Leaves, Leaves and More Leaves!

Managing Employee Leaves in the Community College Setting

Professional Development Workshop
Sponsored by: Northern 14 and Bay Area 10
December 11, 2014

Presented by:
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Stephanie White, Esq.

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A Professional Law Corporation
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FAMILY AND MEDICAL LEAVE:
A PRACTICAL GUIDE FOR
EMPLOYERS
Family and Medical Leave:
A Practical Guide for Employers

By
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The state and federal family leave laws add another layer to the complicated issues of employee leaves and disabilities. While parts of the laws (particularly those that arise from differences between the California and federal laws) defy simple explanation, most of the requirements are easily understood and applied once personnel and payroll offices are aware of the basic concepts and apply them uniformly.

CAUTION

Because individual provisions vary widely in these areas, consult your collective bargaining agreements, policies, regulations, and past practice before applying these statutes. Leaves of absence and procedures are negotiable subjects. While contract language cannot limit employee leave rights granted by state or federal law, it can grant additional benefits.

Family and Medical Leave Act of 1993

The federal Family and Medical Leave Act (FMLA; 29 U.S.C. §2601, et seq.) allows eligible employees to take leave for their own serious health conditions, childcare, specified family members’ serious health conditions, or for reasons related to a family member’s military service. Each eligible employee may take up to 12 workweeks of family and medical leave in a 12-month period (26 weeks for qualifying illnesses and injuries incurred during active duty military service). The leave is unpaid, but the employer must continue to make its standard contributions toward health insurance coverage. In most cases, employees who take such leaves have rights to reinstatement upon their return.
The 2008 amendments to the FMLA added two new qualifying reasons for FMLA leave, reasons that do not necessarily qualify for California family leave. Employees now may take up to 26 workweeks of FMLA leave in 12 months to care for a specified family member who was injured or became ill in the line of active military duty. An employee now also may take up to 12 workweeks of FMLA leave for a “qualifying exigency” resulting from a specified family member’s call to active military duty or deployment to a foreign country.

While registered domestic partners are not covered family members for FMLA leave, an employee’s leave to care for a registered domestic partner’s ill child may be a qualifying reason if that child would otherwise be considered a stepchild because the employee partner acts in loco parentis.

The FMLA provides that where state laws grant employees greater family leave rights, they prevail over the federal law.

The U.S. Department of Labor is the agency charged with enforcing the FMLA. It has adopted extensive regulations interpreting the law. The text of the law, regulations, fact sheets and copies of various forms are available on its website at http://www.dol.gov/whd/fmla.

**California Family Rights Act**

The California Family Rights Act (CFRA; Government Code § 12945.2) substantially mirrors the federal requirements; however, at least three major distinctions must be addressed.

Under the FMLA, pregnancy and pregnancy-related disabilities are “serious health conditions.” The CFRA does not include an employee's pregnancy as a serious health condition because female employees in California have the right to pregnancy disability leave (PDL) under Government Code § 12945. Therefore, while in most circumstances FMLA leave and CFRA leave will run concurrently, where an employee takes leave for a pregnancy or childbirth-related disability, FMLA leave will run concurrently with the pregnancy disability leave, and the employee will additionally be entitled to 12 workweeks of CFRA leave after the birth of the child for child care and bonding. This issue is discussed in more detail below under “Calculating Family and Medical Leave.”

Second, California law requires that registered domestic partners be treated as spouses in many legal respects. An eligible employee may now take CFRA leave to care for a registered domestic partner with a serious health condition, or to care for a registered domestic partner’s ill child (if that child would be otherwise considered a stepchild because the partner acts in loco parentis).

Finally, the military-related leave provisions apply only to leave taken under the FMLA. However, some leave to care for an ill or injured military service member would also qualify as standard family leave if the employee is caring for a parent, spouse, or minor child (or adult child with a disability and incapable of self-care) with a serious health condition, for up to 12 workweeks. Leave in excess of 12 workweeks (or to care for an individual not covered by the CFRA) and “qualifying exigency” leave are not covered by CFRA.
The California Department of Fair Employment and Housing (DFEH) is charged with enforcing the CFRA and has adopted regulations and forms relating to the law (see California Code of Regulations, Title 2, § § 11087-11098). Information on the CFRA can be accessed through the DFEH website at www.dfeh.ca.gov.

While the CFRA provides for unpaid family leave, employees participating in the State Disability Insurance (SDI) program may receive partial compensation for up to six weeks of otherwise uncompensated family leave through the Paid Family Leave program. This will be discussed below in “Obligations Once an Employee Takes a Family and Medical Leave.”

CFRA Regulations

The California Fair Employment and Housing Council, part of the Department of Fair Employment and Housing, is in the process of revising the CFRA regulations. The proposed changes modify the medical certification form and also make substantive changes to the rules and procedures governing CFRA leaves. The proposed regulations can be viewed on the DFEH website at http://dfeh.ca.gov/FEHCouncil.htm.

Pregnancy Disability Leave Act

The California Pregnancy Disability Leave Act (PDLA; Government Code § 12945) grants employees up to four months of leave while disabled by pregnancy, childbirth, or related medical condition. This leave is unpaid, but the employee is entitled to health benefits in the same manner as if working. Employees need not meet any eligibility criteria.

Temporary disability related to pregnancy, childbirth, or related medical conditions must be treated the same as any other temporary disability, including the right to use available leaves.

The PDLA also includes provisions requiring the reasonable accommodation of disabilities arising from pregnancy, childbirth, or related medical conditions. This includes job modifications and transfers to vacant positions.

Like the CFRA, the PDLA is administered by the Department of Fair Employment and Housing. Information regarding the PDLA can be found at www.dfeh.ca.gov. The PDLA regulations were significantly amended effective December 30, 2012 (see California Code of Regulations, Title 2, § § 11035-11051).
ELIGIBILITY FOR FAMILY
AND MEDICAL LEAVE

An employer should first determine whether the employee requesting leave is “eligible” under state and/or federal law. The 2009 amendments to the regulations require that an employer provide an employee with notice of eligibility within five business days of the request for leave (or of when the employer learns of the need for leave for a qualifying reason). If the employer contends that the employee is ineligible, the notice must include at least one reason for the ineligibility.

An employee must meet four criteria to be eligible:

• The employee has been employed by the employer for at least 12 months.

• The employee has actually worked 1,250 hours in the 12 months prior to the leave (excluding all paid and unpaid time off, including sick leave and vacation).

• The employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

• The employee has not taken 12 workweeks of FMLA and/or CFRA leave (or 26 weeks to care for an injured military service member) during the appropriate 12-month period prior to the present request.

Emploved For at Least 12 Months

The initial requirement is relatively simple – has the employee been employed for at least 12 months? This requirement is based on hire date or the first day of service, whichever is earlier. The 12 months need not be continuous, thus new employees who previously work as substitutes might meet this requirement. An employer must go back at least seven years to determine eligibility.

1,250 Hours in the Prior 12 Months

This is a crucial element of the eligibility test. In order to qualify for family and medical leave, the employee must have actually worked 1,250 hours in the 12 months prior to taking the leave. While technically the employee has the burden of proving eligibility, this is frequently shifted to the employer by government enforcement agencies.

Under federal law, full-time instructional personnel (employees whose principal function is to teach and instruct students) are presumed to work at least 1,250 hours. This includes community college instructional personnel. If a district contends that a full-time instructor did not work 1,250 hours, under the regulations it has the burden of proof. It will be very difficult to argue that a full-time instructor worked less than 1,250 hours, regardless of contract language that might define an instructor's workday as being a specified number of hours. This is because the law assumes that instructors also work outside of their instructional day, for example, grading student work and preparing instruction. If an instructor is in a part-time or hourly assignment, a
district may be able to prove that the employee has not worked 1,250 hours in the prior 12 months.

When calculating the hours, keep the following in mind:

- Exclude all time spent on paid or unpaid leaves, including sick leave, extended illness leave, workers’ compensation leave, and vacation; and
- Include overtime hours worked, but only in actual time, not time-and-one-half, as well as any extra or substitute hours worked.
- If the employee took a military leave during the applicable 12-month period, the time must be included as if the employee had worked his or her regular schedule.

The 1,250 hours are counted back 12 months from the first day of qualifying leave. Thus, if the employee was absent for an extended period of time for a family leave-qualifying reason, and the employer knew or should have known of this but did not give written notice that it was counting that time as family leave, the 1,250-hour requirement would be measured backward from the first day of that leave. Thus, the employer cannot deduct that time off from the 1,250 hours.

**Example:** A full-time (eight-hour, 12-month) classified employee begins using sick leave and extended illness leave on October 1 for back surgery. The employer does not provide written notice that the leaves are running concurrently with FMLA/CFRA leaves. In February, the employee requests family leave because the paid leaves are nearly exhausted. In order to determine whether the employee has worked 1,250 hours, the employer should look at the 12 months backward from October 1, not from February.

Where the employee is taking leave intermittently, he or she need not “re-qualify” each time the leave is taken. The qualification is determined as of the first date of leave for a qualifying reason.

Check and double check all calculations. When in doubt as to whether an employee has worked the requisite hours, assume the employee is eligible; it will cost less to pay for the benefits and provide the leave than if the employee successfully sues, where he or she would be entitled to damages, including the cost of medical care.

**Employment of 50 or More Employees Within 75 Miles**

Public agencies are covered by the FMLA and CFRA regardless of the number of employees. However, for the employee to be eligible, he or she must work with 50 or more employees within a 75-mile radius. The 75 miles are surface miles, not as the crow flies.

Persons are “employed” for purposes of this section if they are on the payroll, whether or not actually working at the time. For employees with no fixed worksite, it is the worksite to which they are assigned as their home base, from which their work is assigned, or to which they report.
Family Leave Taken in Prior 12 Months

Each employee is entitled to only 12 workweeks (or 26 workweeks for military caregiving) of family leave per 12-month period under each law. Except for the following reasons, leaves taken under the FMLA and CFRA run concurrently:

- Leave for disability related to pregnancy, childbirth, or related medical condition;
- CFRA leave taken to care for a domestic partner;
- The 14 additional weeks authorized to care for an injured, covered service member;
- Leave taken to care for an injured military servicemember where the employee is the “next of kin” or where the servicemember is the adult child of the employee (in some circumstances); and
- Leave taken for a “qualifying exigency” related to a family member’s military service.

The 12 months can be set in three ways: calendar year, employer-defined year, or “rolling” year.

A calendar year is just that – January 1 through December 31. Adopting a calendar year rule potentially would allow an employee to take 24 workweeks in one school year, assuming the employee otherwise works sufficient hours when not on leave to meet the 1,250-hour requirement.

Under a fiscal (or “employer-defined”) year definition, for California public educational institutions, the 12-month period would be from July 1 through June 30. If an employer adopts the fiscal year rule, the employee could take four workweeks in January to care for an ill child and 12 workweeks in the fall to care for his or her parent because it is a new fiscal year, assuming the employee still meets the 1,250-hours-worked requirement.

A “rolling” year is individualized to the employee taking the leave and begins on the first day of FMLA/CFRA leave, then counting backward or forward 12 months. (The employer must state in its policy and notice whether it has adopted the backward or forward method of calculating the rolling year.) An employee need not take all family leave at one time. If a rolling year is used, for example, an employee might take four workweeks in January to care for an ill child, and eight workweeks in the fall to care for his or her parent. But, if the employee takes 12 workweeks in January through March, he or she is not entitled to another family leave until the following January.

Where the leave is taken under the FMLA to care for an injured military servicemember, the 12-month period begins on the first day of leave, regardless of the form of 12-month period adopted by the employer.
IMPORTANT

A court has held that an employer must give notice to employees about its definition of the 12-month period for use of family leave, and that adoption of a policy or regulation is insufficient notice unless that policy or regulation is actually given to each employee. [Bachelder v. America West Airlines (9th Cir. 2001) 259 F. 3d 1112.] Placing the definition in the applicable collective bargaining agreement suffices for notice to employees in those units, though unrepresented employees must still receive the policy and/or regulation, or a letter specifying the designated year.

In addition, where the employer seeks to use a “rolling year,” the same court held that use of the statutory language (“in any 12-month period”) as a definition of the year is insufficient. We recommend the following language: “Employees are entitled to 12 workweeks of family leave in any 12-month period, which shall be counted backward/forward from the date family leave is taken.” The employer must state whether it is counting backward or forward.

If the employer negotiates family leave provisions that grant employees greater rights than the laws require, it may not count those additional benefits against the FMLA/CFRA leave entitlement. For example, if the employer allows its employees to take family leave to care for a non-military sibling, and an employee takes 12 workweeks for that purpose, the employee would be entitled to an additional 12 workweeks for reasons qualifying under FMLA or CFRA, such as to care for a parent, assuming the employee still meets the 1,250-hour requirement.
FAMILY AND MEDICAL LEAVE QUALIFYING CONDITIONS

FMLA or CFRA leave may be taken only for one of the following reasons:

- Serious health condition of the employee;
- Serious health condition of the employee’s child, parent, or spouse;
- Birth of a child, or placement of a child in the family for adoption or foster care;
- Serious illness or injury sustained in the line of duty on active duty by a military servicemember who is the spouse, child, parent or next of kin of the employee (FMLA and possibly CFRA); or
- Qualifying exigency arising out of the fact that a spouse, child or parent of the employee is a covered servicemember on covered active duty or has been notified of an impending call or order to covered active military duty (FMLA only).

The following definitions apply to FMLA and CFRA leave:

- Where the leave is to care for an ill child or the birth or placement for adoption or foster care of a child, a “child” is a “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis” who is under age 18, or 18 or over and incapable of self-care because of mental or physical disability. (FMLA and CFRA)

The U.S. DOL issued a letter opinion that an employee may take leave to care for the child of a domestic partner if the employee partner acts in loco parentis to the child even if not legally or biologically the parent or stepparent.

The U.S. DOL has prepared a question-and-answer information sheet to address commonly asked questions about when an employee may take family leave to care for an adult child with a serious health condition. The information sheet can be found at [http://www.dol.gov/whd/fmla/AdultChildFAQs.htm](http://www.dol.gov/whd/fmla/AdultChildFAQs.htm).

- Where the leave is to care for a servicemember injured in the line of duty on active military duty, or a qualifying exigency arising from a call to covered active duty, a “child” is a “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis,” regardless of the age of the child. (FMLA only)

- “Covered servicemember” means the employee’s spouse, child, or parent on active duty or call to active duty status, or veteran where the leave is to care for the family member. (FMLA only)
“Next of kin” means the “nearest blood relative” of a covered servicemember other than the servicemember’s spouse, parent, or child, in the following order of priority: Blood relatives who have been granted legal custody of the covered servicemember by court decree or statutory provision, siblings, grandparents, aunts and uncles, and first cousins, “unless the covered servicemember has specifically designated in writing another blood relative as his or her nearest blood relative for purposes of military caregiver under the FMLA.” Where no designation has been made and there are multiple family members of the same level of relationship to the covered servicemember, all such family members shall be considered “next of kin” and may take FMLA leave to care for the servicemember consecutively or simultaneously. For example, if the servicemember had four siblings who were the nearest blood relatives, all four could take this leave simultaneously. When the servicemember has made a designation, only that person may be considered “next of kin.” (FMLA only)

“Parent” means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to an employee when the employee was a minor. A step-parent or grandparent who raised or helped raise an employee as a child would be considered a parent. “Parents” do not include “in laws.” (FMLA and CFRA)

“Spouse” is a husband or wife; it does not include persons who are only cohabiting. (FMLA and CFRA) The CFRA includes registered domestic partners as spouses. Registered domestic partners are defined as same-sex partners at least 18 years of age sharing a common residence or same or opposite sex partners sharing a common residence where one or both of the partners are eligible for Social Security and if they are of opposite sexes, at least one is age 62 or older. In order to qualify as registered domestic partners, the partners must file a Declaration of Domestic Partnership with the California Secretary of State pursuant to Family Code Section 297. (FMLA and CFRA)

For purposes of confirmation of family relationship, an employer may require the employee to provide reasonable documentation or statement of the relationship. The documentation may be in the form of a simple statement from the employee, a child’s birth certification, a court document, etc. The employer is entitled to examine the documentation, such as a birth certificate, but must return the official document to the employee. An employer cannot require verification of registered domestic partnership unless it also requires verification for marriages.
Serious Health Conditions
(Non-Military)

Employers must base their determinations of whether employees' or their family members' health conditions are "serious" and thus qualify for family and medical leave on medical certifications provided by employees seeking leave. In general, the statutes and regulations focus on whether:

- the condition requires inpatient or inpatient-type care; or

- the employee (or family member) is incapacitated for at least three consecutive calendar days and the condition requires continuing treatment (two or more times) by a health care provider or treatment on at least one occasion that leads to a regimen of continuing treatment under the supervision of the provider.

Chronic health problems may also constitute "serious health conditions" even though the absence may be for less than three days and the individual did not seek treatment from a health care provider while out. Generally, a chronic serious health condition is one that requires periodic visits for treatment by a health care provider, continues over an extended period of time (including recurring episodes of a single underlying condition), and may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.). The employee must go to a health care provider for treatment or consultation at least twice each year.

The U.S. Senate Committee Report on the FMLA lists examples of serious health conditions:

- Heart attacks
- Heart conditions requiring bypass of valve operations
- Most cancers
- Back conditions requiring extensive therapy or surgical procedures
- Strokes
- Severe respiratory conditions
- Spinal injuries
- Appendicitis
- Pneumonia
- Emphysema
- Severe arthritis
- Severe nervous disorders
- Injuries caused by serious accidents on or off the job
- A parent or spouse suffering from Alzheimer's disease or clinical depression

Under the FMLA only, the following also are considered serious health conditions for employees (they are considered serious health conditions of family members under CFRA):

- Ongoing pregnancy
- Miscarriages
- Complications or illnesses related to pregnancy (such as severe morning sickness)
Need for prenatal care
Childbirth
Recovery from childbirth

Pregnancy and related conditions of employees are not qualifying reasons for leave under the CFRA; however, the employee is protected under the California Pregnancy Disability Leave Act (Government Code § 12945). The distinction between the FMLA and CFRA in regard to pregnancy will be addressed more fully below in the “Calculation of Family and Medical Leave” section.

The federal regulations explicitly state that certain conditions are not “serious health conditions,” unless complications develop:

- Common colds
- Flu
- Ear aches
- Upset stomachs
- Minor ulcers
- Headaches other than migraines
- Routine dental or orthodontia problems
- Periodontal disease
- Cosmetic treatments (such as for acne or plastic surgery) unless inpatient hospital care is required
- Absence because of an employee’s use of a controlled substance (as opposed to absence for treatment for substance abuse)

While, for example, the regulations state that ordinarily a common cold will not be a serious health condition, the U.S. Department of Labor has issued a letter opinion that in some circumstances it can be a serious health condition when the other requirements are met. The DOL declined to clarify this conflict in the 2009 revised regulations.

The regulations also include types of treatment that do not qualify as “continuing treatment,” such as routine physical, eye, and dental examinations, and regimens of continuing treatment by themselves (including the taking of over-the-counter medication, bed rest, drinking fluids, or exercise) that may be initiated without a visit to a health care provider.

**Childcare or Child-Bonding Leave**

An employee may take leave for the birth of a child, or placement of a child with the family for adoption or foster care, only within the first 12 months after birth or placement of the child.

The state and federal laws conflict in terms of employee entitlement to child care/child bonding leave where both parents work for the same employer. Under the FMLA, if both spouse (married) parents work for the same employer, they may only take 12 workweeks combined for childcare/bonding. The California law provides that if both parents (regardless of whether they are married) work for the same employer, they may be limited to a combined total of 12
workweeks. If the employer follows the CFRA and restricts unmarried parents to 12 combined workweeks, it violates the FMLA. If it only limits leave for spouse parents, the employer may be violating California laws prohibiting marital status discrimination. As a result of these conflicting provisions, the best way to implement the laws is not to restrict the leave when it involves childcare leave and allow each parent 12 workweeks of leave.

_Leave to Care for Covered Servicemember_
_Injured in the Line of Duty_
_(FMLA; Possibly CFRA)_

An eligible employee who is the spouse, son, daughter, parent, or “next of kin” of a “covered servicemember” may take up to a total of 26 workweeks in a 12-month period of FMLA leave to care for the covered service member, where the servicemember suffers a serious illness or injury in the line of duty on active duty. These 26 workweeks would include 12 workweeks taken for any other qualifying reason. The 12-month period for using the 26 workweeks commences on the first day that the employee takes leave to care for a covered servicemember, regardless of the 12-month period definition adopted by the employer for other types of FMLA leave. The 26 workweeks are per servicemember and per injury. Thus, an employee could take two 26-workweek periods in one 12-month period where the servicemember suffers a second illness or injury or for different family members (such as a spouse and then a child).

While the CFRA does not include military caregiver leave as a separate qualifying reason, in some circumstances the leave may also be protected under California law. If the servicemember is a parent, spouse or child (including an adult child that is incapable of self-care) and the illness or injury is a “serious health condition,” then the leave would qualify under the CFRA. If the leave exceeds 12 workweeks or is for a “next of kin,” it would not be covered by CFRA.

“Covered servicemember” means a:

- Current member of the Armed Forces (including the National Guard or Reserves) who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness; or

- A veteran who is undergoing medical treatment, recuperation, or therapy, for a serious injury or illness and who was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of five years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy.

“Serious injury or illness” means:

- In the case of a member of the Armed Forces (including a member of the National Guard or Reserves), an injury or illness that was incurred by the member in line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in line of duty on active duty
in the Armed Forces) and that may render the member medically unfit to perform
the duties of the member's office, grade, rank, or rating; or

- In the case of a veteran who was a member of the Armed Forces (including a
  member of the National Guard or Reserves) at any time during a period of five
  years preceding the date on which the veteran undergoes that medical treatment,
  recuperation, or therapy, a qualifying (as defined by the Secretary of Labor) injury
  or illness that was incurred by the member in line of duty on active duty in the
  Armed Forces (or existed before the beginning of the member's active duty and
  was aggravated by service in line of duty on active duty in the Armed Forces) and
  that manifested itself before or after the member became a veteran.

More information on the military-related reasons for family leave can be found at
http://www.dol.gov/whd/fmla under "General Guidance" and "Fact Sheets." The definitions
were significantly altered by the National Defense Authorization Act (NDAAA) for Fiscal Year
2010 to expand the definitions of covered service members and qualifying reasons for leave.

Qualifying Exigency Leave
(FMLA Only)

An eligible employee may take up to 12 workweeks of FMLA leave for specific reasons related
to a call to active duty or foreign deployment by the employee's parent, spouse, or child who is a
"covered servicemember." A "covered servicemember" is one whose service is "covered active
duty," which requires foreign deployment.

"Qualifying exigency leave" includes members of the regular Armed Forces, not just Reservists
or members of the National Guard. Covered service is now defined as deployments to foreign
countries. In the case of a member of a regular component of the Armed Forces, "covered active
duty" means duty during the deployment of the member of the Armed Forces to a foreign
country. In the case of a member of the reserve component of the Armed Forces, it means duty
during the deployment of the member with the Armed Forces to a foreign country under a call or
order to active duty under a provision of law referred to in U.S. Code, Title 10, Armed Forces.

The leave may be taken for the following qualifying exigencies:

- **Short-notice deployment:** To address any issue that arises from the fact that a
  covered servicemember is notified of an impending call or order to covered active
duty seven or fewer calendar days prior to the date of deployment. Leave for this
  purpose may be used for seven calendar days beginning on the date a covered
  servicemember is notified of an impending call to duty.

- **Military events and related activities:** To attend any official ceremony, program,
or event sponsored by the military that is related to the active duty or call to active
duty status of a covered servicemember; and, to attend family support or
assistance programs and informational briefings sponsored or promoted by the
military, military service organizations, or the American Red Cross that are
related to the active duty or call to active duty status of the servicemember.
Childcare and school activities: Four reasons fall under this exigency.

(1) To arrange for alternative child care when the active duty status or call to active duty of a covered servicemember necessitates a change in the existing child care arrangement for a child of the covered servicemember. The child of the covered servicemember must be under 18 or 18 or older and incapable of self-care because of a mental or physical disability.

(2) To provide child care for a child of a covered servicemember on an urgent, immediate need basis (but not a routine, regular, or everyday basis) when the need to provide such care arises from the active duty or call to active duty status of a covered servicemember. The child of the covered servicemember must be under 18 or 18 or older and incapable of self-care because of a mental or physical disability.

(3) To enroll in or transfer to a new school or day care facility, the child of a covered servicemember when enrollment or transfer is necessitated by the active duty or call to active duty status of a covered servicemember. The child of the covered servicemember must be under 18 or 18 or older and incapable of self-care because of a mental or physical disability.

(4) To attend meetings with staff at a school or a day care facility, such as meetings with school officials regarding disciplinary measures, parent-teacher conferences, or meetings with school counselors, for a child of the covered servicemember, when such meetings are necessary due to circumstances arising from the active duty status or call to active duty of a covered military member. The child of the covered servicemember must be under 18 or 18 or older and incapable of self-care because of a mental or physical disability.

Financial and legal arrangements: Two reasons fall under this category.

(1) To make or update financial or legal arrangements to address the covered servicemember’s absence while on active duty or call to active duty, such as preparing and executing financial and health care powers of attorney, transferring bank account signature authority, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), obtaining military identification cards, or preparing or updating a will or living trust.

(2) To act as the covered servicemember’s representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the covered member is on active duty or call to active duty, and for a period of 90 days following the termination of the covered servicemember’s active duty status.
**Counseling:** To attend counseling provided by someone other than a health care provider, for oneself, for the covered servicemember, or for the child of the servicemember, provided that the need for counseling arises from the active duty or call to active duty status of a covered servicemember. The child of the covered servicemember must be under 18 or 18 or older and incapable of self-care because of a mental or physical disability.

**Rest and recuperation:** To spend time with a covered military member who is on short-term, temporary, rest and recuperation leave during the period of deployment. Eligible employees may take up to five days of leave for each instance of rest and recuperation. (In addition to any other rights, California Military and Veterans Code Section 395.10 provides for up to 10 days of unpaid leave for the spouse of a military member for the period during which the military member is on leave from deployment in an area designated as a combat theater or combat zone by the President of the United States during “a period of military conflict.” In order to be eligible, the spouse must work at least 20 hours per week and must provide notice within two business days of receiving official notice of the military leave. The eligible employee must submit documentation showing that the covered military member is on leave from deployment.)

**Post-deployment activities:** Two reasons fall under this category.

1. To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of the covered military member’s active duty status.

2. To address issues that arise from the death of a covered military member while on active duty status, such as meeting and recovering the body of the military member and making funeral arrangements.

**Additional activities:** To address other events which arise out of the covered military member’s active duty status or call to active duty provided that the employer and employee agree that such leave shall qualify as an exigency and agree to both the timing and duration of such leave.
DOCUMENTATION OF NEED
FOR FAMILY LEAVE

An employer may require an employee requesting family leave to provide documentation of the need for leave.

Certification of Serious Health Condition
(Non-Military)

An employer may require that an employee seeking leave for a serious health condition (either his or her own or that of a family member) provide a certification from a health care provider.

*Caveat:* If the employee is using paid sick leave during any portion of the FMLA/CFRA leave, the employer may only ask for that information that its sick leave policy or collective bargaining agreement allows it to request.

The first medical certification is at the employee’s expense. If the employer doubts the validity of the certification, it may require the employee to obtain a second opinion at the employer’s expense. If the first two opinions differ, the employer may require a third opinion (again at its expense), which will be binding. If an employer requires additional certification, it could lead to charges of discrimination unless the requirement is uniformly applied, or based on clear facts indicating a reason to not believe the first certification. For example, an employer might request a second certification for an employee who has a history of requesting leaves or calling in sick near holidays or vacation, or an employee who presents a certification from a non-traditional medical provider or a medical provider not in the local area.

NOTE

Both the U.S. Department of Labor and the California Department of Fair Employment and Housing (DFEH) have created medical certification forms. While employers are not required to use these forms, they are also not permitted to ask for any information not included on the forms. We recommend using the DFEH form because it requires less information on the illness or injury and thus is less intrusive on employee or patient rights. The federal certification form may violate California law. The DFEH form can be found at California Code of Regulations, Title 2, § 11098.
The Genetic Information Nondiscrimination Act of 2008 (GINA) strictly limits an employer’s access to and use of medical information that includes certain “genetic information” as it relates to the employee or a covered family member. In order to prevent inadvertent acquisition of such information, employers should add the “safe harbor” language included in the GINA regulations on all forms and documents requesting medical information, including family leave medical certification forms:

“The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic information” as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.”

This language is included on the sample forms that request medical information.

Certification of Leave Taken to Care for Covered Servicemember
(FMLA Only)

This is also known as “military caregiver leave.” When an employee requests leave to care for an ill or injured covered servicemember, the employer may require an employee to obtain a certification of the serious illness or injury. Any one of the following may provide the certification:

- A U.S. Department of Defense (DOD) health care provider;
- A U.S. Department of Veterans Affairs (VA) health care provider;
- A DOD TRICARE network authorized private health care provider; or
- A DOD non-network TRICARE authorized private health care provider.
If the health care provider is unable to make certain "military-related" determinations, the health care provider may rely on determinations from an authorized DOD representative, such as a DOD recovery care coordinator.

Along with the general information required of a health care provider for FMLA leave, where an employee requests leave to care for a covered servicemember with a serious injury or illness, the employer may require that the health care provider provide the following additional information:

♦ Whether the health care provider is a DOD health care provider, a VA health care provider, a DOD TRICARE network authorized private health care provider, or a DOD non-network TRICARE authorized private health care provider.

♦ Whether the covered servicemember’s injury or illness was incurred in the line of duty on active duty.

An employer may also request that certification set forth information provided by the employee or covered servicemember:

♦ The relationship of the employee to the covered servicemember;

♦ Whether the covered servicemember is a current member of the Armed Forces, National Guard or Reserves, and the service member’s military branch, rank, and current unit assignment;

♦ Whether the covered servicemember is assigned to a military medical facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit), and the name of the medical treatment facility or unit;

♦ Whether the covered servicemember is on the temporary disability retired list; and

♦ A description of the care to be provided to the covered servicemember and an estimate of the leave needed to provide care.

In lieu of the sample Department of Labor certification form or an employer’s certification form, an employer must accept "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) issued to any family member to join an injured or ill service member at his or her bedside. During the period of time specified on the ITO or ITA, an eligible employee may take leave to care for the covered servicemember in a continuous block of time or intermittently. An employer may not require any additional information (including whether the intermittent leave is medically necessary). If the leave extends beyond the date of the ITO or ITA, the employer may request a certification form. An employer also may seek authentication and clarification of the ITO or ITA orders, but may not require second or third opinions. An employer may require the employee submitting an ITO or ITA to provide confirmation of the family relationship to the covered servicemember.
The U.S. Department of Labor has developed a “Certification for Serious Injury or Illness of a Current Servicemember for Military Family Leave” form (WH-385) and “Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave” form (WH-385-V), which are available on the DOL’s website at http://www.dol.gov/whd/fmla under “Forms.”

**Certification of Qualifying Exigency**

**(FMLA Only)**

The first time an employee requests leave for a qualifying exigency arising out of active duty or call to active duty by a specified family member, an employer may require the employee to provide a copy of the covered servicemember’s active duty orders or other documentation issued by the military which indicates that the covered servicemember is on covered active duty or call to covered active duty and the dates of the covered servicemember’s active duty service. The employee need only provide this documentation once. Copies of new orders must be provided if the request or leave relates to the new orders.

The employer may also require the employee to provide and sign a statement or description of the appropriate facts regarding the qualifying exigency for which leave is requested, and any appropriate documentation. Documentation includes meeting announcements, a document confirming an appointment, or a bill for services for handling legal or financial affairs. The employee must also state the approximate date the qualifying exigency commenced or will commence. If the leave is for a single period of time, the employee must provide the beginning and ending dates of the leave. If the leave is to be on an intermittent or reduced schedule basis, the employee must provide an estimate of the frequency and duration of the qualifying exigency. If the qualifying exigency involves a third party, the employee must provide appropriate contact information for the individual or entity and a brief description of the purpose of the meeting.

If the employee submits a complete and sufficient certification, the employer may not request additional information. However, if the exigency involves a meeting with a third party, the employer may contact the third party to verify meetings or appointments, but may not request additional information. An employer need not obtain the employee’s consent to contact the third party.

An employer may also contact an appropriate unit of the Department of Defense to verify that a covered servicemember is on covered active duty or call to covered active duty. The employer cannot request additional information and the employee’s consent is not required.

The U.S. Department of Labor has developed a “Certification of Qualifying Exigency for Military Family Leave” form (WH-384), which is available on the DOL’s website at http://www.dol.gov/whd/fmla under “Forms.”
RESPONDING TO REQUESTS FOR
FAMILY AND MEDICAL LEAVE

Employers have numerous obligations under the FMLA and CFRA once they receive a request for family leave, or learn that a leave is for a qualifying reason. If an employer fails to properly respond to a request for leave, or does not give all the required information, it may be liable for significant damages under either or both laws, and/or may have to provide an employee with additional leave.

**Employee Request for Leave**

An employee need not specifically request family leave, or refer to either or both of the laws, in order to be protected by the statutes. If an employee requests a leave for an FMLA/CFRA qualifying reason, it is the employer’s obligation to inform the employee of his or her rights, and to treat the leave as family leave, if the employee qualifies. An employer must provide an initial notice of eligibility and rights and responsibilities within five business days of the leave request. Once the employer has received all appropriate documentation, it sends a notice “designating” the leave, or stating that the leave is not covered by the FMLA and/or CFRA.

An employee is only required to provide verbal notice that he or she needs leave for an FMLA or CFRA qualifying reason, and the anticipated timing and duration of the leave. If necessary, the employer may request additional information in order to determine whether the reason for the leave qualifies (including medical certification, military certification, and verification of the familial relationship). The employer may require the employee to comply with its usual and customary notice and procedural requirements for requesting leave. The employee’s failure to follow such internal procedures, however, does not give the employer the right to disallow or delay an employee’s FMLA/CFRA leave if the employee gives timely verbal or other notice.

**Example:**
An employee tells his supervisor that his wife is having cancer surgery and he may need time off. The employer is now on notice that the employee is absent for a qualifying reason and must inform the employee of his rights under FMLA/CFRA.

**Example:**
An employee takes vacation to care for his seriously ill parent but does not tell the employer the reason, just that he is taking vacation leave. The employer is not obligated to provide notice to the employee of his FMLA/CFRA rights (though if the employer learns of the qualifying reason, it may designate the leave as FMLA/CFRA).
NOTE

Supervisors should be trained in the basic reasons qualifying for family leave and should not be advising employees that they are or are not eligible or that a reason does or does not qualify. Rather, they should be instructed that when an employee indicates that he or she may need leave for a qualifying reason, the employee should be directed to the personnel office. The supervisor should also contact the personnel office with information about the employee's request. Once a supervisor has knowledge that an employee needs a leave for an FMLA and/or CFRA qualifying reason, that knowledge is imputed to the employer and the employer will be liable for failure to provide proper notice to the employee or grant the employee his or her leave rights.

If the employee plans to take leave for a birth, adoption, placement in foster care, or planned medical treatment, and the need for the leave is foreseeable, the employee must provide the employer with at least 30 days’ notice. If the employee fails to give 30 days’ notice in such cases and has no reasonable excuse, the employer may delay the taking of the leave until at least 30 days have passed. To delay a leave, an employer must show that the employee knew of the FMLA/CFRA notice requirements (such as through a posting at a worksite), and that the need for the leave and its approximate date were clearly foreseeable 30 days in advance.

In emergency or other unforeseeable situations, the employee must provide the employer with such notice “as soon as practicable.” The federal regulations define “as soon as practicable” as meaning “as soon as both practical and possible, taking into account all of facts and circumstances in the individual case.” According to the regulations, that will ordinarily require at least verbal notice to the employer on the same day or the next business day.

IMPORTANT

An employer may not deny a request for family leave because it is inconvenient or will be disruptive to operations. This includes requests for intermittent leave or for a part-time work schedule.
Responding to the Request

Once an employer becomes aware of an employee’s need for family leave, it must respond in writing to the employee. Any response to an employee must refer to both the FMLA and the CFRA.

The U.S. Department of Labor has adopted sample forms. An employer must send the specified notices, or an employer-developed notice including the same information. The initial document to be given to the employee is the “Notice of Eligibility and Rights & Responsibilities” (Form WH-381). This notice must be given to the employee within five business days of the request for leave or learning of the need for leave. Once an employee has provided the necessary information, the employer must send the “Designation Notice” (Form WH-382). The forms can be found at [http://www.dol.gov/whd/fmla](http://www.dol.gov/whd/fmla), under “Forms.” The forms included with these materials have been altered to include reference to CFRA.

The 2009 amended FMLA regulations do not set a specific time limit on providing retroactive designation of leave. The employer may provide appropriate notice to the employee retroactively “provided that the employer’s failure to timely designate leave does not cause harm or injury to the employee.” [29 C.F.R. §825.301(d)] An employer and employee also may mutually agree to retroactively designate a leave.

**IMPORTANT**

*The current CFRA regulations do not allow for retroactive designation of paid leave as CFRA leave except in limited circumstances; however, the Department of Fair Employment and Housing has indicated that if the employee receives all of his/her leave rights, it may find that the employer has complied with the law. Because of the ambiguities under the CFRA, it is always in the employer’s best interests to notify employees that FMLA/CFRA leaves are running concurrently with paid leaves.*
CALCULATING FAMILY
AND MEDICAL LEAVE

This may be the most confusing area for most employers, and one that requires communication and coordination between personnel and business offices. It is important that everyone applies the same principles in determining when a family leave (and the right to paid benefits) begins and ends.

Every employee who is eligible for family and medical leave is entitled to 12 workweeks of leave in the defined 12-month period (or 26 workweeks when caring for an injured, covered servicemember). The leave may be taken intermittently, or on a reduced-work-schedule basis (such as part-time work). Full weeks when the employee is not expected to work (such as winter and spring breaks, summer recess, or off-track periods) are not counted as part of the 12 workweeks where the leave is continuous. However, holidays are included in the 12 workweeks where the leave is continuous. For example, if the employee is on family leave and a week includes one or more holidays, that week counts as one of 12.

Employers must clearly inform employees when FMLA/CFRA leaves are beginning and whether they are running concurrently with paid leaves.

♦ Where the leave is for an employee’s own serious health condition (except pregnancy), an employer may require that the employee use paid sick leave, extended illness leave, vacation, and compensatory time concurrently with unpaid family and medical leave. The employee may also require that he or she be allowed to use such leave. Unless negotiated otherwise with a union or through policy, the employee does not have the right to object to paid leave and unpaid FMLA/CFRA leaves running concurrently.

♦ Where the leave is for an employee’s pregnancy or related disability, an employer may require that the employee use paid sick leave and extended illness leave for that time that is concurrent with pregnancy disability leave. The employee must be allowed to use vacation or compensatory leave but the employer cannot require her to use it. This may be an exception to a district’s standard rule or practice.

♦ Where the leave is for the serious health condition of an employee’s family member (including covered servicemember), either the employer or employee may require that the employee use vacation or compensatory time off. The employee may use up to one-half of his or her annual sick leave entitlement pursuant to Labor Code § 233 (if the family member is a parent, spouse, registered domestic partner, or minor child). Any other use of sick or extended illness leave must be by mutual agreement.

♦ Where the leave is for child care or bonding, either the employer or the employee may require that the employee use vacation or compensatory time off. Use of sick or extended illness leave must be by mutual agreement.
AB 1606

Effective January 1, 2015, Education Code sections 87784.5 (academic) and 88207.5 (classified) authorize employees to take up to 30 days of leave in an academic year for the birth or adoption of a new child.

It appears from the legislative statements that the intent was for the 30 days to be paid and to come from available full-paid sick leave, and to include days of personal necessity leave. Unfortunately, neither statute reflects that intent.

IMPORTANT

While the laws allow employers to run FMLA/CFRA leave concurrently with paid leaves, many collective bargaining agreements, policies and past practices allow employees to use them after paid leaves. Review contracts, policies and past practices before taking action to require concurrent use.

Even if the policy and/or collective bargaining agreement provide that FMLA/CFRA leave will run concurrently with available paid leaves, this does not constitute specific individualized notice to the employee that the unpaid FMLA/CFRA leaves are running concurrently with paid leaves. A separate notice to the employee at the time of the leave is required.

Intermittent Leave

Employees may take leave on an intermittent or reduced-work-schedule basis if medically necessary, based on the certification of the health care provider. They cannot take it in increments smaller than the shortest period of time that the employer’s payroll system uses to account for absences or use of leave, provided that it is one hour or less.

The general rule allowing use of family leave on an intermittent or reduced work-schedule basis does not apply when the leave is for child care or child bonding. Under the CFRA, an employee may not take intermittent leave of less than two weeks’ duration for child care (after birth, adoption, or foster care placement) without employer agreement, except an employer must grant leaves of lesser duration on two occasions. (Under the FMLA, child care leave cannot be taken intermittently without employer agreement.) Thus, if the employer objects, a new parent could
not leave work early or take off one day a week for several months simply as child care, though he or she could do it twice.

When the employee takes leave intermittently or works a reduced schedule, the leave should be reduced to days or hours based on the employee's traditional workweek. Twelve workweeks are the same as 60 work days for an employee who works five days per week. An employee who works less than that would receive a pro-rata portion (in the same way that sick leave benefits are pro-rated for part-time employees).

Example: Assume an eight-hour employee must be absent two hours every day to care for an ill parent. Each week, the employee would use 10 hours of FMLA/CFRA leave and sick leave, vacation, and/or compensatory time off, if available. The employee could do this for 48 weeks (if medically necessary).

Example: Assume a six-hour employee must be absent two hours every day for treatment for his or her own illness. Each week the employee would use 10 hours of FMLA/CFRA leave, and sick leave, extended illness leave, vacation, and/or compensatory time off, if available. The employee could do this for 36 weeks (if medically necessary).

**Pregnancy Leave**

Because of the differing provisions in the state and federal laws, calculating pregnancy leave can be complicated.

Under the California pregnancy disability leave law (PDLA; Government Code § 12945), a pregnant employee is entitled to four months of leave for disability related to pregnancy or childbirth (PDL). Because pregnancy is a qualifying reason under the FMLA, the 12 workweeks of FMLA leave run concurrently with the first 12 weeks of the PDL (assuming proper FMLA notice is given). CFRA leave does not run concurrently with PDL because an employee's pregnancy is not a qualifying reason for CFRA leave. The employee's sick leave, extended illness leave, and possibly vacation and compensatory leave (if the employee elects to use them), run concurrently with the PDL and FMLA leave. After the pregnancy-related disability ends, the employee is entitled to the 12 workweeks of unpaid CFRA leave with paid benefits (which run concurrently with any remaining FMLA leave).

According to the PDLA and the CFRA regulations, CFRA leave commences upon exhaustion of the four months of PDLA leave or at the end of the employee's pregnancy disability, whichever occurs first. The result is that an employee with a particularly difficult pregnancy may exhaust all leaves, including CFRA, before pregnancy or childbirth disability ends.
The PDLA regulations state that PDL can also be FMLA leave, and therefore, the two entitlements run concurrently. (Title 2, California Code of Regulations, §11045) Because public education employees receive more than four months of paid illness leave (either fully or partially paid), PDL and FMLA also run concurrently with the paid leaves assuming proper notice is given.

The regulations also very clearly state that PDL does not run concurrently with CFRA leave, and that an employee is entitled to receive both leaves. [Title 2, CCR, §§11046 and 11093]. The maximum entitlement for pregnancy/child bonding is four months (PDL) plus 12 workweeks (CFRA). [Title 2, CCR, §§11046(d) and 11093(d)] Thus, after the employee has exhausted her FMLA and PDLA leaves and/or is no longer disabled from the pregnancy, she is still entitled to 12 workweeks of CFRA leave.

The question then is the amount of time for which the employee is entitled to employer-paid benefits. While on FMLA leave, the employee is entitled to benefits. Effective January 1, 2012, employees using PDL became entitled to benefits for up to four months under the same terms and conditions as if working. PDLA regulations specifically provide that the benefits provided pursuant to the PDLA do not meet an employer's obligation to provide benefits during a CFRA child care/child bonding leave. Thus, an employee would receive four months (PDLA) plus 12 workweeks (CFRA) of benefits. [Title 2, CCR, §11046(d).]

For example, assume an employee is off work for pregnancy disability two weeks before the birth and is disabled for six weeks afterward. Those eight weeks are FMLA and PDLA, and thus the employee is entitled to benefits during that time. After the employee is released by her physician, she is entitled to 12 workweeks of CFRA child bonding leave, which would include the remaining four weeks of FMLA leave (because FMLA can be used for pregnancy disability and/or child bonding). The employee would have 20 workweeks of leave, all with benefits.

Example – Eight weeks disability (2 weeks before birth), 12 workweeks child care.

|——2 wks——|——6 wks——|——12 wks——|
|Birth       |Disability ends|
|——FMLA (12 wkwks)——|
|——PDLA (8 wkwks)——|
|——CFRA (12 wkwks)——|
|——Benefits (20 wkwks)——|

The PDLA regulations can be found at www.dfeh.ca.gov.
OBLIGATIONS ONCE AN EMPLOYEE TAKES A FAMILY AND MEDICAL LEAVE

Once an employee begins a family and medical leave, an employer has few obligations, but they are important and failure to follow the laws could lead to substantial liability.

**Benefits**

While an employee is on family and medical leave, he or she is entitled to participate in group health plans as if still working, including the employer's contribution.

The employee's right to participate in the plans is only the same as if he or she were working. Thus, if an employee contribution is required, it is still required while the employee is on leave. If the leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably through a payroll deduction. If the leave is unpaid, the employer has several options for the manner of requiring payment, but it may not increase the contribution for “administrative costs” and may not require pre-payment of the entire contribution. The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. If an employee is 30 days late with a payment, the employer may send written notice of the delinquency and state that failure to remit the money in 15 days will result in termination of coverage.

If an employee discontinues health insurance coverage while on an FMLA/CFRA leave, he or she must be reinstated on the plan immediately upon return. The employer (and insurance carrier) cannot require that the employee wait for an open enrollment period or that the employee re-qualify for benefits.

If there are any changes in benefit plans or coverage while an employee is on FMLA/CFRA leave, the employee should be given notice of the changes as if he or she were still working.

**Paid Family Leave**

California’s “Family Temporary Disability Insurance Program” (FTDI) (also known as “Paid Family Leave”) is part of the State Disability Insurance program (SDI). FTDI provides six weeks of “wage replacement benefits” (partially paid leave) to workers who take unpaid time off to care for a seriously ill child, spouse, parent, or registered domestic partner, or to bond with a new child of the employee or registered domestic partner. The law applies only to employees who are covered by SDI.

Employees receive a portion of their pay in FTDI benefits. Employees have to provide medical certification of the serious health condition and that it “warrants the participation of the employee.”
In most districts, are not covered by SDI unless specifically negotiated by bargaining units and an election is filed with the state.

Information on the program is available through the Employment Development Department and on its website at http://www.edd.ca.gov/Disability/Paid_Family_Leave.htm.

**NOTE**

*Effective July 1, 2014, the Paid Family Leave program will be expanded to provide compensation for employees who take unpaid leave to care for siblings, grandparents, grandchildren, and parents-in-law. The bill enacting this change did not change the California Family Rights Act statute and did not expand the reasons for which an employer is required to grant family leave. An employee who participates in the FTDI program will only be entitled to compensation for these additional family members if the employer agrees to grant unpaid leave for those reasons.*

**Periodic Updates**

An employer may require an employee on a family and medical leave to report periodically (at reasonable intervals of not less than 30 days) to the employer on the status and intention of the employee to return to work. Any such requirement must be nondiscriminatory.

**Layoffs or Disciplinary Actions (Including Dismissal)**

Employees on FMLA/CFRA leaves are subject to the same employment conditions as employees who are working. Thus, the employer has the right to take employment action against an employee on such leave, *if the basis for the action is unrelated to the leave.*

Employees on FMLA/CFRA leave may be laid off in the same manner as those employees who are working. Employees on FMLA/CFRA leave do not accrue seniority credit while on leave (unless it runs concurrently with paid leave), but they also do not lose any seniority (the leave is not considered a break in service). All layoff procedures remain unchanged for employees on leave; it is important, however, not to forget such employees in seniority lists, bumping charts, and all notices. Do not consider positions of employees on leave as vacant.

Simply because an employee takes an FMLA/CFRA leave does not insulate him or her from personnel actions. If the district has grounds for discipline that are not based on the taking of the leave, it may initiate or continue to proceed with the disciplinary action.
Any leave taken for an FMLA and/or CFRA qualifying reason may not be used against the employee in any way. This is true even if the employer has not designated the leave as family leave. Thus, if an employer is disciplining an employee for excessive absenteeism it must exclude all leave that would have qualified under FMLA and/or CFRA. If the employee already has used the 12 workweeks of FMLA/CFRA leave in the designated 12-month period, then leave taken after that can be included in the disciplinary action (though disability accommodation laws may also bar an employer from using disability-related absences as a basis for discipline). Even if leave qualifies under FMLA and/or CFRA, an employer may discipline an employee for failing to comply with reasonable rules related to use of leave, such as notice requirements.

Even where the discipline is unrelated to the leave, an employee who has requested, is taking, or has taken, an FMLA and/or CFRA leave may argue that any action taken was retaliatory or discriminatory. Employers taking disciplinary actions against employees in such situations should be sure to have strong, factual, documented reasons for the action that are unrelated to the leave or the reasons for the leave. Taking disciplinary action while an employee is on, or has just returned from, an FMLA/CFRA leave is always subject to the risk of litigation.

**Return From FMLA/CFRA Leave**

On return from an FMLA/CFRA leave, the employee is entitled to be returned to the same position that employee held when the leave commenced, or to an “equivalent position.”

If the leave was for the employee’s own serious health condition and the employee is unable to perform an essential function of the position because of a physical or mental condition (including the continuation of a serious health condition), the employee has no right to be restored to another position under the FMLA or CFRA. However, the employee may have a right to reasonable accommodation, including assignment to a different position, under the Americans with Disabilities Act and/or the California Fair Employment and Housing Act.

The employer may require a certification of ability to return to work if the employee was absent for his or her own serious health condition. However, it cannot require the employee to obtain a second opinion or go to a physician selected by the employer, even though it might otherwise have that right under its collective bargaining agreement or policies. The 2009 FMLA regulations clarify, however, that the employer might have the right under the ADA to require such information if there is a belief that the employee cannot perform the essential functions of his or her position as a result of a protected disability, or poses a direct threat to himself/herself or others in the workplace.

An employer may not permanently replace an employee on an FMLA/CFRA leave unless it has an equivalent vacancy available upon the employee’s return. Generally, a position is equivalent if:

- The employee’s salary and hours are the same.
- The employee’s opportunity for overtime or extra pay is the same.
- The position requires the same level of skill, effort, and responsibility.
• The position is at the same or geographically approximate worksite.

• The position has the same shift or the same or equivalent work schedule.

If the employee used paid leaves concurrently with FMLA/CFRA leave, the employee may have greater return rights than under the FMLA or CFRA. For example, the collective bargaining agreement may guarantee the employee a right of reinstatement to the specific position from which he or she went on leave, as opposed to reinstatement to an equivalent position.

An employee is not entitled to return to an equivalent position if his or her position has been eliminated through a layoff, so long as the employee received all layoff rights.

**Highly Compensated or “Key” Employees**

The lone exception to the reinstatement requirement is for “highly compensated” or “key” employees. This applies only to reinstatement, not to granting or denying a leave request. A highly compensated employee is one who is a salaried employee among the highest paid 10% of the employer’s employees.

An employer may deny reinstatement to a key employee if the refusal is necessary to prevent substantial and grievous economic injury to the operations of the employer and the employer notifies the employee of the intent to refuse reinstatement at the time the employer determines the refusal is necessary. The employee then must be given an opportunity to return to work immediately.

It would be difficult, if not impossible, to prove “substantial and grievous economic injury” if the employee is reinstated, thus employers will rarely be able to successfully use this provision.

**What Do You Do When An Employee Cannot Return?**

Situations may exist where the employee is unable to return. Depending on the reason for the inability to return and the type of employee, the employer has various options under the Education Code, board policies and regulations, and collective bargaining agreements. This could include additional paid or unpaid leaves or dismissal.

**Recovery of Insurance Premiums if Employee Fails to Return From Leave**

If an employee fails to return from family and medical leave, an employer may recover the health insurance premiums it paid during the unpaid portions of the leave, with certain important exceptions. An employee is considered to have “returned” to work if he or she returns for at least 30 calendar days. Exceptions to an employer’s right to recover premiums:

• Highly compensated employees whom the employer has informed it will not reinstate upon return;

• Employees who cannot perform the functions of their jobs as a result of their own serious health conditions;
Employees who are needed to care for the serious health conditions of a spouse, registered domestic partner (CFRA only), child, parent, or specified military service member; or

Other circumstances “beyond the control of the employee.” **Examples:**

- The spouse being unexpectedly transferred more than 75 miles from the employee’s worksite;
- The employee being laid off;
- A parent’s decision not to return because a newborn child has a serious health condition (but not if the parent simply decides not to return to work to stay home with a healthy child because it is not a circumstance beyond his or her control).

If the employee cannot return, the employer will, in most situations, have to provide the employee with his or her COBRA rights to continue health coverage at the employee’s expense.

An employer cannot recover the health benefit premium for any part of the FMLA/CFRA leave that ran concurrently with paid leave. This is because the employee was entitled to paid benefits under the terms of the paid leave independent of the FMLA/CFRA leave benefits.
FAMILY AND MEDICAL LEAVE
NOTICES, POLICIES, REGULATIONS,
AND COLLECTIVE BARGAINING
AGREEMENTS

In addition to implementing the requirements of the FMLA and CFRA, employers must ensure that their employees are aware of their rights under the laws. Employers should adopt policies and regulations to clarify those provisions of the laws that are in the employer’s discretion. In addition, portions of both laws are subject to negotiation under collective bargaining laws.

General Recommendation

An employer may grant greater rights to its employees than required by either law. However, such provisions could have costly effects and result in greater disruption of employer services. Before agreeing to expanded rights, districts should consider the costs and potential impact on programs.

IMPORTANT

While employers are not required to include family leave policies in collective bargaining agreements, a federal court decision makes it advantageous to do so. The employer must define the 12-month period for taking the leave (calendar year, fiscal year, rolling year). If it includes that definition in its collective bargaining agreements, it is considered sufficient notice for FMLA purposes for bargaining unit employees. Otherwise, the employer must provide each employee with written notice defining the year.

Notices

Employers are required to post on their premises, notices explaining the FMLA and CFRA provisions and information concerning the procedures for filing complaints of violations of the acts with the appropriate agencies. The notices must be posted prominently where employees work and where they can be readily seen by employees and applicants. If the employer has more than one worksite, the notice should be posted at each site.
Under the FMLA, an employer that willfully violates the posting requirement may be assessed a civil penalty of up to $100 for each separate offense. Further, an employer that fails to post the required notice cannot take any adverse action against an employee, including denying family and medical leave, for failing to furnish the employer with advance notice of the need to take a family and medical leave.

**Policies and Regulations**

Neither the FMLA nor the CFRA requires that an employer adopt policies and regulations implementing the laws. Both laws, however, do require that if the employer has any written guidance to employees concerning employee benefits or leave rights (such as an employee handbook), FMLA and CFRA rights must be included. If an employer does not have anything such as an employee handbook, it must provide written guidance to employees concerning employee rights and obligations under the laws.

**Collective Bargaining Agreements**

While the minimum requirements of FMLA and CFRA are not negotiable (because they are mandated by law), portions of the laws that are subject to employer discretion, or additional leave rights, are negotiable.

Employers should review collective bargaining agreements to ensure that no provisions conflict with FMLA/CFRA.

The advantage of including the family leave provisions in the collective bargaining agreement is that this constitutes notice of the defined 12-month period for taking the leave. If it is not specifically defined in the contract, a handbook, or other information provided to each employee, the employer must send a notice to all employees defining the 12-month period. Failure to do so will allow the employee to apply the 12-month-period definition in the manner most beneficial to him or her.

The most obvious drawback of including FMLA/CFRA in a collective bargaining agreement is that complaints concerning application of the laws would be subject to the grievance procedure unless the parties specifically provide that an employee or the union may not grieve application of the family leave provisions.

Issues a union may attempt to bargain:

- Additional qualifying reasons, such as allowing leave to care for serious health conditions of other family members or individuals (such as including all persons listed in the bereavement section);
- Medical certification from employees prior to, during, and at the return from leave;
- Timing and type of notice required from employees;
• Eliminating the 1,250 hours-worked requirement, or change its calculation to include paid leaves;

• Eliminating the employer’s right to require an employee to use paid leaves concurrently with unpaid FMLA/CFRA leave;

• Increasing the 12 (or 26) workweeks of leave;

• Making issues concerning the leave subject to the grievance procedure and binding arbitration;

• Allowing employees to use sick leave for reasons other than their own illnesses.
This AALRR publication is intended for informational purposes only and should not be relied upon in reaching a conclusion in a particular area of law. Applicability of the legal principles discussed may differ substantially in individual situations. Receipt of this or any other AALRR publication does not create an attorney-client relationship. The Firm is not responsible for inadvertent errors that may occur in the publishing process.
FAMILY LEAVE AND
MEDICAL LEAVE SAMPLE FORMS
The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

1. Employee's Name: __________________________________________

2. Patient's Name (If other than employee): __________________________

3. Date medical condition or need for treatment commenced
   [NOTE: THE HEALTH CARE PROVIDER IS NOT TO DISCLOSE THE UNDERLYING DIAGNOSIS WITHOUT THE CONSENT OF THE PATIENT]:

4. Probable duration of medical condition or need for treatment: __________________________

5. The attached sheet describes what is meant by a "serious health condition" under both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). Does the patient's condition qualify under any of the categories described? If so, please check the appropriate category.

(1) ☐  (2) ☐  (3) ☐  (4) ☐  (5) ☐  (6) ☐
6. If the certification is for the serious health condition of the employee, please answer the following:

YES      NO

☐ ☐ Is employee able to perform work of any kind?  
(If “No,” skip next question.)

☐ ☐ Is employee unable to perform any one or more of the essential functions of employee’s position?  (Answer after reviewing statement from employer of essential functions of employee’s position, or, if none provided, after discussing with employee.)

7. If the certification is for the care of the employee’s family member, please answer the following:

YES      NO

☐ ☐ Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety, or transportation?

☐ ☐ After review of the employee’s signed statement (See Item 10 below), does the condition warrant the participation of the employee?  
(This participation may include psychological comfort and/or arranging for third-party care for the family member.)

8. Estimate the period of time care needed or during which the employee’s presence would be beneficial:

________________________________________________________________________

9. Please answer the following question only if the employee is asking for intermittent leave or a reduced work schedule.

YES      NO

☐ ☐ Is it medically necessary for the employee to be off work on an intermittent basis or to work less than the employee’s normal work schedule in order to deal with the serious health condition of the employee or family member?

If the answer to 9 is yes, please indicate the estimated number of doctor’s visits, and/or estimated duration of medical treatment, either by the health care practitioner or another provider of health services upon referral from the health care provider.

________________________________________________________________________
ITEM 10 IS TO BE COMPLETED BY THE EMPLOYEE NEEDING FAMILY LEAVE.
****TO BE PROVIDED TO THE HEALTH CARE PROVIDER UNDER SEPARATE COVER.

10. When family care leave is needed to care for a seriously ill family member, the employee shall state the care he or she will provide and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced work schedule:

11. Signature of health care provider:

Date: ______________________________

12. Signature of Employee:

Date: ______________________________

* * * * * * * * * * * * * * *
SERIOUS HEALTH CONDITION

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

1. Hospital Care

Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment

(a) A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition) that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

3. Pregnancy [NOTE: An employee's own incapacity due to pregnancy is covered as a serious health condition under FMLA but not under CFRA.]

Any period of incapacity due to pregnancy, or for prenatal care

4. Chronic Conditions Requiring Treatment

A chronic condition which:

(1) Requires periodic visits for treatment by a health care provider or by a nurse or physician's assistant under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.)
5. Permanent/Long-Term Conditions Requiring Supervision

A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer’s, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions)

Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).
Notice of Eligibility and Rights & Responsibilities:
Family and Medical Leave Act (FMLA)
and California Family Rights Act (CFRA) (DOL Form WH-381 revised)

TO: ________________________________ (Employee)
FROM: ______________________________ (Employer Representative)
DATE: ______________________________

Part A – Notice of Eligibility

On __________, you informed us that you needed leave beginning on ____________ for:

____ The birth of a child, or placement of a child with you for adoption or foster care;

____ Your own serious health condition;

____ Because you are needed to care for your _____ spouse; _____ child; _____ parent; _____
registered domestic partner (CFRA leave only) due to his/her serious health condition.

____ Because of a qualifying exigency arising out of the fact that your _____ spouse; _____ son or
daughter; _____ parent is on covered active duty or call to covered active duty status with
the Armed Forces.

____ Because you are the _____ spouse; _____ son or daughter; _____ parent; _____ next of kin
of a covered servicemember or veteran with a serious injury or illness.

This Notice is to inform you that you:

____ Are eligible for FMLA and/or CFRA leave (See Part B below for Rights and Responsibilities)

____ Are not eligible for FMLA and/or CFRA leave, because (only one reason need be checked,
although you may not be eligible for other reasons):

____ You have not met the FMLA’s and/or CFRA’s 12-month length of service
requirement. As of the first date of requested leave, you will have worked
approximately _______ months towards this requirement.

____ You have not met the FMLA’s hours of service requirement.

____ You do not work and/or report to a site with 50 or more employees within 75 miles.

If you have any questions, contact __________________________ or view the FMLA/CFRA poster
located in __________________________.
Part B – Rights and Responsibilities for Taking FMLA and/or CFRA Leave

As explained in Part A, you meet the eligibility requirements for taking FMLA and/or CFRA leave and still have FMLA and/or CFRA leave available in the applicable 12-month period. However, in order for us to determine whether your absence qualifies as FMLA and/or CFRA leave, you must return the following information to us by __________________. (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

____ Sufficient certification to support your request for FMLA and/or CFRA leave. A certification form that sets forth the information necessary to support your request ___ is ___ is not enclosed.

____ Sufficient documentation to establish the required relationship between you and your family member.

____ Other information needed (such as documentation for military family leave):

________________________________________________________________________

________________________________________________________________________

____ No additional information requested.

If your leave does qualify as FMLA and/or CFRA leave you will have the following responsibilities while on FMLA and/or CFRA leave (only checked blanks apply):

____ Contact __________________ at __________________ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA and/or CFRA leave, and recover these payments from you upon your return to work.

____ You will be required to use your available paid ______ sick, ______ extended illness, ______ vacation, and/or ______ other leave during your FMLA and/or CFRA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA and/or CFRA leave and counted against your FMLA and/or CFRA leave entitlement.

____ Due to your status within the district office, you are considered a “key employee” as defined in the FMLA and/or CFRA. As a “key employee,” restoration to employment may be denied following FMLA and/or CFRA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We _____ have ____ have not determined that restoring you to employment at the conclusion of FMLA and/or CFRA leave will cause substantial and grievous economic harm to us.
While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every __________________. (Indicate interval of periodic reports, as appropriate for the particular leave situation.)

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA and/or CFRA leave you will have the following rights while on FMLA and/or CFRA leave:

• You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:
  ___ the calendar year (January – December).
  ___ a fixed leave year based on a fiscal year (July 1 through June 30, inclusive).
  ___ the 12-month period measured forward from the date of your first FMLA and/or CFRA leave usage.
  ___ a “rolling” 12-month period measured backward from the date of any FMLA and/or CFRA leave usage.

• You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on _________________________.

• Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.

• You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA and/or CFRA-protected leave. (If your leave extends beyond the end of your FMLA and/or CFRA entitlement, you do not have return rights under FMLA and/or CFRA.)

• If you do not return to work following FMLA and/or CFRA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA and/or CFRA leave; 2) the continuation, recurrence, or onset of a covered servicemember’s serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA and/or CFRA leave.

• If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA and/or CFRA leave entitlement, you have the right to have ___ sick, ___ extended illness, ___ vacation, and/or ___ other leave run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA and/or CFRA leave.
For a copy of conditions applicable to sick/extended illness/vacation/other leave usage please refer to __________________________ available at:

______________________________

Applicable conditions for use of paid leave: __________________________

Once we obtain the information from you as specified above, we will inform you, within five (5) business days, whether your leave will be designated as FMLA and/or CFRA leave and count towards your FMLA and/or CFRA leave entitlement. If you have any questions, please do not hesitate to contact: __________________________ at __________________________.
Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee’s FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c).

Designation Notice –
Family and Medical Leave Act (FMLA)
and California Family Rights Act (CFRA) (DOL Form WH-382)

To: ___________________________ (Employee)

FROM: ______________________________ (Employer Representative)

Date: ____________________________

We have reviewed your request for leave under the FMLA and/or CFRA and any supporting documentation that you have provided.

We received your most recent information on ______________________ and decided:

__ Your FMLA and/or CFRA leave request is approved. All leave taken for this reason will be designated as FMLA and/or CFRA leave.

The FMLA and/or CFRA require that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

__ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement:

__ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA and/or CFRA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).
Please be advised (check if applicable):

____ You have requested to use paid leave during your FMLA and/or CFRA leave. Any paid leave taken for this reason will count against your FMLA and/or CFRA leave entitlement.

____ We are requiring you to substitute or use paid leave during your FMLA and/or CFRA leave.

____ If the leave is for your own serious health condition, you will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position ____ is ____ is not attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

Additional information is needed to determine if your FMLA and/or CFRA leave request can be approved:

____ The certification you have provided is not complete and sufficient to determine whether the FMLA and/or CFRA apply to your leave request. You must provide the following information no later than ________________________, (provide at least seven calendar days) unless it is not practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.

(Specify information needed to make the certification complete and sufficient)

____ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

____ Your FMLA and/or CFRA Leave request is Not Approved.

____ The FMLA and/or CFRA do not apply to your leave request.

____ You have exhausted your FMLA and/or CFRA leave entitlement in the applicable 12-month period.
Certification of Qualifying Exigency for Military Family Leave
[Family and Medical Leave Act (FMLA)] (DOL Form WH-384)

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a current servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees’ family members created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 CFR 1630.14(c)(1), if the Americans with Disabilities Act applies.

Employer name: ____________________________________________

Contact Information: ________________________________________

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II fully and completely. The FMLA permits an employer to require that you submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a qualifying exigency. Several questions in this section seek a response as to the frequency or duration of the qualifying exigency. Be as specific as you can; terms such as “unknown,” or “indeterminate” may not be sufficient to determine FMLA coverage. Your response is required to obtain a benefit. 29 CFR 825.310. While you are not required to provide this information, failure to do so may result in a denial of your request for FMLA leave. Your employer must give you at least 15 calendar days to return this form to your employer.

Your Name: ________________________________________________

First Middle Last

Name of covered military member on covered active duty or call to covered active duty status:

First Middle Last

Relationship of covered military member to you: ________________________________

Period of covered military member’s covered active duty: ________________________________

A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes written documentation confirming a covered military member’s covered active duty or call to covered active duty status. Please check one of the following:

_____ A copy of the covered military member’s active duty orders is attached.

_____ Other documentation from the military certifying that the covered military member is on covered active duty (or has been notified of an impending call to covered active duty) is attached.

_____ I have previously provided my employer with sufficient written documentation confirming the covered military member’s covered active duty or call to covered active duty status.
PART A: QUALIFYING REASON FOR LEAVE

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military; a document confirming the military member's Rest and Recuperation leave; a document confirming an appointment with a third party, such as a counselor or school official, or staff at a care facility; or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached.

____ Yes ____ No ____ None Available

PART B: AMOUNT OF LEAVE NEEDED

1. Approximate date exigency commenced.

________________________________________________________________________

Probable duration of exigency:

________________________________________________________________________

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency? ____Yes ____No.

If so, estimate the beginning and ending dates for the period of absence:

________________________________________________________________________

3. Will you need to be absent from work periodically to address this qualifying exigency? ____Yes ____No.

Estimate schedule of leave, including the dates of any scheduled meetings or appointments:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):

Frequency: _____ times per _____ week(s) _____ month(s)

Duration: _____ hours ____ day(s) per event.
PART C:

If leave is requested to meet with a third party (such as to arrange for childcare, to attend counseling, to attend meetings with school or childcare or parental care providers, to make financial or legal arrangements, to act as the covered military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: ___________________________ Title: ___________________________

Organization: _________________________________________________________________

Address: _______________________________________________________________________

Telephone: (______) __________________ Fax: (______) ___________________________

Email: _________________________________________________________________________

Describe nature of meeting: ______________________________________________________

____________________________________________________________________________

____________________________________________________________________________

PART D:

I certify that the information I provided above is true and correct.

__________________________________________ Date

Signature of Employee
Certification for Serious Injury or Illness of a Current Servicemember for Military Family Leave [Family and Medical Leave Act (FMLA)] (DOL Form WH-385)

Notice to the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a current servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 CFR 1630.14(c)(1), if the Americans with Disabilities Act applies.

SECTION I: For Completion by the EMPLOYEE and/or the CURRENT SERVICEMEMBER for whom the Employee Is Requesting Leave

INSTRUCTIONS to the EMPLOYEE or CURRENT SERVICEMEMBER: Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a servicemember. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 CFR 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; (3) a DOD non-network TRICARE authorized private health care provider; or (4) a health care provider as defined in 29 CFR 825.125

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a current member of the Regular Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member’s active duty and was aggravated by service in the line of duty on active duty in the Armed Forces that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a current servicemember's serious injury or illness includes written documentation confirming that the servicemember's injury or illness was incurred in the line of duty on active duty or if not, that the current servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that the current servicemember is undergoing treatment for such injury or illness by a health care provider listed above. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as “lifetime,” “unknown,” or “indeterminate” may not be sufficient to determine FMLA coverage. Limit your responses to the servicemember’s condition for which the employee is seeking leave.
The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

SECTION I: For Completion by the EMPLOYEE and/or the CURRENT SERVICEMEMBER for whom the Employee Is Requesting Leave: (This section must be completed first before any of the below sections can be completed by a health care provider.)

PART A: EMPLOYEE INFORMATION

Name and Address of Employer (this is the employer of the employee requesting leave to care for the current servicemember):

Name of Employee Requesting Leave to Care for the Current Servicemember:

First    Middle    Last

Name of the Current Servicemember (for whom employee is requesting leave to care):

First    Middle    Last

Relationship of Employee to the Current Servicemember:

☐ Spouse   ☐ Parent   ☐ Son   ☐ Daughter   ☐ Next of Kin

PART B: SERVICEMEMBER INFORMATION

(1) Is the Servicemember a Current Member of the Regular Armed Forces, the National Guard, or Reserves?    Yes    No

If yes, please provide the servicemember's military branch, rank and unit currently assigned to:
Is the servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)?  ___ Yes ___ No  If yes, please provide the name of the medical treatment facility or unit:  

(2) Is the Servicemember on the Temporary Disability Retired List (TDRL)?  
___ Yes ___ No

PART C: CARE TO BE PROVIDED TO THE SERVICEMEMBER

Describe the Care to Be Provided to the Current Servicemember and an Estimate of the Leave Needed to Provide the Care:

SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; (3) a DOD non-network TRICARE authorized private health care provider; or (4) a health care provider as defined in 29 CFR 825.125: If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator). (Please ensure that Section I above has been completed before completing this section. Please be sure to sign the form on the last page.)

PART A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider's Name and Business Address:

Type of Practice/Medical Specialty:

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; (4) a DOD non-network TRICARE authorized private health care provider; or (5) a health care provider as defined in 29 CFR 825.125:

Telephone: ( ) ______________________ Fax: ( ) ______________________

Email: ______________________
PART B: MEDICAL STATUS

(1) The current Servicemember’s medical condition is classified as (Check One of the Appropriate Boxes):

☐ (VSI) Very Seriously Ill/Injured – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ (SI) Seriously Ill/Injured – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ OTHER Ill/Injured – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member’s office, grade, rank, or rating.

☐ NONE OF THE ABOVE (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a “serious health condition” under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380-F or an employer-provided form seeking the same information.)

(2) Is the current Servicemember being treated for a condition which was incurred or aggravated by service in the line of duty on active duty in the Armed Forces? ___ Yes ___ No

(3) Approximate date condition commenced: ________________________________

(4) Probable duration of condition and/or need for care: ________________________________

(5) Is the servicemember undergoing medical treatment, recuperation, or therapy? ___ Yes ___ No. If yes, please describe medical treatment, recuperation or therapy:

________________________________________________________________________

PART C: SERVICEMEMBER’S NEED FOR CARE BY FAMILY MEMBER

(1) Will the servicemember need care for a single continuous period of time, including any time for treatment and recovery? ___ Yes ___ No

If yes, estimate the beginning and ending dates for this period of time:

________________________________________________________________________

(2) Will the servicemember require periodic follow-up treatment appointments? ___ Yes ___ No. If yes, estimate the treatment schedule:

________________________________________________________________________

(3) Is there a medical necessity for the servicemember to have periodic care for these follow-up treatment appointments? ___ Yes ___ No
(4) Is there a medical necessity for the servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? Yes ___ No. If yes, please estimate the frequency and duration of the periodic care:

Signature of Health Care Provider: ________________________________

Date: ________________________________
Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave
[Family and Medical Leave Act (FMLA)] (DOL Form WH-385-V)

Notice to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking military caregiver leave under the FMLA leave due to a serious injury or illness of a covered veteran to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 CFR 1630.14(c)(1), if the Americans with Disabilities Act applies.

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

SECTION I: For Completion by the EMPLOYEE and/or the VETERAN for whom the Employee Is Requesting Leave

INSTRUCTIONS to the EMPLOYEE and/or VETERAN: Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for military caregiver leave under the FMLA leave due to a serious injury or illness of a covered veteran. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 CFR 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

(This section must be completed before Section II can be completed by a health care provider.)

PART A: EMPLOYEE INFORMATION

Name and Address of Employer (this is the employer of the employee requesting leave to care for a Veteran):
Name of Employee Requesting Leave to Care for a Veteran:

<table>
<thead>
<tr>
<th>First</th>
<th>Middle</th>
<th>Last</th>
</tr>
</thead>
</table>

Name of Veteran (for whom employee is requesting leave to care):

<table>
<thead>
<tr>
<th>First</th>
<th>Middle</th>
<th>Last</th>
</tr>
</thead>
</table>

Relationship of Employee to Veteran:

☐ Spouse  ☐ Parent  ☐ Son  ☐ Daughter  ☐ Next of Kin (Please specify relationship):

PART B: VETERAN INFORMATION

(1) Date of the Veteran’s Discharge:

(2) Was the Veteran dishonorably discharged or released from the Armed Forces (including the National Guard or Reserves)?  ___Yes  ___No

(3) Please provide the Veteran’s military branch, rank and unit at the time of discharge:

(4) Is the Veteran receiving medical treatment, recuperation, or therapy for an injury or illness?  ___Yes  ___No

PART C: CARE TO BE PROVIDED TO THE VETERAN

Describe the care to be provided to the Veteran and an estimate of the leave needed to provide the care:

__________________________________________________________________________

__________________________________________________________________________

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SECTION II: For Completion by: (1) a UNITED STATES DEPARTMENT OF DEFENSE (“DOD”) HEALTH CARE PROVIDER; (2) a UNITED STATE DEPARTMENT OF VETERANS AFFAIRS (“VA”) HEALTH CARE PROVIDER; (3) a DOD TRICARE network authorized private health care provider; (4) a DOD non-network TRICARE authorized private health care provider; or (5) a health care provider as defined in 29 CFR 825.125.

**INSTRUCTIONS to the HEALTH CARE PROVIDER:** The employee named in Section I has requested leave under the military caregiver leave provision of the FMLA to care for a family member who is a veteran. For purposes of FMLA military caregiver leave, a serious injury or illness means an injury or illness incurred by the servicemember in the line of duty on active duty in the Armed Forces (or that existed before the beginning of the servicemember’s active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the servicemember became a veteran, and is:

(i) a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember’s office, grade, rank, or rating; or

(ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or

(iii) a physical or mental condition that substantially impairs the covered veteran’s ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or

(iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans’ Affairs Program of Comprehensive Assistance for Family Caregivers.

A complete and sufficient certification to support a request for FMLA military caregiver leave due to a covered veteran’s serious injury or illness includes written documentation confirming that the veteran’s injury or illness was incurred in the line of duty on active duty or existed before the beginning of the veteran’s active duty and was aggravated by service in the line of duty on active duty, and that the veteran is undergoing treatment, recuperation, or therapy for such injury or illness by a health care provider listed above. Answer fully and completely all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as “lifetime,” “unknown,” or “indeterminate” may not be sufficient to determine FMLA military caregiver leave coverage. Limit your responses to the veteran’s condition for which the employee is seeking leave.

(Please ensure that Section I has been completed before completing this section. Please be sure to sign the form on the last page and return this form to the employee requesting leave (See Section I, Part A above). **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**
PART A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider’s Name and Business Address:

Telephone: ( ) ___________________ Fax: ( ) ___________________

Email: ________________________________

Type of Practice/Medical Specialty: ________________________________

Please indicate if you are:

☐ a DOD health care provider
☐ a VA health care provider
☐ a DOD TRICARE network authorized private health care provider
☐ a DOD non-network TRICARE authorized private health care provider
☐ other health care provider

PART B: MEDICAL STATUS

Note: If you are unable to make certain of the military-related determinations contained in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as, DOD Recovery Care Coordinator) or an authorized VA representative.

(2) The Veteran’s medical condition is:

☐ A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember’s office, grade, rank, or rating.

☐ A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50% or higher, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave.

☐ A physical or mental condition that substantially impairs the covered veteran’s ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment.

☐ An injury, including a psychological injury, on the basis of which the covered veteran is enrolled in the Department of Veterans’ Affairs Program of Comprehensive Assistance for Family Caregivers.

☐ None of the above.

(2) Is the Veteran being treated for a condition which was incurred or aggravated by service in the line of duty on active duty in the Armed Forces? _____ Yes _____ No

(3) Approximate date condition commenced: ____________________________
(4) Probable duration of condition and/or need for care:__________________________

(5) Is the veteran undergoing medical treatment, recuperation, or therapy for this condition?  
   ____Yes ____No.

   If yes, please describe medical treatment, recuperation or therapy:
   ____________________________

PART C: VETERAN'S NEED FOR CARE BY FAMILY MEMBER

"Need for care" encompasses both physical and psychological care. It includes situations where, for
example, due to his or her serious injury or illness, the veteran is unable to care for his or her own
basic medical, hygienic, or nutritional needs or safety, or is unable to transport him or herself to the
doctor. It also includes providing psychological comfort and reassurance which would be beneficial
to the veteran who is receiving inpatient or home care.

(1) Will the veteran need care for a single continuous period of time, including any time for
treatment and recovery? ____Yes ____No

   If yes, estimate the beginning and ending dates for this period of time:
   ____________________________

(2) Will the veteran require periodic follow-up treatment appointments?  
   ____Yes ____No. If yes, estimate the treatment schedule:
   ____________________________

(3) Is there a medical necessity for the veteran to have periodic care for these follow-up treatment
   appointments? ____Yes ____No

(4) Is there a medical necessity for the veteran to have periodic care for other than scheduled
   follow-up treatment appointments (e.g., episodic flare-ups of medical condition)?  
   ____Yes ____No. If yes, please estimate the frequency and duration of the periodic care:
   ____________________________

Signature of Health Care Provider: _________________________ Date: __________

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UNDERSTANDING AND MANAGING EMPLOYEE LEAVES
Understanding and Managing Employee Leaves

By Tina L. Kannarr, Esq.
Atkinson, Andelson, Loya, Ruud and Romo

It should be so simple. An employee calls in sick one day and a year later you’re still trying to figure out how much leave he or she should receive. Between confusing statutes, overlapping laws, and quirky contract language, personnel and payroll offices spend far too many hours calculating and recalculating leaves, trying to make sure that the employee receives his or her entitlement and the district complies with all of its legal obligations.

This workshop will explain the legal requirements and help districts harmonize the many laws and become aware of the issues so that they can handle leave questions without wasting valuable man-hours.

CAUTION

Because individual provisions vary widely in these areas, consult your collective bargaining agreements, policies, regulations, and past practice before applying these statutes. Leaves of absence and procedures are negotiable subjects. While contract language cannot limit employee leave rights granted by state or federal law, it can grant additional benefits.
The Basics – Types of Illness or Injury Leaves

Community College Academic Employees:

Full-Paid Sick Leave (Education Code Section 87781)

Academic employees earn 10 days of full-paid sick leave each year (proportionately less if part-time). Unused leave is never lost and accumulates from year to year. The leave can be used before it is earned. (Education Code Section 87781) An employee is not entitled to cash payment for accumulated sick leave when he or she leaves employment, but the sick leave can be credited toward retirement or transferred to another district in some circumstances. (Education Code Sections 22717, 87782, 87783, and 87785)

Districts may adopt reasonable rules and regulations regarding the use of sick leave, such as notice and verification requirements.

Extended Illness Leave (Education Code Sections 87780 and 87786)

Academic employees are entitled to one of two types of extended illness leave under the Education Code. Neither is limited per illness or injury.

- Differential Pay Leave — Section 87780 grants each academic employee five school months of extended illness leave for which the employee receives the difference between his or her salary and the salary that is actually paid to a substitute or would have been paid had one been employed (“differential pay leave”). This leave does not accumulate.

- 50% Pay Leave — Section 87786 allows districts to adopt an alternative to differential pay leave. If this plan is adopted, the employee receives 50% of his or her salary for five months (“50% pay leave”). This leave does not accumulate.

As with regular sick leave, districts may adopt reasonable rules and regulations regarding the use of such leave.

Pregnancy Leave (Education Code Section 87766)

Education Code Section 87766 requires districts to provide for leaves of absence for academic employees absent because of pregnancy, miscarriage, childbirth, and recovery therefrom. This leave is considered “temporary disability leave” and the employee is entitled to all of the same rights as other persons with temporary disabilities. (The California Pregnancy Disability Leave Act will be discussed separately below.)
Disability Benefit Applicant (Education Code Sections 24005 and 87789)

Districts may grant leaves of absence to academic employees who have applied for disability benefits through STRS. This leave may not extend more than 30 days beyond the final determination by STRS. If STRS determines that the employee is eligible for STRS disability, the district must extend the leave for the term of the disability, not to exceed 39 months (unless the employee resigns). This leave is unpaid. (Education Code Sections 24005 and 87789) The employee filling the position is designated as temporary so long as he or she is employed only for the term of the disability allowance leave.

Industrial Accident and Illness Leave (Education Code Section 87787)

Academic employees are entitled to 60 days of full-paid industrial accident leave in one fiscal year for the same illness or accident. The 60 days do not accumulate. If the 60-day period overlaps into the next fiscal year, the employee may only use the remainder and will not receive a new 60-day entitlement for the same illness or injury. After the 60 days are exhausted, the employee has the right to use regular sick leave and extended illness leave. The employee is entitled to a maximum of 100% of his or her salary when combined with temporary disability payments. If the district does not adopt regulations limiting the amount of days to 60, the employee receives an unlimited number of days. (Education Code Section 87787)

Community College Classified Employees:

Full-Paid Sick Leave (Education Code Section 88191)

Twelve-month classified employees are entitled to 12 days of full-paid sick leave each year. Employees who work less than 12 months or five days per week are entitled to pro-rated sick leave. Unused leave is never lost and accumulates from year to year. The leave may be taken before it is earned, except that new employees may only take six days (or the appropriate portion if part-time) during the first six months of service. (Education Code Section 88191) An employee is not entitled to cash payment for accumulated sick leave when he or she leaves employment, but the leave may be credited toward retirement or transferred to another district in certain circumstances. (Government Code Section 20963 and Education Code Section 88202)

Districts are permitted to adopt reasonable rules and regulations regarding the use of sick leave, such as notice and verification requirements.

Extended Illness Leave (Education Code Section 88196)

Like academic employees, classified employees are entitled to extended illness leave following exhaustion of full-paid leaves. Two types of extended illness leave exist. Neither is limited per illness or injury.

- **Differential Pay Leave** — An employee may receive five months of leave at the difference between his or her salary and that *actually paid* to a substitute who must be hired specifically for the absent employee’s position from outside the district. This leave does not accumulate.
• **50% Pay Leave** — An employee may receive 100 working days of leave at not less than 50% of the employee’s salary. This leave does not accumulate.

(Education Code Section 88196)

Districts are permitted to adopt reasonable rules and regulations regarding the use of sick leave, such as notice and verification requirements.

**Pregnancy Leave (Education Code Section 88193)**

Districts may provide for paid or unpaid pregnancy leave for classified employees. However, such employees still retain their rights to use sick leave and extended illness leave. (Education Code Section 88193) (The California Pregnancy Disability Leave Act will be discussed separately below.)

**Industrial Accident and Illness Leave (Education Code Section 88192)**

Classified employees are entitled to 60 days of full-paid industrial accident leave in one fiscal year for the same illness or accident. The 60 days do not accumulate. If the 60-day period overlaps into the next fiscal year, the employee may only use the remainder and will not receive a new 60-day entitlement for the same illness or injury. After the 60 days are exhausted, the employee has the right to use regular sick leave, extended illness leave, vacation, and other compensatory time off. The employee is entitled to a maximum of 100% of his or her salary when combined with temporary disability payments. If the district does not adopt regulations limiting the amount of days to 60, the employee receives an unlimited number of days. Districts may require employees to serve a minimum continuous period of time (up to three years) before they become eligible for benefits under this section. (Education Code Section 88192)

**Pregnancy Disability Leave Act:**

*(Government Code Section 12945)*

Government Code Section 12945 provides that employees are entitled to four months of unpaid pregnancy disability leave for the period of time during which the employee is disabled on account of pregnancy, childbirth, or related medical conditions, which include lactation. The employee is guaranteed the right to return to her job at the end of the leave. (The PDLA also requires employers to reasonably accommodate the temporary disabilities caused by pregnancy and related conditions.)

Employers must continue the health and welfare benefits of employees on pregnancy disability leave (up to four months) under the same terms and conditions as if the employee were working.

If an employer has greater leave rights for temporary disabilities than under this law, the pregnant employee is entitled to those same benefits. Thus, the longer leave entitlements in the Education Code still apply.
Family and Medical Leaves:
(29 U.S.C. §2611, et seq.)
(Government Code Section 12945.2)

Both state and federal laws grant unpaid leaves of absence to employees for their own serious health conditions, to care for specified family members with serious illnesses or injuries, for child-rearing/child bonding, or for reasons related to a family member’s military service. Only the provisions that apply to the employee’s own illness will be discussed here.

The federal Family and Medical Leave Act of 1993 (FMLA; 29 U.S.C. §2611, et seq.) and the California Family Rights Act (CFRA; Government Code Section 12945.2) provide that an employee who meets eligibility criteria may take up to 12 workweeks of unpaid leave in a 12-month period for his or her own serious health condition, among other reasons. The employee is entitled to continuation of health benefits during that period to the same extent as if he or she were actually working.

FMLA and CFRA leave may run concurrently with paid leave, but the employer must notify the employee in writing that it will be running the leaves concurrently with paid leave. CFRA leave, however, does not run concurrently with the first four months of paid or unpaid leave for pregnancy or related disability.

In order to be eligible for family leave, the employee must have worked for the employer for at least 12 months prior to starting the leave, and have actually worked (not counting paid or unpaid time off) 1,250 hours in the prior 12 months. Full-time instructors are presumed to work 1,250 hours.

FORMS

While the Department of Fair Employment and Housing’s “Certification of Health Care Provider” form (found at California Code of Regulations, Title 2, §11098) may still be used, the federal forms should be used for notice of family leave (Form WH-381), designation of family leave (WH-382), certification of qualifying exigency (Form WH-384), and certification of service member’s serious illness or injury (WH-385). They are available at http://www.dol.gov/whd/fmla under “Forms.”
CFRA Regulations

The California Fair Employment and Housing Council, part of the Department of Fair Employment and Housing, is in the process of revising the CFRA regulations. The proposed changes modify the medical certification form and also make substantive changes to the rules and procedures governing CFRA leaves. The proposed regulations can be viewed on the DFEH website at http://dfeh.ca.gov/FEHCouncil.htm.

Labor Code Section 233:

Employees may use paid sick leave to care for an ill parent, spouse, registered domestic partner, or child. Employees may use not less than the amount of sick leave that would be accrued during six months at the employee’s rate of entitlement. It is not clear if this leave includes personal necessity leave granted by the Education Code or contract, or if it is in addition to that leave. This paid leave does not extend the 12 workweeks of FMLA/CFRA leave; however, the district must still give individual notice to the employee that the Section 233 leave is running concurrently with FMLA/CFRA leave, if the reason for the leave qualifies as a “serious health condition.”

Healthy Workplace, Healthy Families Act of 2014 (AB 1522):

Effective July 1, 2015, employees who work for 30 or more days in a calendar year will be entitled to paid sick leave. Labor Code Section 245, et seq., require employers (which include community college districts) to grant one hour of paid sick leave for every 30 hours worked, up to a maximum of 24 hours in one calendar year. An employee can carry over a maximum of 24 hours to another year and are not entitled to payment for unused leave when the employee ceases employment.

The leave may be used for the diagnosis, care, or treatment of an existing health condition of or preventive care for, the employee or an employee’s family member. The following family members are covered by the law: child (regardless of age and dependency status, and including those for whom the employee acts in loco parentis), parent (of the employee, employee’s spouse, or employee’s registered domestic partner), spouse, registered domestic partner, grandparent, grandchild, and sibling. The employee begins earning the leave from the first day of employment, but may not use the leave until the 90th day.

Importantly, this law does not apply to employees who are covered by a collective bargaining agreement that provides paid sick leave or paid time off for illness, binding arbitration, premium wage rates for all overtime hours work, and a regular hourly rate of pay not less than 30% more than the state minimum wage rate. Because the Education Code grants significantly more full-paid illness leave than that mandated by this law, the real impact for districts is on their
substitutes and seasonal workers (if they are not in a bargaining unit and do not also hold a regular classified position).

AB 1606:

Effective January 1, 2015, Assembly Bill 1606 adds Education Code sections 87784.5 (academic) and 88207.5 (classified). These statutes provide for 30 days of leave in an academic year for the birth of a child (biological parent) or adoption of a child (nonbiological parent) within the first year after birth or adoption.

The legislative analyses state that the 30 days of leave are with pay and come from an employee’s available sick leave. Unfortunately, that language does not appear in either statute. The statutes state only that employees are entitled to 30 days, “less than any days of leave authorized pursuant to” the personal necessity leave statutes.

If the statutory language conflicts with a collective bargaining agreement, it does not apply until that agreement expires or is renewed.

Genetic Information Nondiscrimination Act of 2008 (GINA):

The Genetic Information Nondiscrimination Act of 2008 (GINA) strictly limits an employer’s access to and use of medical information that includes certain “genetic information” as it relates to the employee or a covered family member. An employer may protect itself from liability for inadvertent acquisition of such information if it includes the “safe harbor” language set forth in the GINA regulations on all forms and documents requesting medical information, including family leave medical certification forms:

"The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic information” as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

This language is included on the sample FMLA/CFRA forms that request medical information and should be added to any district forms that request medical information from employees and their physicians.

The safe harbor language will not protect an employer from liability if it actually uses genetic information, regardless of how it was obtained.
Counting the Days

How do you count, and keep track of, an employee’s use of the various illness leave provisions? The laws are complicated, and frequently districts have differing interpretations between the payroll and personnel offices, potentially resulting in grievances or lawsuits. Few cases exist interpreting the statutes and collective bargaining agreement language can result in different rules. Leaves for work-related illness or injuries will be addressed separately because the receipt of temporary disability benefits dramatically changes the counting of illness leaves.

NOTE

_Personnel and payroll offices need to coordinate their interpretations and applications of the statutes and contract provisions._

Full-Paid Sick Leave:

This is the easiest leave to calculate. Full-paid sick leave is used on a day-for-day basis (except when the absence is for a work-related illness or injury).

Full-time academic employees receive 10 full-paid sick days each fiscal year; part-time academic employees earn a prorated amount each year. The days can be used in full- or partial-day increments.

Classified employees earn one day of sick leave for each month they work. Thus, a 12-month, eight-hour employee earns 12 eight-hour days of sick leave; a 10-month, eight-hour employee earns 10 eight-hour days. A part-time employee earns sick leave on a pro-rated basis. For example, a 10-month, six-hour employee earns 10 six-hour days each year. As with academic employees, classified employees may take full-paid sick leave in full- or partial-day increments.

Extended Illness Leave – Substitute Differential Pay:

Extended illness leave is where the calculations become more complicated, dependent upon the particular type leave adopted by the district and whether the employee is academic or classified.
Academic Employees:

For community college academic employees, no cases exist interpreting the differential pay leave statute. However, because section 87780 parallels the K-12 certificated statute, section 44977, as it existed prior to the 1999 changes, the cases interpreting that statute should apply.

Two California appellate courts held that the five months of differential pay leave under former section 44977 begin running on the eleventh day of absence (after the current year’s entitlement to full-paid sick leave is exhausted), and concurrently with any accumulated sick leave. [Napa Valley Educators Association v. Napa Valley Unified School District (1987) 194 Cal. App. 3d 243, 239 Cal. Rptr. 395; Lute v. Governing Board of Covina-Valley Unified School District (1988) 202 Cal. App. 3d 1177, 249 Cal. Rptr. 161.] Thus, if an academic employee had 10 days of full-paid sick leave and 20 days of accumulated full-paid sick leave, the clock on the five months would begin to run on day 11, but the employee would receive full pay for the first 30 days of absence that school year. After that, the employee would receive differential pay for approximately four months.

Again, the statute is unclear as to whether an academic employee is entitled to a new five months each school year. However, under the prior version of Section 44977, the courts held that employees receive a new five-month period each school year, even if they do not return for the start of the school year, or are absent for the same reason. [CTA v. Governing Board of Gustine Unified School District (1983) 145 Cal. App. 3d 735, 193 Cal. Rptr. 650; Lakeside Federation of Teachers v. Board of Trustees, Lakeside Union School District (1977) 68 Cal. App. 3d 609, 137 Cal. Rptr. 517.] It appears that the same rule would apply to community college academic employees.

IMPORTANT

The courts have held that the five months of differential pay leave do not have to be used continuously or for the same or a serious illness. Thus, once an employee has exhausted full-paid leave, he or she can use the five months on a day-by-day basis for short- or long-term absences. [CTA v. Parlier Unified School District (1984) 157 Cal. App. 3d 174, 204 Cal. Rptr. 20.] This is a K-12 case, but the same reasoning would likely apply to community college employees.

Classified Employees:

There are no court decisions interpreting the calculation of leave under the classified differential pay leave portion of section 88196 (or the K-12 parallel statute, section 45196). According to a 1970 Attorney General’s opinion, the five months begin on the first day of absence for illness or injury and include not only full-paid sick leave, but also any vacation or compensatory time an
employee may take as a result of illness or injury. [53 Ops. Atty. Gen. 111 (1970).] The employee receives full pay for such accumulated time off, and then differential pay for the remainder of the five months, if any.

Section 88196 does not state whether the five months of differential leave renew annually. An argument can be made that because the 100-day, 50% pay provision in section 88196 specifically provides that the 100 days renew annually ("... shall once a year be credited with..."), and the five-month section does not, the intent was that an employee would receive only one five-month period in his or her career. However, it is very possible that a court would find such a narrow interpretation inequitable and not in keeping with the Legislature’s intent. When reviewing Education Code provisions, the courts have traditionally interpreted them liberally to afford the greatest rights to employees. A court could easily find that it would be unfair to classified employees to allow them a five-month differential leave only once in their careers.

The five months of substitute differential pay leave available under section 88196 are not limited by reason, renew annually, and run concurrently with other paid leaves. [See also, CTA v. Governing Board of Gustine Unified School District (1983) 145 Cal. App. 3d 735, 193 Cal. Rptr. 650; Lakeside Federation of Teachers v. Board of Trustees, Lakeside Union School District (1977) 68 Cal. App. 3d 609, 137 Cal. Rptr. 517.]

Unlike the certificated statute, Sections 45196 and 88196 require that a district actually employ a substitute in the absent employee’s position if it wants to set off that pay against an absent employee’s salary. If no substitute is employed, the employee is entitled to his or her full pay. If it plans to deduct the pay from the absent employee’s salary, a district may not move a current employee into the absent employee’s position and deduct that salary. [California School Employees Association v. Tustin Unified School District (2007) 148 Cal. App. 4th 510, 55 Cal. Rptr. 3d 739.]

Extended Illness Leave – 50% Pay:

Academic Employees:

Section 87786 allows districts to adopt extended illness leave plans where the employee receives 50% of his or her salary for five months. There are no cases interpreting this statute, but decisions under a former K-12 leave statute are instructive.

Two California appellate courts held that the five months of differential pay leave under former section 44977 begin running on the eleventh day of absence (after the current year’s entitlement to full-paid sick leave is exhausted), and concurrently with any accumulated sick leave. [Napa Valley Educators Association v. Napa Valley Unified School District (1987) 194 Cal. App. 3d 243, 239 Cal. Rptr. 395; Lute v. Governing Board of Covina-Valley Unified School District (1988) 202 Cal. App. 3d 1177, 249 Cal. Rptr. 161.] Thus, if a certificated employee had 10 days of full-paid sick leave and 20 days of accumulated full-paid sick leave, the clock on the five months would begin to run on day 11, but the employee would receive full pay for the first 30 days of absence that school year. After that, the employee would receive differential pay for approximately four months. Because the community college academic employee statutes
parallel the K-12 statutes as they existed at that time, the reasoning would likely apply to section 87786.

The statute is unclear as to whether an academic employee is entitled to a new five months of 50% pay leave each school year. Under the prior version of the K-12 substitute differential leave statute, the courts held that employees receive a new five-month period each school year, even if they do not return for the start of the school year, or are absent for the same reason. [CTA v. Governing Board of Gustin Unified School District (1983) 145 Cal. App. 3d 735, 193 Cal. Rptr. 650; Lakeside Federation of Teachers v. Board of Trustees, Lakeside Union School District (1977) 68 Cal. App. 3d 609, 137 Cal. Rptr. 517.] It appears that this rule also would apply to 50% pay leave for academic employees.

Classified Employees:

Section 88196 provides that districts may adopt plans where each year, classified employees are credited with 100 days of leave, including the annual sick leave entitlement, at 50% pay. The statute states that the 100 days are exclusive of any other paid leaves, such as vacation, holidays, or compensatory time off. A 2009 California Court of Appeal decision interpreted the K-12 version of this provision, and prohibited a district from counting vacation against the 100 days despite a clear past practice to the contrary. [California School Employees Association v. Colton Joint Unified School District (2009) 170 Cal. App. 4th 857, 88 Cal. Rptr. 3d 486.] In Colton, the court made general statements that vacation can never run concurrently with 50% pay leave. Because section 88196 is virtually identical to the K-12 statute, the same rules would apply.

Section 88196 specifically states that classified employees each year receive a new 100 days. These 100 days are not limited by the reason for the leave.

Family and Medical Leave:

Except for pregnancy, an employer has the right to run FMLA leave concurrently with CFRA leave, and to run both concurrently with paid sick leave when the absence is for the employee’s own serious health condition unless the employer has waived that right through contract language, board policies and/or regulations. (The pregnancy rule will be discussed separately below.) The laws only require that the employer give individual written notice to the employee that it will be running FMLA and/or CFRA leaves concurrently with paid leaves. If the employer has knowledge before the employee takes the leave that the leave is for an FMLA/CFRA qualifying reason, it must provide that notice before the leave is taken, within five business days of learning of the need for FMLA and/or CFRA leave. The FMLA regulations state that retroactive designation may only be made where the “failure to give timely notice does not cause harm or injury to the employee.” [29 C.F.R. §825.301(d)]

Thus, where the FMLA/CFRA leave is for the employee’s own serious health condition (except pregnancy) and proper written notice is given, the unpaid FMLA/CFRA leaves run concurrently with the paid leaves.
CAUTION

The current CFRA regulations do not allow for retroactive designation of paid leave as CFRA leave except in limited circumstances; however, the Department of Fair Employment and Housing has indicated that if the employee receives all of his/her leave rights, it may find that the employer has complied with the law. Because of the ambiguities under the CFRA, it is always in the employer’s best interests to notify employees that FMLA/CFRA leaves are running concurrently with paid leaves.

Example – FMLA/CFRA leave concurrent with paid leaves, full-paid sick leave including accumulated leave and substitute differential pay leave (Academic):

<table>
<thead>
<tr>
<th>10 days</th>
<th>20 days</th>
<th>5 months</th>
</tr>
</thead>
<tbody>
<tr>
<td>FMLA/CFRA (12 workweeks)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>full salary (30 days)</td>
<td>sub. diff. pay (4 months)</td>
<td></td>
</tr>
</tbody>
</table>

Total Absence – Approximately 5½ months

Example – FMLA/CFRA leave consecutive to paid leaves, full-paid sick leave including accumulated leave and substitute differential pay leave (Academic):

<table>
<thead>
<tr>
<th>10 days</th>
<th>20 days</th>
</tr>
</thead>
<tbody>
<tr>
<td>5 months</td>
<td></td>
</tr>
<tr>
<td>FMLA/CFRA (12 workweeks)</td>
<td></td>
</tr>
<tr>
<td>full pay (30 days)</td>
<td>sub. diff. pay (5 mos)</td>
</tr>
</tbody>
</table>

Total Absence – Approximately 8½ months

The first example shows the FMLA/CFRA leaves running concurrently with the paid leaves and the employee being absent a total of six months and ten days. In the second example, the FMLA/CFRA leaves are run after the paid leaves and the employee is absent nine months and ten days.
Time normally spent not working is not counted as part of the 12 workweeks of FMLA/CFRA leave. Winter and spring breaks, and summer recess are excluded, thus extending the time an employee might be absent. Where the leave is continuous, the 12 workweeks do include holidays.

FMLA/CFRA leave need not be taken all at once, and can be taken in daily or partial-day increments; thus, employers frequently must turn the 12 workweeks into hours or days. If an employee works less than full-time, the time off is proportionate. For example, if an employee only works a three-day week, five hours per day, 12 workweeks would be the same as 36 five-hour days, or 180 hours.

**Pregnancy:**

When the leave is for the employee’s pregnancy or related medical conditions, the calculation becomes a bit more difficult. CFRA does not include an employee’s pregnancy or related disabilities as qualifying reasons for CFRA leave. Thus, where the leave is for the employee’s pregnancy, FMLA leave and CFRA leave do not run concurrently. The 12 workweeks of CFRA leave for child care or childbonding do not begin until the mother is no longer disabled due to pregnancy, or has exhausted her PDLA leave, whichever occurs first.

An employee is entitled to four months of unpaid leave while disabled by pregnancy. The regulations define “four months” as being “one-third of a year or 17-1/3 weeks.” They do not define “one-third” of a week but appears to require an employer to convert “17-1/3” weeks to hours. For a 40-hour employee, that means 693 hours. [California Code of Regulations, Title 2, §11042(a).] If an employee’s schedule varies from month-to-month, a monthly average of the hours worked over the four months prior to taking the leave is used to determine the employee’s normal work month. [CCR, Title 2, §11035(I).]

---

**Example – PDLA leave, FMLA leave, CFRA leave, full-paid sick leave including accumulated leave, and substitute differential pay leave (Academic):**

- 10 days
- 20 days
- 5 months
- FMLA (12 workweeks)
- PDLA (4 months)
- CFRA (12 wkweeks)
- Full salary (30 days)
- Sub. diff. pay (4 mos)
- Leave/bens only
Industrial Accident or Illness Leave:

When the employee’s leave is because of a work-related illness or injury, the calculations become nightmarish. Unfortunately, the courts have provided little or no guidance in this area, so districts must fend for themselves.

If an employee is absent for a work-related illness or injury, he or she is entitled to 60 days of full-paid industrial accident or illness leave. (Sections 87787 and 88192). Neither of these statutes specifically states whether the employee is entitled to the 60 days if the matter is in dispute. The general practice appears to be that when a district is disputing the claim, it counts the time off as regular sick leave, not as part of the 60 days. If the claim is later upheld, the 60 days are retroactively applied and the employee is credited with the same amount of sick leave. When the 60 days are used, they are not pro-rated based on any temporary disability payments received by the employee.

IMPORTANT

Districts should ensure that they have clearly adopted the standard of a maximum of 60 days of industrial accident and illness leave for all employees. Absent specific adoption of the 60-day maximum, employees will be entitled to an unlimited number of industrial accident leave days and will not have to use their sick leave. (Education Code sections 87787 and 88192) Be sure to adopt the 60-day maximum in policies and regulations for unrepresented employees in addition to any contract language for bargaining unit personnel.

Academic Employees:

Section 87787 provides that an academic employee absent because of a work-related illness or injury who has exhausted the 60 days “may elect to take as much of his or her accumulated sick leave which, when added to his or her temporary disability indemnity, will result in a payment to him or her of not more than his or her full salary.” Thus, it requires that the regular and accumulated sick leave be pro-rated based upon any temporary disability payment received by the employee. For example, if an employee had 10 days of sick leave and was receiving two-thirds of his or her salary in temporary disability, the 10 days would become 30, because the employee was only using one-third of each day of sick leave to receive full salary.

Section 87787 does not refer to the extended illness leave rights of academic employees. Employee groups have argued that based on that language, districts must pro-rate not only full-paid sick leave, but also the five months of extended illness leave. They often cite to a San Diego County Counsel’s opinion to support their position. For example, they contend that where the employee is receiving two-thirds of his or her salary from temporary disability payments, he or she would receive 15 months, not five, because only one-third of a day of extended illness leave is being used.
No appellate court has issued a published opinion on this issue, and the San Diego opinion appears to conflict with the statutory language providing specifically for only five months of extended illness leave per year. Because this interpretation could result in employees being absent in perpetuity, most districts do not pro-rate the extended illness leave based on the temporary disability payments. Even if a district pro-rates the extended illness leave, under no circumstances is the employee entitled to more than 100% of his or her salary.

Example – Work-related illness leave, 10 days full-paid sick leave, five months of substitute differential pay leave, FMLA/CFRA leave, and the employee receiving 2/3 of his/her salary in temporary disability payments (Academic):

<table>
<thead>
<tr>
<th>60 days</th>
</tr>
</thead>
<tbody>
<tr>
<td>10 (30) days</td>
</tr>
<tr>
<td>5 months</td>
</tr>
<tr>
<td>FMLA/CFRA (12 wkwks)</td>
</tr>
<tr>
<td>full salary (90 days)</td>
</tr>
</tbody>
</table>

Classified Employees:

The classified statute, section 88192, differs significantly from the academic provision.

First, an Attorney General’s opinion states that the five months of differential pay leave run concurrently with the 60 days. However, section 88192 provides that the 60 days are to be used "in lieu of" the full-paid sick leave provided by statute. While no appellate court has issued a published opinion on this issue, we do not believe that it was the Legislature's intent that the 60 days run concurrently with the five months or 100 days given that the purpose behind the law seems to be to provide additional leave for work-related illnesses or injuries. Therefore, we generally recommend that the five months or 100 days commence when the employee begins using his or her regular sick leave.

Section 88192 provides that once an employee has exhausted the 60 days, he or she may use other sick leave. However, if the employee is receiving temporary disability payments, "the person shall be entitled to use only so much of the person's accumulated or available sick leave, accumulated compensating time, vacation or other available leave which, when added to the workers' compensation award, provide for a full day's wage or salary." As explained above in regard to academic employees, employee groups have contended that the five months or 100 days should be pro-rated based on temporary disability payments. Because this interpretation could result in employees being absent in perpetuity, most districts do not pro-rate the extended illness leave based on the temporary disability payments. Even if a district pro-rates the
extended illness leave, under no circumstances is the employee entitled to more than 100% of his or her salary.

<table>
<thead>
<tr>
<th>Example — Work-related illness leave, 10 days full-paid sick leave, five months differential pay leave, FMLA/CFRA leave, and the employee receiving 2/3 of his/her salary in temporary disability payments (Classified):</th>
</tr>
</thead>
<tbody>
<tr>
<td>60 days</td>
</tr>
<tr>
<td>10 (30) days</td>
</tr>
<tr>
<td>5 months</td>
</tr>
<tr>
<td>FMLA/CFRA (12 workweeks)</td>
</tr>
<tr>
<td>full salary (90 days) sub. diff. pay/ 2/3 temp. disab. (3½ mos)</td>
</tr>
</tbody>
</table>
What Do You Do When the Leave Runs Out?

Once a district has successfully navigated the morass of calculating the leaves of absence, the question then becomes what it can, or must, do if the employee exhausts his or her leaves and is still unable to return. Unfortunately, easy answers do not always exist and districts may be forced to initiate for-cause termination proceedings, or let the employee remain in limbo forever.

Remember that while generally districts are not required by law or statute to grant additional paid or unpaid leaves after statutory and contractual leaves have been exhausted, if the district has a practice of granting such leaves, denial in particular cases could be discriminatory, or a unilateral change in terms or conditions of employment. Further, because leaves are a form of reasonable accommodation under the disability discrimination laws, a district might be required to grant additional paid or unpaid leaves to an employee who is unable to return due to a disability. While it may be routine for a district to place an employee on the 39-month reemployment list for exhaustion of leaves, that employee may be protected by the disability discrimination laws and may have the right to additional leaves, or other forms of reasonable accommodation and could argue that placement on the 39-month list is discriminatory. Thus, it may be wise to consult with legal counsel before placing employees on the 39-month reemployment list, depending on the particular circumstances. You should certainly consult with legal counsel before initiating termination proceedings against an employee where the cause is based on physical or mental disability.

CAUTION

Many statutes and contract provisions focus on the employee’s ability to resume his or her duties after an illness leave. Under the disability discrimination laws, an employer may not require that the employee have a full and complete release with no restrictions before allowing a return to work. When an employer receives a medical release with restrictions, it must analyze whether the person is disabled under the law and if that disability can be reasonably accommodated.
Non-Workers’ Compensation-Related Leaves:

Academic Employees:

Based on judicial interpretations of the K-12 statutes, it appears that academic employees of community college districts who exhaust all paid leaves remain in limbo unless they are terminated through for-cause proceedings (the same rule that applies to K-12 districts and county offices operating under the 50% pay rule). Additionally, they each year become entitled to another five months of leave, so they can remain on leave in perpetuity, unless dismissed. [CTA v. Governing Board of Gustine Unified School District (1983) 145 Cal. App. 3d 735, 193 Cal. Rptr. 650; Lakeside Federation of Teachers v. Board of Trustees, Lakeside Union School District (1977) 68 Cal. App. 3d 609, 137 Cal. Rptr. 517.]

Classified Employees:

Education Code section 88195 provides that once a classified employee has exhausted all entitlement to paid leave (including sick leave, vacation, and compensatory time off), he or she may apply for additional leave (paid or unpaid) not to exceed six months. Districts are not required to grant such additional leaves. The district may renew the leave for up to two additional six-month periods, not to exceed a total of 18 months. If no additional leave is granted, or the leaves are exhausted, the employee then is placed on the 39-month reemployment list.

If medically able, the employee has a right to return to a vacant position in the classification from which he or she left. If there has been a layoff in that classification, the employee is slotted into the layoff reemployment list based on his or her seniority once he or she indicates to the district his or her ability to return.

ISSUE

Some employees have challenged placement on the 39-month list based on a PERS statute regarding disability retirement. Please see the discussion of disability retirement and allowances below.

Workers’ Compensation-Related Leaves:

Workers’ compensation laws create a great deal of confusion in this area. An important issue is how the Education Code interacts with the Labor Code. In 2003, the California Workers’ Compensation Appeals Board held that a district may place an employee on the 39-month reemployment list and stop employer-paid health benefits once the employee exhausts all leaves, regardless of the employee’s workers’ compensation status. It rejected employee claims that such placement violates Labor Code Section 132a, which bars discrimination or retaliation against employees who have filed workers’ compensation claims. Districts should notify their workers’ compensation administrators prior to taking any employment action against an
employee who has a pending workers' compensation claim, including placement on a 39-month reemployment list.

**Academic Employees:**

Section 87787 is silent on what happens to an academic employee with a work-related illness or injury who exhausts all paid leaves. Given that silence, it is likely that the rules under the extended illness leave statutes would apply in the same manner as if the employee exhausted all leaves for a non-work-related illness or injury. Thus, the district will have to initiate for-cause termination proceedings if it wants to terminate the employment relationship.

**Classified Employees:**

Unlike the statute for academic employees, the classified industrial accident or illness law addresses the termination of employment. Section 88192 provides that when all available leaves (paid or unpaid) have been exhausted and the employee is medically unable to return, he or she is placed on a 39-month reemployment list.

"When available" during the 39 months, the employee shall be reemployed in a vacancy in his or her former classification. No cases have interpreted what "when available" means, though presumably it applies when the employee is medically able to return.

**Disability Allowance and Retirement:**

In some circumstances, an employee may not be able to return to work, and may be eligible for a disability allowance or retirement under the State Teachers Retirement System or the Public Employees Retirement System. Personnel offices should be aware of these rights in order to assist employees in making decisions, as well as ensuring that the district is complying with its legal obligations.

**Academic Employees:**

Section 87789 allows districts to place academic employees on leaves of absence while the employees are applying for STRS disability benefits. If STRS determines that the employee is eligible for such benefits, the district must grant the employee a leave for the term of the disability, not to exceed 39 months, unless the employee resigns or retires. Under STRS rules, this leave is unpaid.

The employee filling the position of the disability allowance recipient is a temporary academic employee, and his or her term of employment is equal to the length of the absence of the regular employee. If the temporary employee’s service extends beyond the length of the absence, all the days of service are credited as a probationary employee. Thus, if a district retains the temporary employee beyond the leave of absence and it is for two or more school years, he or she would become permanent, assuming the employee is appropriately credentialed.
Classified Employees:

Unlike the provision for academic employees, the Education Code does not specifically address placing a classified employee on a leave of absence while he or she applies for or receives a disability allowance. Thus, it appears that such placement would be discretionary.

Classified employees have raised an issue regarding their placement on a 39-month reemployment list following exhaustion of leaves. The employees contend that a PERS statute bars such placement where the employee’s condition might make him or her eligible for disability retirement. Under Government Code Section 21153, a public agency may not separate a PERS member from employment because of a disability if the member is otherwise eligible to retire for disability. Thus, instead of placing an employee on a 39-month reemployment list, the district must apply for PERS disability for that person.

The issue arises because there are differing standards for a medical inability to work. To receive PERS disability, an employee must establish a substantial inability to perform his or her duties, and it usually requires some degree of permanency of the condition. In contrast, an employee is placed on a reemployment list when he or she has exhausted all leaves and is medically unable to return to work. A Court of Appeal recognized this distinction when it held that the Los Angeles County Office of Education complied with both the Education Code and Section 21153 when it placed an employee on the 39-month list and simultaneously applied for PERS disability on her behalf. PERS denied the disability claim and the employee argued that LACOE was required to reinstate her. The court agreed with the county office, finding that based on all of the available information, the employee was properly placed on the reemployment list and the contrary determination by PERS did not mean that she was “medically able” to resume her duties under the Education Code. [Jones v. Los Angeles County Office of Education (2005) 134 Cal. App. 4th 983, 36 Cal. Rptr. 3d 617.] This ruling has been questioned by other courts and thus should be relied upon with caution.

Where the employee will be unable to return to work permanently, or for an extended period of time, the employee may be eligible for PERS disability and the district should consider applying for PERS disability if the employee has not done so.

Because no definitive ruling yet exists on the conflict between the Education and Government Codes, districts should act with caution when placing classified employees on 39-month reemployment lists.

Conclusion

With so many different leave laws, it is hardly surprising that questions arise in what appear on the surface to be even the simplest cases. Being aware of the various laws, and employee rights under them, protects districts from liability while also ensuring that they are not providing extra benefits not required by law or contract.
Statutes Regarding Illness Leaves for Employees

**Education Code**

**Community College Academic:**

§87763  Leaves of absence
§87764  Power to grant leaves of absence
§87765  Power to grant leave of absence in case of illness, accident, or quarantine
§87766  Power to grant leaves of absence for pregnancy
§87780  Salary deductions during absence from duties
§87781  Leave for illness or injury; paid leave; accumulation
§87781.5 Use of sick leave for personal reasons
§87782  Transfer of accumulated sick leave
§87783  Transfer of accumulated leave for illness or injury
§87784  Leave of absence for personal necessity
§87784.5 Leave for new child
§87785  Transfer of accumulated leave of absence
§87786  Exception to sick leave when district adopts specific rule
§87787  Required rules for industrial accident and illness leaves of absence
§87789  Applicant for disability allowance

**Community College Classified:**

§88190  Leaves of absence and vacations
§88191  Leave of absence for illness or injury
§88192  Industrial accident and illness leaves for classified employees
§88193  Leave of absence for pregnancy
§88195  Additional leave of absence for nonindustrial accident or illness; reemployment preference
§88196  Absences due to illness or accident; deductions from salary; payment of substitutes; sick leave entitlement
§88196.5 Deduction from salary; amounts payable under insurance policy
§88197  Absences due to illness or accident; deductions from salary; amounts payable to employee under insurance policy
§88198  Power of board to grant leaves of absence
§88199  Power of governing board to grant leave of absence and compensation for accident or illness
§88202  Transfer of accumulated sick leave and other benefits
§88207  Personal necessity
§88207.5 Leave for new child
Pregnancy Disability Leave Act (PDLA)
Government Code Section 12945

Family and Medical Leave
Government Code Section 12945.2

California Family Rights Act (CFRA)


Family and Medical Leave Act of 1993 (FMLA)

Labor Code Section 233

Healthy Workplaces, Healthy Families Act of 2014
Labor Code Section 245, et seq.
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EXAMPLE OF LEAVE CALCULATIONS
Community College Academic

Differential Pay Leave *(Section 87780)*

Example 1 — Illness and Extended Illness Leave:

*Substitute Differential Pay Leave (Section 87780)*
10 days of current year sick leave
20 days of accumulated sick leave

<table>
<thead>
<tr>
<th>10 days</th>
<th>20 days</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>5 months</td>
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<td>full salary (30 days)</td>
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Example 2 — FMLA and/or CFRA Leave:

*FMLA/CFRA leave running concurrently with paid leaves*
*Substitute Differential Pay Leave (Section 87780)*
10 days of current year sick leave
20 days of accumulated sick leave

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Examples of Leave Calculations

Example 3 — Pregnancy Disability Leave and Child Bonding Leave:
(assume 8 weeks of pregnancy disability and 12 workweeks of child bonding.)

*FMLA leave running concurrently with paid leaves*
*CFRA child-bonding leave running consecutively to paid leaves*

**Pregnancy Disability Leave**

*Substitute Differential Pay Leave (Section 87780)*
*10 days of current year sick leave*
*20 days of accumulated sick leave*

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\begin{align*}
| & 10 \text{ days} | & 20 \text{ days} | \\
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| & \text{FMLA (12 wkws)} | \\
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| & \text{CFRA (12 wkws)} | \\
| & \text{full pay (30 days)} | & \text{sub diff pay (2 wks)} | & \text{bens only (12 wkws)} |
\end{align*}
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Example 4 — Worker's Compensation Leave:

*FMLA/CFRA leave running concurrently with paid leaves*

*Substitute Differential Pay Leave (Section 87780)*

*10 days of current year sick leave*
*20 days of accumulated sick leave*
*60 days Industrial Accident Leave (Section 87787)*
*2/3 Pay Temporary Disability Payments*

\[
\begin{align*}
| & 60 \text{ days} | \\
| & 10 (30) \text{ days} | \\
| & 5 \text{ months} | \\
| & \text{FMLA/CFRA (12 wkws)} | \\
| & \text{full salary (90 days)} | & \text{sub. diff. pay / 2/3 temp. disab. (4 mos)} |
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Community College Academic

50% Pay Leave (Section 87786)

Example 1 — Illness and Extended Illness Leave:

50% Pay Leave (Section 87786)
10 days of current year sick leave
20 days of accumulated sick leave

[Diagram showing 10 days, 20 days, 5 months, full salary (30 days), 50% pay (approx. 4 months)]

Example 2 — FMLA and/or CFRA Leave:

FMLA/CFRA leave running concurrently with paid leaves
50% Pay Leave (Section 87786)
10 days of current year sick leave
20 days of accumulated sick leave

[Diagram showing 10 days, 20 days, 5 months, FMLA/CFRA (12 workweeks), full salary (30 days), 50% pay (approx. 4 months)]
Example 3 — Pregnancy Disability Leave and Child Bonding Leave:

(Assume 8 weeks of pregnancy disability and 12 workweeks of child bonding.)

FMLA leave running concurrently with paid leaves
CFRA child-bonding leave running consecutively to paid leaves
Pregnancy Disability Leave
50% Pay Leave (Section 87786)
10 days of current year sick leave
20 days of accumulated sick leave

10 days + 20 days = 6 weeks

FMLA (12 wkws)
PDLA (8 weeks)

CFRA (12 wkws) =

Full pay (30 days) = 50% pay (2 wks) =
bens only (12 wkws)

Example 4 — Worker’s Compensation Leave:

FMLA/CFRA leave running concurrently with paid leaves
50% Pay Leave (Section 87786)
10 days of current year sick leave
20 days of accumulated sick leave
60 days Industrial Accident Leave (Section 87787)
2/3 Pay Temporary Disability Payments

60 days

10 (30) days = 5 months

FMLA/CFRA (12 wkws)

Full salary (90 days) = 50% pay / 2/3 temp. disab. (4 mos)
Community College Classified

Differential Pay Leave (Section 88196)

Example 1 — Illness and Extended Illness Leave:

Substitute Differential Pay Leave (Section 88196)
10 days of current year sick leave
20 days of accumulated sick leave

Example 2 — FMLA and/or CFRA Leave:

FMLA/CFRA leave running concurrently with paid leaves
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10 days of current year sick leave
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FMLA/CFRA leave running concurrently with paid leaves
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Community College Classified

50% Pay Leave (Section 88196)

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50% Pay Leave (Section 88196)
10 days of current year sick leave
20 days of accumulated sick leave

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Examples of Leave Calculations

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EMPLOYEE ABSENTEEISM
MANAGING ATTENDANCE ISSUES
Introduction

When we speak of attendance problems, we include many issues -- absenteeism, tardiness, leaving work early, excessive breaks -- as well as related issues such as inadequate notice, failure to provide verification, and failure to properly perform duties when present.

Two broad categories of attendance issues exist. The first is permitted leaves, those leaves that are allowed by law or contract, where the employee legitimately qualifies for the leave and has not exhausted leave entitlement. The second is unauthorized leaves, where the reason for the leave is not authorized, available leave for those purposes has been exhausted, or the employee presents a fraudulent reason for leave.

Unauthorized leaves are much easier to deal with for obvious reasons. It is the permitted leaves that create the most difficulty and frustration. State and federal laws and contractual provisions grant public school employees significant amounts of authorized leaves, most of which are paid. The laws and contracts protect employees taking those leaves, limiting an employer's ability to take action even when the leave significantly disrupts operations.
Leaves Authorized by Law or Contract

Both laws and contracts grant employees the right to take leave for a wide variety of reasons. Here we will address the most common.

Illness Leave

The Education Code specifically grants public education employees certain leaves for illness. They earn essentially one day per month worked of full-paid sick leave each year, which accumulates if unused [sections 87781 (community college academic) and 88191 (community college classified)]. The laws allow districts to adopt rules for the use of illness leave, which generally include advance notice requirements, medical verification, and medical release to return to work.

In addition to full-paid illness leaves, employees are entitled to extended illness leave at lesser rates of pay. Academic employees are entitled to five school months at the difference between their salaries and that paid to substitutes or would have paid if one was hired (section 87780) or five school months at 50% pay (section 87786). Classified employees are entitled to five months at the difference between their salaries and what is actually paid to a substitute, or 100 days at 50% pay (section 88196).

Contracts should be reviewed carefully to determine which rules have been adopted and whether the district has agreed to different language granting greater rights.

Healthy Workplace, Healthy Families Act of 2014 (AB 1522):

Effective July 1, 2015, employees who work for 30 or more days in a calendar year will be entitled to paid sick leave. Labor Code Section 245, et seq., require employers (which include community college districts) to grant one hour of paid sick leave for every 30 hours worked, up to a maximum of 24 hours in one calendar year. An employee can carry over a maximum of 24 hours to another year and are not entitled to payment for unused leave when the employee ceases employment.

The leave may be used for the diagnosis, care, or treatment of an existing health condition of or preventive care for, the employee or an employee's family member. The following family members are covered by the law: child (regardless of age and dependency status, and including those for whom the employee acts in loco parentis), parent (of the employee, employee's spouse, or employee's registered domestic partner), spouse, registered domestic partner, grandparent, grandchild, and sibling. The employee begins earning the leave from the first day of employment, but may not use the leave until the 90th day.

Importantly, this law does not apply to employees who are covered by a collective bargaining agreement that provides paid sick leave or paid time off for illness, binding arbitration, premium wage rates for all overtime hours work, and a regular hourly rate of pay not less than 30% more than the state minimum wage rate. Because the Education Code grants significantly more full-paid illness leave than that mandated by this law, the real impact for districts is on their
substitutes and seasonal workers (if they are not in a bargaining unit and do not also hold a regular classified position).

**Personal Necessity Leave**

**Academic Employees:**

Education Code sections 87781.5 and 87784 grant academic employees up to six days of personal necessity leave each year, which comes out of full-paid sick leave. If an employee has exhausted all full-paid sick leave, he or she is not entitled to any personal necessity days. Unlike the classified law, these statutes are silent on a district's ability to negotiate a greater amount. (However, section 87764 allows districts to grant more or different leaves to academic employees.)

Also, the academic employee statutes do not include a definition of "immediate family. In all other respects they are treated the same as K-12 and county office certificated employees.

The specific reasons for personal necessity leave:

- Death or serious illness of a member of the employee's immediate family; and
- Accident involving the employee's person or property or the person or property of a member of the employee's immediate family;

The district may not require advance permission when personal necessity leave is taken for these reasons. This statute, unlike the classified statute, does not define "immediate family."

**Classified Employees:**

Education Code section 88207 grants classified employees up to seven days of personal necessity leave each year, which comes out of full-paid sick leave. If an employee has exhausted all full-paid sick leave, he or she is not entitled to any personal necessity days.

The specific reasons for personal necessity leave:

- Death or serious illness of a member of the employee's immediate family;
- Accident involving the employee's person or property or the person or property of a member of the employee's immediate family;
- Appearance in any court or before any administrative tribunal as a litigant, party, or witness under subpoena or any order made with jurisdiction.

For the first two reasons, the district may not require advance permission. "Immediate family" is defined for personal necessity leave (and bereavement) leave as: "[T]he mother, father, grandmother, grandfather, or a grandchild of the employee or of the spouse of the employee, and the spouse, son, son-in-law, daughter, daughter-in-law, brother, or sister of the employee, or any
relative living in the immediate household of the employee.” Under Family Code section 297, a registered domestic partner is considered a “spouse” under California law.

The district may negotiate personal necessity leave days in excess of seven per year.

**Child Bonding Leave (AB 1606)**

Effective January 1, 2015, Assembly Bill 1606 adds Education Code sections 87784.5 (academic) and 88207.5 (classified). These statutes provide for 30 days of leave in an academic year for the birth of a child (biological parent) or adoption of a child (nonbiological parent) within the first year after birth or adoption.

The legislative analyses state that the 30 days of leave are with pay and come from an employee’s available sick leave. Unfortunately, that language does not appear in either statute. The statutes state only that employees are entitled to 30 days, “less than any days of leave authorized pursuant to” the personal necessity leave statutes.

If the statutory language conflicts with a collective bargaining agreement, it does not apply until that agreement expires or is renewed.

**Industrial Accident and Illness Leave**

Education Code sections 87787 (academic) and 88192 (classified) grant 60 work days of industrial accident or illness leave per illness or injury. After that leave is exhausted, the employee may use other available paid leaves, which are prorated based on the amount of temporary disability payments.

**Bereavement Leave**

Employees are entitled to bereavement leave for the deaths of members of the immediate family, three days for in-state travel and five days for out-of-state travel. [Education Code sections 87788 (academic) and 88194 (classified).]

Immediate family is defined as: “the mother, father, grandmother, grandfather, or a grandchild of the employee or of the spouse of the employee, and the spouse, son, son-in-law, daughter, daughter-in-law, brother, or sister of the employee, or any relative living in the immediate household of the employee.” Under Family Code section 297, a registered domestic partner is considered a “spouse” under California law.

**Vacation**

Classified employees earn vacation, which is generally one day per month worked or based on a formula (Education Code sections 88197). Many districts grant additional vacation based on an employee’s longevity.
Jury Duty Leave

A district may, but is not required to, grant leave for jury duty for academic employees, and if the leave is granted, may pay the employee. (Education Code section 87035)

Classified employees are entitled to leave for jury duty and to compensation for such leave. (Education Code section 87036) It is unlawful for a district to encourage exemption from jury service.

Union Activities Leave

In addition to contract provisions for paid union released time and requirements under the Educational Employment Relations Act (EERA) to grant paid released time for specified purposes, the Education Code grants union officers the right to paid release time if the union reimburses the district for the employee’s salary and benefits. Classified employees are also entitled to leave to attend “important organization activities” authorized by the union. [Education Code sections 87768.5 (academic) and 88210 (classified).] Assuming proper notice is given and reimbursement provided, the district cannot deny the requested leave regardless of a negative impact on operations.

Family and Medical Leave

Employees who meet eligibility criteria are entitled to up to 12 workweeks (or 26 workweeks to care for a family member injured in the line of active duty military service) of unpaid leave in a 12-month period for qualifying reasons under the federal Family and Medical Leave Act of 1993 (FMLA; 29 U.S.C. §2601, et seq.) and the California Family Rights Act (CFRA; Government Code section 12945.2). The employer must give the employee written notice that leave is FMLA/CFRA. The qualifying reasons are:

- The birth of an employee’s child, and care for the child during the first 12 months after the birth of the child;
- The adoption or placement of a foster child during the first 12 months after adoption or placement of the child;
- The care of a seriously ill spouse, parent, registered domestic partner (CFRA leave only), or child under age 18 or 18 or older and incapable of self-care because of mental or physical disability;
- A serious health condition of the employee making him or her unable to perform job duties;
- The care of a parent, spouse, child (including adult child), or “next of kin” who suffered a serious injury or illness in the line of duty on active duty in the Armed Forces (FMLA leave only);
• A qualifying exigency arising out of the fact that a spouse, child (including adult child) or parent of the employee is a covered military member on active duty or has been notified of an impending call or order to active military duty.

Pregnancy Disability Leave

Government Code section 12945 grants employees who are disabled by pregnancy, childbirth, or recovery therefrom, up to a maximum of four months (17-1/3 weeks) of pregnancy disability leave. The leave is unpaid and can run concurrently with illness leaves and FMLA leave, but not CFRA leave. No written notice to the employee is required. An employee on PDLA leave is entitled to receive her benefits in the same manner as if she was working.

Military Leave

Under state and federal law, an employer must grant military leave to employees for a wide range of military service, including active duty service, and active or inactive duty training. Under the California Military and Veterans Code, in some circumstances employees on such leaves are entitled to one month's pay for the leave. Military leave cannot be denied regardless of the negative impact on the district.


Family Illness Leave

Labor Code section 233 requires that employers allow employees to use up to one-half of their annual entitlement to illness leave to care for an ill parent, spouse, registered domestic partner, or child.

Parental School Leave

Labor Code section 230.8 grants the parent, guardian, or grandparent with custody, 40 hours of unpaid leave each year (with no more than eight hours in a month) to participate in activities of the school or licensed child day care facility of any of his or her children, if the employee, prior to taking the time off, gives reasonable notice to the employer of the planned absence of the employee. The employee must use existing vacation, personal necessity, and compensatory days concurrently with the 40 hours. There are limits where both parents work for the same employer and request the same time off.
Unauthorized Leaves

A leave of absence may be unauthorized for a variety of reasons.

- Reason for the leave is not covered by law or contract;
- Reason for the leave is covered, but all such available leave has been exhausted;
- Failure to give required notice or verification of leave;
- Leave request denied;
- Falsifying reason for leave;
- No reason given.

Where the leave is not authorized, taking action is much less complicated than where it is authorized.

- If the reason for the leave is not covered under any leave rule, pay may be docked and appropriate disciplinary action taken. For example, an academic employee wants to take two days off to start a vacation early (such as the two days before spring break). Assuming the contract includes the standard prohibition against using PNL for vacation or holiday, this is not an authorized reason.

- If the reason for the leave is covered but all such leave has been exhausted, pay may be docked and potentially, disciplinary action taken. For example, a classified employee has used all seven days of PNL and then there is a fire at her home. While normally that would qualify for PNL, she has no PNL days to use.

- If the contract requires notice and approval for vacation and the employee does not give notice in time or receive approval and then takes the time off anyway, the absence is unauthorized and pay may be docked and disciplinary action taken. A corollary to this is where an employee requests vacation, that request is denied, and he or she then calls in sick on the days for which vacation was requested. The district may be able to dock the pay and take disciplinary action if it can prove that the employee was not in fact ill.

- If a leave request is properly denied (pursuant to the terms of the contract or law), an employee who takes the leave anyway may have his or her pay docked and be disciplined.

- An employee who falsifies the reason for a leave (such as calling in sick when not ill) may have his or her pay docked and be subject to discipline.

- An employee who simply fails to show up for work, or arrives late or leaves early without providing notice, may have his or her pay docked and be disciplined.
The key to all of these is following contract language and applying it consistently, such as enforcing timelines on notice or requests for vacation. A common issue is where employees are allowed to request vacation leave at the last minute despite clear timelines and procedures in the contract. It will be much more difficult to discipline for failure to follow those procedures if the employer has not previously enforced the procedures. If that is the case, the employer may inform employees that it will be enforcing such clear rules in the future and then follow through.

It may be difficult to determine whether a specified reason for leave is false. While in some worker's compensation cases there are investigators to determine whether the employee is as disabled as he or she is claiming, that is rarely done in routine leave situations. You must be careful to avoid relying on hearsay (such as workplace rumors) unless you can get concrete information. One tactic is to require verification. This is usually an illness leave issue, and most contracts allow the district to require medical verification. That verification, or failure to provide it, can be used as evidence.
Controlling Authorized Leaves

For most supervisors, employees using authorized leaves are a much bigger problem than unauthorized leaves. Contracts and statutes give employees broad rights to take leave, and in many cases strictly preclude employers taking any action based on the use of such leaves. That is why the reason for the leave is crucial, as well as its negative impact.

Some controls granted to employers by under contracts and the law can help limit leaves to truly legitimate, necessary uses:

Notice of Leave

Most contracts and many laws include provisions specifying the amount of notice an employee must give before taking a leave. These rules should be strictly enforced for all employees. If everyone taking a leave is required to comply with the appropriate rules, it minimizes claims for discrimination. Examples:

- **Illness leave** – Most collective bargaining agreements require that employees give notice of an illness-related absence by a certain time. If the contract is silent, negotiate notice language. The purpose of the notice is to allow the employer to make other arrangements, thus it needs to be early enough to allow the employer to act.

- **Personal necessity leave** – Where the personal necessity is death of a family member or accident, a district cannot require advance permission be granted. However, you can negotiate language requiring the employee to give notice of the leave as soon as possible.

- **Bereavement leave** – Most contracts include a “reasonable” notice requirement for bereavement leave.

- **Vacation** – Most contracts require advance approval for vacation requests, some with specific timelines. If the contract requires vacation scheduling and approval by the end of September, for example, that language should be enforced for all.

- **Jury duty leave** – An employee called for jury duty must normally give reasonable notice. If the contract is silent, districts should consider negotiating rules on notice.

- **Union activities leave** – If the contract has specific advance notice requirements, those should be enforced, or negotiated if the contract is silent. If the leave is to serve as a union officer and the union is reimbursing the district, the statute only says that the employee must request the leave. A reasonableness requirement could probably be enforced. For example, if an employee calls in on Monday morning and says he will be on a union leave for two months effective immediately, a district likely would be successful in arguing that the notice was not reasonable.
FMLA/CFRA leave – Where the FMLA/CFRA leave is for a planned event and there is at least 30 days’ notice of the event, the employee must give advance notice to the employer. For example, a male employee’s wife is having a baby and he does not tell anyone that he will be taking FMLA/CFRA leave until she goes into labor near her due date. While the specific date might have changed, he certainly knew at least 30 days in advance that a baby would be coming. For other family leave qualifying reasons, the general rule is that the notice must be “reasonable,” which is usually considered to be two business days.

Most leaves require only “reasonable” notice so the issue then will be what notice is reasonable under the circumstances. That would be based on when the employee knew of the need for the leave, his or her ability to contact the district, and efforts made.

Verification

In most circumstances, employers may require verification that a leave was taken for the stated reason. This arises most frequently with illness and family and medical leave. Again, contract language will likely control the use of illness leave while the FMLA and CFRA include specific verification requirements. Examples:

- Requiring a doctor’s note verifying that the employee was medically unable to work on the specified days where the absence is illness or disability-related;
- Requiring submission of the appropriate medical certification for use of FMLA/CFRA leave (including a statement that the employee is needed to care for the family member if that is the reason for the leave), or military documents where the FMLA leave is related to a family member’s military service;
- Requiring a copy of a jury duty summons and the certificate on completion of jury services;
- Requiring a written notice from the appropriate union that the requested union leave complies with the statutory requirement and that it will reimburse the district as required by law; or
- Requiring copies of military orders for military leave.

The content of the verification, particularly where illness is involved, can be very important. A doctor’s note that says the employee was seen by the doctor on a specified date does not verify that he or she was medically unable to work. Also review whether the individual who wrote the note is qualified under the terms of the contract or law. For example, under the FMLA and CFRA, a chiropractor may only write a note for back issues (this rule would not apply where the employee is using regular illness leave and not FMLA/CFRA). An employer cannot require that the employee or his or her physician identify the nature of the illness or injury.
If you have reason to doubt the substance of the note based on the individual who prepared the note, you may be able to require more documentation. It will depend upon the author's qualifications and the nature of the illness.

**Release to Return to Work**

Where a leave is for illness, most contracts allow the employer to require a medical release that the individual is medically able to return to work. If it is a full release without restrictions and the employer has no reason to doubt its accuracy, that note will be sufficient. Where the release includes restrictions, the employer will likely have to engage in the interactive process under the disability laws (addressed below).

If the employee is returning from military leave, an employer has the right to documentation on when the service ended (because the employee must return within certain timelines) and that any discharge was honorable.

**Review Availability of Leave**

Most statutes prescribe specific amounts of leave for specific reasons, for example, six or seven days of personal necessity leave each year. Districts should closely monitor and track leave use to ensure that employees do not receive more leave than they are entitled to use.

Many districts have granted greater leave rights than those provided by law. Negotiating language that sticks to the statutory limits can help with absenteeism issues.

If an employee has exhausted available leave but continues to be absent, as long as it is not for his or her own illness, the district may take action based on the additional absences.

How a district calculates leave is also important. Under the FMLA and CFRA, an employer may require that unpaid FMLA/CFRA leave run concurrently with available paid leaves. Districts should enforce this right and make sure contract language does not require extra time off. With FMLA/CFRA leave, employers are required to give written notice. Providing the proper notice in a timely manner can restrict the amount of time off.

**Leave Approval**

In some cases, an employer may require that an employee may not take leave until it is approved. This is most common with vacation leave. That language should be strictly enforced.

**Advancing Leave**

Under the Education Code, full-paid sick leave must be advanced at the start of the academic year. Thus, an employee could take the first 10 days off. In contrast, the Education Code does not require that an employer advance vacation. Assuming the contract does not require it, districts should not advance vacation leave.
Communicate with Administration

Supervisors should communicate with the central office on leave use. This can lead to controlling the amount of leave taken. For example, the central office will be more aware of available leave balances so it can inform the employee when paid leaves will be exhausted. Also, the central office might be able to determine that an employee is ineligible for leave (such as FMLA/CFRA) where a supervisor would simply grant the leave.

Control Pay for Leaves

Many districts grant greater leave rights than required by law. An employee is more likely to be absent where the leave is paid than unpaid. If the district adheres to the statutory minimums, it can control its costs and potential disruption caused by absences. Examples:

- Granting more than one day per month for illness leave or vacation;
- Granting more than six (academic) or seven (classified) days per year for personal necessity leave;
- Expanding the reasons for use of leave (such as other “necessities” for PNL, using sick leave to care for the family, adding family members or others to the definition of “immediate family;” expanding FMLA/CFRA to cover care for other family members);
- Granting more than 12 workweeks of FMLA/CFRA leave, or granting FMLA/CFRA leave to employees not eligible by law;
- Paying certificated employees for jury duty;
- Granting more than 60 days of industrial accident or illness leave (or failing to adopt the 60-day rule as required by the Education Code);
- Allowing employees to use extended illness leave for personal necessity or to care for others;
- Making an unpaid leave, such as parental school leave, a paid leave in addition to personal necessity or vacation.
“Untouchable” Leaves

Aside from technical issues (notice, verification, etc.) there are some leaves that may never be the basis of discipline. It is very important to properly designate a leave at the outset to determine which leaves to consider when taking disciplinary action or evaluating an employee. Assuming the employee has leave available, and has provided proper notice and verification, the following leaves are essentially “untouchable” and must be excluded from discipline or evaluation.

- Military leave
- Jury duty
- Union officer and activities leave
- FMLA/CFRA leave
- Pregnancy disability leave

Regardless of how disruptive absences for those reasons may be, if the employee complies with all of the statutory and contractual rules, the time off may not be used against him or her for disciplinary or evaluation purposes.
Interaction of Leaves and Disability Laws

The most significant hurdle facing most attendance cases is the protection offered by the disability anti-discrimination and reasonable accommodation laws. The federal Americans with Disabilities Act (ADA; 42 U.S.C. §12101) and the California Fair Employment and Housing Act (FEHA; Government Code Section 12900, et seq.) require that employers “reasonably accommodate” the known disabilities of employees who are considered “qualified individuals with a disability.” These laws have a significant impact on an employer’s ability to address leave issues with employees.

Americans with Disabilities Act

The ADA, as amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), directs the Equal Employment Opportunity Commission (EEOC) and the courts to interpret the standards for disabilities liberally, specifically overturning U.S. Supreme Court decisions limiting the definition of a disability. The general effect of those amendments is to bring the ADA definition of disability more in line with the broader protections of California law.

Disability:

A disability is defined as “a physical or mental impairment that substantially limits one or more major life activities: a record of such an impairment; or being regarded as having such an impairment.” The amendments added the following:

- An impairment need not prevent, or significantly or severely restrict, performance of a major life activity to be “substantially limiting.”

- Disability “shall be construed in favor of broad coverage” and “should not require extensive analysis.”

- An individual’s ability to perform a major life activity is compared to “most people in the general population,” often using a common-sense analysis without scientific or medical evidence.

- An impairment need not substantially limit more than one major life activity.

An impairment that is “episodic” or “in remission” is a disability if it would substantially limit a major life activity when active. Examples of impairments that are episodic or in remission include epilepsy, hypertension, multiple sclerosis, asthma, diabetes, major depression, bipolar disorder, schizophrenia, and cancer.

Disability protections also apply where an individual is “regarded as” disabled.
Major Life Activities:

“Major life activities” shall not be interpreted to strictly create a demanding standard for disability.

- Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others and working.

- Major bodily functions: A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions.

Impairments for which an individualized assessment “can be conducted quickly and easily, and that will consistently result in a determination that the person is substantially limited in a major life activity”: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV/AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

Impairments that may be substantially limiting for some individuals but not for others, and therefore may require somewhat more, though still not extensive, analysis: asthma, high blood pressure, back and leg impairments, learning disabilities, panic or anxiety disorders, some forms of depression, carpal tunnel syndrome, and hyperthyroidism.

Temporary, non-chronic impairments of short duration with little or no residual effects that usually will not substantially limit a major life activity include: common cold, seasonal or common influenza, a sprained joint, minor and non-chronic gastrointestinal disorders, a broken bone expected to heal completely, appendicitis, and seasonal allergies.

However, an impairment may still be substantially limiting even if it lasts or is expected to last fewer than six months, such as a 20-pound lifting restriction lasting several months.

Substantially Limited in Working:

An individual with a disability will usually be substantially limited in another major life activity, therefore making it unnecessary to consider whether the individual is substantially limited in working.

Previously, an individual had to be substantially limited in a “class” or “broad range” of jobs. The ADAAA replaced that with the concept of a “type of work.”

A type of work may be identified by the nature of the work (e.g., commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs).
A type of work may also be defined by reference to job-related requirements (e.g., jobs requiring repetitive bending, reaching or manual tasks; jobs requiring frequent or heavy lifting; and jobs requiring prolonged sitting or standing).

Consideration of Mitigating Measures:

Positive effects of mitigating measures (except for ordinary eyeglasses and contact lenses) are ignored in determining whether an impairment is substantially limiting. However, mitigating measures may, on their own, impair a major life activity and thus would be considered (for example, medication that makes it impossible for the individual to drive).

Examples of mitigating measures include medication, medical equipment and devices, prosthetics, hearing aids, cochlear implants and other implantable hearing devices, low vision devices, mobility devices, oxygen therapy, use of assistive technology, reasonable accommodations and auxiliary aids or services, behavioral or neurological modifications, and surgical interventions that do not permanently eliminate an impairment.

Ordinary eyeglasses and contact lenses are lenses “intended to fully correct visual acuity or eliminate refractive error.” They can be considered in determining “disability.”

The employer must show that challenged uncorrected vision qualification standards are job-related and consistent with business necessity, regardless of whether the person challenging the standard has a disability.

Fair Employment and Housing Act

The California Fair Employment and Housing Act (FEHA) prohibits discrimination against individuals who have “a physical disability, mental disability or medical condition.” Unlike the ADA, FEHA requires only that the disability or medical condition “limit” a major life activity, not “substantially limit.” [The Department of Fair Employment and Housing (DFEH) enforces the FEHA.]

Disability:

FEHA protects physical and mental disabilities.

“Physical disability” includes, but is not limited to, all of the following:

- Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:

  (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.

  (B) Limits a major life activity.
Any other health impairment not described in paragraph (1) that requires special education or related services.

Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

“Physical disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

“Mental disability” includes, but is not limited to, all of the following:

- Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity.
- Any other mental or psychological disorder or condition not described in paragraph (1) that requires special education or related services.
- Having a record or history of a mental or psychological disorder or condition described in paragraph (1) or (2), which is known to the employer or other entity covered by this part.

“Mental disability” does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs.

As under the ADA, individuals who are “regarded as” having a disability are also protected.

California law also provides that “chronic or episodic ailments” such as HIV/AIDS, epilepsy, seizure disorders, diabetes, clinical depression, bipolar disorder, multiple sclerosis, heart disease and hepatitis should be included in the definitions of physical and mental disabilities.

Medical Condition:

“Medical condition” means either:

- Any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer; or
- Genetic characteristic, which means either:
  - Any scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is known to be a cause of a disease or disorder in a person or his or her offspring, or that is determined to be associated with a statistically increased risk of development of a disease or
disorder, and that is presently not associated with any symptoms of any disease or disorder; or

- Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or his or her offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

“Limits” a “Major Life Activity”:

The phrase “major life activities” is broadly construed and includes physical, mental, and social activities and working. Working is a major life activity regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.

State law requires that the condition only limit a major life activity, not “substantially” limit as the ADA requires. “Limits” is defined under state law as “makes the achievement of the major life activity difficult.”

Consideration of Mitigating Measures:

State law also forbids an employer from considering mitigating measures (such as medication, assistive devices or reasonable accommodations) in determining whether an employee’s ability to engage in a major life activity is limited, unless the mitigating measure itself limits a major life activity.

Determining Whether an Employee Is “Disabled”

Employers are required to reasonably accommodate the known disabilities of employees. Whether a disability is “known” depends on the information available to the employer.

If it is an obvious disability, for example use of a wheelchair, the employer is on notice and has an obligation to engage in the interactive process to determine whether an accommodation is necessary and reasonable. If it is not obvious, a statement by the employee may be sufficient to trigger the process. It is important to note that the statement need not be in writing or to the central office. If an employee tells his or her immediate supervisor that he suffers from severe asthma that causes intermittent absences, he has put the employer on notice that he might have a protected disability and the employer must then act accordingly.

In the attendance area, the mere fact that an employee is absent frequently or for long periods for illness does not necessarily mean that he or she has a protected disability. (It may, however, put the employer on notice that the absences could be qualified for FMLA/CFRA, because an illness of more than three consecutive days while the employee is under medical care is a qualifying reason for FMLA/CFRA.)
Often, an employee will assert a disability in response to discipline or an evaluation. If that disability was not known to the employer, the discipline or evaluation can go forward as written. However, the employer must then engage in the interactive process to determine whether the employee has a protected disability, and if so, whether it can reasonably accommodated in the future.

An employer is entitled to medical verification of a claimed disability and work-related restrictions. Recent changes in the FEHA regulations now specifically prohibit an employer from requiring the employee to disclose the nature of the disability but do establish parameters for the types of information that may be required. An employer is only entitled to medical information directly related to the asserted disability and/or medical condition and how that disability and/or medical condition affects his or her ability to work. Any request for medical verification should be narrowly tailored to the issue at hand. In some circumstances, an employer may send the employee to a physician selected by the employer.

Leave as Reasonable Accommodation

If an employee suffers from a protected disability or medical condition, the question is then whether and how he or she can be reasonably accommodated. Here we will address only accommodations that relate to attendance.

The most frequent disability-related leave request is for intermittent absences required by the disability. For example, an employee who suffers from severe asthma might have to be absent intermittently when his condition flares up. Related requests include reducing the work schedule or making it flexible because of restrictions imposed by the disability. An employee may also require more frequent breaks, breaks at specific times, or longer breaks as an accommodation of a disability.

Whether a leave or modified work schedule is a reasonable accommodation will depend on all of the facts. There is no automatic answer to any disability accommodation request because the analysis is based on the specific employee, the specific disability, how the disability affects him or her, the employee’s job, and the employer’s operations. What is reasonable in one situation might not be in another.

An employer is not required to remove an essential function of a job as a reasonable accommodation, but the EEOC and DFEH generally have not held that attendance is an essential function. Again, it depends on all of the circumstances.

The EEOC has issued a document titled *The Americans With Disabilities Act: Applying Performance And Conduct Standards to Employees With Disabilities*. That document states that while an employer may have to modify time and attendance policies as an accommodation,
[E]mployers need not completely exempt an employee from time and attendance requirements, grant open-ended schedules (e.g., the ability to arrive or leave whenever the employee’s disability necessitates), or accept irregular, unreliable attendance. Employers generally do not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice.”

The Americans With Disabilities Act: Applying Performance And Conduct Standards to Employees With Disabilities, Section III, Question 22. [The complete document can be found at http://www.eeoc.gov/facts/performance-conduct.html.] An employer also does not have to grant an indefinite leave as an accommodation.

The employer will have to show the negative impact of the absenteeism, including the amount of leave taken and the timing of the leave, and thus how it imposes an undue hardship. If an employer shows that attendance is an essential function, then allowing leaves would not be a reasonable accommodation.

The EEOC, DFEH and courts have long grappled with the issue of whether attendance is an essential function. The courts have recognized that for at least some jobs, being able to actually report to work is an essential function. The U.S. Ninth Circuit Court of Appeals recently cited with approval a Seventh Circuit decision holding that attendance is an essential function for a teacher [Samper v. Providence St. Vincent Medical Center (9th Cir. 2012) 675 F. 3d 1233, citing with approval Nowak v. St. Rita High School (7th Cir.1998) 142 F. 3d 999.]

To address illness-related discipline where the illness is a disability, the employer should:

- Monitor and document attendance, including days of the weeks, tardies, long breaks, leaving early;
- Document negative impact in detail;
- Document notice given by the employee, when, to whom, content of the notice, and the response;
- Document requests for verification and verifications provided, including whether clarification was requested and provided and timeliness of documentation.

When addressing attendance issues in evaluations, supervisors should be very cautious to avoid a negative comment or rating based solely the quantity of leave. Where leave is a reasonable accommodation, an employer cannot then discipline the employee for the leave.

When a supervisor has issues with an employee’s attendance, he or she should communicate with the administration so that the district may engage in the interactive process and determine whether the leave may be protected.
How to Handle an Employee Absenteeism Issue

Attendance issues implicate many laws and rights under contracts and policies. An employer may believe that it can act based solely on contract language, and then run into restrictions under the ADA, FEHA, FMLA, and CFRA. Districts need to understand the rights and limits created by these laws and collective bargaining agreements in order to avoid inadvertently violating them.

- First, contracts, policies, regulations, and practices can provide greater rights than laws, but in most cases cannot provide fewer rights.
- Second, as a general matter courts will interpret discrimination and leave statutes in a manner most beneficial to the employee, not the employer, since the laws were enacted to protect employees.
- Third, where laws conflict, courts will usually apply the law that provides the greatest benefit to the employee. The FMLA, for example, specifically states that where the FMLA conflicts with state law, then whichever law provides the greatest rights to the employee will apply.
- Fourth, while federal law usually supersedes contrary state law, and both supersede contract provisions, courts will first attempt to harmonize the laws without finding that one overrules another. Employers must remember that these rules are again applied in a manner that provides the greatest benefit to the employee.

The two biggest concerns are where an employee appears to be excessively absent for illness but the absences are intermittent, and where an employee on a long-term absence for illness seeks to return.

When Can an Employer Require Verification of Illness?

Employers that believe an employee is abusing illness leave want verification, either from the employee’s physician or one selected by the employer. Whether and how such verification may be required depends on a variety of factors.

- First, look at contract language if the employee is in a bargaining unit. Contracts generally include language regarding the circumstances under which the district may request medical verification for the use of illness leave. This includes verification by the employee’s physician and/or the employer’s.
- Second, if the contract is silent or the position is not in a bargaining unit, look to board policies, administrative regulations, employee handbooks and past practice.
- Third, determine whether the leave is protected by the FMLA and/or the CFRA. Both laws include provisions regarding certification of serious health conditions. If the absence is protected by either or both laws and the employee is using paid illness leave concurrently with unpaid family leave, the employer can enforce
contract rules related to use of paid leave, including more frequent verification than under FMLA and CFRA. If the employee is using only unpaid family leave, the employer may not enforce contract rules that conflict with the FMLA and CFRA. Under those laws, an employer may require initial certification from a health care provider, renewals when the prior note ends and annual certifications for ongoing conditions. It usually cannot require notes for individual absences where all are for protected reasons. Thus, if the employee has asthma (a “serious health condition” under FMLA and CFRA), the employer could require an initial note, but could not require the employee to provide a note for each day absent unless the employee is using paid illness leave and the rules for use of such leave allow such a requirement.

- Fourth, assuming the contract, etc., do not prohibit the employer from requiring medical verification, look at the ADA. Under the ADA, requiring medical verification of illness is considered a “medical inquiry” or “medical examination” and such an examination or inquiry must be “job-related” and “consistent with business necessity.” The Equal Employment Opportunity Commission (EEOC) issued a guidance regarding medical examinations and inquiries and held that an employer may require verification of the use of illness leave, as long as it is required for all employees, not just those with disabilities. [Enforcement Guidance: Disability-Related Inquiries And Medical Examinations Of Employees Under The Americans With Disabilities Act (ADA) (7/27/00), http://eeoc.gov/policy/docs/guidance-inquiries.html.]

**Caveat:**

While it may ask for verification that illness leave is being used legitimately, an employer is not entitled to know the specific nature of the illness or injury that causes the absence. An employer is only entitled to know the specific nature of the illness/injury where the employee has requested reasonable accommodation and thus is claiming to have a protected disability.
Sending the Employee to the Employer’s Physician

Regardless of whether it is actually true, a general assumption exists that an employee’s physician will write what the employee asks him or her to write on work notes. Thus, employers frequently want the employee to be examined by their physicians, who presumably would be “neutral.” Depending on the circumstances, such exams, even if permissible, may not provide much benefit.

There are two reasons to seek such an exam – to determine whether the leave was properly used and whether the employee is medically able to return to work.

As explained above, an employer first must determine whether it has the right to require such an exam. Again, contracts, policies, regulations, and practices must be reviewed.

Assuming those provisions allow the employer to require such an exam, the employer is also bound by the ADA, FEHA, FMLA and CFRA.

If the leave is protected by the FMLA and/or CFRA, the employer may require an exam by its physician when determining whether the employee is entitled to the leave. If the two doctors disagree, a third physician (agreed upon by the employer and employee) makes the decision. (It is important to note that under the FMLA, the employer-selected physician cannot be one it uses regularly.) Where the employee is simultaneously using paid leave, the employer may follow its rules for the use of paid leave. However, an employer may not require an employee returning from an FMLA leave for his or her own serious health condition to submit to a fitness for duty exam by an employer-selected physician as a prerequisite to returning to work. It may only require a release from the employee’s physician, and the request must be limited to the reasons for the leave and the employee must be given notice at the time the leave is designated as family leave that it will require such a certification and identify essential functions it wants the physician to address.

Finally, the ADA and FEHA come into play. Under the EEOC Guidance on medical examinations referenced above, an employer may require an employee to be examined by its physician in limited circumstances when it relates to a request for accommodation or a concern about an employee’s condition posing a direct threat to health or safety. The Guidance does not address whether an employer may require an employee to see an employer-selected physician to verify the reason for an absence. If the employee has requested an accommodation, the employer may require an exam by its physician where the employee has provided “insufficient documentation” – where the documentation does not specify the ADA disability and explain the need for accommodation, the health care professional does not have the expertise to give an opinion about the employee’s condition, the documentation does not specify the functional limitations due to the disability, or “other factors indicate that the information provided is not credible or is fraudulent.”

Even if the employer may lawfully require the employee to be examined by its physician, the employer needs to weigh the practical benefits of such an examination.
- If the employer’s physician issues an opinion conflicting with the employee’s physician’s opinion, a court or administrative agency will likely defer to the employee’s physician’s determinations because of a presumed historical relationship. In some circumstances an employer can show why the employee’s physician’s opinion is not reliable, but it will bear that burden.

- If the exam is to determine whether leave was appropriately used, it is unlikely that an employer-selected physician will be able to determine whether the employee was medically able to work on a particular day in the past.

- If the employer-selected physician agrees with the employee’s physician, the employer will have a difficult time challenging those determinations.

This is not to say that all such exams are useless. A detailed exam that requires the employee to physically demonstrate a particular skill or act will usually reveal helpful information. Employers should ensure that if the employee is examined by its physician, the physician has historical information (such as relevant medical records) and require physical demonstration of tasks.

Using a specialist with expertise in the particular area of the employee’s medical condition can counteract an assumption that the employee’s physician knows best. For example, an employee has been on leave due serious depression (including suicide attempts and self-mutilation). The employee’s paid leaves are almost exhausted and her physician, a general practitioner, provides a broad release to return to work without restrictions. Believing that her condition creates a direct threat to her own health and safety and that of others at work, the employer has the employee examined by the head of psychiatry at a teaching hospital. Because that physician has particular expertise which the employee’s physician lacked, the employer could argue that it was the better-reasoned opinion.

If the employer-selected physician’s opinion conflicts with the employee’s physician’s opinion, a copy of that report should be forwarded to the employee’s physician for review and comment.
Worker's Compensation and Medical Exams

If the employee's condition is the subject of a pending worker's compensation claim, the employer may more easily require the employee to see a physician it has selected, under the terms of the worker's compensation laws. However, an employer cannot require that an employee be released by a specific worker's compensation physician before he or she may return to work. Worker's compensation physicians analyze injuries and restrictions from the perspective of the worker's compensation laws. A person may have a compensable worker's compensation injury that does not impact his or her ability to perform his or her duties. If an employee with a pending claim provides a release from another physician, the employer can certainly review it and challenge it to the extent it conflicts with the worker's compensation physicians' opinions, but cannot reject it out of hand.
Abandonment of Position

Employers frequently want to argue that an employee has abandoned his or her position because the employee has not appeared for work and has not been in communication. Employers then seek to simply release the employee without following the normal discipline procedures. The law does not allow such a release and requires the employer to comply with due process.

What Constitutes Abandonment?

There is no clear, definitive rule as to what constitutes abandonment of position. The general definition is that an employee has abandoned his or her position because he or she has been absent for a certain period of time without receiving authorization (or being denied authorization), has not communicated with the employer about the absence, and has not responded to communications from the employer.

Nothing in law states how many days of absence constitute “abandonment.” For classified employees, discipline policies, regulations, or contract language will frequently specify an absence of three to five days. For academic employees, Education Code section 87732 does not include abandonment as a specific cause for discipline (it does not address attendance specifically at all), but a true abandonment could fall under many of the broader causes for suspension or dismissal.

Due Process

If an employee has been absent without authorization or notice, the employer’s first response should be to attempt to communicate with the employee. While telephone calls are useful, a letter should also be sent directing the employee to return to work immediately. It is easy for an employee to explain away a failure to respond to a telephone call he or she may or may not have received. If the employer can show that it sent a letter to the employee’s address identified in the employer’s files, it will be far more difficult for the employee to challenge. (As part of this, the administration should verify the address it has on file, comparing addresses in personnel files with payroll or site information. If there is a conflict, send the letter to all known addresses.) E-mail communications are also useful, but courts have not yet addressed their legal effect in such circumstances.

If the employee still does not return to work or does not provide a legitimate reason for the absence and failure to communicate, the district may initiate discipline proceedings, including dismissal. All normal discipline procedures apply, including notice and a right to a hearing if requested. Abandonment is not an automatic cause for dismissal.
Placement on 39-Month Reemployment List

An employee who has exhausted all available leaves and is not medically able to return to work may, in some circumstances, be placed on a 39-month reemployment list. Placing an employee on the 39-month list helps to resolve many employers’ issues with excessively absent employees.

Academic Employees:

No medical 39-month reemployment list exists for academic personnel, regardless of whether the district has adopted the substitute differential or 50% pay rule. When an academic employee exhausts all paid leaves, he or she effectively goes into “limbo” until the start of the next academic year, when the employee receives a new bank of full paid sick leave and a new five months of extended illness leave. The district would have to follow standard dismissal procedures to sever the employment relationship.

Classified Employees:

Once a classified employee exhausts all available leaves, he or she must be placed on a medical 39-month reemployment list (Education Code sections 88192 and 88195). A classified employee may only return from the 39-month list when he or she is medically able and there is a vacancy in the classification from which the employee left.

Because this placement severs the employment relationship, a district should engage in the interactive process with the employee before placement on the list to determine whether the employee can be reasonably accommodated.

STRS Disability

An academic employee who receives a disability allowance from the State Teachers’ Retirement System (STRS) must be granted an unpaid leave of up to 39 months. The employee would be entitled to return if determined to no longer be “disabled” for STRS purposes. (Education Code sections 24005 and 87789)
Conclusion

Excessive employee absenteeism frustrates supervisors and employers. The many statutory and contractual protections for eligible leaves make it very difficult for employers to take any actions against employees who legitimately use available leaves. However, employers are not without recourse assuming they follow contractual and statutory procedures and consistently apply work rules to leaves.
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