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Alert | Labor & Employment

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There's A New Leave Law in Town (Sort of)

With many Americans counting down the days until 2020 is over, 2021 will not be a cakewalk for employers, particularly in California. This is in part due to the passage of SB 1383, a historic expansion of the Moore-Brown-Roberti Family Rights Act (commonly known as the California Family Rights Act, or the CFRA), which will go into effect Jan. 1, 2021. This GT Alert provides an overview of the changes that SB 1383 will bring with respect to family and medical leaves in California, and identifies some of the challenges that employers should be aware of as the effective date of these amendments nears.

Currently, the CFRA – which is similar to the federal Family and Medical Leave Act (FMLA) – requires that covered employers provide eligible employees with up to 12 workweeks of unpaid, job-protected leave during any 12-month period in connection with a serious health condition (excluding pregnancy), to bond with their new child, or to care for a child, parent, or spouse/domestic partner.

Covered Employers

Now: Employers with at least 50 employees nationally (the New Parent Leave Act, or the NPLA, applies to employers with 20 or more employees nationally).

Starting in 2021: Departing from the FMLA, the CFRA will apply to employers with five or more employees. SB 1383 does not specify whether this figure is limited to California employees or applies nationally.

Eligible Employees

Now: Currently, to be eligible for CFRA leave, an employee must:

1. have been employed for a total of at least 12 months at any time prior to the start of the leave,
2. have worked for the employer for at least 1,250 hours in the 12-month period prior to start of the leave, and
3. work at a location with 50 or more employees (20 or more employees, in the case of baby bonding under the NPLA, which will be repealed as of Jan. 1, 2021) within a 75-mile radius.

Starting in 2021: Same as above, except that requirement #3 will be eliminated. This is another departure from the FMLA, which imposes eligibility requirements #1 through #3. All remote employees who did not report into a covered location with 50 or more employees within a 75-mile radius will be covered under the CFRA if they meet other eligibility requirements.

Definition of Family Member

Now: Child (defined as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis who is either (1) under 18 or (2) an adult dependent child), parent, or spouse (which includes registered domestic partners, pursuant to the California Domestic Partner Rights and Responsibilities Act). This is consistent with the FMLA except for registered domestic partners, who are only covered family members under the CFRA.

Starting in 2021: Child (of any age), parent, or spouse, PLUS parent-in-law, grandparent, grandchild, sibling, and domestic partner. This may lead to potential "stacking" of leaves – e.g., 12 weeks of CFRA leave to care for a sibling with a serious health condition (which will not count against an employee's FMLA entitlement), followed by 12 weeks of FMLA leave for the employee's own serious health condition.

Qualifying Reasons for Taking CFRA Leave

Now: Any of the following:

- the birth of a child of the employee or the placement of a child with an employee in connection with the adoption or foster care of the child by the employee;
- to care for a child, parent, or spouse with a serious health condition; or
- an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions.

Starting in 2021: All of the reasons above, taking into account the expanded definition of family member (e.g., caring for a sibling or an adult child with a serious health condition), PLUS a qualifying exigency related to the covered active military duty or call to covered active military duty of an employee's spouse, domestic partner, child, or parent in the U.S. Armed Forces, per Unemployment Insurance Code § 3302.2. This corresponds to the expansion of paid family leave benefits to cover qualifying exigencies, which is the product of SB 1123 and also goes into effect Jan. 1.

Baby Bonding When Both Parents Work for the Same Employer

Now: Parents are entitled to a combined 12 weeks of leave.

Starting in 2021: Each parent is entitled to 12 weeks of baby bonding leave. SB 1383 is silent as to whether an employer can impose any limitations on when this leave is taken (i.e., by requiring it to be taken sequentially as opposed to concurrently), but regulations may clarify this.

'Key Employee Exception'

Now: An employer is not legally required to reinstate a salaried employee who is among the highest paid 10% of the employer's employees within 75 miles of the employee's work location worksite, to the same or a comparable position if (1) doing so is "necessary to prevent substantial and grievous economic injury" to the employer's operations and (2) the employer complies with certain notice requirements. This is often referred to as the "key employee exception."

Starting in 2021: The key employee exception has been eliminated.

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Whether a company has 10 employees or 10,000, SB 1383 will likely present significant challenges for all employers, but particularly for small employers.

For example, having just one employee – let alone more than one – completely out of work for a consecutive 12-week period could have a pronounced impact on the operations of an employer with only a handful of employees. And with 12 weeks being the new "floor," there still may be a duty to reasonably accommodate an employee's health condition (if the employee is disabled within the meaning of federal or state law) after the expiration of the CFRA leave, unless the employer can establish that providing additional leave is unreasonable or imposes an undue hardship on the business.

Additionally, intermittent leaves, which often involve time off for which advance notice from the employee is not possible (e.g., episodic flare-ups), are challenging enough for large employers, and could be particularly difficult on small employers that run tight operations, not only from a staffing perspective, but also financially. For example, if a small retailer (with five employees total) that normally staffs two employees per day has one employee calling out without prior notice for half or full days on a weekly basis, this may place a significant strain on other employees and will likely result in the employer paying out unavoidable overtime.

Finally, while SB 1383 does not require employers who are not otherwise obligated to offer health benefits to provide such benefits, it does require employers offering benefits to continue these benefits during the duration of the employee's CFRA leave, at the level and under the conditions that coverage would have been provided if the employee had continued to work. For employers whose health plans do not currently account for these types of statutory leaves, changes will be necessary.

Even for large employers familiar with the CFRA, SB 1383's expanded benefits that deviate from the FMLA create unique challenges. For example, an employee who requests (and takes) 12 weeks of leave to care for a sibling or grandparent with a serious health condition will have exhausted her CFRA entitlement, but still has 12 weeks of FMLA remaining. This is because time off for a reason that does not qualify under the FMLA cannot count against an employee's FMLA entitlement. As a result, employers

could end up providing 24 weeks of job-protected leave with benefit continuation to some employees, depending on the circumstances.

Perhaps recognizing the impact of this new law on small employers, the California legislature passed a separate bill (AB 1867, which is known primarily as the bill requiring that employers with 500 or more employees provide COVID-19 supplemental sick leave) that mandates that the Department of Fair Employment and Housing (DFEH) create a pilot program for CFRA-covered employers with fewer than 20 employees. Under this program, once a DFEH right-to-sue notice is issued, employers and employees will be able to mediate disputes via the DFEH's dispute resolution division, and the employee will be precluded from filing a lawsuit until the mediation is complete.

With Jan. 1 right around the corner, all California employers (including those who are already covered under the CFRA) should familiarize themselves with and prepare to comply with the new CFRA. This will mean, for example, updating employee handbooks or leave policies and ensuring that leave processes are compliant with the new law. Further, the DFEH may well update its set of CFRA forms to conform to the new law.

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