

California's Paid Family Leave Law

In September 2002, the State of California enacted the nation's first Paid Family Leave program. As of July 1, 2004, nearly all non-governmental employees in California became eligible to receive up to six weeks of Family Temporary Disability Insurance (FTDI) benefits over a 12-month period. This Alert provides an overview of the new California employment law. While the law is applicable only to California employees, companies that have operations in California, or even individual employees working in California, should become familiar with this law. While California's Paid Family Leave program is the only law of its kind in the country at present, it is anticipated that legislators in other states may propose similar legislation.

Law Does Not Create New Leave Rights

Although the law is commonly referred to as the "paid family leave law," it is important to note that the law does not provide California employees with any new rights to take a leave of absence. What the law does is provide the worker who takes a qualifying leave of absence with some income replacement during the period of the leave. The law states explicitly that the right to benefits under the Paid Family Leave program does *not* confer upon the employee any leave rights, or any form of job protection. In short, an employee must be eligible under other laws or under the employer's leave policies to take a family-care leave of absence. If he or she is eligible to take such a leave of absence, then an employee may be eligible to receive partial income replacement from the state during the leave.

Law Creates State Fund for "Family Temporary Disability" Circumstances

Nearly all non-governmental employees in California have monies withheld from their wages that are paid into the State Disability Insurance (SDI) fund. This state-administered fund pays disability benefits to contributing employees when they are unable to work, due to non-occupational causes, after a seven-day waiting period. SDI does not provide full income replacement; the maximum weekly SDI benefit is \$728. The benefit amount may be offset by any other sources of income. Since January 2004, the wages of California employees have been withheld at a greater amount and a portion of the amounts withheld have been paid into the state's FTDI fund. As of July 1, 2004, employees have been able to apply for FTDI benefits if they are out of work under qualifying circumstances. Employees who take a family leave, as defined below, now are eligible to receive partial income replacement from the state's FTDI fund.

Eligibility to Receive FTDI Benefits

In order to be eligible to receive benefits from the FTDI fund, an employee must have taken at least seven days off from work to care for a seriously ill child, spouse, parent or registered domestic partner, or to bond with a new child. These are circumstances for which leave may be taken if the employee is eligible under the terms of the federal Family and Medical Leave Act (FMLA) or under the California Family Rights Act (CFRA). Both the FMLA and CFRA have criteria pertaining to the size of the employer and the length of service of the employee. However, the Paid Family Leave program imposes no such constraints. Thus, any employee is eligible to receive FTDI benefits, regardless of duration of service and regardless of employer size. The provisions apply to both full- and part-time workers. However, FTDI benefits are available to the employee only if he or she is taking a permitted leave of absence for family temporary disability. And, unless the employee is eligible to take a leave under the FMLA or CFRA, or under one of the employer's internal policies, then he or she will not be eligible to receive FTDI benefits.

The qualifying circumstances applicable to receiving FTDI benefits are almost identical to the circumstances under which an eligible employee may take FMLA or CFRA leave, with the exception of the aforementioned employer size and employee service criteria of those laws. For example, any leave taken to bond with a newly born or newly adopted child must be taken within one year of the birth or placement. Once the one-year anniversary has passed, the right to receive FTDI benefits in conjunction with that leave terminates. One notable exception, however, is a situation in which both parents are employed by a single employer and seek to take time off at the same time to bond with their new child. Under California's CFRA, the employer may limit the total CFRA time taken to twelve weeks in the aggregate for "baby bonding" leave. If both parent-employees are eligible under FMLA and CFRA to take a leave, then each might also be eligible to receive up to six weeks of FTDI benefits.

Duration of Benefits

An eligible employee may receive up to six weeks of FTDI benefits within a 12-month period. The 12-month period is measured as the 365-day period beginning with the first day on which the employee establishes a valid claim for FTDI benefits. The first day of the 365-day period is the first day of the seven-day waiting period. If an employee is receiving FTDI benefits toward the tail end of the one-year period, and the one-year anniversary occurs *before* he or she has received six weeks' worth of benefits, the right to benefits terminates and the employee is required to re-establish his or her valid claim to benefits in the *new* twelve-month period.

Waiting Time, Use of Vacation or Sick Pay and Re-Established Claims

If an employee is taking a family temporary disability leave under FMLA, CFRA or other company policy, he or she will not be eligible to receive FTDI benefits from the state until a seven-day waiting period has been fulfilled. The regulation states that the first seven days of either an original or re-established claim is a non-payable waiting period. The waiting period can be satisfied in increments of full or partial days. An

illustrative example, noted in the proposed regulations, provides as follows. The claimant has a parent who suffered a heart attack that required hospitalization. (This satisfies the “serious health condition” requirement.) The parent has been released from the hospital, but has several follow-up medical appointments scheduled. The claimant is required to care for the parent and to take the parent to the medical appointments. The first seven days on which the claimant is absent from work to care for the parent constitute the employee’s waiting period. The days missed need not be consecutive. The first day missed constitutes the beginning date of the 12-month period. After the claimant has had seven unpaid work days, his or her waiting period has been fulfilled on this particular claim. At that point, the claimant may be eligible to receive up to six weeks of benefits, providing that he or she actually misses those days on account of family temporary disability circumstances and provided that these days all occur before the 12-month period has expired.

If an employee seeks to receive FTDI benefits within the 12-month period to care for a different care recipient, then a new seven-day unpaid waiting period must be satisfied before the employee may tap into his or her remaining FTDI allotment for the period. And, as noted above, if the employee is utilizing his or her remaining balance of FTDI benefits and the 12-month anniversary occurs, then the employee must file a new claim in this new 12-month period.

An employer may adopt policies that require an employee to use some or all of his or her accrued vacation time prior to receiving FTDI benefits. If an employer has a policy requiring the use of one week of vacation time prior to an employee’s receipt of FTDI, then the first seven days of absence will constitute the waiting period for FTDI benefits. However, the employee will suffer no economic loss since he or she will receive vacation pay during the first seven work days missed. If the employer’s policy requires the use of *two* weeks of vacation time prior to receiving FTDI benefits, then the employee does not begin receiving FTDI benefits until the third week. If the employer’s policy requires the use of *all* vacation time while on a qualifying leave, and if the employee has more than two weeks of accrued vacation time, the employee’s receipt of vacation pay will not prevent him or her from receiving FTDI benefits in week three and thereafter.

Conclusion

California’s paid family leave law is unique. Proponents focus upon the fact that the actual benefit is wholly employee-funded and have argued that the passage of the law will not negatively impact businesses. However, many employers recognize that the availability of income replacement benefits can largely determine whether employees take time off.

As a practical matter, it will take a while before the full impact of this law on businesses within California can be adequately assessed. In the meanwhile, employers should be aware of the Family Paid Leave program and its interplay with FMLA, CFRA and an employer’s own internal policies concerning leaves of absence.

For general information on state disability insurance benefits and procedures, go to California’s

Employment Development Department (“EDD”) Web site: www.edd.ca.gov. Click on the Paid Family Leave link on the left side of the page. The site has general information, forms, FAQs and the proposed implementing regulations.

For Further Information

If you have any questions about the information in this Alert, please contact Jennifer A. Kearns at 619.744.2242 or jakearns@duanemorris or the lawyer in the firm with whom you are regularly in contact.

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