



## Employee Leaves of Absence in California



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ON THE FRONT LINES OF WORKPLACE LAW<sup>SM</sup>



## The Legal Landscape: Know the Rules!

- California Family Rights Act (“CFRA”)/Family and Medical Leave Act (“FMLA”)
- California Paid Sick Leave
- Pregnancy Disability Leave (“PDL”)
- Leave as Reasonable Accommodation under the Americans with Disabilities Act (“ADA”) and Fair Employment & Housing Act (“FEHA”)
- New Parent Leave Act (“NPLA”)
- Local Ordinances
- Other “minor” leaves

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## What is it: Employer's Duty to Designate

- Make the right designation at the time of the request!
- Who, why and when
- Know your obligations and policies:
  - Protected leave?
  - Maintenance of benefits?
  - Job restoration?

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## California Paid Sick Leave Law

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## Basic Requirements

- Employers, regardless of size, must provide at least **3 days or 24 hours of paid sick leave** to employees who work 30 or more days within a year from commencement of their employment.
  - Note, the employee starts accruing immediately
  - The benefit, however, does not vest until after the 30<sup>th</sup> day
  - Employers have the right to defer available use of the paid sick days until the 90<sup>th</sup> day of employment (probation period)
- Limited exceptions: Employees covered by valid CBA that meets the 5 statutory requirements, In-home support services employees provided by the state of California, airline flight deck or cabin crew employees with equivalent benefits. Individuals under these categories are not considered “employees” under the new statute.
- Employer may limit employees to using **24 hours or 3 days** of paid sick leave per year.

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## How Much Sick Leave?

- **“24 hours or 3 days”**
  - Labor Comm.’s Aug. 2015 –First formal Opinion Letter on new leave laws: Employees must receive the greater benefit, i.e. AWS (10 hour days) and Part-Time (still get 24 hours)
- **Non-Full Time Employees**
  - 24 hours
  - Employees whose normal workday is less than 8 hours would receive 24 hours of sick leave
- **Alternative Work Week**
  - 3 days (Likely more than 24 hours)
  - Employees whose normal workday is greater than 8 hours would receive the equivalent of three full workdays

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## Four Options for Compliance

1. Accrue sick leave at the statutory minimum
2. Provide the minimum amount of sick leave at the beginning of each year- “Front-loading”
3. Offer the statutory minimum of sick leave through an alternative paid leave benefit, i.e. PTO
4. Follow your sick leave policy that was in place prior to 1/1/15

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## Permissible Uses

- Regardless of which option you provide, you must ensure the policy permits employees to enjoy the benefits of the broad uses under the law
- Employees may make an oral or written request for paid sick leave
- Not just for when the employee is sick
  - Paid sick days may be used for employee’s illness, preventative care, diagnosis, or treatment
  - And for covered family members under the same reasons: spouse, registered domestic partner, children (regardless of age), parents (including step-parents and parents-in-law), grandparents and siblings.

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## When Can Employees Begin to Take Paid Sick Leave?

- Paid sick days may also be used by employees who are victims of **domestic violence, sexual assault, or stalking**
- Expansion of Kin Care law to allow sick paid benefits to be used in whole or in part to care for family members which is broadly defined
- Doctor's Note: Statute is silent
- Beginning no later than on the 90<sup>th</sup> day of employment
- Employees may determine when and how much sick leave they want to use
- Employer may impose a reasonable minimum increment for use (2 hours)

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## Calculating Sick Leave Pay

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## Rate of Sick Leave Pay

- Exempt Employees
  - Calculated in the same manner as the employer calculates the Exempt Employee's wages for other forms of paid leave time
- Non-Exempt Employees (2 Options)
  - Calculated in the same manner as the regular rate of pay for the workweek the employee uses the paid sick time regardless of whether the employee worked overtime. Note the regular rate may be impacted if the employee receives non-discretionary bonuses or commissions; or
  - "90-day lookback" calculation

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## Rate of Sick Leave Pay: "90-Day Lookback" Calculation

- Total compensation (minus OT premium) in the full pay periods of the prior 90 days **divided by** the total hours worked equals the rate of sick pay
- Example
  - Jason took sick leave on March 31<sup>st</sup>. From January 1 – March 31<sup>st</sup> he earned **\$9,000** in wages, and worked **480 hours**. His hourly rate of pay for paid sick leave is:
 
$$\$9,000 \div 480 \text{ hours} = \$18.75/\text{hour}.$$
  - This automatically takes into account any bonuses or commissions paid out because it's total wages.

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## Notice & Recordkeeping Obligations For Sick Leave

## Wage Theft Prevention Act

- Entitlement to paid sick leave must also be included on **Wage Theft Prevention Act notice**
- Notice must state that employees:
  - May accrue & use sick leave
  - Have the right to request sick leave
  - May not be terminated or retaliated for requesting/using sick leave
  - Have the right to file a complaint with the *DLSE*
- Workplace posters and paystubs- **PAGA!!!**

# California Family Rights Act (CFRA)

## A Reminder: the basics

- CFRA
- Covered employers: 50 or more employees
- Eligible Employees: employed one year, worked 1250 hours, employed at a worksite with more than 50 employees within 75 miles
- Eligible for: 12 workweeks of unpaid, job-protected leave in which health benefits must be maintained at current levels for a serious health condition
- Many technical requirements regarding notices, designations, certifications and administration



## Some Important Differences - FMLA vs CFRA

- FMLA includes pregnancy related disability as a serious health condition
- CFRA does NOT!
  - CFRA = post-birth bonding leave only
- PDL covers pregnancy-related disabilities
- Military related leaves
- Care for *registered* domestic partners
  - But, same sex spouses now protected under FMLA

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## Covered Employers

- Includes *successors in interest*
- Now includes *joint* employers
- Adopts federal definition of joint employer:
  - Whether joint employment relationship exists decided on totality of circumstances and based on economic realities
  - *May* not need common ownership/management

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## Employee Eligibility

- Employee still must be employed for 12 months with employer *before the start* of CFRA leave; and
- Employee must have worked 1,250 hours in 12-month period *before the start* of CFRA leave.
- However, employee eligible if satisfies 12-month requirement while on leave (e.g., work comp, sick leave, vacation)
  - Should designate portion of leave during which employee is eligible as CFRA

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## Employee Eligibility

50 Employees within 75-mile radius *when leave requested:*

- Can be single or multiple locations
- If no fixed worksite, can be . . .
  - Office assigned as home base
  - Where work assigned
  - Where employees report
  - *Ex.: CA salesperson who reports to HQ in NY – now count NY employees*

*“Spouse” = same-sex couples*

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## Calculating Leave Entitlement (Hours):

- For employees working variable schedules, calculate 12 workweeks of leave by using weekly average of hours scheduled over 12 months prior to leave – not weekly average of hours worked over 12 weeks prior to leave
  - Additional leave as reasonable accommodation?
- Normally worked overtime counts against leave entitlement
  - Voluntary overtime does not

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## Calculating Leave Entitlement (Hours):

- Physically impossible for intermittent leave, then greater absence can be counted against leave entitlement
  - Must permit to return to extent can perform other aspects of duties
  - Ex.: Flight attendant on a plane

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## Responding To Leave Request: Employer's Obligation!

- Generally . . .
  - Employee provides “notice” of need for leave
    - Ex. “I am sick and need a few days off” sufficient?
    - *Forseeable* leaves: 30 days’ notice: need, reason, duration
    - Worker’s Compensation overlap? Labor Code 132a
  - Employer determines whether and which leave applies
  - Employer informs employee of eligibility
  - Employer requests medical certification information
- Employer response within 5 business days – not 10 calendar days (Like FMLA)

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## Medical Certification:

- Use CA certification form – caution FMLA forms!
- Cannot contact health care provider to “clarify” SHC, only to “authenticate” (allowed by FMLA)
- Employee obligated to provide information to determine CFRA-qualifying
- If employee fails to provide, can deny leave if employee was notified of consequences in advance

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## Recertification and Fitness For Duty:

- For “second opinion,” employer must have “good faith, objective reason” to doubt validity of certification
  - Higher standard than previous “reason to doubt”
- No longer require fitness-for-duty exam as condition to return
  - OK after return, only if “job-related” and “consistent with business necessity”
  - Included in designation notice?
  - Uniform policy requiring it?

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## Substitution of Paid Time Off:

- If employee receiving disability payment, paid sick leave or any other partial wage replacement, not on “unpaid leave” and cannot force to use paid time off
- Can require, or employee can elect, to use vacation or sick pay
- Sick pay, however, only can be required for SHC of employee, but parties can agree
  - FMLA generally allows it
  - Paid Family “Leave” or State Disability Insurance

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## Increased Reinstatement Rights:

- Must inform employees of “guarantee”
- Return to same or virtually identical job
- Rights apply even if employee replaced or job has been restructured to accommodate leave
  - *Not* if employment would have ended anyway or shift would have changed
- If no longer qualified because of loss of license, attend a course or “*other non-qualifying reason*,” give “*reasonable*” opportunity to fulfill

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## Notice Requirements:

- Poster requirement (stand-alone or “all-in-one”)
- Posted prominently where can be seen by employees and applicants
- Electronic posting permissible if meets posting requirements
- Make sure to update handbooks

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## SB 63 – Parental Leave

### Honey I Shrunk The CFRA!

*New Parent Leave  
Act*



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## NPLA – Parental Leave - Overview

- Provides for **12 weeks** of **job-protected** parental leave (means for the birth, adoption, foster care placement).
  - Must maintain group health insurance coverage (similar to FMLA/CFRA).
- Part of ongoing effort to extend CFRA/FMLA type requirements to smaller employers.
- Contains other provisions similar to CFRA (retaliation, etc.)

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## NPLA – Who's Covered?

### Employers:

- At least **20 or more** employees within **75** miles. (Remember multiple worksites).
- Does not apply to employees covered under CFRA/FMLA (50 or more).
- Result - employers with **20-49** employees.

### Employees:

- More than 12 months of service with the employer.
- At least 1,250 hours within the previous 12-month period.

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## NPLA – What's Covered?

- **12 weeks** of leave to bond with a new child within one year of the child's birth, adoption or foster care placement.
- Parental leave **only**. Not all of the other CFRA/FMLA types of leave.
- Unpaid leave. But employee shall be entitled to use accrued vacation, paid sick time, other accrued time off.
- Where both parents work for same company, employer is not required to grant more than 12 weeks of leave total. Employer may, but is not required, to grant leave to both parents simultaneously.

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## Pregnancy Disability Leave Law (PDL)

### California Pregnancy Disability Leave - who is covered?

- A woman is “disabled by pregnancy” if, in the opinion of her health care provider, she is unable to work at all or perform one or more essential functions of her job without undue risk to herself, successful completion of her pregnancy, or to other persons
- Doctor’s certification sufficient



## Amount of Leave: PDL

- 4 months of leave = 88 working days for a full-time employee who works 5 eight-hour days per week
  - Number of days or hours *normally worked* in 17 1/3 weeks
- For employees who work more or less than 5 days per week, or who work alternative work schedules, 4 months of leave is calculated on a pro rata basis
- Transfers as Reasonable Accommodation
- ADA/FEHA overlap: ongoing “disability” and duty to accommodate

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## Use of Accrued Paid Time Off: PDL

- **Paid Vacation:** Employee may elect at her option to use paid vacation (or PTO) during her PDL. Employer cannot require employee to do so
- **Paid Sick Leave:** Employer may require , or employee may elect to use, paid sick leave during her PDL

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## Reinstatement Rules-PDLL

- Same benefits
  - Health insurance paid during PDL
- Same job, or *comparable* job if justified
- Defenses:
  - Job no longer exists/employment *would have ceased*
  - Available comparable job in 60 days?
  - Employer's policies

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## Employees with Protected Disabilities

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## FEHA Definition of Physical Disability

- Physical Disability - any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects certain body systems and “limits” a major life activity
  - Record of, regarded as, associated with
- Per se physical disabilities

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## FEHA Definition of Mental Disability

- Mental Disability - 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
  - Record of, regarded as, associated with
- Per se mental disabilities

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## “Limits” A Major Life Activity

- **Limits** means makes the achievement of the major life activity difficult and does not take into account mitigating measures
- **Major life activity** is broadly construed and includes physical, mental, and social activities and working

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## Basis for Leave: FEHA/ADA

- “Reasonable accommodation for the known physical or mental disability of an applicant or employee”
- Intersection of FEHA/ADA, Worker’s Compensation and Sick Leave
  - Wage replacement during reasonable accommodation leave
  - Creates “notice” issues: repeated sick days suggest disability and trigger interactive process?
    - Absenteeism cases: discipline for protected absences prohibited!

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## Engage in the “Interactive Process”

- Prompt and in good faith
- Employer selects appropriate reasonable accommodation
- *Mutual* obligation to engage in process
- Leave is an accommodation of last resort
- Document, document document !!!

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## Amount of Leave: ADA/FEHA

- No minimum or maximum amount, “*It depends*”
- Indefinite leave not required, *Dezham v. Macy’s West Stores, Inc.* 2014 (C.D. Cal. 2014)
- Employer’s policies and circumstances drive the analysis
- Previous unsuccessful leave relevant?
- Leave that is not reasonably calculated to return employee to work unreasonable!

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## Returning Disabled Employee to Work

- Determine what available positions, if any, will allow the disabled employee to perform the essential job duties. When multiple employees are seeking the same position, a disabled employee seeking reassignment is entitled to preferential consideration.
- Document search for vacancies
- Communication with employee

*Swanson v. Morongo School District*, 232 Cal. App. 4th 954 (2014).

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## Questions?



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# Thank You



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