FREEMAN FREEMAN & SMILEY, LLP

EMPLOYMENT LAW BULLETIN

June 9, 2015

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July 1, 2015: A Day of Change for California Employers

(Part 1)

While human resources professionals and counsel typically review "new laws" when a new year begins, this year there are significant changes going into effect on July 1, 2015. This is the first of two articles about new requirements that take effect in California on July 1, 2015.

New California Family Rights Act Regulations

Effective July 1, 2015, extensive amendments to the California Family Rights Act ("CFRA") regulations become effective. Among other things, the new regulations change several important definitions, clarify reinstatement rights, clarify and expand procedures regarding key employees, specify how the leave year is determined, address intermittent and reduced schedule leaves, shorten the time for the employer response to a leave request to five business days, clarify who may designate the use of other paid time during the leave, and further restrict the information provided to the employer on the medical certification form. For the new medical certification form, **click here**. The state has also issued language for a mandatory poster and described how employees are to be given notice of their CFRA rights. For the new poster language, **click here**.

The New Regulations

Change several definitions:

Covered Employer: successors in interest of a covered employer and joint employer are now specifically included in the definition. The definition still does not definitively define "joint employer," leaving it to the "totality based on the economic realities of the situation".

Same-Sex Marriages and Domestic Partners: several definitions have been amended to make it clear that same-sex marriages and domestic partners are treated the same as spouses.

Counting employees for coverage: employees on paid or unpaid leave (including CFRA leave), leave of absence, disciplinary suspension, or other leave, are now clearly counted. See, also, the discussion of worksite below.

Eligible Employee: clarifies that a full-time or part-time employee working in California who has been employed for a total of at least 12 months (52 weeks) with the employer at any time prior to the commencement of a CFRA leave, and who has actually worked within the meaning of state law for the employer at least 1,250 hours during the 12-month period immediately prior to the date the CFRA leave is to commence. Furthermore, if

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an employee is not eligible for CFRA leave at the start of a leave because the employee has not met the 12-month length of service requirement, the employee may nonetheless meet this requirement while on leave, because leave to which the employee is otherwise entitled counts towards length of service (although not for the 1,250 hour requirement). The employer should designate the portion of the leave in which the employee has met the 12-month requirement as CFRA leave. For example, if an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (e.g., sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment.

Worksite: a worksite can refer to either a single location or a group of contiguous locations. For employees with no fixed worksite, the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, for the purpose of counting 50 employees, if a salesperson works from home in California but reports to and receives assignments from the corporate headquarters in New York, *the New York headquarters, not her home,* constitutes the worksite from which there must be 50 employees within a 75-mile radius in order for the salesperson to be eligible for CFRA leave. When an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that of the secondary employer. The employee is also counted by the secondary employer to determine CFRA eligibility for the secondary employer's employees.

Key Employee: As before, an employer may refuse to reinstate a "key employee." Under the new definition, a key employee is an employee who is paid on a salary basis and is amongst the highest paid 10% of the employer's employees who are employed within 75 miles of the employee's worksite at the time of the leave request. Whether an employee is "among the highest paid 10 percent," pursuant to Government Code section 12945.2, is determined by comparing the year-to-date wages, within the meaning of the California Labor Code and Industrial Welfare Commission Wage Orders, of the employer's employees within 75 miles of the worksite where the requesting employee is employed at the time of the leave request, divided by the number of weeks worked (including weeks in which paid leave was taken).

Serious Health Condition: the three-pronged definition has been expanded and clarified.

- "Inpatient care" means a stay in a hospital, hospice, or residential health care facility, any subsequent treatment in connection with such inpatient care, or any period of incapacity. A person is considered to be an "inpatient" when a health care facility formally admits him/her to the facility with the expectation that he/she will remain at least overnight and occupy a bed, even if it later develops that such person can be discharged or transferred to another facility and does not actually remain overnight.

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- "Incapacity" means the inability to work, attend school, or perform other regular daily activities due to a serious health condition, its treatment, or the recovery that it requires.
- "Continuing treatment" means ongoing medical treatment or supervision by a health care provider.

Clarify the obligation to reinstate:

Upon granting the CFRA leave, the employer must inform the employee of its guarantee to reinstate the employee to the same or comparable position (subject only to the existence of specified defenses) and must provide the guarantee in writing upon the request of the employee.

The employer must reinstate the employee to the same or a comparable position at the end of the leave, unless the refusal is justified by one of the specified defenses. An employee is entitled to reinstatement even if the employee has been replaced or his/her position has been restructured to accommodate the employee's absence. If the employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, or other non-qualifying reason, as the result of the leave, the employee must be given a reasonable opportunity to fulfill those conditions upon returning to work.

The employee is entitled to the same position or to a comparable position that is equivalent (i.e., virtually identical) to the employee's former position in terms of pay, benefits, shift, schedule, geographic location, and working conditions, including privileges, perquisites, and status. The position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. Equivalent benefits include benefits resumed in the same manner and at the same levels as provided when the leave began, subject to any changes in benefit levels that may have taken place during the period of CFRA leave affecting the entire workforce, unless otherwise elected by the employee. The CFRA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, position, or geographic location that better suits the employee's personal needs on return from leave, from offering a promotion to a better position, or from complying with an employer's obligation to provide reasonable accommodation under the disability provisions of the Fair Employment and Housing Act (FEHA).

Clarify and expand the employer's obligations regarding "key employees":

In order to deny reinstatement to a key employee, the employer must establish not only that the employee is a "key employee" but that the refusal to reinstate is necessary because the employee's reinstatement will cause substantial and grievous economic injury to the operations of the employer. Under the regulations, a precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a key

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employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.

An employer who believes it may deny reinstatement to a key employee must inform the employee in writing at the time the employee gives notice of the need for CFRA leave (or when CFRA leave commences, if earlier) that he or she is a key employee. At the same time, the employer must also inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that reinstatement will result in substantial and grievous economic injury to its operations. If the employer cannot give such notice immediately because of the need to determine whether the employee is a key employee, it shall give the notice as soon as practicable after the employee notifies the employer of a need for leave (or the commencement of leave, if earlier). An employer who fails to provide notice in compliance with this provision will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if it reinstates a key employee who has given notice of the need for CFRA leave (or who is on CFRA leave), the employer shall notify the employee in writing that it cannot deny CFRA leave, but that it intends to deny reinstatement on completion of the leave. An employer should ordinarily be able to give such notice prior to the employee starting leave. The employer must serve the notice either in person or by certified mail. The notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the duration of the leave and the urgency of the need for the employee to return.

If an employee on leave does not return to work in response to the employer's notification of intent to deny reinstatement, the employee continues to be entitled to maintenance of health benefits coverage as provided by section 11092(c) and the employer may not recover its cost of health benefit premiums. A key employee's rights under CFRA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave.

After an employer notifies an employee that substantial and grievous economic injury will result if the employer reinstates the employee, the employee still is entitled to request reinstatement at the end of the leave period even if he or she did not return to work in response to the employer's notice. The employer must then again determine whether reinstatement will result in substantial and grievous economic injury, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result,

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the employer shall notify the employee in writing (in person or by certified mail) of the denial of reinstatement.

Clarify how the CFRA "leave year" will be determined:

An employer may still choose any of the methods (the calendar year, any fixed 12–month "leave year," the 12–month period measured forward from the date any employee's first CFRA leave begins, or a "rolling" 12–month period measured backward from the date an employee uses any CFRA leave) allowed in the FMLA regulations for determining the 12-month period in which the 12 weeks of CFRA leave entitlement occurs. The employer must, however, apply the chosen method consistently and uniformly to all employees in California and notify employees requesting CFRA leave of its chosen method.

If an employer fails to select one of the above methods for measuring the 12-month period, the method that provides the most beneficial outcome for the employee will be used. An employer wishing to change to another method is required to give at least 60 days' notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstance may a new method be implemented in order to avoid the Act's leave requirements.

Address 12 workweeks in the context of a variable schedule and clarify the employee's obligation regarding scheduling:

If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of CFRA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) shall be used for calculating the employee's leave entitlement.

If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

If an employee uses CFRA leave in increments of less than one week, the fact that a holiday may occur within a week in which an employee partially takes leave does not count against the employee's CFRA entitlement unless the employee was otherwise scheduled and expected to work during the holiday.

If an employee normally would be required to work overtime, but is unable to do so because of a CFRA-qualifying reason that limits the employee's ability to work overtime, the hours that the employee would have been required to work may be counted against the employee's CFRA entitlement. In such a case, the employee is using intermittent or reduced schedule

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leave. For example, if an employee normally would be required to work 48 hours in a particular week, but due to a serious health condition the employee works 40 hours that week, the employee would utilize eight hours of CFRA-protected leave out of the 48-hour workweek. Voluntary overtime hours that an employee does not work due to a serious health condition shall not be counted against the employee's CFRA leave entitlement.

If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than CFRA, and prior to the employee notice of need for CFRA leave), the hours worked under the new schedule are to be used for making this calculation.

Clarify certain issues regarding intermittent and reduced leave schedules:

Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed “clean room” during a certain period of time, the entire period that the employee is forced to be absent is designated as CFRA leave and counts against the employee's CFRA entitlement. However, an employee shall be permitted to return to work if he or she is able to perform other aspects of the work that are not physically impossible, such as administrative duties, and thereby shorten the time designated as CFRA leave.

Confirm that a salary may be reduced for intermittent or reduced work schedule:

Under FMLA, it was permissible for an employer to reduce the salary of a exempt employee on FMLA leave without losing the exempt status. Under the new regulations, employers may reduce exempt employees’ pay for CFRA intermittent leave or a reduced work schedule, provided the reduction is not inconsistent with any applicable collective bargaining agreement or employer leave policy, the FEHA, and any other applicable state or federal law.

Shorten the time for the employer response to a leave request:

The time for an employer to respond to a leave request remains “as soon as practicable” but the maximum allowable time for response has been shortened from 10 calendar days to 5 business days.

Clarify who may designate the use of paid leave during CFRA leave:

An employee may elect to use or an employer may require an employee to use any accrued vacation time or other paid accrued time off (including undifferentiated paid time off (PTO)), other than accrued sick leave, that the employee is otherwise eligible to take during the otherwise unpaid portion of the CFRA leave.

An employee may also elect to use, or an employer may require an employee to use, any accrued sick leave that the employee is eligible to take during the otherwise unpaid portion of

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a CFRA leave if the CFRA leave is for the employee's own serious health condition or any other reason if mutually agreed between the employer and the employee. If an employee is receiving a partial wage replacement benefit during the CFRA leave, the employer and employee may agree to have employer-provided paid leave, such as vacation, paid time off, or sick time supplement the partial wage replacement benefit, unless otherwise prohibited by law.

For leave for an employee's own serious health condition, the employee may also substitute leave taken pursuant to a short- or long-term disability leave plan, as determined by the terms and conditions of the employer's leave policy, during the otherwise unpaid portion of the CFRA leave. This paid disability leave runs concurrently with CFRA leave, and may continue longer than the CFRA leave if permitted by the disability leave plan. An employee receiving any form of disability payments is not on "unpaid leave" and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation.

An employee receiving Paid Family Leave to care for the serious health condition of a family member or to bond with a new child is not on "unpaid leave," and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation.

Only if the employee asks for requests leave for what would be a CFRA-qualifying event may an employer require the employee to use any accrued vacation time or other paid accrued time off (including PTO time), other than accrued sick leave, that the employee is otherwise eligible to take during the otherwise unpaid portion of the CFRA leave. If an employee uses paid leave under circumstances that do not qualify as CFRA leave, the leave will not count against the employee's CFRA leave entitlement.

If an employee requests to utilize accrued vacation time or other paid accrued time off without reference to a CFRA-qualifying purpose, an employer may not ask whether the employee is taking the time off for a CFRA-qualifying purpose. If the employer denies the employee's request and the employee then provides information that the requested time off is or may be for a CFRA-qualifying purpose, the employer may inquire further into the reasons for the absence.

Address employee payment of group health benefit premiums:

If employees are required to pay premiums for any part of their group health coverage, the employer must provide the employee with advance written notice of the terms and conditions under which premium payments must be made.

If CFRA leave is paid, the employee's share of premiums must be paid by the method normally used during any paid leave, typically as a payroll deduction, unless a voluntary agreement between the employer and the employee dictates otherwise.

If CFRA leave is unpaid, the employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium

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payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(A) Payment due at the same time as if made by payroll deduction;

(B) Payment due on the same schedule as payments are made under COBRA;

(C) Payment prepaid pursuant to a cafeteria plan at the employee's option;

(D) The employer's existing rules for payment by employees on leave without pay would apply, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid CFRA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or

(E) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the CFRA leave is foreseeable).

Unless an employer policy provides a longer grace period, an employer's obligation to maintain health benefits coverage ceases under CFRA if an employee's premium payment is more than 30 days late. In order to drop coverage, an employer must provide written notice at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the written notice unless payment has been received by that date.

The employer may recover the employee's share of any premium payments missed by the employee for any CFRA leave period during which the employer maintains health coverage by paying the employee's share.

Regardless of whether an employee pays premiums while on CFRA leave, all other obligations of an employer under CFRA would continue, such as reinstatement upon return and complete restoration of coverage/benefits equivalent to those that the employee would have had if leave had not been taken, including family or dependent coverage.

If an employer terminates an employee's health benefits coverage in accordance with the regulations because of the employee's non-payment of premiums and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

Confirm that CFRA leave is different than and independent of an employer's other obligations, e.g., state pregnancy disability leave and disability accommodations.
Change the wording on the required poster

The new poster language can be found **here**.

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Change the wording on the medical certification form

The CFRA has always been more restrictive than FMLA about the information that an employee and his/her medical provider must provide to support CFRA leave. Thus, employers have always been required to limit their certification form to the CFRA form where the leave request is for CFRA leave, even if that leave runs concurrently with another leave that may allow for more extensive information.

The regulations have changed the CFRA certification form, further restricting the information that the employer may obtain. This new form should be the exclusive form used for CFRA leave beginning July 1, 2015. For the new form, click **here**.

Recognize the possibility of fraudulently-obtained CFRA leave:

An employee who fraudulently obtains or uses CFRA leave from an employer is not protected by CFRA's job restoration or maintenance of health benefits provisions. An employer has the burden of proving that the employee fraudulently obtained or used CFRA leave.

Written by Teresa R. Tracy

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