

**The Performance Review Podcast**  
**Greenberg Traurig, LLP**  
**Episode 31**

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- Michael Wertheim: Welcome back to the Performance Review podcast, Greenberg Traurig's podcast on all things workplace in California, with your hosts Michael Wertheim and Brian [00:00:30] Kelly.
- Brian Kelly: How are you doing, Michael?
- Michael Wertheim: I am doing well. Today we are talking about parental leave, and parental leave is kind of like one of those confluences of two amazing things in your life. Number one is work. We talked about on a prior episode that getting a job offer can be this pivotal moment in your life. Well, guess what a close second is? A close second.
- Brian Kelly: Well, are we ranking them? Are we saying decidedly, this is second? Maybe you want to take that back, but... Yeah. [00:01:00] Second, parental leave. Having a kid.
- Michael Wertheim: Obviously joking that one of the biggest moments in a person's life, the decision and process through which you have a family, and that does intersect with your life at work. And so what we're talking about today, apropos of, I now have a almost four-month-year-old... Four-month-year-old? No, four-month-old. See, my brain's all over the place. This is why you have to have parental leave.
- Brian Kelly: You're sleep-deprived.
- Michael Wertheim: Yeah. So apropos of that, we thought let's talk about parental leave and the requirements [00:01:30] and regulations around that in California. Because it's such an important moment in someone's life, it also warrants a ton of attention at the home front, but also, if you are a business owner in California or work at a company, this can really impact your staffing needs, both for the immediate and as for the future.
- So we're going to talk through a number of things here today. We're talking about the California Family Rights Act, and what it covers as it runs parallel [00:02:00] to the Family and Medical Leave Act, so at the federal level. We're going to talk about a separate law, which is California's Pregnancy Disability Leave Act. Different from the family rights that you have, you have pregnancy

disability leave. We're going to talk about then an important piece of this. What happens to your money when you're on leave? Are you getting paid? Are you not getting paid? So we'll talk about paid family leave and state disability insurance, and some very specific San Francisco nuances that, Brian, you're going to be able to touch on. So [00:02:30] a whole lot of areas to cover and more, so let's dive into it.

Brian Kelly: Yeah. And Michael, I'm going to sleep great tonight knowing that we are helping both employers and doing a service to our children by educating the population on these important leave rights.

Michael Wertheim: I won't sleep easy tonight, but you know why.

Brian Kelly: All right. Quick primary. If we use a bunch of acronyms, apologies in advance, but this is an acronym heavy area of the law. FMLA refers to the federal Family and Medical Leave Act. [00:03:00] CFRA, if you hear that, that means the California Family Rights Act, that is the state analog to the federal Family Medical Leave Act. And we may sprinkle some other ones in. If you hear PFL and SDI, those are the state-funded benefit programs applicable during these leaves. All right. So we'll test all our listeners at the end to make sure that they remember those acronyms, but let's jump into it.

So first topic today is CFRA, California Family Rights [00:03:30] Act. Now, again, this is the state analog to the federal Family Medical Leave Act, the FMLA. And the most basic premise of the law is that there are eligibility requirements in order to be able to take leave under the California Family Rights Act. Two of those eligibility requirements are shared with the FMLA. And those two shared eligibility requirements are, you have to have worked for your employer for at least 12 months prior to the start of your leave, and you have [00:04:00] to have worked 1,250 hours during the 12-month period immediately prior to the leave.

Now, those 1,250 hours, those are actual working hours, meaning that vacation hours, sick leave hours, and other leave time is excluded. So there's a world in which a part-time employee, when you factor in their vacation, sick leave, they're not going to meet that threshold, that 1,250-hour threshold, in the 12 months preceding the leave.

Now, the one difference with California [00:04:30] eligibility requirements versus the federal requirements, and surprise surprise, California is more employee favorable, an employer must only have five employees for an employee to be eligible for CFRA. And that's substantially less than the Family Medical Leave Act, where you have to have 50 employees within a 75-mile radius for the employee to qualify for leave. So again, two shared eligibility requirements, and one substantially more employee favorable [00:05:00] eligibility requirement under the CFRA.

Michael Wertheim: Favorable in the sense that it's easier to achieve that, because a smaller company might be required to follow these laws, but this is good for employers and good for employees, which, when you have both of those things, good for employers, you want your employees to be happy. And throughout kind of this entire podcast, we're just talking about the minimum requirements, but companies are free to come up with benefits and policies that are even more generous than [00:05:30] what is required under state law. That could include lengthier times for leave. It could include additional pay or other benefits related thereto.

And so I think this topic comes up a lot in what we talk about with respect to the interplay between employers and employees. But having a workplace that employees like generally [inaudible 00:05:50] to the benefit of the company. And you see that bear out in employee morale, and then productivity, possibly that affects revenue. So all good things [00:06:00] to keep employees happy. So in terms of the qualifying reasons, so we talked about you got to be eligible, you got to work at the company, they've got to be of a certain size. And then for the reasons, the CFRA and FMLA share the following qualifying reasons. So that would be... To take parental leave. This would be to bond with a child after they're born, or there's an adoption or a foster care placement. All of that is within the 12 months of that event. Or the employee's own serious [00:06:30] health condition. And there's a bunch of definitions for that. But the key piece is that FMLA includes pregnancy as a serious health condition, while the CFRA does not. [inaudible 00:06:45]

Brian Kelly: Now, hold on. Are you saying California law is less employee favorable than the federal law?

Michael Wertheim: What I am saying is, actually, California has a separate pregnancy disability leave that actually enhances [00:07:00] the protections for employees who deal with that. And I should say, Brian and I are married to individuals, two different individuals, who have gone through pregnancy. And so we're not qualified to speak really about that full experience, but as supporters of those who have gone through it, boy, what a life-changing, transformative experience, and it deserves its own law in California.

Michael Wertheim: Point is, there is a separate law in California. And why that's important here is, with respect to leave, the CFRA and FMLA will run concurrently. So the amount of time you get off under those leaves don't stack on top of each other. You get [00:08:00] one or the other, generally. But with respect to pregnancy disability, that's added on. So if you qualify under the pregnancy disability leave law, you can add that onto baby bonding time under California Family Rights Act.

Brian Kelly: So lo and behold, California after all is more employee favorable than the federal law. My question earlier was in jest.

Michael Wertheim: It's...

Brian Kelly: So Michael, how long is CFRA leave?

Michael Wertheim: So that entitles an employee up to [00:08:30] 12 weeks during a 12-month period. Employers can come up with how they want to have a method of rolling those weeks within a 12-month period, so that it's not super rigid, it doesn't need to all be taken at once. And indeed, as you can see, I think actually in your section coming up, intermittent-

Brian Kelly: Oh yeah, I'll get into intermittent. Don't you worry about that.

Michael Wertheim: Okay. I just wasn't sure if that's what you were telling to do. Basically 12 weeks, 12 weeks is what we're talking about, within [00:09:00] a 12-month period.

Brian Kelly: Same as federal law. So that's one commonality.

Michael Wertheim: [inaudible 00:09:04]

Brian Kelly: There is a small nuance with the 12-week maximum entitlement to CFRA leave compared to the federal Family Medical Leave Act, and that's if both married spouses are employed by the same company, then under federal law, but not California law, they share a combined 12-week entitlement between them for child bonding purposes. So good news, if you're married in California, [00:09:30] and you work for the same employer, and you guys have a kid, then you each get 12 weeks of CFRA leave. You don't need to split it, as you would have to under the federal law.

Michael Wertheim: [inaudible 00:09:41] people leaving California, come back to California.

Brian Kelly: That's right.

Michael Wertheim: This is a good one.

Brian Kelly: Yeah. You don't know what you're missing. So we alluded to earlier intermittent leave. Now, a lot of people, when they think of any leave of absence, they think of a continuous block of time, and people are out for eight weeks straight, 12 weeks straight, what have you. [00:10:00] Well, actually both state and federal law permit intermittent use of leave in multiple increments in a few different instances.

Now, of course, California allows it in more instances than the federal law does. Under federal law, you can use intermittent leave if it's for your own health condition. So again, because the FMLA covers pregnancy, if you have a pregnancy-related medical leave, you can use that intermittently. [00:10:30] California does one better and says, for child bonding after the birth or adoption of a child, you can use leave intermittently too. And I think this is somewhat not well-known both by employers and employees. And on two occasions under California law, you can take a minimum increment of intermittent leave that is

less than two weeks. So I could take two occasions, even just a day, of child bonding leave. And then after those two initial occasions of intermittent leave, [00:11:00] the minimum increment that an employer would have to allow is a two-week increment. I would then burn through the rest of my 12-week allotment in, at minimum, two-week chunks.

Michael Wertheim: Right. So this doesn't add to, but comes out of the existing 12-week allotment.

Brian Kelly: That's correct. Now, just how small can an intermittent use be? Well, under the permissible categories that we just mentioned of intermittent use, it has to be the lesser of the smallest increment of time that an employer's [00:11:30] time-tracking system tracks absences, like for vacation or sick leave, or one hour. So if it's the case that your employer has a time-tracking system that only tracks vacation in, let's say, two-hour chunks, then the answer here is one hour. But if the answer is that your employer tracks paid sick time and vacation in, let's say, half-hour chunks, or even 10th of an hour, then your intermittent use could be that small. Now, I think that's a little kind of hypothetical, but the point is, if [00:12:00] you're an employer out there, don't just assume that parental leave can only be taken in one continuous block. There are all these intermittent leave rules.

Now, separate from intermittent leave, let's talk about the money. Michael and I always love circling back to this topic. We are-

Michael Wertheim: Yeah, I mean, that's-

Brian Kelly: We are selfish individuals.

Michael Wertheim: That's what it's about.

Brian Kelly: All right. So sources of pay during leave. Of course, the underlying leave, California Family Rights Act leave, is unpaid itself by the employer. But that doesn't mean [00:12:30] there aren't other sources of pay potentially available. And those other sources of pay may very well be from the employer, or it could be from a third party.

Now, what would the other sources of pay be from the employer? Of course, accrued paid vacation and/or paid sick time. So for someone that had just given birth and is obviously recovering, or is bonding with a sick child in the one-year period after the child is born or adopted, paid sick time would [00:13:00] apply. And even in instances where there is no illness, to the extent that the employer has accrued paid vacation, that could be another source of income during an otherwise unpaid CFRA leave. In San Francisco, there's yet another source of pay from the employer, and that's supplemental compensation from the employer. We'll talk about that a little bit more later.

And importantly, what are the third party sources of pay that may be available during parental leave under the CFRA? That would be [00:13:30] LTD insurance from your employer, to the extent your employer has a long-term disability insurance policy. Or, under the State of California, you have access to and are encouraged to apply for California paid family leave, PFL, and California paid state disability insurance, SDI. These are state-funded programs via employer withholdings, and they are remitted to the state from your normal payroll, and then they act as a source of funds for [00:14:00] you during the leave. And we'll go over the duration of those later on.

Michael Wertheim: It's interesting, right? Because we're talking about... It's job-protected leave, really, is what we're talking about, but it's not necessarily paid unless your company has a policy like that. So generally you have to seek other sources of income.

So that does change someone's litmus for the evaluation of how much time they can take off, want to take off, need to take off. So obviously, again, we're talking about the minimums of what's required. It's job-protected leave. It's not necessarily paid. [00:14:30] The job protection piece comes in to ensuring that, when you do go on that leave, you don't suffer adverse employment consequences for having done so. But doesn't necessarily mean that there's wage replacement. So obviously a very real consideration. There are other jurisdictions, other countries, that have very different rules on this, but we're in California, so that's where we're stuck with.

But in terms of getting that leave, like I said before, the FMLA and CFRA do run concurrently, [00:15:00] but not concurrent to the pregnancy disability leave. So if you qualify under that, you can get a much longer period of time because of the pregnancy disability leave law.

Brian Kelly: All right. That's a good segue. Let's jump into the Pregnancy Disability Leave Act under California law.

So the eligibility requirements are the same under California's Pregnancy Disability Leave Act as the relatively new Federal Pregnant Workers Fairness Act. Essentially, any female employee, regardless of tenure, hours worked, or number of employees [00:15:30] within a specific geographic proximity of the employer, are eligible for pregnancy disability leave for qualifying reasons.

So Michael, what are those qualifying reasons? Not rocket science here.

Michael Wertheim: So that could include a number of pregnancy, childbirth, or related medical conditions, morning [00:16:00] sickness, lactation complications, bedrest, gestational diabetes, preeclampsia. By the way, these are a lot of words I learned when my wife was pregnant, things I had never even heard of. And the list goes on. But all of this is very real, because we're talking about this major life event, but also it's a major medical event, or can be. So these are very real

reasons that the pregnancy disability leave law deals with this in a separate way, because we're talking about real medical [00:16:30] conditions can get very serious.

Brian Kelly: All right. Length of leave. Now, remembering that pregnancy disability leave in California does not run concurrently with CFRA, the length of leave is important here, and it's going to be the lesser of the period of disability [00:17:00] due to pregnancy, childbirth, or related medical conditions, or four months. So just because you have a pregnancy, doesn't necessarily mean you're always going to get four months. If you happen to be disabled for less than that, then that will be the period of your pregnancy disability leave.

Michael Wertheim: I mean, this is the part of the HR department where you need to know a little bit of calculus, right?

Brian Kelly: Totally. Yes.

Michael Wertheim: Because [inaudible 00:17:24] like, if this, then that. You've got a whole formula that you have to follow.

Brian Kelly: Yes. As a practical [00:17:30] matter, employees often take pregnancy disability leave in a length that aligns with the State of California's presumptive disability benefit periods under the SDI program that we mentioned earlier. And those presumptive periods would be four weeks before the estimated delivery date, so leading up to the childbirth, and then six weeks after the delivery date for a natural birth, or eight weeks if it's a C-section. And that's just based on, I think statistically, what medical providers typically [00:18:00] find to be the period of recovery for those disabilities. But obviously complications, to be verified by the healthcare provider, can result in different leave lengths than those presumptive SDI periods, again, maxing out at a potential four months.

All right. Let's see where we should go next. You know what, we got to talk about intermittent leave here too. We highlighted it earlier for CFRA leave, but of course it can be used intermittently. And again, it has to be... The intermittent uses can be in increments as small as [00:18:30] one hour, or whatever the smallest increment of time that the company's time tracking system tracks absences for. So again, don't-

Michael Wertheim: As if we didn't need another reason to think of my life in one-tenth of an hour increments. Now I can be thinking about [inaudible 00:18:44] a company does track time that way, you could get as little of that as leave.

Brian Kelly: That's right. We're all just living six minutes at a time.

Okay. Sources of pay. Here too, pregnancy disability leave is not a paid leave by the employer, [00:19:00] unless the employer adopts a policy more generous than that. But again, there are the same other sources of pay that are available

from the employer. Again, it could be accrued paid vacation or paid sick time. And then from third parties, it can be employer disability insurance plan through a third-party carrier, or again, the California paid SDI program.

Michael, remind us one more time, what is the rule on whether pregnancy disability leave is concurrent with FMLA and CFRA?

Michael Wertheim: [00:19:30] So, as we said before, you're not eating up pregnancy disability leave when you take California Family Rights Leave Act, CFRA, people call it CFRA. So you can combine it with FMLA. Those two are... And I guess the real question is, what's the maximum length allowed when you combine those two?

Brian Kelly: Sure. So let's assume that someone has the maximum period of disability under the Pregnancy Disability Leave Act. That will be four [00:20:00] months. And then, because it doesn't run concurrently with the California Family Rights Act, that disabled person could then have 12 additional weeks for child bonding thereafter. So 12 weeks plus four months, a little shy of just seven months. That is the maximum potential time for someone to take off who has a especially long disability period.

Michael Wertheim: Another thing to consider is that there are accommodations that your workforce might request or need, that are other than just being off work. [00:20:30] So that's not really the focus of today's discussion, because we're talking about parental leave, but there's a whole host of other accommodations that you might need to consider, based on the needs of your employees. That could be modifying work schedules, so that they're either allowed to come earlier or later or more frequent breaks as the employee needs. It could include modifying work duties or practices, depending on what their needs are. Could be equipment like furniture, stools, or [00:21:00] a reasonable break time for lactation, or a privacy room for that. All things to consider.

And then there's also just a point about additional accommodations under the Americans With Disabilities Act. So if somebody has exhausted all of their leave under the acts that we've talked about today, an employer is still entitled to give more than that if they'd like. And obviously there are considerations for how much that person has used, and there are business considerations for whether it makes sense and whether the accommodation [00:21:30] thereafter is reasonable. Not necessarily the subject of these laws' protections, but something that we always want people to keep in mind, is that this is not a closed box here. There's a lot of different ways that you can approach these issues with your employees, and it's a good thing to do that.

Brian Kelly: That's right. There's a bundle of rights when you combine both the state and federal protection, so never assume that you're only ever giving out one if you're a California employer. Be sure to check whether either apply.



Now, we've alluded to it a couple of times already, but let's talk more about California's paid [00:22:00] family leave program and state disability insurance programs. The general purpose of these programs is, again, they're not a right to an underlying leave of absence for an employee. They are merely state-provided, state-paid benefits while you are on a leave of absence, whether that leave of absence is continuous, used all in one block, or whether it's used intermittently.

Now, the qualifying reasons for these two different programs are, of course, unique. For the paid family [00:22:30] leave program, among other reasons not related to parental leave, the qualifying reason is to bond with your child in the year after the child's birth, adoption, or foster care placement. And then conversely, for California's SDI, State Disability Insurance program, the qualifying reason is the employee's own non-work related illness or injury that prevents them from working. So again, pregnancy or related medical conditions.

Now, each of these benefit programs has a maximum duration [00:23:00] of benefits. For PFL, that's eight weeks of benefits for every 12 month period. And then SDI, it's going to be the lesser of 52 weeks or the period that you have a qualifying disability. Now, the State of California determines whether you qualify for these benefit programs, and employees apply directly with the state for these benefits. Employers should simply encourage their employees to apply.

Now, what is the amount of the [00:23:30] paid benefits from the State of California under these programs? It's not full wage replacement. It's currently 70% of the employee's average weekly earnings, and there's a cap at certain income levels. For lesser paid employees, it can be 90%. And again, this is all calculated by the state, so if you're an employer, don't be losing sleep thinking you got to all of a sudden go do a bunch of math tomorrow to figure out what the state paid benefits are. That's the state's job. [inaudible 00:23:56]

Michael Wertheim: ... logistically, same for the application [00:24:00] process. You have to comply to the extent you need to as far as the leave and the requested leave. But when an employee is applying for these things, they're doing so through the state, so that the employees are directly applying through there. Other than providing notice to the employer, the employer is responsible for the application process, or as you said, calculating the total benefits.

Brian Kelly: Now it is a little bit of a headache though when you are attempting to integrate these state paid benefits with [00:24:30] an employer source of pay during an otherwise unpaid leave. Again, those employer sources of pay might be accrued paid vacation or paid sick leave. There are some somewhat esoteric rules about this. When an employee is receiving state-paid benefits from California PFL or SDI, the employee can elect and they can even be encouraged by the employer to use paid vacation, paid sick leave concurrently. However, the company can't require that they must use [00:25:00] that paid vacation and paid sick leave concurrently.

Additionally, the employee's election to simultaneously or concurrently use those employer sources of pay may result in disqualification or lowering of the amount of benefits that they receive from the State of California. But that's for the state to determine, not the employer. And then we'll get into it a little bit more, but paid family leave under the State of California also integrates with San Francisco's fairly bespoke supplemental compensation requirement, [00:25:30] under its paid parental leave ordinance.

All right, my fair city of San Francisco. Michael-

Michael Wertheim: Bay Area bias here. Okay.

Brian Kelly: Yeah. Yeah, you're not saddled with this up in Sacramento, but here's what we're dealing with in San Francisco. San Francisco, I think still currently to this day, is the only locality or state in the country that affirmatively requires employers to pay directly for a portion of parental leave. Now, the purpose of San Francisco's [00:26:00] paid parental leave ordinance is that it requires employers to provide employees with a top-up supplemental compensation while they were receiving California's state-paid family leave benefits, during child bonding leave. Here too, San Francisco's supplemental compensation requirement is not a right to an underlying leave of absence. It just requires employers to pay when someone is otherwise on a child bonding leave of absence.

[00:26:30] There are some eligibility requirements. Not every employee in San Francisco is entitled to this. You have to have been employed for 180 days prior to your child bonding leave. You have to work in San Francisco a minimum amount of eight hours per week, and have those hours be at least 40% of your total weekly hours worked in San Francisco. And the employee has to apply for and actually receive the state-paid family leave benefits during the leave in question. Because again, the [00:27:00] San Francisco law requires supplemental compensation topping up those state-paid benefits.

The duration of the supplemental compensation under San Francisco law aligns with the PFL benefit period, eight weeks. And then the supplemental compensation amount is equal to the employee's normal gross weekly wage, minus the California paid family leave benefit amount. There are certain caps and there's a very helpful, God bless San Francisco, a very helpful calculator [00:27:30] on the city website that-

Michael Wertheim: There's a calculator. This is truly bespoke. It comes with its own calculator.

Brian Kelly: Every leave should, right?

There's lots to consider here. And again, I think, Michael, you noted aptly at the beginning that employers are free to adopt more favorable provisions and policies than what these even generous California leave laws require. And

having been the home to a lot of cutting edge employment industries, whether it's Silicon Valley [00:28:00] tech companies or what have you, parental leave policies [inaudible 00:28:03] employers have been a really valuable recruiting tool. So it's not surprising to see even more interesting interactions between employer policies and these leave laws.

All right, Michael. Is it time for pop culture corner?

Michael Wertheim: Yeah, I think we've covered a lot of ground. I think we now need to put this into practice with respect to things where we see this play out in pop culture, in TV and movies.

Brian Kelly: All right. So I was a little [00:28:30] hesitant to cover this one, because I think it's so obvious that everyone already knows. Probably the most important movie about child bonding-

Michael Wertheim: [inaudible 00:28:38]

Brian Kelly: ... parental leave, pregnancy disability, the 2012 film Prometheus from the Alien franchise. Everyone recalls that Dr. Elizabeth Shaw, near the conclusion of the movie, has a surprise pregnancy. It turns out to be a little cute baby xenomorph. She has an emergency C-section. And unfortunately, Weyland Industries being the uncaring [00:29:00] employer that it was, gave Dr. Shaw no time off to bond with her little baby xenomorph. And lo and behold, should we be surprised that there were drastic consequences that followed? If she had time to nurture that little baby xenomorph, maybe the xenomorph would not have killed the engineer and gone on to rampage through the galaxy thereafter, and in subsequent films in the chronology.

So I think it's a really good learning lesson for the value, pregnancy disability leave, [00:29:30] child bonding leave, and perhaps history would be different had Dr. Shaw had some time off.

Michael Wertheim: Right. Yeah, I think that probably is the most... When people think of a movie about pregnancy or a movie about babies and bonding with the baby, I think that's definitely at the top of the list for sure. Prometheus, which takes place I think in 2089. So I guess we'll see if the laws... If it's a prescient film, and whether the laws catch up, or whether Weyland Industries can change the course of history [00:30:00] by then to allow for its employees to take California bonding leave.

I think of another silly application, maybe. There's a 1994 film Junior, a classic buddy comedy between Arnold Schwarzenegger and Danny DeVito. Not the only film they were in together. They were also in Twins, where they play twins. But in this one, Schwarzenegger gets pregnant. He's a scientist who gets pregnant, and it calls to question, do his... He's a pregnant man. We would have

to apply these laws [00:30:30] in a way that looks at, does he qualify under either federal or state law?

Another example that highlights the job of HR departments is... I was thinking of Amy Schumer has a movie that came out recently called Kinda Pregnant, where she fakes a pregnancy as a result of various things in her life. She likes the attention she gets when she puts on a fake belly bump when trying on clothes. So she lives her life as though she's pregnant. Not to get into asking all these questions of a woman about that sort of thing, but [00:31:00] her HR department, to what extent do they need to require a verification that she's actually pregnant in terms of the leave that she would get? So really both those examples just highlight the kind of issue spotting in the sort of law school exam type questioning that you might have to deal with in an HR department when employees are going through these things.

Brian Kelly:

We're happy to leave you with those very practical thoughts at the conclusion of this important episode. So thank you as always for joining, and we look forward to seeing you [00:31:30] next time, episode 32.