

March 25, 2015

Updated California Family Rights Act (CFRA) Regulations Will Take Effect on July 1, 2015

The California Fair Employment and Housing Council's updates to the California Family Rights Act ("CFRA") regulations have been approved and will take effect on July 1, 2015. The amended regulations clarify certain CFRA provisions and align the CFRA more closely with the federal Family and Medical Leave Act ("FMLA"), although important differences still remain between the two laws, both of which apply to employers with 50 or more employees. Here is an overview of the updates.

Aligning CFRA and FMLA

The updated CFRA regulations are geared largely at harmonizing employer's responsibilities under CFRA and FMLA. To that end, they incorporate the March 2013 FMLA regulations to the extent those rules are not inconsistent with the CFRA. This is a welcome development for employers that have been struggling with the interplay between the newer FMLA rules (which received a major overhaul in 2008) and the older CFRA rules. Changes made to more closely track the FMLA rules include updates to:

- The definition of "covered employer" (to add guidance on joint employer situations) and "eligible employee" (clarifying the 12-month length of service requirement, how to determine if there are 50 employees within a 75-mile radius for an employee who has no fixed worksite, and establishing eligibility for employees who have not met the 12-month service requirement prior to a leave).
- The definition of "spouse," to clarify coverage for same-sex spouses (note that the FMLA regulations were recently amended to cover spouses in legal, same-sex marriages).
- The reinstatement provisions, including an expanded reinstatement guarantee, permissible defenses to a refusal to reinstate, and "key employee" rules.
- The process of responding to CFRA leave requests (the revised CFRA regulations give employers five days) and making retroactive designations.

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- Intermittent leave and reduced schedule provisions, with respect to overtime, holidays, and calculating leave entitlement.
- The consequences of an employee's failure to respond to employer inquiries regarding the leave request, failure to return a required medical certification, and fraudulently obtaining CFRA leave.

The new CFRA regulations also make a number of other important modifications, including updates to the required workplace poster and a new medical certification form, as well as changes consistent with recent case law.

Key CFRA and FMLA Differences Remain

Despite the amendments to the CFRA regulations, there also remain a number of notable areas in which CFRA administration continues to differ from the FMLA, or where clarity is still lacking. For example:

- *Pregnancy disability*: Pregnancy disability is not covered under CFRA, even though it is a serious health condition under the FMLA. The new CFRA regulations clarify, consistent with recently updated pregnancy disability leave regulations, that an employer must maintain an employee's group health benefits for the entire time an employee is on pregnancy disability leave (up to four months) and a subsequent CFRA leave (12 weeks).
- *Medical certifications*: The FMLA regulations permit an employer – specifically, a human resources professional, leave administrator, management official or health care provider – to contact the employee's health care provider to clarify or authenticate a medical certification. The CFRA regulations have been amended to specify that an employer may not contact a health care provider for any reason other than to authenticate a medical certification. Also, the standard for seeking second opinions differs under the FMLA and the CFRA. The FMLA permits an employer to seek a second opinion when it has "reason to doubt" the validity of a medical certification. The amended CFRA rules, on the other hand, state that the employer must have a "good faith, objective reason" to doubt the validity of a medical certification in order to seek a second opinion, and employers continue to be barred from seeking second opinions unless the certification involves the employee's own serious health condition. The CFRA rules also continue to prohibit employers from

asking employees to provide additional information in the certification process, such as symptoms or the underlying diagnosis.

- *Substituting paid leave:* The FMLA rules generally permit an employee to choose to substitute accrued paid leave during an otherwise unpaid FMLA leave, or for an employer to require the substitution of accrued paid leave. The CFRA rules, however, differentiate between leave for the employee's own serious health condition and for other reasons. The employee may elect or the employer can require the employee to use sick leave during an unpaid portion of CFRA leave for the employee's own serious health condition, and the employer and employee can agree to substitute sick leave during other CFRA leaves. An employee may elect or the employer can require the employee to use vacation or PTO for any unpaid CFRA leave. The rules also clarify that an employee receiving Paid Family Leave (PFL) benefits is not on unpaid leave, so the employer cannot require substitution of accrued paid time off during any such portion of a CFRA leave.

Getting Ready

Employers should begin the process of updating their FMLA/CFRA policies, procedures, and forms to ensure compliance with the new regulations. And, beginning July 1, employers should replace their workplace posters and medical certification forms. [Click here to download a copy of the new CFRA regulations.](#)

We will explore the new CFRA regulations in more depth in our Employment Law Update webinar, "The New CFRA Regulations and Other Family and Medical Leave Developments: What Employers Need to Know." The webinar will be presented on two dates, [March 26](#) and [March 31](#).

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