VOLUME 75 ◆ NUMBER 2

Employee Benefit Plan Review

Above and Beyond the FMLA: California Expands Eligibility for Job-Protected Family and Medical Leave, and Now Includes Virtually All Employers

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Attention all businesses, organizations, schools or individuals with employees in California: A sweeping expansion of family and medical leave law recently took effect. On January 1, 2021, SB 1383, a groundbreaking expansion of the California Family Rights Act ("CFRA"), took effect, and most employees in the Golden State may be eligible to take up to 12 weeks off to care for themselves or certain family members if they become seriously ill or are in need of care. In addition, qualified employees may receive pay from the state of California during their qualifying leaves.

Background of the CFRA

CFRA is California's version of the federal Family and Medical Leave Act ("FMLA"). Since the inception of both laws in 1993, the CFRA and the FMLA have overlapped significantly. The differences between the two laws were relatively minor, to the relief of employers forced to comply with both. Until now, both laws:

- Applied to employers with 50 or more employees.
- Applied to employees with at least 12 months of employment.
- Provided up to 12 weeks of job-protected leave if an employee was seriously ill or injured or needed to care for specified family members or to bond with a newly born, adopted or fostered child.
- Set forth the same reasons for taking the leave.
- Provided rights to retain benefits during leave and to be reinstated to the same or comparable positions upon timely return.
- Provided exceptions if the employer had fewer than 50 employees within 75 miles of the worksite where the employee requesting the leave worked.
- Allowed an employer to refuse reinstatement to the same or a comparable position for high wage earners if certain conditions were met.

Changes to the Law

Beginning January 1, 2021, the CFRA changed in several significant ways, going far beyond what the FMLA requires and significantly reducing the overlap between the two laws. The changes include:

- The new law is expanded to all employers with five or more employees. The law

does not require the employer to have an office in California nor require that all employees be living or working within the state. At present, it is unclear whether an employer must have at least five employees working within the state of California. Guidance from the California Department of Fair Employment and Housing is anticipated, as is a poster that outlines the CFRA as amended.

- The law eliminates the 75-mile radius requirement. If an employer is otherwise covered, all employees must be considered for leave regardless of where their co-workers work, provided they meet the tenure threshold.

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- The law provides for leave for qualifying military exigencies. Employees with a spouse, domestic partner, child or parent called to active duty by the U.S. armed forces may qualify for leave.
- The law expands the pool of family members in need of care to include grandparents, grandchildren, and siblings of the employee. Eligible employees may now request leave to care for these relatives in addition to spouses, domestic partners, children, and parents of the employee. (Parents-in-law are also covered under existing CFRA regulations.)
- The definition of "child" now applies to all children of the employee, regardless of age. Employees now can request leave to care for adult children with serious health conditions, not solely minors and dependent adults.
- The law increases the amount of time off for two parents working for the same employer. Now each eligible employee may take up to 12 weeks off, instead of splitting the same 12 weeks between them.
- The law eliminates the possibility of refusing reinstatement to the same or comparable positions for employees who are among the top 10 percent of earners of the employer.

New Obligations for Small Employers and Repeal of New Parent Leave Law

Until now, smaller employers have not had to provide such job-protected leave for employees, although employers with 20 or more employees have had to do so for baby-bonding purposes since the New Parent Leave Act ("NPLA") went into effect in 2018. The new law expanding the CFRA repeals the NPLA, as it is duplicative.

Required Compliance with Both the FMLA and the New CFRA

Although the new law acknowledges and references the FMLA, it does not replace it. Employers with 50 or more employees must comply with both laws. Employers may no longer assume that compliance with the FMLA is enough to comply with the CFRA, making leave administration more complicated.

The CFRA and FMLA were nearly identical and ran concurrently (with some exceptions) until now. With the new changes to the CFRA, employers who took advantage of the 75-mile radius requirement that existed under both laws can no longer do so under the expanded CFRA. Those who chose to replace high income earners and return them to different, non-comparable positions upon conclusion of the leave may no longer do so under the modified CFRA.

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Therefore, employers must be careful to assess whether the leave qualifies under both FMLA and CFRA; if so, the leaves would run concurrently. For example, if an employee takes off 12 weeks following a heart surgery, that leave would be covered under both laws. If, however, an employee takes a leave that qualifies under one statute and not the other – for example, a woman who is on bed rest due to pregnancy complications would be on FMLA leave but not utilizing her CFRA leave – employers must be careful to track the use and remaining time available under each statute separately.

Payment During Leave

Neither the CFRA nor the FMLA require employers to pay employees who qualify for leave during their absences. That does not change under the new law. Pay may be available, however, to qualified employees through disability benefits or the state's Paid Family Leave Law. An employer's obligation to make up any differences in pay under local laws, such as San Francisco's Parental Leave Ordinance, remains in effect.

What This Means for Employers

Compliance with the new CFRA is mandatory, not optional. There are no small-employer or out-of-state headquarter exceptions. Only employers with fewer than five employees can ignore the new law. Unlike under

other laws, such as the Americans with Disabilities Act, there is no "undue hardship" exception for the CFRA.

To comply with the law, employers should be prepared to document leave requests and properly designate and track leave. Employers should closely evaluate the reasons for the leave, particular circumstances (such as whether two parents work for the same employer), be careful not to deny leave automatically and consider reinstatement carefully. Employers must learn what information can and cannot be requested of employees. Prior leave requests may require a closer look under the new law. Finally, employers should update handbooks and train managers about these changes before the law takes effect.

This may be the most expansive leave law in the country, but with proper templates, policies, documents and legal guidance, compliance becomes manageable.

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