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"DOES CRUELLA DE VIL JUST NEED A STRESS LEAVE?: THE LATEST DEVELOPMENTS IN FMLA/CFRA/PDL/PSL."

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PRESENTATION OVERVIEW

- General Review of California's Top Leave Laws;
- What's New and Trending: Pending legislation and recent cases;
- Pros and Cons of Third Party Administrators;
- Best Practices for Employers.

**NOTE*: MORE INFORMATION ON THIS TOPIC IS AVAILABLE FROM THE LEXIS-NEXIS PUBLICATION "CALIFORNIA LEAVE LAW: A PRACTICAL GUIDE FOR EMPLOYERS"

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CHALLENGES FOR EMPLOYERS

- Employers, front line managers do not understand leave laws and overlapping obligations;
- Front line managers that are uninformed and "trigger" happy;
- Failure to properly document performance problems when they occur- once the request for leave is made it's a problem;
- Overlapping leaves are triggered, especially work injury related leave and FEHA/ADA, FMLA/CFRA, PDL;
- Work Comp and disability/LOA management handled by different departments, administrators or HR programs;
- No HR department or the HR team is inexperienced;
- Lack of proper documentation- e.g. it creates evidence against the company;
- Overlapping leaves are triggered but;
- Pattern of excused and unexcused absences;
- Managing extended leaves;
- Managing performance problems of disabled employees.

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FIRST SCENARIO

Monday: Employee is written up for ongoing performance problems by a new manager, for the first time after years of below standard performance;

Tuesday: Employee says she has been subjected to a "hostile working environment" by her former manager who called her names such as stupid and lazy, and yelled at her in front of her co-workers- HR starts an investigation;

Wednesday: Employee calls in and says she is on stress related leave for 2 weeks- she already used up all of her paid sick leave;

Thursday: HR provides the employee with a DWC-1 and employee subsequently files a WC psyche claim based on stress;

Friday: Employee sends in a note from the health care provider taking her off work for two weeks, from September 1 to September 15;

September 15: Employee does not report back to work; no note extending leave; employee is eligible for FMLA/CFRA leave;

September 30: Employer receives letter of representation from "Fair Lawyers on Behalf of Everyone" (not the WC attorney) requesting a copy of personnel and payroll records; Employer's attorney asks if employee's meal and rest periods were provided as required, and explaining what "PAGA" means.

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SECOND SCENARIO

February 1: Employee injures his back at work and files a work comp claim;

February 4: Employer sends FMLA/CFRA notice of eligibility and rights and responsibilities to employee; employee-applicant's attorney sends a letter advising that employee-applicant does not want the time off designated as FMLA/CFRA leave;

June 1: Treating physician places employee on temporary disability;

October 1: Employer terminates group health insurance benefits pursuant to company policy and sends a letter requesting an update on status and return to work date- employee does not respond;

November 1: Employer continues to grant the employee extended medical leave and sends another letter advising that the employee must advise when ready to return to work; No response from employee; Employee remains "on the books;"

One year later, employee files 132a alleging discrimination and wrongful termination. Personnel and payroll records have been requested. Employer does not know what premium pay is; payroll records show that hourly employees frequently take short meal periods or delayed meal periods.

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WHAT'S NEW: DFEH v. KAJSONG

- An employee filed a complaint with DFEH in February 2018 alleging that KajSong, which operates women's retail clothing stores, stopped scheduling her for a month after she submitted a doctor's note requiring a change to her work schedule. For disability-related reasons, the employee couldn't both open the store in the morning and close it at night. KajSong ultimately provided a new work schedule, but significantly reduced the employee's work hours and demoted her. The company also had an unlawful "fully healed" policy that required employees who were out sick to bring in a doctor's note indicating they could "resume full duty" before they could return to work.
- "Blanket 'fully healed' policies violate California law, which requires a good faith interactive process when an employee requests a reasonable accommodation, including a schedule change," said DFEH Director Kevin Kish. "Employers cannot ignore requests for accommodations, or unilaterally remove employees from the schedule when they request an accommodation."

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WHAT'S NEW: FMLA DESIGNATION

- The U.S. Department of Labor ("DOL") issued Opinion Letter FMLA2019-1-A, stating that neither the employer or the employee may delay designating paid leave as FMLA leave (federal law).
- In California, employers must take into consideration the 9th Circuit's decision in *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1244 (9th Cir. 2014). In *Escriba* the 9th Circuit held that under certain circumstances an employee might request time off but still decline to invoke FMLA leave, in order to preserve his or her FMLA rights for future use.
- However, *Escriba* involved leave to care for a family member; it did not involve a leave for the employee's own serious health condition. For California employers, legal counsel should be consulted on the appropriate policy regarding required designation in light of *Escriba*.

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REVIEW: ESCRIBA V. FOSTER POULTRY FARMS 743 F.3d 1236, 1244 (9th Cir. 2014)

- Maria Escriba worked for Foster Farms. She requested two weeks of leave to care for her father who was ill in Guatemala. Ms. Escriba advised her supervisors of the FMLA/CFRA qualifying reason for the leave, but requested vacation leave, as opposed to family leave. When Ms. Escriba failed to return to work after expiration of her vacation leave, Foster Farms terminated her employment. Ms. Escriba filed suit, alleging that Foster Farms violated the FMLA/CFRA by terminating her employment. Ms. Escriba argued that Foster Farms was required to designate her leave as FMLA leave, even though she had declined FMLA leave, because an employee cannot waive her or her rights under the FMLA.
- On appeal, the Ninth Circuit held that Ms. Escriba's leave was not protected under the FMLA/CFRA. The court noted that, "there are circumstances in which an employee might seek time off but intend not to exercise his or rights under the FMLA." Ms. Escriba was not, in fact, relinquishing her right to take FMLA leave….[Ms. Escriba] affirmatively declined to exercise her FMLA rights in order to *preserve* her leave for future use."

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WHAT'S NEW: PARENT'S ATTENDANCE AT AN IEP IS A QUALIFYING REASON FOR FMLA LEAVE

- According to the Department of Labor (DOL), a parent's attendance at a child's individualized education program (IEP) meeting, to address the education and special medical needs of a child, is a qualifying reason for taking intermittent FMLA leave.
- The DOL also noted in its opinion letter that leave for a covered family member includes leave to:
  (1) make arrangements for changes in a covered family member's medical care;
  (2) help make medical decisions on behalf of a hospitalized family member; and
  (3) make arrangements to find suitable childcare for a child with a disability.

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GENERAL REVIEW OF CALIFORNIA'S LEAVE LAWS

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CALIFORNIA'S MISCELLANEOUS STATUTORILY MANDATED DISABILITY RELATED LEAVES

- Rehabilitation Accommodation Leave
- Domestic Violence/Sexual Assault and Stalking Leave

LEAVES OF ABSENCE AS AN ACCOMMODATION UNDER THE FEHA/ADA

When the employee cannot presently perform the essential functions of the job, or otherwise needs time away from the job for treatment and recovery…

- Holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer's leave plan may be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to recover sufficiently to return to work at the end of the leave, and perform the essential functions of the job, with or without further reasonable accommodation, and does not create an undue hardship for the employer.
- When an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence.

EXTENDED LEAVE AS AN ACCOMMODATION

- This may require multiple extensions of a leave of absence and/or extended leaves of absence (See *Higgins-Williams v. Sutter Medical Foundation*, 237 Cal.App.4th 78 (2015));
- This type of accommodation is very challenging for employers and can pose significant risk if not implemented correctly, especially if there are overlapping obligations under other statutes such as FMLA/CFRA or work injury related leave;
- Management must be trained on an employer's obligations for extended leave;
- **No specified length of time for extended leave- it requires an individualized assessment.**

EXTENDED LEAVES

Remember: Every request for an extension of medical/disability leave requires:

- An individualized assessment via an interactive process as to how much leave is appropriate– specifically, can additional time off from work be granted as an accommodation.

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CASE EXAMPLE OF REQUEST FOR EXTENSION OF LEAVE

- A manager requested a seven-day extension to his previously approved vacation leave in order to comply with his doctor's orders restricting him from working during that time.
- Employee denied request for extension of leave and terminated employee while he was still on vacation. What happened then?

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WHAT HAPPENED?

- Employee filed a lawsuit and the EEOC charged that instead of granting the manager's request for additional medical leave, the company immediately fired the employee, before he even exhausted his vacation time;
- Employer had to pay 100k;
- Bottom Line: Medical verification carries a lot of weight and employers must carefully consider (and grant if appropriate) extensions for leave.

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WHAT IS A MAXIMUM LEAVE POLICY?

- A maximum leave policy is one in which there is a maximum amount of leave an employer will provide or permit, regardless of the reason for the leave.
- However, under the FEHA/ADA an employer may have to make an exception to its maximum leave policy, and provide additional leave as a reasonable accommodation.

EEOC V. LOWE'S (MAXIMUM LEAVE POLICY)

- EEOC charged that Lowe's failed to provide reasonable accommodations to disabled employees when their medical leaves of absence exceeded Lowe's 180-day (and, subsequently, 240-day) maximum leave policy. EEOC also charged that Lowe's violated the ADA by terminating individuals who were "regarded as" disabled, had a record of disability, and/or were associated with someone with a disability.
- Employer must pay $8.6 million.

WHY ARE MAXIMUM LEAVE POLICIES RISKY?

- Maximum leave policies are risky because they place arbitrary limits on the amount of leave for disability purposes.
- Employers must understand that they must conduct an individualized assessment to determine if an extension can be granted, and leave may have to be provided beyond maximum leave limits as an accommodation.
- Managers and supervisors must also be trained on compliance with FEHA/ADA and maximum leave policies.

REMEMBER- KEY POINTS OF THE 2012 AMENDED FEHA DISABILITY REGULATIONS

KEY POINT:

- An employer is not required to provide indefinite leave.
- However, anytime an employer becomes aware of the need for an accommodation because a disabled employee has exhausted leave under WC law, FMLA/CFRA, PDL, or any other federal/state law or employer policy, and the employee is requesting additional medical leave as an accommodation, the employer must conduct an interactive process to determine if additional leave can be provided without causing an undue hardship.

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WHAT IS A COVERED DISABILITY UNDER THE FEHA REGULATIONS?

- "Mental Disability," as defined at Government Code section 12926, includes, but is not limited to, having any mental or psychological disorder or condition that limits a major life activity.
- "Mental Disability" includes, but is not limited to, emotional or mental illness, intellectual or cognitive disability (formerly referred to as "mental retardation"), organic brain syndrome, or specific learning disabilities, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, post- traumatic stress disorder, and obsessive compulsive disorder.

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WHAT IS A COVERED PHYSICAL DISABILITY UNDER THE FEHA REGULATIONS?

"Physical Disability," includes, but is not limited to, having any anatomical loss, cosmetic disfigurement, physiological disease, disorder or condition that does both of the following:

- (A) affects one or more of the following body systems: neurological; immunological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; circulatory; skin; and endocrine; and
- (B) limits a major life activity (caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.)
- (C) "Disability" includes, but is not limited to, deafness, blindness, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, cerebral palsy, and chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis and heart disease.

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DISABILITY DEFINED UNDER THE FEHA *continued*…

- A "Record or History of Disability" includes previously having, or being misclassified as having, a record or history of a mental or physical disability or special education health impairment of which the employer is aware.
- A "Perceived Disability" means being "Regarded as," "Perceived as" or "Treated as" Having a Disability, including:
  - (A) Being regarded or treated by the employer as having, or having had, any mental or physical condition or adverse genetic information that makes achievement of a major life activity difficult; or
  - (B) Being subjected to an action, including non- selection, demotion, termination, involuntary transfer or reassignment, or denial of any other term, condition, or privilege of employment, based on an actual or perceived physical or mental disease, disorder, or condition, or cosmetic disfigurement, anatomical loss, adverse genetic information or special education disability, or its symptom, such as taking medication, whether or not the perceived condition limits, or is perceived to limit, a major life activity.

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DISABILITY DOES NOT INCLUDE…

- Conditions that are mild, which do not limit a major life activity, as determined on a case-by-case basis.
- These excluded conditions have little or no residual effects, such as the common cold; seasonal or common influenza; minor cuts, sprains, muscle aches, soreness, bruises, or abrasions; non-migraine headaches, and minor and non-chronic gastrointestinal disorders.

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REVIEW: WHAT IS A REASONABLE ACCOMMODATION?

- An employer has an affirmative duty to make reasonable accommodation for the disability of any employee if the employer knows of the disability, unless the employer can demonstrate, after engaging in the interactive process, that the accommodation would impose an undue hardship.
- No elimination of an essential job function is required. Where a quality or quantity standard is an essential job function, an employer is not required to lower such a standard as an accommodation, but may need to accommodate an employee with a disability to enable him or her to meet its standards for quality and quantity.

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EEOC V. WILMINGTON TRUST COMPANY

- Wilmington Trust Corporation agreed to pay $700,000 to settle a disability discrimination lawsuit. According to the EEOC's lawsuit, the Company had a long-standing inflexible policy and practice of placing employees with disabilities on involuntary leave until it received their medical provider's clearance to return to work with no restrictions.
- This practice resulted in denying qualified individuals with disabilities reasonable accommodations, as well as placing qualified individuals with disabilities on involuntary leave and/or discharging them because of disability. One employee was a teller who was prescribed a cam walker boot to treat Achilles tendonitis and bone spurs. Instead of allowing her to wear the walker boot, which would not have affected the essential functions of her job, the Company placed her on involuntary leave and then fired her.
- The EEOC's district director, stated, "We hope that this settlement will help inform employers and the public at large that the ADA requires employers to engage in an interactive process and does not allow for such 'no restriction' policies."

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MUST THE EMPLOYER PROVIDE THE ACCOMMODATION REQUESTED BY THE EMPLOYEE?

- An employer is required to consider any reasonable accommodations of which it is aware or which are brought to its attention by the employee, except ones that create an undue hardship.
- The employer shall consider the preference of the employee to be accommodated, but has the right to select and implement an accommodation that is effective for both the employee and the employer or other covered entity.

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WHEN IS IT APPROPRIATE TO REQUIRE MEDICAL CERTIFICATION?

- When the disability or need for reasonable accommodation, such as a leave of absence, is not obvious; and,
- The employee has not already provided the employer with reasonable medical documentation confirming the existence of the disability and the need for reasonable accommodation.

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WHAT SHOULD THE MEDICAL CERTIFICATION CONTAIN?

- It should confirm the existence of the disability and the need for reasonable accommodation.
- Where necessary to assist with the interactive process, reasonable medical documentation may include a description of physical or mental limitations that affect a major life activity that must be met to accommodate the employee.
- Disclosure of the nature of the disability is not permitted.

WHAT IF THE MEDICAL CERTIFICATION IS UNCLEAR?

- If information provided by the employee needs clarification, then the employer must identify the issues that need clarification, specify what further information is needed, and allow the employee a reasonable time to produce the supplemental information.
- For example, for leave as an accommodation, is the anticipated return to work date provided.

WHEN IS MEDICAL CERTIFICATION FOR A LOA INSUFFICIENT?

- Documentation is insufficient if it does not specify the existence of a FEHA disability and explain the need for reasonable accommodation, such as a LOA. Where relevant, such an explanation should include a description of the applicant's or employee's functional limitation(s) to perform the essential job functions.
- Documentation also might be insufficient where the health care provider does not have the expertise to confirm the applicant's or employee's disability or need for reasonable accommodation, or other objective factors indicate that the information provided is not credible or is fraudulent.

INTERMITTENT LEAVE AS AN ACCOMMODATION

- If an employee requests, as a reasonable accommodation, leave on an intermittent or reduced-schedule basis for planned medical treatment of the employee's disability, reasonable medical documentation includes:
  - information that is sufficient to establish the medical necessity for such intermittent or reduced-schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery.

EEOC v. FAMILY HEALTHCARE NETWORK- ALLEGED DISABILITY DISCRIMINATION

- Family HealthCare Network will pay $1.75 million and furnish other relief to settle a disability and pregnancy discrimination suit filed by the U.S. Equal Employment Opportunity Commission (EEOC). The Visalia, California based health care company operates over 20 health care sites in Tulare, Kings and Fresno Counties. According to the EEOC's lawsuit, Family HealthCare used its leave to deny reasonable accommodations to its disabled and/or pregnant employees, refusing to accommodate them with additional leave and firing them when they were unable to return to work at the end of their leave. In some instances, Family HealthCare discharged individuals before they had even exhausted their approved leave and failed to rehire them when they tried to return to work.

- In addition to the $1.75 million in monetary relief, the three-year consent decree requires Family HealthCare to retain an EEO monitor to review and revise the company's policies, as appropriate. The company will also implement effective training regarding preventing discrimination and harassment based on disability and/or sex-pregnancy for the owners, human resources and supervisory personnel and staff. Additionally, Family HealthCare will develop a centralized tracking system for employee requests for accommodations and discrimination complaints. The company is also required to submit regular reports to the EEOC verifying compliance with the decree.

DFEH v. CALIFORNIA COAST CREDIT UNION

- The California Department of Fair Employment and Housing (DFEH) has reached a settlement in an employment discrimination case with California Coast Credit Union involving a former employee who alleged she was terminated for needing to work a modified schedule due to her disability. The complainant filed a complaint with DFEH alleging California Coast Credit Union discriminated against and terminated her because of her disability. Complainant's doctor ordered that she work a modified schedule due to her disability. Although it initially accommodated complainant by allowing her to work six-and-a-half hours per day instead of eight hours, California Coast Credit Union later terminated complainant when she requested an extension of the accommodation.

- After DFEH found cause to believe a violation of the Fair Employment and Housing Act (FEHA) had occurred when California Coast Credit Union refused to extend complainant's accommodation despite her doctor's orders, the parties participated in mediation, which resulted in a settlement in which California Coast Credit Union will pay complainant $27,500 in lost wages and emotional distress damages as well as $2,500 to the DFEH for its attorney fees.

DFEH v. CALIFORNIA COAST CREDIT UNION *continued…*

- "An employer's duty to reasonably accommodate an employee with a disability does not necessarily expire at the conclusion of the time period listed on a doctor's note," said DFEH Director Kevin Kish. "When an employee requests an extension of the accommodation period based on a new doctor's note, the employer has a duty to continue the interactive process to determine if an extension would pose an undue hardship."
- In addition to a monetary settlement, California Coast Credit Union has agreed to update its policies to comply with FEHA, retain an outside consultant to provide annual training on the policy to its supervisory and human resources personnel for three years, and provide reports to the DFEH for three years concerning its compliance with the terms of the settlement agreement.

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BEST PRACTICES

- Consider (and grant if appropriate) requests for extensions of leave, conduct the interactive process and document;
- Do not require that an employee has no work restrictions before returning to work;
- Always conduct the interactive process to consider requests for an accommodation and document. Use an interactive process form for documenting the meeting.
- Train managers and supervisors on recognizing the triggers for an interactive process.

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FAMILY AND MEDICAL LEAVE

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10 FMLA/CFRA MISTAKES MADE BY EMPLOYERS

1. Managers/supervisors who fail to notify HR when an employee may need required FMLA/CFRA notice of eligibility;
2. Untrained managers and supervisors who do not understand an employee's FMLA/CFRA rights to intermittent leave;
3. Failing to understand which family members are covered and qualifying reasons;
4. Inaccurate or incomplete medical certifications;
5. Not obtaining a second or third medical opinion when appropriate;
6. Failing to keep accurate records of FMLA/CFRA leave;
7. Not using the appropriate FMLA/CFRA forms;
8. Failure to timely notify the employee of FMLA/CFRA designation;
9. Failure to understand the overlapping protections under the FEHA/ADA for additional leave after expiration of FMLA/CFRA;
10. Denying FMLA/CFRA leave, or failing to grant the required amount of leave, and taking adverse employment action.

FAMILY AND MEDICAL LEAVE-IN GENERAL

- In general, statutorily required leave of up to 12 weeks of unpaid leave, with benefit continuation, that employers with 50 or more employees must provide to eligible employees for time off from work needed for their own serious health condition, the serious health condition of a family member, military purposes, or for baby bonding time. May be taken intermittently.
- Federal law: Family and Medical Leave Act (FMLA)
- California law: California Family Rights Act (CFRA)

ELIGIBLE EMPLOYEES

Those employees:

- Working for an employer with 50 or more employees;
- Have worked 12 months for the employer, 1,250 hours in the last 12 months, and work at a worksite with 50 employees within a 75 mile radius.

HOW CAN FMLA LEAVE BE TAKEN?

- In blocks of time
- Intermittently in minimum increments of 1 hour
- By working a reduced schedule

FAMILY AND MEDICAL LEAVE FORMS

- Employers must be sure to use required forms:
  - Notice of Eligibility and Rights and Responsibilities
  - Medical Certification
  - Designation Notice
- Employers should use a cover letter - *Graziadio v. Culinary Inst. Of America*, 2016 U.S. App. Lexis 4861.

WHEN SHOULD AN EMPLOYER PROVIDE THE EMPLOYEE WITH THE "NOTICE OF ELIGIBILITY AND RIGHTS AND RESPONSIBILITIES"?

- As soon as the employer has knowledge that the employee may need FMLA/CFRA time for their own serious health condition, the serious health condition of a covered family member, or for baby bonding time.
- The notice must be provided within five (5) business days of a request by the employee for family and medical leave or from when the employer receives knowledge that the employee may need FMLA/CFRA leave.

MEDICAL CERTIFICATION

- The employee should be required to provide medical certification verifying a serious health condition of the employee or covered family member. Provide this with the "Notice of Eligibility and Rights and Responsibilities".
- The DFEH medical certification form should be used.
- The employee must return the medical certification form within fifteen (15) calendar days.

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WHAT IS A "SERIOUS HEALTH CONDITION"?

(And why it matters…)

1. Hospital Care
2. Absence plus treatment
3. Pregnancy (FMLA only)
4. Chronic conditions requiring treatment
5. Permanent long-term conditions requiring medical supervision
6. Multiple treatments for restorative surgery after an injury or accident

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WHAT IS A "SERIOUS HEALTH CONDITION" continued…

1. Any period of incapacity or treatment in connection with, or after inpatient care (no overnight stay is required, only admission to a facility where overnight stay is expected);
2. Any period of incapacity requiring absence from work, school, or other regular daily activities, of more than 3 consecutive calendar days, in addition to treatment by a health care provider;
3. Ongoing treatment by or under the supervision of a health care provider for a chronic or long-term health condition, or incurable medical condition;
4. Restorative dental or plastic surgery after an accident or injury.

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WHY THE DEFINITION OF A SERIOUS HEALTH CONDITION MATTERS?

- It triggers employer knowledge of the need for the required notice of eligibility and rights and responsibilities to be provided to the employee;
- It determines if the employees is eligible for family and medical leave.

KEY RISKS IN MANAGING FMLA/CFRA

- Uninformed managers, HR representatives who do not understand the employer's legal obligation to conduct an interactive process, and consider additional leave, once FMLA/CFRA is exhausted and the employee is requesting additional time off to recover.
- This can create liability for failure to engage in the interactive process AND failure to offer an accommodation in the form of extended leave.

BEST PRACTICES

- Implement a compliant FMLA/CFRA policy-it should be in the handbook. Review the policy with all employees.
- Train the LOA management team on the required policies and procedures.
- Train all managers and supervisors on FMLA/CFRA requirements, and Company policies and procedures, especially on recognizing the circumstances that put the employer on notice that an employee may need FMLA/CFRA leave.
- Consider second or even third medical opinion if appropriate.
- Properly and timely document.

PAID SICK LEAVE

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PAID SICK LEAVE-IN GENERAL

- All California employers are required to provide paid sick leave (PSL) of 3 days (24 hours) per twelve month period. May offer PTO in lieu of PSL. Employee's accrue at a rate of 1 hour for every 30 worked.
- Accrual vs. frontloading method-methods for providing PSL
- 48 hours of carryover is required (use can be limited to 3 days (24 hours) per 12 month period
- Accrued amount of PSL hours must be on all employee's paystubs
- PSL can be used in minimum increments of 2 hours.

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90TH-DAY OF EMPLOYMENT

- An employer can require that the employee cannot use PSL until the 90th day of employment;
- However, PSL begins to accrue from the date of hire.

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HOW CAN PAID SICK LEAVE BE USED?

- An employee can use paid sick time for an existing health condition or preventive care for themselves or a "family member." Family member is defined as a child, parent (including parent-in-law), spouse or registered domestic partner, grandparent, grandchild or sibling.
- Paid sick leave may be used for an employee who is a victim of domestic violence, sexual assault or stalking.

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REMEMBER-KEY POINT ON REQUESTS FOR PAID SICK LEAVE

- Paid sick leave must be provided when the employee makes an oral or written request. The employer cannot require a written request.
- Be sure to check your LOA/PSL policies on this point.

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WHAT ADVANCE NOTICE OF NEED FOR PSL CAN BE REQUIRED?

- If the employee's need for paid sick leave is foreseeable, the employee must provide "reasonable" advance notice. If it is not, the employee must provide notice as soon as practicable.

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PAID SICK LEAVE FAQ FROM THE LABOR COMMISSIONER

DISCIPLINING EMPLOYEES FOR UNEXCUSED ABSENCES

- "If an employee has an absence that would otherwise violate the employer's attendance policy, and if the absence was for a reason not covered under the paid sick leave law, the employer is not required to allow the employee to use paid sick leave for that absence, and it is not a violation of the law for the employer to give an "occurrence" for such absence."

- "If an employee has an unscheduled absence that would otherwise result in an "occurrence" under an employer's attendance policy, and if the employee elects to use accrued paid sick leave for only part of the unscheduled absence (for example, if the employee is absent for a full eight-hour day of work, but elects to use only four hours of his or her accrued paid sick leave for the absence [which the employee is allowed to do], the employer would be allowed to give an "occurrence" (or 1/2 of an "occurrence") for the one-half day of unscheduled absence for which no paid sick leave was used. Only time that is properly taken as accrued paid sick leave is protected from disciplinary action."

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WHAT'S NEW: PROPOSAL FOR INCREASE IN AMOUNT OF PAID SICK LEAVE

AB 555 (GONZALEZ) – PAID SICK LEAVE

This bill would modify the employer's alternate sick leave accrual method to require that an employee have no less than 40 hours of accrued sick leave or paid time off by the 200th calendar day of employment or each calendar year, or in each 12-month period.

The bill would modify that satisfaction provision to authorize an employer to satisfy accrual requirements by providing not less than 40 hours or 5 days of paid sick leave that is available to the employee to use by the completion of the employee's 200th calendar day of employment. The bill would also provide that an employer is under no obligation to allow an employee's total accrual of paid sick leave to exceed 80 hours or 10 days, as specified. The bill would raise the employer's authorized limitation on the employee's use of carryover sick leave to 40 hours or 5 days.

❖Status: Pending on the Assembly Floor; the author made it a 2-year bill.

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CHALLENGES

- Employers cannot require a doctor's note, or request medical diagnosis (managers must be trained on this-but check local ordinances that may apply for variances from state law).
- Employee abuse of the PSL policy.
- Employer compliance with local ordinances.
- Ensuring proper procedures are in place (e.g. correct accrued hours are on the pay stub).
- Question: Will more sick leave be required under California law?

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BEST PRACTICES

- Implement a compliant paid sick leave policy that includes a provision for disciplinary consequences if there is an abuse of the policy including providing a false reason for using PSL.
- Scrutinize requests around holidays or following denial of a request for a day off for vacation purposes or a personal day.
- Train managers and supervisors on the policy especially on the prohibition against requesting a doctor's note.

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PREGNANCY AND PARENTAL LEAVE

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PREGNANCY AND PARENTAL LEAVE

- Leave provided to a pregnant employee for:

1. Pregnancy Disability Leave (PDL): 17 1/3 Weeks- 4 months (no length of service requirement);
2. Baby Bonding Time: 12 Weeks-if eligible under FMLA/CFRA;
3. New Parent Leave Act: 12 weeks if eligible and work for an employer with 20 or more employees;
3. Leave provided as a reasonable accommodation for disability related to pregnancy under the Fair Employment and Housing Act.

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COULD A PREGNANT EMPLOYEE BE ENTITLED TO MORE THAN 7 MONTHS OF LEAVE?

YES

FOR COVERED EMPLOYERS WITH ELIGIBLE EMPLOYEES.

HOW?

- 17 weeks of PDL; plus,
- Additional time off as an accommodation under FEHA if needed, and the employer can grant without incurring an undue hardship, once PDL expires; plus,
- Another 12 weeks of baby bonding time, for eligible employees working for employers with 20 or more employees (New Parent Leave Act/NPLA); or 12 weeks pursuant to FMLA/CFRA for eligible employees working for an employer with 50 or more employees. Note: Pursuant to the NPLA, employers must provide employees with a guarantee of reinstatement before an employee begins parental Leave.

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EEOC v. CATO CORPORATION ALLEGED DISABILITY DISCRIMINATION

- The Cato Corporation, a leading retailer of women's fashion and accessories, has agreed to pay $3.5 million for alleged failure to accommodate disabled and pregnant employees, failing to consider job modifications as accommodations, making employees take unpaid leaves of absence and/or terminating them because of disabilities. The company also agreed to update its reasonable accommodation policies to ensure there is no discrimination against pregnant employees or those with disabilities.
- Further, the company agreed to revise its employment policies to more fully consider whether medical restrictions of its pregnant employees or those with disabilities can be reasonably accommodated. And, the company will conduct companywide training for over 10,000 of its employees and report to the EEOC periodically for three years on its responses to requests for reasonable accommodation by pregnant employees or those with disabilities.

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WHAT'S NEW: FEDERAL PROPOSALS FOR PAID PARENTAL LEAVE

Federal proposals for parental leave including:

1. The CRADLE Act: Republican proposal that would allow new parents to access their Social Security benefits to partially fund paid time off for parental leave. The Cradle Act would provide parents with the option to choose between one and three months of paid parental leave by accessing some of their Social Security benefits early. In exchange, they would agree to postpone collecting their retirement benefits for the amount of double the time they took off for their parental leave.
2. The Family Act: Democratic proposal that would provide for paid family and medical leave, which would be funded by a shared payroll tax on employers and employees.
3. Bipartisan proposal allows people to pull $5000 of their Child Tax Credit benefits, while repaying into the system in future.

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CHALLENGES

- Understanding the overlapping laws that provide leave for pregnant employees (FMLA/CFRA, PDL, FEHA/ADA, PSL);
- Understanding obligation to accommodate pregnant employees who need more time off after expiration of PDL, unless undue hardship can be shown.

BEST PRACTICES

- Implement a compliant pregnancy accommodation and disability leave policy. Review this with all employees.
- Train managers and supervisors on the policy and on all leave available to pregnant employees.
- Conduct and document the interactive process when there is a request for accommodation.
- Comply with the new 2019 lactation accommodation requirements.

WORK INJURY RELATED LEAVE

WORK INJURY RELATED LEAVE

- Time off from work (temporary disability) which an employee takes due to a work injury, pursuant to California's workers' compensation laws.

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CHALLENGES

- May run concurrently with other leaves (FEHA/FMLA/CFRA/PDL).
- Should designation of FMLA/CFRA be required if applicable-employers should consult with legal counsel.
- Understanding the obligation to engage in the interactive process and offer accommodations for injured workers.
- How much time off work is required?

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BEST PRACTICES

- Train managers and supervisors on the FEHA/ADA and in particular that this important law likely is protecting the injured worker in addition to work comp laws.
- Conduct the interactive process when necessary in a work comp case, particularly when there is a request for modified duty or return to work.
- Make sure your work comp administrators and LOA/Accommodation team coordinate.

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MISCELLANEOUS DISABILITY RELATED LEAVES MANDATED BY STATUTE IN CALIFORNIA

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CALIFORNIA'S MISCELLANEOUS STATUTORILY MANDATED DISABILITY RELATED LEAVES

- Domestic Violence/Sexual Assault, Stalking Leave
- Rehabilitation Accommodation Leave

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DOMESTIC VIOLENCE/SEXUAL ASSAULT AND STALKING LEAVE

- Employees who are victims of domestic violence, sexual assault or stalking may need time off for legal proceedings, such as obtaining a restraining order, or for medical treatment.
- Protections for victims of domestic violence or sexual assault are extended to victims of stalking. Employers may have to accommodate victims of stalking, if appropriate!

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REHABILITATION LEAVE

- Current illegal drug use is not a protected disability under the federal ADA or the FEHA and current users are not protected from discrimination.
- Under the California Labor Code, employers with 25 or more employees, must reasonably accommodate any employee who volunteers to enter an alcohol or drug rehabilitation program, if the reasonable accommodation does not impose an undue hardship.
- Reasonable accommodation includes time off with or without pay and adjusting working hours; an employee who is absent for alcohol or drug rehabilitation can use sick leave pay to which he/she is entitled.

WHAT'S NEW: PROPOSAL TO CREATE PRIVATE CIVIL ACTION FOR VIOLATIONS

AB 1478 amends current law regarding jury duty, victims of a crime, domestic violence, sexual assault or stalking by establishing a new private right of action for employer violations, by providing as follows:

An aggrieved employee may also bring a private civil action against an employer in a court of competent jurisdiction, by stating: If a complainant files an action in court against an employer based upon the same or similar facts as a complaint filed with the division under this section, the Labor Commissioner may, at their discretion, close the investigation into the matter. The court may award reasonable attorney's fees to a prevailing employee in addition to any other relief that, in the judgment of the court, will effectuate the purpose of this section, including, but not limited to, reinstatement, damages for back pay, front pay, and emotional distress. An aggrieved employee who brings a private civil action pursuant to this subdivision shall not be required to pursue any other remedy before bringing that action.

PROS AND CONS OF THIRD PARTY ADMINISTRATORS

CONCLUSION

SPEAKER BIOS

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Bernadette M. O'Brien is a Partner at Floyd Skeren Manukian Langevin, LLP and SPHR/SHRM-SCP certified. Ms. O'Brien serves as counsel and advisor to the law firm's Human Resources Department and is Managing Attorney of the firm's Employment Law Department. Ms. O'Brien specializes in human resources consultation, compliance guidance, and policy implementation.

Ms. O'Brien defends employers in employment related disputes before the Department of Fair Employment and Housing, the Equal Employment Opportunity Commission, and the California Labor Commissioner, including claims related to discrimination, harassment, retaliation, wage and hour, and leave of absence laws. Ms. O'Brien provides HR consultation to employers, human resource administrators, and risk managers on numerous HR topics including compliance with federal, state and local employment related laws; HR policy development including employee handbooks; personnel management including hiring, performance, discipline, and termination; ensuring EEO compliance; managing disability and leave of absence policies and procedures; and, wage and hour compliance. Ms. O'Brien also conducts management and employee training sessions throughout California.

Ms. O'Brien is author of the LexisNexis publication *Labor and Employment in California: A Guide to Employment Laws, Regulations and Practices*, co-author of *California Leave Law: A Practical Guide for Employers*, and co-author of *California Unemployment Insurance and Disability Compensation Programs*. She is also editor of Floyd Skeren Manukian Langevin's employment related websites: www.employmentlawweekly.com, www.worklawreport.com, and www.floydskerenhrtraining.com, which provide the latest news and information related to employment law.

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