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time. 29 CFR §825.202(a). Under both the FMLA and CFRA, if an employee takes leave on an intermittent or reduced-time leave schedule, only the amount of leave *actually taken* may be counted toward the twelve (12) workweeks of leave to which the employee is entitled. 29 CFR §825.205(a).

If FMLA leave is taken to care for a child, spouse or parent with a serious health condition, or because of the employee's own serious health condition, leave may be taken at the employee's discretion on an intermittent or reduced-time leave schedule *when medically necessary*. 29 CFR §§ 825.202(b) and 825.203; 2 CCR § 11090.

However, if FMLA leave is taken because of birth/adoption/foster care, an employee may take FMLA leave intermittently or on a reduced-time leave schedule *only if the employer agrees.* 29 CFR § 825.202(c). Unlike the FMLA, the CFRA allows intermittent leave taken for the birth/adoption/foster care *without permission* from the employer. Under the CFRA, an employee may request intermittent leave of less than two (2) weeks duration on any two (2) occasions for the purpose of birth/adoption/foster care. Thereafter, an employer may require the intermittent leave to be taken in a minimum duration of two (2) weeks for these purposes. 2 CCR § 11090.

An employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or leave. The increments may be no larger than one (1) hour. 29 CFR § 825.205(a). Thus, an employer that docks employees' pay for fifteen (15) minutes for tardiness must permit the use of FMLA in 15-minute increments. If an employee is exempt from the minimum wage and over-time requirements of the Fair Labor Standards Act (29 USC §§ 201-209), the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek without

[13] Under the FMLA, the combined total also applies to the maximum 26 workweeks given under 29 USC § 2612(a)(3) for the care for a covered servicemember with a serious injury or illness. 29 CFR § 825.127(d).

affecting that employee's exempt status.

If an employee needs intermittent leave, or a reduced-time work schedule, that is foreseeable for planned medical treatment for the employee or a family member, *the employer may require the employee to temporarily transfer* to an available position for which the employee is qualified and which better accommodates recurring periods of leave. Planned medical treatment for the employee or family member includes a period of recovery from a serious health condition, and intermittent leave or a reduced-time work schedule to care for a newborn child or a child placed with the employee for adoption or foster care (*see above)*. 29 CFR § 825.202(b); 2 CCR § 11090. Transfer to another position may include altering an existing job to better accommodate the employee's need for intermittent leave or a reduced-time work schedule. 29 CFR § 825.204(b); 2 CCR § 11090. The alternative position must have equivalent pay and benefits, but need not have equivalent duties. 29 CFR § 825.204(c); 2 CCR § 11090. The employer may transfer the employee to a part-time job with the same hourly rate of pay and benefits, so long as the employee is not required to take more leave than is medically necessary. Under these circumstances, the employer may proportionally reduce benefits, such as vacation leave, if its normal practice is to base such benefits on the number of hours worked. 29 CFR § 825.204(c).

7. Designation of Leave as FMLA/CFRA Leave

a. Employer's Responsibility to Make the Designation

Under all circumstances, it is the *employer's* responsibility to designate leave, paid or unpaid, as qualifying under the CFRA/FMLA, and to give notice of the designation to the employee within two (2) business days (absent extenuating circumstances). The employer's designation decision can be based only on information received from the employee or the employee's spokesperson (*e.g.*, if the employee is incapacitated, the employee's spouse, adult child, parent, doctor). 29 CFR § 825.301(a), (b); 2 CCR § 11091.

An employer that does not have sufficient information about the reason for an employee's use of paid leave should inquire further to ascertain whether that paid leave potentially qualifies as FMLA leave. 29 CFR §§ 825.301 (b). However, the CFRA regulations prohibit the employer from asking whether the employee is taking time off for a CFRA qualifying purpose unless the employee provides information that the requested time off is or may be for a CFRA qualifying purpose. 2 CCR § 11092.

The employer's notice that the leave has been designated as CFRA/FMLA leave may be oral or in writing. If the notice is oral, it must be confirmed in writing, no later than the following payday

(unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice can be in any form, including a notation on the employee's pay stub.

Employers should be aware that failure to timely designate leave as FMLA leave can result in additional time off given to the employee. The United States Supreme Court, in *Ragsdale v. Wolverine World Wide, Inc.*, reviewed a case where the employer did not timely inform an employee that leave taken was considered leave under FMLA. Despite the employer's failure to inform the employee, the Court held that the employee was not entitled to any additional leave under the FMLA.

The Supreme Court reasoned that the employee had not suffered any detriment to the designation of the time because she would have taken the time off regardless of the designation. However, the Court stated that had she been able to show injury as a result of the employer's failure to inform her, that she may have been entitled to an additional amount of leave, health benefits, and/or monetary compensation.

For military caregiver leave that also qualifies as leave taken to care for a family member with a serious health condition, the regulations provide that an employer must designate the leave as military caregiver leave first.[14] 29 CFR 825.127(c)(4).

b. Retroactive Designation of the Leave

The FMLA regulations were amended in 2009. Under those amendments, an employer may retroactively designate leave as FMLA, with appropriate notice to the employee, if the retroactive designation does not cause harm or injury to the employee. 29 CFR §825.301(d). Retroactive designation is also acceptable with agreement of the employee. 29 CFR §825.301(d). The CFRA rules governing the retroactive designation of leave mirror those within the FMLA. *See*, 2 CCR 11091(a)(1)(B).

Employers may designate leave as CFRA leave after the employee has returned to work only if the employee was absent for a reason qualifying under CFRA and the employer did not learn the reason for the absence until the employee's return (*e.g.*, when the employee was absent for a only a brief period). The employer may, within two (2) business days of the employee's return to work, designate the leave retroactively with appropriate notice to the employee. 2 CCR § 11091(a)(1)(B).

[14] The Department of Labor believes that applying military caregiver leave first will help to alleviate some fo the administrative issues caused by the running of the separate "single 12-month period" for military caregiver leave.

If leave is taken for a CFRA qualifying reason, but the employer has not designated it as such, the employee must notify the employer within two (2) business days of returning to work that the leave was for a CFRA reason if the employee wishes to assert CFRA protections for the absence. 2 CCR § 11091(a)(1)(B).

c. Preliminary Designations

If the employer knows the reason for the leave but has been unable to confirm that the leave qualifies under the CFRA/FMLA, or if the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation and notify the employee at the time the leave begins, or as soon as the reason for the leave becomes known. The preliminary designation becomes final on receipt of the requisite information from the employee or of the medical certification confirming that the leave is for a CFRA/FMLA reason. If the medical certification fails to confirm that the absence was for a CFRA/FMLA reason, the employer must withdraw the designation (with written notice to the employee). 2 CCR § 11091(a)(1)(B). An employer may require an employee on CFRA/FMLA leave to report periodically on his/her status and intent to return to work. 29 CFR § 825.311(a).

Under the CFRA, the employer is obligated to respond to the leave request as soon as practicable and no later than ten (10) calendar days after receiving the request. Once given, approval is deemed to be retroactive to the date of the first day of the leave. 2 CCR § 11091(a)(6).

d. Employee Notice Requirements

Under both CFRA and FMLA, an employee is required to give the employer at least thirty (30) days' advance notice before leave is to begin if the need for the leave is foreseeable. If thirty (30) days' notice is not practicable, the employee is required to give as much notice as practicable. It is expected that the employee will give notice within one or two working days of learning of the need for leave, except in extraordinary circumstances. 29 CFR §§ 825.302(a), 825.303(a), 825.304(b), (c); 2 CCR § 11091(a)(2)-(3).

An employer may not deny CFRA leave, the need for which is an emergency or was otherwise unforeseeable, on the grounds that the employee did not provide advance notice of the need for the leave. 2 CCR § 11091(a)(4). However, if the employee who had notice of the 30-day requirement fails to give thirty (30) days' notice for foreseeable leave with no reasonable excuse for the delay, the employer may delay the taking of leave until at least thirty (30) days after the date the employee provides notice. 29 CFR

§ 825.304(b); 2 CCR § 11091(a)(5).

The employee must give at least verbal notice sufficient to make the employer aware of the need for a leave that qualifies as CFRA/FMLA leave and the anticipated timing and duration of the leave. The employee need not expressly assert FMLA or CFRA rights, but need only state that leave is required for one of the CFRA/FMLA qualifying reasons. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA/CFRA leave is being sought by the employee. 29 CFR § 825.302(c); 2 CCR § 11091(a)(1).

When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule leave so as not to unduly disrupt the employer's operations, subject to the health care provider's approval. 29 CFR § 825.302(e); 2 CCR § 11091(a)(2).

An employer may not require compliance with stricter CFRA/FMLA notice requirements where the provisions of a collective bargaining agreement, state law, or applicable leave plan allow less advanced notice to the employer. 29 CFR § 825.302(d).

8. Medical Certification of Need for Leave

a. Generally

Under the FMLA, once the employee has given notice of intent to take leave because of a serious health condition of the employee or a family member, an employer may require the employee to provide a certificate from the health care provider supporting the need for the leave.[15] An employer must give written notice of the requirement for medical certification. The employee must be given at least fifteen (15) calendar days after the employer's request for certification to obtain the required medical certification. 29 USC § 2613; 29 CFR § 825.305(b); 2 CCR § 11091(b).

If the need for leave is *foreseeable*, the employer may delay the leave of an employee who fails to provide timely medical certification after being asked by the employer, until the required certification is provided. 29 CFR § 825.313(a). If the need for leave is *not foreseeable*, the employee must provide certification within the time frame specified by the employer (at least fifteen (15) days) or as soon as reasonably possible. If an employee fails to provide a medical certification within a reasonable period of time

[15] The Department of Labor has developed optional forms (WH-384 and WH-385) for employees' use in obtaining certification that meets "qualifying exigency" and "military caregiver leave" certification requirements. (Available at www.dol.gov. Click on "Resources," then click on "Forms.")

under the circumstances, the employer may delay the employee's continuation of leave. If the employee never produces the certification, the leave is not CFRA/FMLA leave. 29 CFR § 825.313(b).

At the time it requests certification, the employer must notify the employee of the consequences of failing to provide adequate certification. If an employee provides incomplete certification, the employer must give the employee a reasonable opportunity to cure any deficiency. 29 CFR § 825.305 (d).

Both the U.S. Department of Labor and the California Fair Employment & Housing Commission have issued forms that may be used for medical certification. The major difference between the two forms is that under the CFRA, the employer may not require the employee to identify the serious health condition involved or to provide any additional information. 29 CFR §825.306(b), App B to pt 825; 2 CCR § 11087(a)(1)-(2). Although the federal regulations do not require the health care provider to give a diagnosis, they do require that the provider certify which part of the definition of "serious health condition," if any, applies to the patient's condition, and the medical facts that support the certification, including a brief statement about how the medical facts meet the criteria of the definition. 29 CFR § 825.306(a)(3).

b. Second and Third Opinions

Under the FMLA, if the employer has reason to doubt the validity of the medical certification provided by the employee, the employer may, at its expense, obtain a second medical opinion. 29 USC § 2613(c); 29 CFR § 825.307(b)(1). If the first and second opinions differ, the employer may, at its expense, obtain a third opinion from a health care provider jointly selected by the employee and employer. The third opinion is binding. 29 USC § 2613(d); 29 CFR § 825.307(c). The employer must reimburse the employee for any reasonable "out-of-pocket" travel expenses incurred in obtaining the second and third opinions and, except in very unusual circumstances, may not require the employee or family member to travel outside normal commuting distances for the purpose of obtaining the second or third opinion. 29 CFR § 825.307(e). Copies of the second and third medical opinions must be provided to the employee on request. 29 CFR § 825.307(d); 2 CCR §§ 11091(b)(2)(D).

However, note that while the FMLA allows employers to seek authentication and clarification of military caregiver certifications, it prohibits employers from requiring a second or third opinion on military caregiver leave. 29 CFR § 825.310(d). Employers are also not permitted to require re-certification for such leave. 29 CFR § 825.310(d).

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Under the CFRA, an employer can require a second or third medical opinion if an employee asks for leave because of his/her own serious health condition, but cannot require a second or third medical opinion if an employee asks for leave to care for a relative with a serious health condition. 2 CCR § 11091(b).

9. Reinstatement

a. Generally

Under both the CFRA and FMLA, an employee returning to work from leave has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the leave period. 2 CCR § 11089(c)(1); 29 USC §2614(a)(3); 29 CFR § 825.216(a). An employee (other than a "key employee" - *see* §§ II.10. below) is entitled to be restored to the same position the employee held when the leave began, or to an *equivalent position* with equivalent benefits, pay and other terms and conditions of employment. 29 CFR §§ 825.214.

An "equivalent" or "comparable" position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status, involving the same or substantially similar duties and responsibilities requiring substantially equivalent skill, effort and responsibility. 29 CFR § 825.215(a); 2 CCR § 11087(g). The employee ordinarily is entitled to return to the same or a geographically close work site and the same shift or the same or an equivalent work schedule. 29 CFR § 825.215(a), (e)(1)-(2). The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar payments. 29 CFR § 825.215(e)(3).

If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, etc., as a result of the lack, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

Under the CFRA, the employer must guarantee to reinstate the employee to the same or a comparable position (subject to permissible defenses) when it grants the leave request. The employer must put the guarantee in writing at the employee's request. 2 CCR § 11089(a).

b. Fitness-For-Duty Report

Under both the CFRA and FMLA, an employer may have a uniformly applied policy or practice that requires all similarly situated employees who take leave because of their own serious

health conditions to submit a "fitness-for-duty" report as a condition for returning to work. 29 CFR § 825.312(a); 2 CCR § 11091(b)(2)(E). The certification need only be a simple statement of the employee's ability to return to work. The employer may contact the employee's health care provider with the employee's permission to clarify the employee's fitness to return to work. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made. No second or third opinions on a fitness-for-duty certification may be required. 29 CFR § 825.312(f).

The employer must give specific notice to any employee from whom a fitness for duty certification will be required. Such notification must be given with the leave designated provided at the time the employee took leave (unless the employee's condition changes from one that did not require certification under the employer's practice or policy). Second or third fitness-for-duty reports cannot be required and an employer cannot require a fitness for duty report from an employee who takes intermittent leave. 20 CFR § 825.310(d), (f).

c. Accrued Benefits

Benefits accrued at the time leave began (*e.g.*, paid vacation, sick leave, or personal leave, to the extent not substituted for FMLA leave) must be available to the employee when the employee returns from leave. 29 CFR § 825.215(d)(2).

10. Special Rules For Key Employees

a. "Key Employee" Defined

A key employee is an "eligible" employee who is paid on a salary basis and who is among the highest paid ten percent (10%) of the employees employed by the employer within seventy-five (75) miles of the employee's worksite. 29 USC § 2614(b)(2); 29 CFR § 825.217(a); GC § 12945.2(r); 2 CCR § 11089(c)(2)(A)-(B). The determination of whether a salaried employee is among the highest paid ten percent (10%) is made at the time the request for leave is made. 29 CFR § 825.217(c)(2); 2 CCR § 11089(c)(2)(B).

b. Potential Denial of Reinstatement

Under the FMLA, an employer may deny reinstatement to a key employee if reinstatement would cause "substantial and grievous economic injury" to the employer's operations. It is not relevant that the employee's absence during the leave will cause substantial and grievous injury. 29 CFR § 825.218(a); 2 CCR § 11089(c)(2)(C); GC § 12945.2(r).

Under the FMLA, an employer who believes that reinstatement may be denied to a key employee must give the employee written notice at the time leave is requested (or when the leave commences, whichever is earlier). The notice must fully inform the employee of the potential consequences of being a key employee with respect to reinstatement and maintenance of health benefits. If notice cannot be given immediately because the employer needs to determine if the employee *is* a key employee, it must be given as soon as practicable. An employer that fails to provide this notice to the employee loses its right to deny restoration. 29 CFR § 825.219(a).

As soon as the employer determines that reinstatement of the employee would cause substantial and grievous economic injury, it must give the employee written notice of its determination and its intent to deny reinstatement. This notice must be served either in person or by certified mail. It must explain the basis for the employer's determination, and if leave has commenced, must give the key employee a reasonable time to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return. 29 CFR § 825.219(b); 2 CCR § 11089(c)(2)(C); GC § 12945.2(r).

Under the FMLA, an employee who received notice that her or his reinstatement would cause substantial and grievous economic injury is entitled to request reinstatement at the end of the leave period even if he/she did not return to work in response to the employer's notice. The employer must then decide if reinstatement would cause substantial and grievous economic injury, based on the facts at that time. If the employer makes that determination, it must give the employee a written notice (in person or by certified mail) of the denial of reinstatement. 29 CFR § 825.219(d).

c. Benefit Maintenance under FMLA

Under the FMLA, if the key employee does not return from leave when notified by the employer that substantial or grievous economic injury will result from his/her reinstatement, the employee's entitlement to group health benefits nevertheless continues until:

1. The employee advises the employer that he/she does not desire restoration to employment at the end of the leave period;

2. FMLA leave entitlement is exhausted; or

3. Reinstatement is actually denied.

The employer may not recover its cost of health benefit premiums

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paid during this continuation period. 29 CFR § 825.219(c)-(d).

11. Paid or Unpaid Leave?

a. FMLA

FMLA leave is generally unpaid. 29 CFR § 825.207(a). However, an employer may require, or the employee may elect, to utilize accrued *paid* vacation or personal leave. 29 USC § 2612(d)(2)(A); 29 CFR § 825.207(a). If leave is taken because of the serious health condition of the employee or a family member, the employer may require, or the employee may elect, to also utilize any medical/sick leave. 29 USC § 2612(d)(2)(B).

An employer is *not* required to allow substitution during normally unpaid FMLA leave in any situation in which the employer would not normally permit such paid leave. For example, an employee has the right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows medical/sick leave to be used for that purpose. 29 CFR § 825.207(a).

b. CFRA

CFRA leave is generally unpaid. However, an employee can elect to use any accrued vacation or other paid time off (including undifferentiated PTO time) during the otherwise unpaid portion of the leave. 2 CCR § 11092(b)(1). An employer may require an employee to use accrued sick leave for CFRA leave taken because of the employee's own serious health condition. The employee may use accrued sick leave during the period of CFRA leave taken for any other reason (*e.g.*, to care for a family member with a serious health condition) only if mutually agreed to between the employer and the employee. 2 CCR § 11092(b)(3). An employer and employee may negotiate for the employee's use of any additional paid or unpaid time off. 2 CCR § 11092(b)(4).

c. Paid Family Leave

Paid Family Leave (PFL) extends the current State Disability Insurance compensation to individuals who take time off work without pay:

- to care for a newborn child;
- to bond with a new child after placement of the child by foster care or adoption;
- to care for a seriously ill child, spouse, parent, domestic partner or a child of the domestic partner that requires the care of the employee requesting the leave.

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PFL does not create a right to a leave of absence. Rather, it provides up to six (6) weeks of compensation for an employee on a qualifying leave of absence. Employees participating in PFL contribute a portion of their payroll deductions to State Disability Insurance (SDI), which administers PFL. While the employee is on leave, PFL pays up to fifty-five percent (55%) of the employee's base pay. PFL must run concurrently with FMLA/CFRA if the employee is otherwise eligible for FMLA/CFRA. Un Ins Code § 3303.1(b).

12. Health Benefit Continuation

a. Generally

Both the CFRA and the FMLA require employers to maintain an employee's coverage under any group health benefit plan (medical, dental, and vision) during qualifying leave in the same manner as if the employee were actively working. 29 USC § 2614(c)(1); 29 CFR § 825.209(a); 2 CCR § 11092(c).

If paid leave is substituted for FMLA/CFRA leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction. 29 CFR § 825.210(b). If the leave is unpaid, the employer may require that payment of the employee's share be made to the employer or to the insurance carrier, if any, but no additional charge may be added to the employee's premium payment for administrative expenses. 29 CFR § 825.210(c).

The employer must provide the employee with advance written notice of the terms and conditions under which the employee's premium payments must be made during the leave. 29 CFR § 825.210(d). The employer's obligation to maintain health insurance coverage ends if the employee's premium payment is more than thirty (30) days late. However, the employer must provide at least fifteen (15) days' advance written notice to the employee that the coverage will terminate because of the nonpayment of premiums. 29 CFR § 825.212(a)(1).

An employee may choose not to retain health coverage during FMLA leave. However, if coverage lapses because of the non-payment of premiums during leave, upon return from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, without any qualifying period, physical examination, or exclusion or pre-existing conditions. 29 CFR § 825.209(e).

The employer's obligation to continue health coverage begins on the first day of CFRA/FMLA leave and continues for the duration of the leave, up to a maximum of twelve (12) workweeks in a 12-month period. 2 CCR § 11092(c)(2).

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As a result, a female employee who takes more than twelve (12) weeks in a 12-month period for combined Pregnancy Disability Leave *and* CFRA leave, or an employee who takes more than twelve (12) weeks in a 12-month period for combined CFRA leave to care for a registered domestic partner and FMLA leave for another individual is entitled to coverage under a group health benefit plan *only for the first 12 weeks of the leave.* However, nothing precludes the employer from maintaining and paying for health care coverage for longer than twelve (12) workweeks. 2 CCR § 11092(c).

Moreover, under the CFRA, the employee is entitled to participate in health plans for more than twelve (12) workweeks of leave to the same extent and under the same conditions that would apply to any other leave granted by the employer for any reason other than CFRA leave. 2 CCR § 11092(d). Unpaid leave for the employee's serious health condition must be compared to other unpaid disability leaves; unpaid leaves for all other purposes must be compared to other unpaid personal leaves offered by the employer. 2 CCR § 11092(d)(1).

Under FMLA/CFRA, paid sick leave, vacation, or other paid leaves do not accrue during the period an employee is on FMLA/CFRA leave unless they would normally accrue during other types of leaves. 20 CFR § 825.209(h).

b. Failure to Return To Work

Under both the CFRA and FMLA, an employer may recover its share of health insurance premium payments made during a period of unpaid leave from an employee who fails to return to work after exhausting CFRA/FMLA leave entitlement. This is true *unless* the reason for the employee's failure to return to work is 1) the continuation, recurrence, or onset of a serious health condition that would entitle the employee to FMLA leave, or 2) other circumstances beyond the employee's control. 29 CFR § 825.213(a); 2 CCR § 11092(c)(5).

An employer that requests medical certification of the continuation, recurrence, or onset of a serious health condition from an employee who does not provide certification within thirty (30) days may recover the health benefit premiums it paid during the period of unpaid leave. 29 CFR § 825.213(a)(3).

An employee who returns to work for at least thirty (30) calendar days is deemed to have "returned" to work. 29 CFR § 825.213(c); 2 CCR § 11092(c)(5).

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13. Other Benefit Issues: Seniority, Vesting, Plan Participation

a. Generally

Under both the CFRA and FMLA, the employer must resume the employee's benefits in the same manner and at the same levels provided when the leave began. This is subject to any changes in benefit levels that may have taken place during the leave which affected the entire workforce. On return from leave, an employee cannot be required to requalify for any benefits the employee enjoyed before the leave began. 29 CFR § 825.215; 2 CCR § 11092(f).

In order to meet its obligation to return an employee to the same or to an equivalent position with equivalent benefits, an employer may find it necessary to continue to pay premiums for non-health benefits (*e.g.*, life insurance, disability insurance) to avoid a lapse of coverage. Under these circumstances, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums, whether or not the employee returns to work. 29 CFR § 825.213(b).

b. Pension Plans

Any period of FMLA or CFRA leave must be treated as continuous service for purposes of vesting and eligibility to participate in a pension plan. However, unpaid leave periods need not be treated as credited service for purposes of benefit accrual, vesting, or eligibility to participate. 29 CFR § 825.215(d)(4); 2 CCR § 11092(f). Under the CFRA, the employer must allow an employee covered by a pension and/or retirement plan to continue to make contributions in accordance with the plan's terms during the unpaid portion of the leave period. 2 CCR § 11092(e)(2).

c. Seniority

Under the CFRA, an employee retains his/her employee status with the employer, and leave does not constitute a break in service for purposes of longevity or seniority under any collective bargaining agreement or any employee benefit plan. When an employee returns from leave, he/she returns with no less seniority than at the beginning of the leave for purposes of layoff, recall, promotion, job assignment and seniority-related benefits such as vacation. The employer may, but is not required to, allow an employee to accrue seniority during the leave. GC § 12945.2, 2 CCR § 11092.

Under the FMLA, leave does not result in loss of previously accrued seniority or employment benefits. However, an employee may but is not entitled to accrue any additional benefits or seniority during unpaid FMLA leave. 29 CFR § 825.215.

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14. Employer Posting Requirements

a. Generally

Every covered employer must post in a conspicuous place a notice explaining leave rights and providing information about filing complaints of FMLA or CFRA violations. 29 USC § 2619; 29 CFR § 825.300(a); *see* forms in Section XIV of this Handbook.

The penalty for a willful failure to post the FMLA notice is One Hundred Dollars ($100) for each separate violation. 29 CFR § 825.300(b). The CFRA does not contain this penalty provision.

b. Other Required Noticed Information Under FMLA

When an employee notifies the employer of the need to take FMLA leave, the employer must give the employee a notice detailing the employee's obligations and explaining any consequence of a failure to meet those obligations. This notice must include, where applicable, the following information:

- That the leave will be counted against the employee's FMLA leave entitlement;
- That the employee may be required to provide medical certification of a serious health condition and the consequences of failing to do so;
- Whether the employee will have the right to substitute paid leave, whether the employer will require the substitution of paid leave, and the conditions related to any substitution;
- That the employee may be required to make premium payments to maintain health benefits and the arrangements for making such payments;
- That the employee may be required to present a fitness-for-duty certificate to be restored to employment;
- The employee's status being that of a key employee, the potential consequence that restoration may be denied following FMLA leave and explanation of the conditions required for such denial;
- The employee's right to restoration to the same or an equivalent job upon return from leave; and
- The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave. 29 CFR

§ 825.300.

15. Record Keeping Requirements Under the FMLA

The FMLA requires employers to make, keep and preserve records relating to their FMLA obligations for at least three (3) years and, on request, to make them available to the United States Department of Labor for inspection, copying, and transcription. 29 CFR § 825.500.

The records must disclose the following:

- Basic payroll and identifying employee data;
- Dates FMLA leave was taken by employees;
- If FMLA leave was taken in increments of less than one (1) full day, the hours of the leave;
- Copies of notices furnished to the employer by employees and copies of all general and specific notices given to employees as required under FMLA and its regulations;
- Any documents (including written and electronic records) describing employee benefits or employer polices and practices regarding the taking of paid and unpaid leaves;
- Premium payments of employee benefits; and
- Records of any dispute between the employer and any employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

Records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members must be maintained in separate files and be treated as confidential medical records accessible only to those with legitimate reasons for access. 29 CFR § 825.500(g).

Similar records must be maintained under the CFRA, but the required period of retention is two (2) years rather than three (3). GC §12946.

16. Prohibited Acts and Remedies

a. <u>Generally</u>

It is unlawful for any employer:

- To interfere with, restrain, or deny the exercise of any right granted by the FMLA or the CFRA;

- To discharge or in any other manner discriminate against an individual for exercising any right under the FMLA or CFRA, or for opposing any practice made unlawful by the FMLA or CFRA; or

- To discriminate against an employee because he/she has filed any charge, has instituted any proceeding, or has given or is about to give any information in connection with any inquiry or proceeding relating to any FMLA or CFRA right. 29 USC § 2615(a)-(b); GC § 12945.2(l).

b. Remedies Under the FMLA

Employees who believe that their FMLA rights have been violated may file private lawsuits or file complaints with the Wage and Hour Division, Employment Standards Administration of the United States Department of Labor (DOL). 29 CFR § 825.400. There is no "exhaustion of administrative remedies" requirement for filing a private suit. An employee may sue in either federal or state court, without ever involving the DOL.

The employer's liability will equal the amount of any wages, salary, employment benefits, or other compensation the employee lost as a result of the violation or, where no tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss the employee sustained as a result of the violation, such as the cost of providing care, up to a sum equal to twelve (12) weeks' wages or salary for the employee. 29 CFR § 825.400(c). Interest will be added to these damages at the prevailing rate.

Additionally, an employee can recover an amount equal to the damages and interest as liquidated damages unless the employer proves that its violation was in good faith and that it had reasonable grounds for believing that its conduct did not violate the FMLA. Equitable relief, such as employment, reinstatement, and promotion, may also be granted. 29 CFR § 825.400 (c); 29 USC § 2617(a).

Finally, a prevailing employee will be awarded his/her costs for bringing the action, including reasonable attorneys' fees and expert witness fees. 29 CFR § 825.400(c).

c. Remedies Under the CFRA

The CFRA is enforced by the California Department of Fair Employment and Housing and the state courts. The Fair Employment and Housing Commission (FEHC) may order any remedy available under GC § 12970. The damages the FEHC may award for nonmonetary losses, such as emotional distress, are

limited to One Hundred Fifty Thousand Dollars ($150,000). GC § 12970.

An employee discharged for exercising CFRA rights may allege a discharge in violation of public policy. Such a claim is not preempted by workers' compensation law (*Ely v. Wal-Mart, Inc.* (CD) Cal 1995 875 F. Supp 1422). There is no upper limit on the amount a court may award for CFRA violations. A prevailing plaintiff in such a case is entitled to compensatory damages (including emotional distress damages in an appropriate case) and punitive damages, and reasonable attorney fees and costs (including expert witness fees) are also available. GC § 12965(b), (c).

17. Special Rules for Local Educational Agencies under the FMLA

Special rules are provided under Title I of the Family and Medical Leave Act of 1993 for "local educational agencies." 29 CFR § 825.600 et seq. This section recognizes that there is a "need to balance the educational needs of children with the family leave needs of teachers." (Sen. Rep. 103-3, p. 36.)

A local educational agency will not violate the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or Title VII of the Civil Rights Act of 1964 simply as the result of an employee exercising his/her rights under the FMLA (§ 108(b) of the FMLA). The granting of leave, however, does not relieve a local educational agency from its general obligations under these other federal statues.

a. Intermittent Leave for "Instructional Employees"

Special rules apply if a person employed "mainly in an instructional capacity" requests intermittent or a reduced-leave schedule leave that is foreseeable based on planned medical treatment and the employee would be gone for more than 20 percent of the working days during the period of leave. In such cases, the agency or school may require the employee to choose either to:

1. take a 100% leave for a period not to exceed the duration of the planned medical treatment;[16] or

2. transfer temporarily to another position offered by the employer for which the employee is qualified, as long as the new position has equivalent pay and benefits and better accommodates the requested leave. 29 CFR §

[16] The regulations define "periods of a particular duration: as a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave." 29 CFR § 825.601(a)(2).

825.601(a)(1).

Example: *Robert, a teacher at a public elementary school who normally works five days a week, needs to take two days of FMLA leave per week over a four-week period. The "special rules" would apply to Robert because he would be on leave for more than 20 percent of the total number of working days during the period over which the leave extends. If Robert only needed one day off per week, the normal rules would apply.*

If the instructional employee does not give 30 days notice of foreseeable FMLA leave to be taken intermittently, the employer may require the employee to take leave of a particular duration or to transfer temporarily to an alternative position. The employer also may require the employee to delay the taking of leave until the required notice is given. 29 CFR § 825.601(b).

"Instructional employees" are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing. Nor, does it include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also specifically does not include cafeteria workers, maintenance workers, or bus drivers. 29 CFR § 825.600(c).

b. Leave Requested Near the End of an Academic Term

Special rules have been established to allow instructional employees to take needed family or medical leave without disrupting the classroom at critical points in the school year.

The FMLA's regulations define an "academic term" as "the school semester," which typically ends near the end of the calendar year and the end of spring each school year. A school may not have more than two academic terms or semesters each year for purposes of the FMLA. 29 CFR § 825.602(b).

1. More than Five Weeks Prior to the End of the Term

An instructional employee who begins family or medical leave *more than* five weeks prior to the end of an academic term may be required to continue his/her leave until the end of the term if:

- the leave period is at least three weeks; and
- the employee's return to work would occur during the three-week period prior to the end of the term. 29 CFR §

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825.602(a)(1).

Example: *Mary, a teacher, begins family leave to care for her sick child on Oct. 1 and plans to return to work on Nov. 15. The school term ends on Dec. 1. Mary's school may require her to continue on leave until the end of the term because her return to work would occur within three weeks of the end of the school term.*

2. Within Five Weeks of the End of the Term

If leave is required (for a purpose other than the employee's own serious health condition) *within* five (5) weeks of the end of the term, the instructional employee may be required to continue on leave until the end of the term if:

- the leave period is longer than two weeks; and
- the employee would return from leave within two weeks of the end of the term. 29 CFR § 825.602 (a)(2).

3. Within Three Weeks of the End of the Term

If leave is required (for a purpose other than the employee's own serious health condition) *within* three (3) weeks of the end of the term, and the leave will last more than five (5) working days, the instructional employee may be required to continue on leave until the end of the term. 29 CFR § 825.602(a)(3).

If an employee is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The rationale is that the employer had the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not FMLA leave. However, the employer is still required to maintain the employee's group health insurance and restore the employee to the same or equivalent job (including other benefits) at the conclusion of the leave. 29 CFR § 825.603(b).

c. Reinstatement

A determination of how an eligible employee is to be restored to an equivalent employment position upon his/her return from leave is to be made on the basis of established school board policies and practices, and on any existing collective bargaining agreements. These polices and collective bargaining agreements must be in writing, must be made known to the employee prior to the taking of FMLA leave and must clearly explain the employee's restoration rights upon return from leave. 29 CFR § 825.604.

An "equivalent position" is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, prerequisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority. For example, an employee may not be restored to a position requiring additional licensing or certification.

In an April 1996 opinion letter, the Department of Labor took the position that a probationary teacher who took a period of unpaid leave subject to the FMLA could *not* be required, upon returning to work, to begin the probationary period again. According to the agency, "to do so would result in an employee losing an earned benefit that accrued prior to when the leave began, contrary to the FMLA" Wage Hour Opinion Letter FMLA-80 (April 24, 1996).

NOTES

C. POSTING NOTICES

1. Notice of Rights Under Pregnancy Disability Leave ("Notice A")

This notice contains only the minimum requirements of the Fair Employment and Housing Acts provisions regarding pregnancy, childbirth or related medical conditions. This notice is suitable for use by employers with less than 50 employees and who are therefore not subject to CFRA or FMLA.

2. Notice of Rights Under Pregnancy Disability Leave and CFRA ("Notice B")

This notice combines notice of both an employee's CFRA leave rights and pregnancy disability leave rights. This notice is suitable for all employers with 50 or more employees.

3. Notice of Rights Under FMLA ("Notice C")

Notice "A"

PREGNANCY DISABILITY LEAVE

Under the California Fair Employment and Housing Act (FEHA), if you are disabled by pregnancy, childbirth or related medical conditions, you are eligible to take a pregnancy disability leave (PDL). If you are affected by pregnancy or a related medical condition, you are also eligible to transfer to a less strenuous or hazardous position or to less strenuous or hazardous duties, if this transfer is medically advisable.

- The PDL is for any period(s) of actual disability caused by your pregnancy, childbirth or related medical conditions up to four months (or 88 work days for a full time employee) per pregnancy.

- The PDL does not need to be taken in one continuous period of time but can be taken on an as-needed basis.

- Time off needed for prenatal care, severe morning sickness, doctor-ordered bed rest, childbirth, and recovery from childbirth would all be covered by your PDL.

- Generally, we are required to treat your pregnancy disability the same as we treat other disabilities of similarly situated employees. This affects whether your leave will be paid or unpaid.

- You may be required to obtain a certification from your health care provider of your pregnancy disability or the medical advisability for a transfer. The certification should include:

    1) the date on which you become disabled due to pregnancy or the date of the medical advisability for the transfer;

    2) the probable duration of the period(s) of disability or the period(s) for the advisability of the transfer; and,

    3) a statement that, due to the disability, you are unable to work at all or to perform any one or more of the essential functions of your position without undue risk to yourself, the successful completion of your pregnancy or to other persons or a statement that, due to your pregnancy, the transfer is medically advisable.

- At your option, you can use any accrued vacation or other accrued time off as part of your pregnancy disability leave before taking the remainder of your leave as an unpaid leave. We may require that you use up any available sick leave during your leave. You may also be eligible for state disability insurance for the unpaid portion of your leave.

- Taking a pregnancy disability leave may impact certain of your benefits and your seniority date. If you want more information regarding your eligibility for a leave, the impact of the leave on your seniority and benefits, and our policy for other disabilities, please contact *[insert title]*.

Notice "B"

FAMILY CARE AND MEDICAL LEAVE (CFRA LEAVE)
AND PREGNANCY DISABILITY LEAVE

Under the California Family Rights Act of 1993 (CFRA), if you have more than 12 months of service with us and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave, you may have a right to an unpaid family care or medical leave (CFRA leave). This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition or that of your child, parent or spouse.

Even if you are not eligible for CFRA leave, if disabled by pregnancy, childbirth or related medical conditions, you are entitled to take a pregnancy disability leave of up to four months, depending on your period(s) of actual disability. If you are CFRA-eligible, you have certain rights to take BOTH a pregnancy disability leave and a CFRA leave for reason of the birth of your child. Both leaves contain a guarantee of reinstatement to the same or to a comparable position at the end of the leave, subject to any defense allowed under the law.

If possible, you must provide at least 30 days advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for your self or of a family member). For events which are unforeseeable, we need you to notify us, at least verbally, as soon as you learn of the need for the leave.

Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with this notice policy.

We may require certification from your health care provider before allowing you a leave for pregnancy or your own serious health condition or certification from the health care provider of your child, parent, or spouse who has a serious health condition before allowing you a leave to take care of that family member. When medically necessary, leave may be taken on an intermittent or a reduced work schedule.

If you are taking a leave for the birth, adoption or foster care placement of a child, the basic minimum duration of the leave is two weeks and you must conclude the leave within one year of the birth or placement for adoption or foster care.

Taking a family care or pregnancy disability leave may impact certain of your benefits and your seniority date. If you want more information regarding your eligibility for a leave and/or the impact of the leave on your seniority and benefits, please contact .....

Notice "C"

NOTICE OF RIGHTS UNDER FMLA

Basic Leave Entitlement
FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:
• for incapacity due to pregnancy, prenatal medical care or child birth;
• to care for the employee's child after birth, or placement for adoption or foster care;
• to care for the employee's spouse, son, daughter or parent, who has a serious health condition; or
• for a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements
Eligible employees whose spouse, son, daughter or parent is on covered active duty or call to covered active duty status may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is:
(1) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness*; or
(2) a veteran who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran, and who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.*
*The FMLA definitions of "serious injury or illness" for current servicemembers and veterans are distinct from the FMLA definition of "serious health condition".

Benefits and Protections
During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms. Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements
Employees are eligible if they have worked for a covered employer for at least 12 months, have 1,250 hours of service in the previous 12 months*, and if at least 50 employees are employed by the employer within 75 miles.

*Special hours of service eligibility requirements apply to airline flight crew employees.

Definition of Serious Health Condition
A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities. Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition.

Other conditions may meet the definition of continuing treatment.

Use of Leave
An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave
Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities
Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures. Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities
Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility. Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave i s not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers
FMLA makes it unlawful for any employer to:
• interfere with, restrain, or deny the exercise of any right pro vided under FMLA; and
• discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement
An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer. FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights. FMLA section 109 (29 U.S.C. § 2619) r equires FMLA covered employers to post the text of this notice. Regulation 29 C.F.R. § 825.300(a) may require additional disclosures.

NOTES

XV.
TEMPORARY FAMILY DISABILITY INSURANCE (PAID FAMILY LEAVE)

A. APPLICABLE LAW

1. State Law

- Education Code §§ 44043, 44973, and 44984
- Paid Family Leave
  - Unemployment Insurance Code §§ 2601, 2613, 2655, 2676, 2708, 2708.1, 2709, and 3300 et. seq.
  - Title 22 of the California Code of Regulations, §§ 2708, 3301, and 3303.1
- California Family Rights Act
  - Government Code § 12945.2,
  - Title 2 of the California Code of Regulations §§ 11087 and 11092

2. Federal Law

- The Family Medical Leave Act
  - 29 United States Code §§ 2601-2654
  - Code of Federal Regulations 29 CFR Part 825

B. DISCUSSION

1. Relation to State Disability Insurance

PFL is a component of SDI, fully funded through employee contributions, and administered within the policies of SDI and the Employment Development Department (EDD). Claims for PFL benefits must be filed with EDD. Un Ins Code § 3300(f)(g); § 3301(a). An employee must be eligible under the rules and regulations of SDI in order to receive PFL benefits. Un Ins Code § 3302(j). **Only employees who contribute through payroll deduction to SDI are eligible to participate.** Many school districts do not contribute to SDI, but are self-insured instead. Therefore, the employees of these districts will not be eligible for PFL

benefits unless they contributed to SDI through a previous employer.

2. Operation of Leave

The Temporary Family Disability Insurance (TFDI) is known as "Paid Family Leave" (PFL). Un Ins Code § 3300(b). PFL went into effect on January 1, 2004. On that date, employee contributions to State Disability Insurance (SDI) and PFL increased to fund the additional expense. Benefits may be paid for claims that begin on or after July 1, 2004. Stats. 2002 c. 901 § 7 (SB 1661). Similar to SDI, the purpose of PFL is to compensate in part for the wage loss sustained by an employee who is unable to work due to caring for a family member who has a serious health condition, or the birth, adoption or foster placement of a new child. Un Ins Code § 2601.

3. Duration of Paid Leave

a. Six Weeks of Paid Leave

PFL does not provide a right to a leave of absence. PFL provides up to six weeks of wage replacement benefits while an employee is on an otherwise authorized leave. Un Ins Code §3301(a)(1). No more than six weeks of PFL benefits shall be paid within any 12-month period. Un Ins Code §3301(d). A twelve-month period means the 365 consecutive days that begin on the day the employee first establishes a valid claim for PFL. Un Ins Code § 3302(k). An employee who is entitled to leave under the FMLA and/or CFRA must take PFL concurrent with leave taken under the FMLA/CFRA. Un Ins Code § 3303.1(b).

b. Intermittent or Reduced Work Schedule

An eligible employee may elect to take PFL on an intermittent basis when the care recipient's condition warrants the intermittent participation of the employee. Un Ins Code § 2708(c). Since PFL provides no reinstatement or benefit protection, if the employee's request for intermittent leave conflicts with the employer's needs, the employer may transfer the employee to a different position without providing similar pay or benefits or terminate the employee. Un Ins Code § 3301(a). However, if the employee requests intermittent leave and is also eligible for FMLA or CFRA, the employer must follow FMLA and CFRA when providing intermittent leave.

4. Reasons For Which Leave May Be Taken

a. Paid Family Leave

PFL may be taken for the following reasons:

- to care for a seriously ill child, spouse, parent, registered

domestic partner or child of a registered domestic partner;

- to care for the employee's newborn child (within one year of the birth); or

- to bond with a new child after placement of the child by foster care or adoption. Un Ins Code § 3301(a)(1).

b. Serious Health Condition

A serious health condition under PFL means an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential health care facility, or continuing treatment or supervision by a health care provider. Un Ins Code § 3302(h). FMLA and CFRA contain the same definition with the exception that CFRA does not include a disability related to pregnancy, childbirth or other related conditions as a serious medical condition GC § 12945.2(c)(3)(C), 29 USC § 2611(11).

c. Registered Domestic Partners

PFL provides benefits when an employee is required to care for a registered domestic partner or child of a registered domestic partner. Un Ins Code § 3301(a), 3302(d). FMLA and CFRA do not provide benefits for registered domestic partners or their children. GC § 12945.2(c)(3)(A),(C); 29 USC § 2612(a)(1).

5. Amount of Benefits Provided

PFL provides that workers will be reimbursed 55% of their base wage for up to six weeks in any 12-month period. Un Ins Code § 2655(d). Effective January 1, 2018, this rate will increase to the higher of either 23% of the state average weekly wage or 60% of the employees base wage. It will return to 55% on January 1, 2022.

6. Employers Covered by Paid Family Leave

PFL applies to all public and private employers whose employees are subject to SDI, regardless of the number of employees.

7. Employees Eligible for Paid Family Leave

a. Unable to Perform Regular Duties

An employee is determined to be eligible for PFL benefits on any day in which he/she is unable to perform his/her regular or customary work because of absence for a specified reason (see XV.b.4 above) only if ***all*** of the following apply:

- the employee has made a claim for PFL benefits as

required by regulations;

- the employee has been unable to perform his/her regular or customary work for a seven-day waiting period; and

- the employee has filed a certificate of medical eligibility as required. Un Ins Code § 3303.

b. Ineligibility for PFL

An employee is *not* eligible on any day that:

- the employee has received, or is entitled to receive state unemployment compensation benefits or compensation benefits from any other state or the federal government; or

- the employee has received, or is entitled to receive "other benefits" in the form of cash benefits such as workers' compensation, or temporary disability benefits under any employer's liability law of this or any other state or the federal government; or

- the employee has received or is entitled to receive SDI benefits from this or any other state; or

- another family member is ready, willing, able and available for the same period of time in a day that the employee is providing the required care. Un Ins Code § 3303.1(a)(1-4).

c. What Is "Ready, Willing, Able and Available?"

An employee may be ready, willing, able and available regardless of his/her employment status. If another family member is unwilling to provide care or is unreliable because of a physical or mental disability, the employee may receive benefits, if otherwise eligible. If the care recipient warrants 24-hour care, three different care providers will be eligible to receive benefits. However, no two care providers may provide care during the same 8-hour period. Un Ins Code § 3303.1(a)-(1).

d. Prior Period of Employment Not Required

Under PFL, an employee who is otherwise eligible, is not required to have worked for his/her employer for any length of time prior to claiming benefits. However, an employee must have earned at least $300 from which deductions for PFL were withheld. These employee deductions do not have to be earned by the current employer. Thus, an otherwise eligible employee is eligible for benefits under PFL on his/her first day of employment. FMLA and

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CFRA both require that the employee have worked for the employer for a minimum of 1250 hours in the twelve months immediately preceding the first day of leave. 29 CFR § 825.110(a); GC § 12945.2(a); 2 CCR § 11087(e).

8. Filing a Claim for Paid Family Leave

For the purposes of PFL, a valid claim means any claim:

- made in accordance to the applicable rules and regulations; and
- the employee claiming benefits is unemployed; and
- the employee claiming benefits has paid the necessary wages in employment for employers to qualify for benefits; and is caring for a seriously ill family member, or bonding with a minor child during the first year after birth or placement of the child in connection with foster care or adoption. Un Ins Code § 3302(j).

9. Medical Certification of Need for Leave

PFL requires the care recipient to provide the EDD with medical certification from the care recipient's treating physician or practitioner that establishes medical eligibility for each uninterrupted period of disability benefits. The certification must establish the sickness, injury, or pregnancy of the employee, or the family member that warrants the care of the employee. Un Ins Code § 3303(c), § 2708(a).

10. Reinstatement

a. Generally

PFL does not provide a right to a leave of absence or any form of job protection upon return from a leave of absence. Un Ins Code § 3301-(a). It does not require the employer to reinstate the employee, or give the employee a comparable position. However, it requires an eligible employee, who is also entitled to leave under FMLA and/or CFRA, to take PFL concurrently with leave taken under FMLA and/or CFRA. Un Ins Code § 3303.1(b). PFL does not diminish any reinstatement rights and responsibilities conveyed under FMLA and/or CFRA. Un Ins Code § 3301(a)(2).

An employee who is covered under FMLA and/or CFRA is protected from termination and must be reinstated in a same or equivalent position with equivalent benefits, pay, and other terms and conditions of employment. 29 USC § 2614; GC § 12945.2(f)(g).

b. Certificated Employees

Under PFL, an employee who requests only PFL or who is not eligible for FMLA and/or CFRA, does not have a right to be reinstated. However, certificated employees, pursuant to the Education Code, are entitled to be reinstated in the position held by him or her at the time of the granting of the leave of absence, unless otherwise agreed. EC § 44973.

c. Classified Employees

Classified employees do not have the same reinstatement protection under the Education Code as certificated employees, but are provided with reinstatement protection for various individual leaves. (See specific leave sections for reinstatement provisions.)

11. Protection of Benefits During Leave

During PFL, the employee is *not* entitled to accrual of seniority and to participate in health plans, employee benefit plans (including life, short-term and long-term disability or accident insurance), pension and retirement plans, and supplemental unemployment benefit plans. Un Ins Code § 3301-(a). Both CFRA and FMLA require employers to maintain an employee's coverage under any group health benefit plan (medical, dental, and vision) during qualifying leave in the same manner as if the employee were actively working. 29 USC § 2614(c)(1); 29 CFR § 825.209(a); 2 CCR § 11092(c).

12. Record Keeping Requirements Under the PFL

Record keeping requirements for PFL are the same as SDI, because PFL is a component of SDI. A covered employer under PFL is not subject to any additional requirements.

13. Employer Posting Requirements

a. Requirements

Every employer of employees subject to PFL must provide notice to every employee hired after January 1, 2004 and every employee who takes a leave of absence for pregnancy, non-occupational sickness or injury, or the need to provide care for any sick or injured family member, or the need to bond with a minor child within the first year of the child's birth or placement in connection with foster care or adoption. This notice must also instruct the employee to provide notification of the reason for taking leave in a manner consistent with the employer's policy. Un Ins Code § 2613.

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b. Notice of Rights Under Paid Family Leave

1. Notice of Rights Under Unemployment Insurance and State Disability Insurance, Including Paid Family Leave (Notice A)

This notice contains the requirements of Unemployment Insurance, and State Disability Insurance, including Paid Family Leave. This notice is suitable for use by employers whose employees are eligible for Unemployment Insurance and State Disability Insurance, including Paid Family Leave.

2. Notice of Rights Under State Disability Insurance, Including Paid Family Leave. (Notice B)

This notice contains the requirements of State Disability Insurance, including Paid Family Leave. This notice is suitable for use by employers whose employees are eligible for State Disability Insurance, including Paid Family Leave.

Notice A

THIS EMPLOYER IS REGISTERED UNDER THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE AND IS REPORTING WAGE CREDITS THAT ARE BEING ACCUMULATED FOR YOU TO BE USED AS A BASIS FOR:

Unemployment Insurance (UI)
(funded entirely by Employers' taxes)

When you are unemployed or working less than full time and are ready, willing, and able to work, you may be eligible to receive Unemployment Insurance benefits.

If you are within California, call: English 1-800-300-5616 Spanish 1-800-326-8937
Chinese 1-800-547-3506 Vietnamese 1-800-547-2058

If you are outside California but within the United States, Canada, Puerto Rico, or the Virgin Islands, call 1-800-250-3913.

Note to Callers: Mondays are our busiest days. For fastest service, call Tuesday through Thursday. If you are calling to open a claim, you must call by Friday to receive credit for the week.

To file for Unemployment Insurance benefits via the Internet, go to www.edd.ca.gov/eapply4UI.

File your claim promptly. You may lose benefits to which you would otherwise be entitled if you delay in filing your claim.

TTY (FOR DEAF OR HEARING-IMPAIRED INDIVIDUALS ONLY) IS AVAILABLE AT 1-800-815-9387.

State Disability Insurance (SDI)
(funded entirely by Employees' contributions)

When you are unable to work or reduce your work hours because of sickness, injury, or pregnancy, you may be eligible to receive State Disability Insurance benefits.

Your employer must provide a copy of "State Disability Insurance Provisions," DE 2515, to each newly hired employee and to each employee leaving work due to pregnancy or due to sickness or injury that is not related to his/her job.

Claim Forms

1. If your employer operates under an approved Voluntary Plan of disability insurance and you have chosen to be covered by it, obtain disability insurance claim forms from your employer.

2. If you are not covered by a voluntary plan, obtain claim forms from your doctor, hospital, or directly from any California State Disability Insurance (SDI) office.

3. File your Claim for SDI Benefits, DE 2501, within 49 days of the first day of your disability to avoid losing benefits.

FOR MORE INFORMATION ABOUT SDI, CONTACT A DISABILITY INSURANCE CUSTOMER SERVICE CENTER AT 1-800-480-3287.
TTY (FOR DEAF OR HEARING-IMPAIRED INDIVIDUALS ONLY) IS AVAILABLE AT 1-800-563-2441.

Paid Family Leave (PDL)
(funded entirely by Employees' contributions)

When you stop working or reduce your work hours to care for a family member who is seriously ill or to bond with a new child, you may be eligible to receive Paid Family Leave (PFL) benefits beginning July 1, 2004.

Your employer must provide a copy of "Paid Family Leave," DE 2511, to each newly hired employee as of January 1, 2004, and to each employee leaving work to care for a seriously ill family member or to bond with a new child beginning July 1, 2004.

Claim Forms

1. If your employer operates under an approved Voluntary Plan of disability insurance and you have chosen to be covered by it, obtain paid family leave claim forms from your employer.

2. If you are not covered by a voluntary plan, obtain claim forms from any California State Disability Insurance (SDI) office.

3. File your Claim for PFL Benefits, DE 2501F, within 49 days of the first day of your family leave to avoid losing benefits.

FOR MORE INFORMATION ABOUT PFL, CONTACT A PAID FAMILY LEAVE CUSTOMER SERVICE CENTER AT 1-877-BE-THERE.
TTY (FOR DEAF OR HEARING-IMPAIRED INDIVIDUALS ONLY) IS AVAILABLE AT 1-800-563-2441.

NOTE: SOME EMPLOYEES MAY BE EXEMPT FROM COVERAGE BY THE ABOVE INSURANCE PROGRAMS. IT IS ILLEGAL TO MAKE A FALSE STATEMENT OR TO WITHHOLD FACTS TO CLAIM BENEFITS. FOR ADDITIONAL GENERAL INFORMATION, VISIT THE EDD WEB SITE AT WWW.EDD.CA.GOV

Notice B

THIS EMPLOYER IS REGISTERED UNDER THE CALIFORNIA UNEMPLOYMENT INSURANCE CODE AND IS REPORTING WAGE CREDITS THAT ARE BEING ACCUMULATED FOR YOU TO BE USED AS A BASIS FOR:

State Disability Insurance (SDI)

When you are unable to work or reduce your work hours because of sickness, injury, or pregnancy, you may be eligible to receive State Disability Insurance (SDI) benefits.

Your employer must provide a copy of "State Disability Insurance Provisions," DE 2515, to each newly hired employee and to each employee leaving work due to pregnancy or due to sickness or injury that is not related to his/her job.

Claim Forms

- If your employer operates under an approved Voluntary Plan of disability insurance and you have chosen to be covered by it, obtain disability insurance claim forms from your employer.

- If you are not covered by a voluntary plan, claim forms may be obtained from your doctor, hospital, or directly from any California State Disability Insurance (SDI) office.

- File your Claim for SDI Benefits, DE 2501, within 49 days of the first day of your disability to avoid losing benefits.

Paid Family Leave (PFL)

When you stop working or reduce you work hours to care for a family member who is seriously ill or to bond with a new child, you may be eligible to receive Paid Family Leave (PFL) benefits beginning July 1, 2004.

Your employer must provide a copy of "Paid Family Leave," DE 2511, to each newly hired employee as of January 1, 2004, and to each employee leaving work to care for a seriously ill family member or to bond with a new child beginning July 1, 2004.

Claim Forms

1. If your employer operates under an approved Voluntary Plan of disability insurance and you have chosen to be covered by it, obtain family leave claim forms from your employer.

2. If you are not covered by a voluntary plan, claim forms may be obtained from any California State Disability Insurance (SDI) office.

3. File your Claim for PFL Benefits, DE 2501F, within 49 days of the first day of your family leave to avoid losing benefits.

SDI and PFL are funded entirely by employee contributions

FOR MORE INFORMATION ABOUT SDI, CALL 1-800-480-3287. TTY (FOR DEAF OR HEARING-IMPAIRED INDIVIDUALS ONLY) IS AVAILABLE AT 1-800-563-2441. FOR MORE INFORMATION ABOUT PFL, CALL 1-877-BE-THERE. TTY (FOR DEAF OR HEARING-IMPAIRED INDIVIDUALS ONLY) IS AVAILABLE AT 1-800-563-2441.

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XVI
LEAVES DUE TO A DISABILITY

A. APPLICABLE LAW

1. State Law

- Education Code §§ 44986 and 44986.1
- Fair Employment and Housing Act
- Government Code §§ 12900-12996
- *American National Ins. Co. v. FEHC*, 186 Cal. Rptr. 345 (1982)

2. Federal Law

- Americans with Disabilities Act, 42 United States Code §§ 12101-12213
- Family and Medical Leave Act, 29 Code of Federal Regulations § 825.702
- Rehabilitation Act, 29 United States Code §§ 701-797b
- *Hendry v. GTE North, Inc.*, 896 F. Supp 816 (ND Ind. 1995)
- *Tyndal v. National Educ. Ctrs., Inc.*, 31. F.3d. 209 (4th Cir. 1994)

B. DISCUSSION

1. General Requirements

Both the federal Americans with Disabilities Act (ADA) (42 USC §§ 12101-12213) and the state Fair Employment and Housing Act (FEHA) (GC §§ 12900-12996) make it unlawful for any covered employer to fail to make "reasonable accommodation" for the known disabilities of applicants or employees who, with or without reasonable accommodation, can perform the essential functions of the employment position they hold or are applying for. 42 USC §§ 12111(8), 12112(b)(5)(A); GC § 12940(m).

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2. Employers Covered by ADA and FEHA

The ADA applies to any employer with fifteen (15) or more employees. The FEHA applies to any employer with five (5) or more employees. GC § 12926(d).

3. What is Disability?

Under the ADA, an employee's physical or mental condition is not considered a disability unless it "substantially limits" one or more major life activities. However, the FEHA considers an employee disabled if his/her physical or mental impairment "makes difficult" the achievement of a major life activity. GC § 12926(i),(k). This is a significantly lower threshold. As an example, consider an employee with a broken leg. Under the ADA, that employee may not be disabled since he/she is not "substantially limited." However, a leg cast could arguably make daily activities "difficult." Accordingly, an employee who is likely not protected under the ADA ***could*** be covered under California law.

The FEHA's definition of the term "mental disability" may be broader than the ADA's definition. The ADA states that a "mental disability" means any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities (29 CFR § 1630.2(h)(2)), while the FEHA provides that "mental disability" *includes* any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. Major life activity is broadly construed and includes physical, mental, social activities, and working. GC § 12926(i)(1).

The FEHA's definition of the term "physical disability" (see GC § 12926(k)) also differs from the ADA's definition. The FEHA states that the legislature intended for "physical handicap" to have the same meaning as the term "physical handicap,"as construed in *American Nat'l Ins. Co. v. FEHC* (1982) 32 Cal 3d 603, 186 Cal. Rptr. 345. In that case, the California Supreme Court held that the plaintiff must show only that the condition in question was "physical" and "handicapping" in the ordinary dictionary sense of the word, such that it "makes achievement unusually difficult." 32 Cal 3d at 609. The ADA, on the other hand, defines a physical disability as an "impairment that substantially limits [the individual] in one or more major life activities." 42 USC § 12102(2)(a). Whether these varying formulations have any practical difference remains to be seen.

4. What is Reasonable Accommodation?

The term "reasonable accommodations" does not have a precise definition, but it generally includes job and scheduling modifications, services, and other adjustments necessary for a disabled employee to perform their job

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functions or enjoy the benefits of the employment. See 42 USC § 12111(9)-(10). The FEHA's definition is similarly broad. GC § 12926(n).

Both the ADA and the FEHA provide that "reasonable accommodation" can include part-time or modified work schedules and other similar accommodations. 42 USC § 12111(9); GC § 12926(n). A modified work schedule generally is considered a reasonable accommodation where it is not an undue hardship and it permits the employee to receive medical treatment or to alleviate transportation difficulties. Examples include rearranging the schedule by a few hours per week and having the employee work on Saturday and Sunday in exchange for two days off in the middle of the week. Flexible leave policies should be considered where rearranging the employee's schedule is impractical but the employee's disability nonetheless requires him and/or her to take time off work. However, the regulations recognize that the ability to work consistently may be an essential function of the job. See 29 CFR § 1630.14(b), App. The ADA generally does not require an employer to accept an open-ended "work when I can" schedule. *Tyndall v. National Educ. Ctrs., Inc.*, 31 F3d 209 at 213 (4th Cir. 1994); *Hendry v. GTE North, Inc.*, 896 F Supp 816 at 825 (ND Ind. 1995).

The accommodation need not be provided, though, if it would create an "undue hardship." An undue hardship is an "action requiring significant difficulty or expense." 42 USC § 12111(10)(a); GC § 12926(s). Under the ADA, there are a number of factors to consider when determining whether a particular accommodation would cause undue hardship to an employer:

- the nature and cost of the accommodation;
- the overall financial resources of the facility or facilities;
- the number of persons employed at the facility;
- the effect of the accommodation on expenses and resources;
- overall financial resources;
- the overall size of the business in terms of total employees;
- the number, type, and location of facilities;
- the type of operation or operations, including the composition, structure, and functions of the workforce;
- the geographic separateness of the place of accommodation from the covered entity;
- the administrative or fiscal relationship to the covered entity of the accommodating facility or facilities; and

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- the impact of the accommodation on the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

42 USC § 12111(10)(B); 29 CFR § 1630.2(p)(V). The last factor listed above - impact of the accommodation - is not included in the list of factors to be considered under the FEHA. See 2 CCR § 7293.9(b).

5. Effect on Employer Leave Policy

An employer may be required to permit an employee to take a leave of absence as part of the "reasonable accommodation" requirement. See 29 CFR § 1630.2(O) ("accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment").

The Equal Employment Opportunity Commission's Technical Assistance Manual for the Americans with Disabilities Act explains that an employer may be required to make adjustments in leave policies as a reasonable accommodation and that reasonable accommodations may include leave flexibility and unpaid leave (§ 3.10.4):

Flexible leave policies should be considered as a reasonable accommodation when people with disabilities require time off from work because of their disability. An employer is not required to provide additional paid leave as an accommodation, but should consider allowing use of accrued leave, advanced leave, or leave without pay, where this will not cause undue hardship.

People with disabilities may require special leave for a number of reasons related to their disability, such as:

1. medical treatment related to the disability;

2. repair of a prosthesis or equipment;

3. temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing temperatures above 85 degrees could seriously harm the condition of a person with multiple sclerosis);

4. training in the use of an assistance device or a guide dog. (However, if any assistance device is used at work and provided as a reasonable accommodation, and if other employees receive training during work hours, the disabled employee should receive training on this device during work hours, without need to take leave.)

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Section 7.10 of the Technical Assistance Manual states that a uniformly applied leave policy does not violate the ADA because it has a more severe effect on the employee with a disability, but that an employer may be required to modify its leave policies at the request of an employee with a disability as a reasonable accommodation.

Section 7.10 also states that the ADA does not require an employer to give leave as a reasonable accommodation to an employee who has a relationship with an individual with a disability to enable the employee to care for that individual.

6. Interplay with the FMLA

The FMLA regulations address the interplay between the ADA and the FMLA. See 29 CFR § 825.702.

Among other things, the regulations note that, if an employee becomes disabled, a reasonable accommodation under the ADA might be accomplished by providing the employee a part-time job with only those benefits provided to part-time employees. However, the FMLA would permit the employee to work a reduced-time leave schedule until 12 weeks of leave were used, with health benefits maintained during the 12-week period. At the end of the FMLA leave period, the employer is required to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to what the employee had when the FMLA leave commenced.

The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the equivalent position because of a disability, and the employee had exhausted his/her FMLA leave entitlement, the ADA may require the employer to make reasonable accommodation at that time by placing the employee in a part-time job, with only those benefits provided to part-time employees. 29 CFR § 825.702(c).

An employee who is entitled to FMLA leave cannot be *required* to take a job with a reasonable accommodation instead of the FMLA leave. Under the ADA, however, the employer may be required to *offer* such a position. 29 CFR § 825.702(d).

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7. Interplay with the Rehabilitation Act

The Federal Rehabilitation Act (29 USC §§ 701-797b) prohibits executive agencies, the U.S. Postal Service, certain government contractors, and those receiving federal financial assistance from discriminating against individuals with disabilities.

8. Disability Benefit Applicant

A school district may grant a leave of absence to any certificated employee who has applied for disability benefits under the State Teacher's Retirement System (STRS). EC § 44986.

If granted, such leave shall not exceed 30 days beyond final determination of the employee's eligibility for disability benefits by STRS. If the employee is determined to be eligible for the disability benefits by the STRS, the leave shall be extended for the term of disability, but not more than 39 months. EC § 44986(a).

Persons employed to fill behind a permanent certificated employee on disability benefits shall be classified as temporary employees. The term of employment of the temporary employee shall be equal to the number of days of absence of the employee receiving the disability benefit. If the term of employment extends beyond this period, the employee shall be credited for all days served as a probationary employee. EC § 44986(a).

Any member for whom the employer makes application for a disability benefit, and whom STRS finds not to be disabled, shall be reinstated to the former position upon receipt by the employer of notification from STRS of the denial of the disability benefit. EC § 44986.1.

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XVII
MILITARY SERVICE

A. APPLICABLE LAW

- California Education Code §§ 44018, 44800, 44931, 45041, and 45059
- California Government Code § 19774
- California Military and Veterans Code §§ 142, 143, 146, 394, 394.5, 395, 395.1, 395.2, 395.3, 395.4, 395.01, 395.02, 395.03, 395.05, and 395.06
- 86 California Attorney General's Opinion 12 (2003)
- 77 California Attorney General's Opinion 209 (1994)
- 63 California Attorney General's Opinion 483 (1980)
- 63 California Attorney General's Opinion 923 (1980)
- 19 California Attorney General's Opinion 132 (1952)
- 14 California Attorney General's Opinion 228 (1949)
- 7 California Attorney General's Opinion 100 (1946)

B. DISCUSSION

1. When Does Military Leave Apply?

a. Temporary Military Leave

Under the following conditions, employees who are members of the reserves are entitled to receive temporary military leave:

- such service must be ordered, not volunteered for by the employee. Mil & VC § 395. However, a public employee is entitled to temporary military leave while engaged in military duty ordered for purposes of active military training, even though the employee has initially volunteered to be placed on such orders. 63 Ops Cal Atty Gen 923 (1980).

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- the service must be "active military training, inactive duty training, encampment, naval cruises, special exercises or like activity." Mil & VC § 395.

- alternatively, there must be a time of war, rebellion, insurrection, riot, public calamity or other conditions described in Military and Veterans Code sections 142-143 and 146. 63 Ops Cal Atty Gen 483 (1980).

- such service must not exceed one hundred eighty (180) days, including travel to and from such service. Mil & VC § 395.

- there is no minimum employment period in order to be eligible for this leave. 14 Ops Cal Atty Gen 228 (1949).

It specifically does ***not*** require paid military leave of absence for periods of inactive duty such as scheduled reserve drill periods.

b. Non-Temporary Military Leave

Employees are also entitled to leave in cases of "war" or declared national emergencies.

- this leave extends for as long as the war or state of emergency lasts (i.e., beyond the one hundred eighty (180) days of "temporary" leave).

- employees may either be ordered, or may volunteer, to serve.

- leave under this section ends upon the earlier of either ninety (90) days after the war or state of emergency ends, or ninety (90) days after the termination of the employee's active military service (EC § 44800 provides six (6) months). Mil & VC § 395.4.

c. Inactive Military Service

Scheduled reserve drills of the California National Guard and other reserve military units entitle public and private employees to unpaid leaves of absence. GC § 19774(a).

Employees may, if they so desire, "elect to use vacation time or accumulated compensatory time off to attend scheduled reserve drill periods or perform other inactive duty reserve obligations." GC § 19774(b).

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2. Compensation

a. Temporary Military Leave

A district must pay the employee's salary for up to thirty (30) calendar days of temporary military leave of absence per fiscal year. Mil & VC § 395.01(a). Thirty calendar days consists of the number of days or hours the employee would ordinarily work during that period. 86 Ops Cal Atty Gen 12 (2003).

A district may, but is not required, to provide paid military leave for inactive duty training. Mil & VC § 395(b). This requirement applies to military duty which is *ordered* for the purposes of active military training, encampment, naval cruises or special exercises or like activity.

An employee must have been employed by the district for at least one (1) year prior to the first day of the absence to qualify for pay. All prior military service is to be counted as public agency service, regardless of when the service was performed, when calculating whether the employee has been employed with the public agency for a minimum of one year at the time of taking the military leave. 77 Ops Cal Atty Gen 209 (1994).

A district may provide any employee on temporary military leave, the difference between the amount of the employee's military pay and allowances and the amount the employee would have received as an employee, including any merit raises that would have otherwise been granted.

The employee may also receive all benefits that would have been provided had he/she not been called into active duty, unless the benefits are limited or prohibited by vendor contracts. The benefits and compensation must be approved by the governing board. EC § 44018.

b. Non-Temporary Military Leave

A district must pay the employee's salary for up to the first thirty (30) calendar days "while engaged in the performance of ordered military duty." Mil & VC § 395.02.

Pay is required for active military duty under federal orders; it does not apply to state military orders or for purely state emergencies.

It does, however, apply if the employee is inducted, enlists, enters or is otherwise called into active duty.

NOTES

An employee must have been employed by the district for at least one (1) year prior to the first day of the absence to qualify for this benefit.

c. Generally

No more than thirty (30) calendar days pay shall be allowed under the provisions of sections 395.01 (temporary) and 395.02 (non-temporary), or both, for any one (1) military leave of absence or during any one (1) fiscal year, except as otherwise authorized by resolution of the legislative body of a public agency or memorandum of understanding with an employee organization. Mil & VC § 395.03.

Certificated employees are allowed to collect the thirty (30) days of compensation only during that portion of the school year in which they would actually teach and receive salary. 19 Ops Cal Atty Gen 132 (1952).

There is no direct authority for application of this rule to classified employees. It is likely, however, that classified employees would also be limited to pay during that portion of the year during which they actually work.

3. How Do You Calculate Compensation Due?

Thirty (30) days salary for classified employees is deemed to be one (1) month's salary. For certificated employees, it is deemed to be one tenth of their annual salary. EC § 45059.

4. Benefits

a. Certificated Employees

Education Code section 44800 provides that every certificated employee who enters active military service (i.e., is on a non-temporary military leave) shall be entitled to a leave. Such absence shall not affect the classification of the employee. In the case of a probationary employee, this period of absence shall neither count as part of the service required as a condition precedent to becoming a permanent employee of the district, nor be construed as a break in continuity of the service.

Within six months *(more than the ninety (90) days set forth in Mil & VC § 395.4)* after an honorable discharge or placement on inactive duty, the employee shall be entitled to return to the position held by him/her at the time of his/her entrance into the service. Salary shall be that to which he/she would have been entitled had he/she not taken military leave.

NOTES

If the employee was employed under a lawful contract for a period in excess of one year in a position in which he/she had not become a permanent employee of the district, he/she shall be entitled to return to such position for the period his/her contract of employment had to run at the time his/her military leave commenced. Persons employed to take the place of an employee on military leave shall not be entitled to such position following the return of the employee on military leave. EC § 44800.

The credential of a certificated employee, may not become invalid for failure to renew during such leave. The employee has 120 after the end of his/her active duty to renew the credential. EC § 44018.

b. Classified Employees

Classified employees are not similarly protected by the Education Code.

However, Military and Veterans Code sections 395 and 395.1 provide similar protection to them through their general language. Military and Veterans Code section 395.2 also specifically protects non-certificated employees by guaranteeing reinstatement upon application to the school board within either six (6) months of the end of the military service or within one (1) year of a treaty of peace ending the hostilities.

5. Reinstatement and Restoration of Rights

a. Temporary Military Leave

Military and Veterans Code section 395 protects public employee positions during temporary military leave. This protection is "absolute" and mandatory. If the position is abolished or is otherwise eliminated during the leave, the employer must either:

- reinstate the employee to a "position of like seniority, status, and pay if such position exists;" or
- grant the same rights and privileges he/she would have had if he/she occupied the position when it ceased to exist and had not taken temporary military leave of absence.

An employee with at least one (1) year of service with the district, shall be credited with the same vacation, sick leave and holiday privileges and the same rights and privileges to promotion, continuance in office, employment, reappointment to office, or reemployment had the employee not left.

NOTES

b. Non-Temporary Military Leave

The employee or officer must be reinstated, upon request, within six (6) months of the employee's return to civilian life, and not later than six (6) months after the end of the conflict or emergency. This reinstatement right ends twelve (12) months after the employee could have left military service. No sick leave, salary or vacation is owed from the period of military service. All other rights and privileges are restored. The employee must not have received a dishonorable discharge. MIL & VC § 395.1.

6. Resignation and Reinstatement

a. Permanent Certificated Employees

A school district may grant to a permanent certificated employee, who has resigned from the school district and who is rehired within 39 months, most of the benefits of their previous permanent status. Active military service time does not count towards computing this 39 month reinstatement period. EC § 44931.

b. Probationary Certificated Employees

The Education Code does not create post resignation reinstatement rights for probationary certificated employees. Such employees are, however, protected by Military and Veterans Code sections 395.1 and 395.3. The general protections of section 395.1 have already been discussed. Military and Veterans Code section 395.3 applies where no other Military and Veterans code statute protects the employee. 7 Ops Cal Atty Gen 100 (1946).

Any public employee who resigns his/her position to enter the armed forces of either the United States or California for active military service has reinstatement rights. This right must be exercised by written notice to the employer within six (6) months of his/her leaving the military service. This right ends no later than twelve (12) months after the date the employee could have first returned to civilian life.

c. Classified Employees

Classified employees like probationary certificated staff, have no Education Code reinstatement rights after their resignation to actively serve in the military. Military and Veterans Code section 395.2 provides a reinstatement right to classified employees who enter the armed forces. The statute is not clear whether the term "enters" includes just those "ordered" into service or also volunteers. Statutory interpretation suggests that the present wording includes both voluntary and involuntary service. If true,

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sections 395.2 and 395.3 protect classified employees who resign their post to enter active military service beyond the one hundred eight (180) days, but within one year.

7. Is the California National Guard Different?

a. When Does it Apply?

Military and Veterans Code section 395.05 ensures that public employee California National Guard Members, who are ordered to military or naval duty as described by section 146, or due to an extreme state emergency declared by the governor, shall receive thirty (30) days civilian pay, regardless of the number of emergencies declared during a particular fiscal year. 83 Ops Cal Atty Gen 148 (2000).

b. What are the Benefits?

The employee "shall not be subjected by any person directly or indirectly by reason of such absence to any loss or diminution of vacation . . . or be prejudiced by reason of such absence with reference to promotion or continuance in office, employment . . ." as a result of the absence. Mil & VC § 395.05.

The calculation of pay pursuant to the Military and Veterans Code (and Education Code §§ 45059 and 45041) would also apply to State National Guard employees.

NOTES

XVIII
OFFICER OF AN EMPLOYEE ORGANIZATION

A. APPLICABLE LAW

- California Education Code §§ 44987 and 45210

B. DISCUSSION

1. Certificated and Classified Employees

Education Code sections 44987 and 45210 require Districts to grant, upon request, a leave of absence to serve as an elected officer of (1) a local school district public employee organization or (2) any statewide or national public employee organization with which the local organization is affiliated. The leave includes, but is not limited to: absence for the purpose of attending meetings of the body of the organization on which the employee serves as an officer.

The leave shall be without loss of compensation. Compensation during the leave must include retirement fund contributions required of the school district as an employer.

The employee must earn full service credit during the leave of absence and he/she must pay member contributions as prescribed by the Government Code. The maximum amount of the service credit earned shall not exceed twelve (12) years.

The school district shall be reimbursed by the employee organization for all compensation paid the employee on account of the leave. Reimbursement by the employee organization shall be made within ten (10) days after its receipt of the district's certification of payment of compensation to the employee.

This leave of absence is in addition to release time without loss of compensation granted to representatives of an exclusive representative by subdivision (c) of Section 3543.1 of the Government Code.

2. Classified Employees

In addition, Education Code section 45210 requires districts to grant, upon reasonable notification from an employee organization, a leave of absence to a "*reasonable number of unelected classified employees for the purpose of enabling an employee to attend important organizational activities.*"

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All of the provisions set forth above apply to this leave as well.

Section 45210 does not apply to an employee who is subject to a collective bargaining agreement that expressly provides for a leave of absence without loss of compensation for participation in authorized activities as an elected officer or an unelected member of the public employee organization.

3. Not Eligible for Disability Benefits

a. Certificated Employees

Any employee who serves as a full-time officer of the public employee organization shall not be eligible for disability benefits under the State Teachers' Retirement System while on the leave of absence. EC § 44987.

b. Classified Employees

While Education Code section 45210 does not contain a parallel provision, it would be surprising if a classified employee were found to be eligible for such benefits while on leave.

NOTES

XIX
SERVICE IN THE LEGISLATURE

A. APPLICABLE LAW

- California Education Code § 44801

B. DISCUSSION

1. Certificated Employees

Permanent certificated employees who are elected to the legislature shall be granted a leave of absence from their duties. During the leave, the employee may be employed by the school district to perform less than full-time service for such compensation and upon such terms and conditions as may be mutually agreed upon. The absence shall not affect, in any way, the classification (probationary or permanent) of the employee.

Within six (6) months after the term of office expires, the employee shall be entitled to return to the position which he/she held at the time of his/her election and at the salary to which he/she would have been entitled had he/she not taken leave from the district. A person employed to take the place of any such employee shall not have any right to such position following the return of such employee to the position (i.e., they should have been employed as a temporary).

2. Classified Employees

There is no similar right guaranteed to classified employees.

NOTES

XX
SERVICE ON BOARDS, COMMISSIONS, COMMITTEES AND GROUPS

A. APPLICABLE LAW

- California Education Code § 44987.3

B. DISCUSSION

The governing board of a school district shall grant to a **certificated employee**, upon request, a leave of absence of up to twenty (20) school days per year without loss of any compensation for the purpose of enabling such employee to serve on any of the following boards, commissions, committees, or groups, so long as certain requirements are satisfied:

- Advisory Commission on Special Education, as provided for by EC § 33590.
- Advisory Committee for Child Care, as provided for by Chapter 2 (commencing with § 8200) of Part 6.
- California Advisory Council on Vocational Education, as provided for by § 8000.
- California Commission on Crime Control and Violence Prevention, as provided for by § 14101 of the Penal Code.
- Curriculum Development and Supplemental Materials Commission, as provided for by EC § 33530.
- Educational Innovation and Planning Commission, as provided for by EC § 33502.
- Educational Management and Evaluation Commission, as provided for by EC § 33550.
- Equal Educational Opportunities Commission, as provided for by EC § 33570.
- Instructional Television Advisory Commission, as provided for by §§ 51872 and 51873.
- State Council of Educational Planning and Coordination, as provided for by § 21000.

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- Any other group, commission, or board authorized by statute; or commission or board, any of whose members are appointed by the Governor or the State Board of Education; whose purposes and activities are to further public education, exclusive of the Commission for Teacher Preparation and Licensing.

A leave of absence shall not be granted unless all the following requirements are satisfied:

- service is performed in the State of California.

- the board, commission, committee, or group, in writing, informs the employee's district of such service.

- the board, commission, committee, or group agrees, prior to service, to reimburse the school district pursuant to subdivision (d).

The school district shall be reimbursed by the board, commission, etc., for the compensation paid to the employee's substitute and for actual administrative costs related to the leave of absence granted to the employee upon written request for such reimbursement by the school district. Reimbursement shall be made within ten (10) days.

NOTES

XXI
RETRAINING AND STUDY/ TRAVEL OR SABBATICAL LEAVE

A. APPLICABLE LAW

- California Education Code §§ 44966-44970, 44973, and 45380-45387
- *Adelt v. Richmond School District*, (1967) 58 Cal. Rptr. 151.

B. DISCUSSION

1. Certificated Employees

a. Duration

A school district may grant a certificated employee a leave of absence not to exceed one (1) year for the purpose of permitting study or travel by the employee which will benefit the schools and people of the district. The district may require that the leave of absence be taken in separate six (6) month periods or separate quarters provided that the leave of absence begins and ends within a three (3) year period. EC § 44966.

b. Eligibility

An employee must have rendered at least seven (7) consecutive years of service to the district in order to be eligible for the leave. Not more than one (1) such leave of absence shall be granted to an employee in each seven (7) year period. EC § 44967.

The governing board may, subject to the rules and regulations of the State Board of Education, prescribe the standards of service which shall entitle the employee to the leave of absence. Such absence shall not be deemed a break in the continuity of service nor shall it be included as service in computing the seven (7) consecutive years of service required for eligibility. EC § 44967.

c. Service During the Leave

An employee granted this leave may be required to perform such services during the leave as the governing board and the employee may agree upon in writing. EC § 44968.

NOTES

d. Service Following the Leave of Absence

As a condition to receiving this leave, the employee must agree in writing to render service to the district after the leave of absence equal to twice the period of the leave. EC § 44969.

e. Compensation During the Leave

The employee shall receive such compensation during the period of the leave as is agreed upon in writing. Compensation during the leave, however, shall not be less than the difference between the salary of the employee on leave and the salary of the substitute employee in the position which the employee held prior to the granting of the leave. However, in lieu of such difference, the board may pay one-half of the salary of the employee on leave or any additional amount, up to and including, the full salary of the employee on leave. EC § 44968.

An employee granted such leave may also agree in writing not to receive compensation during the period of the leave. EC § 44968.5.

Compensation granted by the governing board to an employee on leave for less than one year may be paid during the first year of service following the return of the employee from the leave of absence. In the event that the leave is for a period of one year, such compensation may be paid in two equal annual installments during the first two years of service following the return of the employee. EC § 44969.

f. Furnishing a Bond

If the employee furnishes a bond indemnifying the district should the employee fail to render the required period of service following the employee's return from leave, compensation shall be paid the employee while on the leave of absence in the same manner as if the employee were teaching in the district. The bond shall be exonerated if the employee's failure to return and render the agreed upon period of service is caused by the death or physical or mental disability of the employee. If the governing board, by resolution, declares that the interests of the district will be protected by the written agreement of the employee, the governing board in its discretion may waive the furnishing of the bond and pay the employee on leave in the same manner as though a bond had been furnished. EC § 44969.

NOTES

g. Failure to Provide Service Following Return from Leave

If the employee does not subsequently serve for the entire agreed upon period, the amount of compensation paid for the leave of absence shall be reduced proportionately. EC § 44970.

If the employee had furnished an indemnity bond and already paid, the proceeds of the bond shall be divided between the employee and the school district proportionately. EC § 44970.

h. Reinstatement

At the expiration of the leave, unless he/she otherwise agreed, the employee shall be reinstated in the position at the time of the granting of the leave. EC § 44973. However, the employer is not required to return a certificated teacher to the same school or classroom, only to an assignment within the scope of his/her certificate. *Adelt v. Richmond*, (1967) 58 Cal. Rptr. 151.

2. Classified Employees

a. Duration

A school district may grant a classified employee a leave of absence not to exceed one (1) year for the purpose of permitting study by the employee or for the purpose of retraining the employee to meet changing conditions within the district. The district may require that the leave be taken in separate six (6) month periods, or in any other appropriate periods, rather than for one (1) continuous year. Such separate periods, however, must be completed within a three (3) year period. EC § 45381.

b. Eligibility

An employee must have rendered at least seven (7) consecutive years for a study leave or for at least three (3) consecutive years for a retraining leave in order to be eligible. EC § 45382.

Not more than one such leave of absence shall be granted in each seven (7) or three (3) year period respectively. Such leaves of absence shall not be deemed a break in service for any purpose, except that such leave shall not be included as service in computing service for the granting of any subsequent leave for retraining and study. EC § 45382.

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c. Service During the Leave

An employee granted such leave may be required to perform services during the leave as the governing board of the district and the employee may agree upon in writing. EC § 45383.

d. Service Following the Leave

Two (2) years is required. EC § 45384.

e. Compensation During the Leave

The employee shall receive such compensation during the leave as the governing board and the employee may agree upon in writing. Such compensation shall not be less than the difference between the salary of the employee on leave and the salary of the substitute employee in the position which the employee held prior to the granting of the leave. However, in lieu of such difference, the board may pay one-half of the salary of the employee on leave or any additional amount up to and including the full salary of the employee on leave. EC § 45383.

Compensation may be paid in two equal annual installments during the first two years of service rendered following the return of the employee from the leave. EC § 45384.

f. Furnishing a Bond

If the employee furnishes a bond indemnifying the district should the employee fail to render at least two years' service following return from leave, compensation shall be paid the employee while on the leave of absence in the same manner as if the employee were working for the district. Such bond shall be exonerated if the employee's failure to return and render two years' service is caused by the death or physical or mental disability of the employee. If the governing board, by resolution, declares that the interests of the district will be protected by the written agreement of the employee, the governing board in its discretion may waive the furnishing of the bond and pay the employee on leave in the same manner as though a bond had been furnished. EC § 45384.

g. Reimbursement

The governing board of any district may grant reimbursement of the cost, including tuition fees, to any permanent classified employee who satisfactorily completes approved training to improve his/her job knowledge, ability, or skill. EC § 45387.

NOTES

Programs eligible for such reimbursement shall include training programs which are designed to upgrade the classified service and to encourage retraining of employees who may otherwise be subject layoff as a result of technological changes. EC § 45387.

h. Failure to Provide Service Following Return From Leave

This subject is not addressed in the Education Code.

i. Reinstatement

This subject is not addressed in the Education Code.

NOTES

XXII
RELIGIOUS BELIEFS

A. APPLICABLE LAW

1. State Law

- Government Code § 12940(a), (l)
- Title 2 of the California Code of Regulations, § 11062

2. Federal Law

- United States Code, 42 USC § 2000e(j) and 2000e-2(a)
- Code of Federal Regulations, 29 CFR § 605.2
- *Transworld Airlines, Inc. v. Hardison,* 432 US 63 (1977)

B. DISCUSSION

Employers must reasonably accommodate an employee's request for time off to observe religious beliefs. 42 USC §§ 2000e(j), 2000e-2(a); 29 CFR 1605.2; GC § 12940(a)(l); 2 CCR § 11062; EEOC Policy Document: *Ansonia Board of Education v. Philbrook* and Religious Accommodation (Apr. 1989) (found in CCH EEOC Compliance Man App 628-A, ¶5020).

A reasonable accommodation is anything that can be accomplished without undue hardship to the employer's operation. 42 USC § 2000e(j); 29 CFR § 1605.2(c); 2 CCR § 11062. In this context, a proposed accommodation poses an "undue hardship" if it would require the employer to bear more than a de minimis cost. *Trans World Airlines, Inc. v Hardison,* 432 US 63 at 84 (1977).

Reasonable accommodation of religious beliefs may include allowing time off in an amount equal to the amount of non-regularly scheduled time the employee has worked in order to avoid a conflict with his/her religious beliefs. (2 CCR § 11062(a).) It may also include voluntary substitutions and "swaps," the creation of flexible work schedules, lateral transfers, and change of job assignments. 29 CFR § 1605.2(d).

NOTES

XXIII
SCHOOL VISITS

A. APPLICABLE LAW

- California Education Code § 48900.1
- California Labor Code §§ 230.7, 230.8

B. DISCUSSION

1. Suspended Child

An employee, public or private, who is a parent or guardian of a child suspended from public school is entitled to take time off to attend a portion of the school day in the classroom of his/her child or ward ***if*** the school has asked the employee to do so and if the employee gives the employer reasonable advance notice. LC § 230.7; EC § 48900.1.

An employee who is discriminated against for taking such time off may be entitled to reinstatement and reimbursement for lost wages and benefits. LC § 230.7(b).

The statute is silent as to pay. The assumption is that, without the employer's agreement to use vacation, CTO, PTO, etc., it is an unpaid leave.

2. School Enrollment and Visits

An employer of 25 or more persons at the same work location is prohibited from discharging or otherwise discriminating against an employee who is a parent, guardian, or grandparent having custody of any child in kindergarten or grades 1 through 12 (or attending a licensed child day care facility) for taking off up to 40 hours each year (not to exceed 8 hours in a month) to find, enroll or reenroll his or her child, to participate in the activities of the school licensed child day care provider, or to address a child care provider or school emergency. LC 230.8

The employee must give reasonable notice to the employer of the planned absence before taking the time off. LC § 230.8(a).

Unless otherwise provided by a collective bargaining agreement, the employee must use existing vacation, personal leave, or CTO. LC § 230.8(b). If requested by the employer, the employee must provide documentation from the school or licensed child day care facility that he

/she visited on a specific date and at a particular time. LC § 230.8(c).

An employee who is discharged or otherwise discriminated against for exercising this right is entitled to reinstatement and reimbursement for lost wages and benefits. (LC § 230.8(d).) An employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehire or promotion by a grievance procedure, arbitration, or hearing authorized by law, is subject to a civil penalty in an amount equal to three times the amount of the employee's lost wages and work benefits. LC § 230.8(d).

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XXIV
ELECTION DAY

A. APPLICABLE LAW

- California Elections Code §§ 12312, 14000
- *Benane v. International Harvester Co.*, 142 CA2d Supp 874 (1956)

B. DISCUSSION

1. Service as Election Official

An employee cannot be suspended or discharged for an "absence while serving as an election officer on election day." Elec Code § 12312. This is not, however, a paid absence.

2. Voting

If an employee does not have sufficient time outside working hours to vote at a statewide election, he/she can take the time off that is necessary, when added to available non-working time, to vote. Unless otherwise agreed, this time must be taken at the shift's beginning or end (whichever will minimize the time off). Up to two hours of this time off is with pay. Elec Code § 14000.

The employer must post notice of this right at least ten days before the election. Elec Code § 14001. An employee who knows or has reason to believe, on the third day before the election, that time off will be necessary must give the employer at least two working days notice. Elec Code § 14000(c).

Under a former statute, it was held that an employee cannot waive voting time rights. *Benane v. International Harvester Co.*, 142 CA2d Supp 874 (1956).

NOTES

XXV
VOLUNTEER FIREFIGHTERS

A. APPLICABLE LAW

- California Labor Code § 230.3
- 78 California Attorney General's Opinion 116 (1995)

B. DISCUSSION

An employer may not discharge or otherwise discriminate against an employee for taking unpaid time off to perform emergency duty as a volunteer firefighter, reserve peace officer or emergency rescue personnel. An employee who has been discharged or discriminated against for that reason is entitled to reinstatement and reimbursement of lost wages and work benefits. LC § 230.3.

A school district may require high level administrators to follow reasonable procedures to ensure that the needs of the school are adequately met during any absence. 78 Ops Cal Atty Gen 116 (1995).

NOTES

XXVI
CATASTROPHIC LEAVE

A. APPLICABLE LAW

- California Education Code § 44043.5

B. DISCUSSION

Education Code section 44043.5 authorizes the establishment of a catastrophic leave program. Such a program permits an employee to donate eligible leave credits to another employee in the event of a catastrophic illness or injury. In addition, the employer and the exclusive bargaining agent can agree to include a provision setting forth requirements for a catastrophic leave program in a collective bargaining agreement.

The term "catastrophic illness" is defined as an illness or injury that is expected to incapacitate the employee for an extended period of time. The term also includes those instances when an employee is required to take time off from work for an extended period to care for an incapacitated family member and the time off from work creates a financial hardship for the employee because s/he has exhausted all sick leave and other paid time off.

"Eligible leave credits" means vacation leave and sick leave which has accrued to the donating employee.

Once a catastrophic leave program is implemented, the following is required:

- the employee in question must request that eligible leave credits be donated and provide the employer with verification of catastrophic injury or illness as required by the employer;

- the employer must either determine that the employee is unable to work due to the employee's catastrophic illness or injury or that of a qualifying family member requires care; and

- the employee must have exhausted all accrued, paid leave credits.

Pursuant to Education Code section 44043.5, if the employer approves the transfer of eligible leave credits, any employee may, upon written notice to the employer, donate eligible leave credits at a minimum of eight hours, and in one hour increments thereafter.

NOTES

The employer must promulgate rules and regulations governing the catastrophic leave program. Such rules, at a minimum, must specify:

- a maximum time that donated leave credits may be used (it cannot exceed twelve (12) consecutive months);
- how catastrophic illness or injury will be verified; and
- that all transfers of eligible leave credits are irrevocable. E.C. § 44043.5.