

New California Family Rights Act Regulations Become Effective July 1

By Jamerson C. Allen on March 26, 2015

Amendments to the California Family Rights Act (“CFRA”) regulations, going into effect on July 1, 2015, are meant to clarify a number of uncertainties, align the CFRA regulations more closely with the federal Family and Medical Leave Act (“FMLA”) regulations (where the laws are consistent), and ensure employers and employees have a clear understanding of their rights and duties under the CFRA.

Key provisions of the revised regulations are highlighted below.

- *Covered Employer*: Amends the definition of “covered employer” to include successors in interest of a covered employer and joint employers. The new regulations do not provide any criteria for determining whether a joint employer relationship exists; rather, the relationship “is to be viewed in its totality based on the economic realities of the situation.”
- *Other Definitions*: Amends the definitions of serious health condition, inpatient care, eligible employee, and spouse to include same-sex marriages and domestic partners.
- *Key Employee*: Extensively revises the provisions regarding the identity of key employees and their reinstatement rights.
- *Eligibility for Leave*: Details how to determine eligibility for leave, including establishing the leave year, determining an employee’s worksite if the employee works remotely or is jointly employed, and addressing breaks in service.
- *Fraudulent Use of Leave*: Denies job restoration and maintenance of health benefits to employees who fraudulently obtain or use CFRA leave. The employer has the burden of proving that an employee committed the fraudulent conduct.
- *Calculating Leave Entitlement*: Details how to calculate leave where the employee has part-time or other alternative schedules or cannot work overtime. Describes how to account for holidays during leave and how to manage situations where it is physically impossible for an employee using intermittent or reduced work schedule leave to begin or end work midway through a shift, such as where a flight attendant or railroad worker is scheduled to work on a plane or train.
- *Notice of Need for Leave*: Addresses situations where an employee’s request for CFRA leave is not clear. For example, if an employee asks for vacation or other paid time off or offers to resign and informs the employer that the reason for the request is CFRA-qualifying, the employer is permitted to question the employee to determine whether CFRA leave is being sought and to obtain the necessary information concerning the leave. The employee has an obligation to respond to an employer’s questions, and the failure

to respond may result in denial of CFRA protection if the employer is unable to determine whether the leave is CFRA-qualifying.

- *Substitution of Paid Leave for Unpaid Leave*: Details permitted substitutions of paid time off or other benefits for unpaid CFRA leave.
- *Job Restoration*: Requires the employer to engage an employee in the interactive process to determine whether an extension of leave would constitute a reasonable accommodation where the employee has a serious health condition that also constitutes a disability under the California Fair Employment and Housing Act (FEHA) and cannot return to work at the conclusion of his or her CFRA leave.
- *Group Health Coverage*: Expands provisions on continuation of coverage and payment of premiums during CFRA leave.
- *Fitness-for-Duty/Return-to-Work*: Clarifies an employer's ability to seek such information.
- *Certification Requirements*: Amends requirements regarding medical certifications, including penalties for failing to provide a certification. Revises the sample Certification of Health Care Provider form to include safe harbor language of the California Genetic Information Nondiscrimination Act of 2011 (CalGINA), and clarifies authentication and second opinion processes.
- *Posting*: Permits electronic posting of CFRA notices and requires employers to translate the CFRA notice into every language spoken by at least 10 percent of its workforce.

Interference, Retaliation

The new regulations significantly expand protections against interference with protected rights and retaliation.

Interference is defined to include refusing to authorize CFRA leave, discouraging an employee from using such leave, and taking actions to avoid responsibilities under CFRA. The regulations provide that transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites below the 50-employee threshold for employee eligibility under CFRA, would constitute "interference" with CFRA rights. Other examples of interference include: changing essential job functions to preclude the taking of leave, reducing an employee's hours available to work to avoid employee eligibility, or terminating an employee when it anticipates an otherwise eligible employee will be asking for a CFRA leave in the future.

The regulations further provide that "interference" includes discriminating or retaliating against a current or prospective employee for having exercised or attempted to exercise CFRA rights or giving information or testimony regarding his or her CFRA leave, or another person's CFRA leave. Employers cannot use the taking of CFRA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions; neither can CFRA leave be counted against an employee under an employer's attendance policies.

The regulations also provide that employees cannot waive, and employers may not induce employees to waive, their prospective rights under CFRA. However, this does not prevent the settlement or release of CFRA claims by employees based on past employer conduct without the approval of a court. This also does not preclude an employee from taking a light duty assignment while recovering from a serious health condition. Further, an employee's acceptance of a light duty assignment does not constitute a waiver of the employee's right to be reinstated to the same position or a comparable position.

All individuals, not merely employees who are CFRA-qualified, are protected from retaliation under CFRA.

Next Steps

California employers should review the new regulations and consult with experienced counsel regarding the changes. Employers also should review and revise their CFRA policies, posters, handbooks, and forms as may be necessary to conform to the amended regulations. In addition, employers should train their human resources

personnel or managers responsible for administering CFRA leave requests and leave about these changes to the California requirements.

Please contact your Jackson Lewis attorneys if you have any questions about the amended regulations, and to discuss your specific organizational needs and how to comply.

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