Legal update

The California Fair Employment and Housing Council ("FEHC") just issued the final revised CFRA regulations which will go into effect on July 1, 2015. The new CFRA regulations followed some, but not all, of the 2008 FMLA regulations. This Special Bulletin highlights the most significant impacts the new CFRA regulations will have on California employers.

Here is a summary of the regulations' highlights:

- Similar to but exceeding the protections afforded under the federal Family and Medical Act (FMLA), CFRA applies to California employers with 50 or more full or part-time employees. The law provides for up to 12 weeks of workplace family leave for employees who have worked 1,250 hours within the past 12 months within a 75-mile radius of the worksite.
- Unlike the 2008 FMLA regulations, the CFRA regulations do not allow for an employer to require a new medical certification form until the first certification has expired. In other words, the employer cannot ask for a new medical certification if the employee has a certification certifying the employee's "lifetime" condition.
- Like the 2012 Pregnancy Disability Leave ("PDL") regulations, the CFRA regulations state that an employee's right to maintenance of health benefits under the CFRA is a separate and distinct right from an employee's right to maintenance of health benefits under the PDL.
- Similar to the FMLA, employers can only retroactively designate leave as CFRA leave if it provides appropriate notice to the employee and it does not cause harm to the employee.
- Employees who are receiving disability benefits or partial wage replacement benefits while on CFRA leave are not considered to be on "unpaid leave." Therefore, employers cannot require those employees to use any accrued paid leave during the CFRA leave.
- There are new notice requirements that employers will need to implement at their physical worksites and possibly their websites.

Eligibility for Leave

Definition of "spouse."

The CFRA regulations now expressly include registered domestic partners and same-sex partners in marriage in the definition of "spouse."

Definition of "key employee."

The CFRA regulations have essentially adopted the FMLA regulations' definition of a "key employee." Subject to certain notice requirements, an employer can deny a key employee who takes CFRA leave reinstatement to the same or comparable position.

Fraudulently-obtained CFRA Leave.

The CFRA regulations include a "new" permissible defense for CFRA leave that is fraudulently obtained or used. This is not necessarily a "new" defense, but the regulations now expressly state, "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." (2 C.C.R. section 11089(d)(3).) Employers who suspect fraudulent use of CFRA leave should seek legal counsel if they are going to deny leave (or discipline an employee) based on fraud.

Medical Certification

Definition of "inpatient care."
An illness, injury, impairment, or physical or mental condition that involves "inpatient care" qualifies as a "serious health condition." Previously, "inpatient care" meant an "overnight stay" in a hospital, hospice, or residential health care facility. The regulations interpreting the FMLA still define "inpatient care" as an "overnight stay." (29 C.F.R. section 825.114.) However, the new CFRA regulations only require an "expectation" that the individual will remain overnight. (2 C.C.R. section 11087(q)(1).) This means an individual who is admitted to the hospital with the expectation that he or she will stay overnight, but is discharged later or transferred to another facility, still qualifies as a person with a "serious health condition."

Recertification.
The 2008 FMLA regulations allow employers to request recertification of a serious health condition at least once every six months, even for lifetime conditions. (29 C.F.R. section 825.308.)

However, the old and new CFRA regulations only allow an employer to request recertification "[u]pon expiration of the time period the health care provider originally estimated." (2 C.C.R. section 11091(b).) The FEHC did not adopt the FMLA's recertification provision because "[l]imiting the circumstances for which an employer may seek recertification is necessary to preserve privacy rights and protect employees on CFRA-qualifying leave from the unnecessary burden of being required to repeatedly justify their need for leave when medical authorization for the leave has already been provided."

As such, because an employee with a serious health condition is likely using FMLA and CFRA leave concurrently, California employers still cannot request a medical recertification from employees with certified lifetime conditions.

Second opinion on medical certification.
The FMLA regulations (and former CFRA regulations) allow employers to require the employee to obtain a second opinion of his or her own serious health condition, if the employer simply has a "reason" to doubt the validity of the medical certification provided by the employee. (29 C.F.R. section 825.307.) The new CFRA regulations now clarify that the employer must have a "good faith, objective reason" to doubt the validity of the medical certification before requiring a second medical opinion.

Notice Requirements

The new CFRA regulations change some of the notice requirements for employers.

Upon receiving a request for CFRA leave, the employer shall respond within five business days. (2 C.C.R. section 11091(a)(6).) This is different from the previous requirement of 10 calendar days. Although the CFRA regulations do not adopt the specific notice requirements set forth in the FMLA regulations – the general notice, eligibility notice, rights and responsibilities notice, and designation notice – we recommend that employers use the same notices for both FMLA and CFRA for administrative ease and to ensure compliance with all notice requirements. (Please note, however, when requesting medical certification from the employee, we recommend that California employers do not use the DOL's sample form because it does not take into account the California Confidentiality of Medical Information Act.)

Every employer must post a notice explaining the CFRA provisions and procedures for filing complaints "in conspicuous places where employees are employed." (2 C.C.R. section 11095(a).)

In addition, employers must post the notice "where it can be readily seen by employees and applicants for employment." (2 C.C.R. section 11095(a) (emphasis added).) "Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section." (Id.) Employers may post the CFRA notice on an Intranet site, but employers will also need to post the notice in an area accessible to applicants.

Retroactive Designation of Leave

The FMLA regulations allow the employer to retroactively designate leave as FMLA leave with appropriate notice, provided that "the employer's failure to timely designate leave does not cause harm or injury to the employee." Similarly, the CFRA regulations only allow retroactive designation of leave as CFRA leave when the employer provides "appropriate notice to the employee and where the employer's failure to timely designate does not cause harm or injury to the employee." Notably, the "harm or injury" must be caused by the employer's failure to designate the leave as FMLA or CFRA leave earlier. This is different

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from the harm an employee purportedly suffers from not being able to take additional leave time.

Although the regulations do allow for employers to designate leave retroactively, it is imperative employers designate leave and provide appropriate notice to employee as soon as practicable.

Use of Accrued Paid Leave While on CFRA Leave

Although not a change from the prior CFRA regulations, the new regulations clarify that an employer may require or an employee may elect to use vacation or paid time off while the employee is on CFRA leave. In contrast, an employee may elect or an employer may require an employee to use accrued sick leave only if the CFRA leave is: (1) for the employee's own serious health condition, or (2) for another reason mutually agreed upon between the employer and employee. In other words, without employer agreement, employees cannot use sick leave to care for a family member with a serious health condition or for bonding leave.

Use of sick leave to care for family members.

Even if the employer and employee do not "mutually agree" to allow use of accrued sick leave to care for a family member, the employer may still be required to allow the employee to use some of the sick leave for the employee to care for a family member with a serious health condition. Labor Code section 233 ("kin care leave") states that employers who provide sick leave "shall permit" employees to use accrued and available sick leave in an amount not less than the sick leave that would be accrued during six months of the employee's current rate of entitlement. The employee's kin care leave to attend to an illness of a child, parent, spouse, or domestic partner could run concurrently with the employee's CFRA leave.

In addition, AB 1522 ("Paid Sick Leave Law"), effective July 1, 2015, requires employers to provide up to three days of paid sick leave for employees to use for their own illnesses or to care for sick family members. The overlap between the Paid Sick Leave Law and CFRA will only be for the caring of a parent, child, spouse, or registered domestic partner. Most likely, this will be the same overlap covered by kin care leave.

Employees receiving disability insurance while on leave.

An employee who is on paid disability leave or receiving Paid Family Leave (a form of insurance provided by the state) concurrently with his or her CFRA leave is not considered to be on "unpaid leave." Therefore, the employer cannot require any such employee to use paid time off, sick leave, or accrued vacation. (2 C.C.R. section 11092(b)(2) and (3).)

Interaction with Pregnancy Disability Leave

In 2012, the FEHC published PDL regulations stating that an employee's right to maintenance of health benefits while on PDL is a separate and distinct entitlement from an employee's right to maintenance of health benefits while on CFRA leave. (2 C.C.R. section11044(c).) The new CFRA regulations reinforce the FEHC's interpretation that the entitlements under the two leaves are separate and distinct. (2 C.C.R. section 11092(c)(2).) This would allow for an employee to potentially receive health benefits for up to 29 1/3 weeks. Although the CFRA statute (Cal. Gov. Code section 12945.2(f)) arguably allows employers to limit maintenance of health benefit coverage 12 weeks, our recommendation is that employers follow the FEHC regulations and maintain health benefits during both the PDL and the CFRA leave separately.

What Does This Mean For Your Agency?

Update your leave policies.

With the new regulations going into effect on July 1, 2015, this gives your agency time to update its leave policies to comply with the new regulations. Your agency should have your legal counsel review your current related policies and employee handbooks regarding this topic.

Update your posted notices.

Update the notices posted by your agency in accordance with the updated text in the new regulations. (See 2 C.C.R. section 11095(d).) This includes any notices on your website. However, as stated above, notices should be accessible to both employees and applicants.

Train your managers and supervisors.

Leaves laws are complicated and change frequently. We suggest that agencies periodically train managers and supervisors regarding the new leaves laws and how they interact with each other. This is a good year to provide training in light of the new Paid Sick Leave Law and the new CFRA regulations

SDRMA will provide all Members with the new document required for posting as soon as we receive them.

Please contact SDRMA Chief Risk Officer Dennis Timoney at dtimoney@sdrma.org or call 800.537.7790.