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PERSPECTIVE

Employers: Navigating changes to the California Family Rights Act

By Wendy Lazerson and Galit Knotz

Important but little noticed changes to the California Family Rights Act become effective Jan. 1, and employers must be up to speed or risk violating the law. Employers have a short window to take action to develop compliance plans. These changes are the result of Senate Bill 1383, signed into law by Gov. Gavin Newsom in September. SB 1383 expands the CFRA to apply to employers with five or more employees, as well as expanding the scope of "family members" for whom covered employees can take unpaid protected leave.

CFRA Expanded to Cover Smaller Employers

Currently, CFRA closely follows the federal Family and Medical Leave Act, known as the FMLA, providing leave protection only to employees working at company locations that have at least 50 employees within a 75-mile radius of the worksite.

Starting Jan. 1, CFRA will apply to employers with five or more employees regardless of whether they work at a location that has 50 employees within a 75-mile radius. While employers with 20-49 employees are currently required to provide employees with protected leave to bond with a new child under the New Parent Leave Act, known as NPLA, these employers, (as well as employers with five to 19 employees), will now be covered under CFRA and subject to its various leave entitlements.

The new iteration of CFRA, like the current one, includes the requirement that employers guarantee an employee's reinstatement to the same or a comparable position upon return from CFRA leave. However, SB 1383 eliminates the "key employee" exception, which permitted an employer to deny CFRA leave to employees who are among the highest-paid 10% of their workforce, if "necessary to prevent substantial and grievous economic injury" to the employer's operations. Under the new law, even "key employees" will have job protection.

CFRA Expands Definition of "Family Members"

Under the current CFRA, employees are entitled to CFRA leave to bond with a new child and to care for the employee's own serious health condition or that of a "family member." Presently, the definition of "family members" includes minor children, adult dependent children, spouses and parents, as in the FMLA, as well as domestic partners. SB 1383 expands the definition of "family members" to include siblings, grandparents, and grandchildren. In addition, SB 1383 expands the definition of "child" to include all adult children (regardless of whether they are dependent) and the children of a domestic partner.

As noted above, SB 1383 obviates the need for NPLA, (which will be repealed Dec. 31, 2020), since small employers will now be subject to all of CFRA's provisions, including those pertaining to baby bonding. Additionally, SB 1383 eliminates the previous limitation on the amount of leave parents may take to bond with a new child when both parents are employed by the same employer. Thus, under the new law, in this situation both parent-employees are each eligible to take 12 weeks of baby bonding, instead of a combined total of 12 weeks.

CFRA Includes and Expands Leave for "Qualifying Exigency"

Currently, the FMLA (but not CFRA) entitles employees to take up to 12 workweeks of protected leave for a "qualifying exigency" arising out of the deployment or military activities of the employee's spouse, child or parent who is a member of the Armed Forces. SB 1383 incorporates the "qualifying exigency" leave into CFRA and expands that leave to include the deployment of the employee's domestic partner.

Potential "Stacking" Issue with FMLA

There is one interesting twist resulting from the new law which appears to be unresolved. The issue is whether leaves taken under CFRA and FMLA run concurrently or are stacked (that is, consecutive).

SB 1383 retained language stating that leave taken by an employee runs concurrently with leave taken pursuant to the FMLA, except for any leave taken under the FMLA for disability on account of pregnancy, childbirth, or related medical conditions (since such leave is covered by California's Pregnancy Disability Leave law). Newly-added language in SB 1383 limits the "aggregate amount of leave" taken under CFRA or the FMLA — or both — to 12 workweeks in a 12-month period (excepting leave taken for disability on account of pregnancy, childbirth, or related medical conditions).

However, despite the legislature's apparent intent to limit the amount of combined leave an employee may take under CFRA and/ or the FMLA to 12 workweeks, the significant changes SB 1383 makes to CFRA's definition of "family members" as well as the inclusion of domestic partners within the definition of "qualifying exigency" leave for military service means that employers large enough to be covered by both CFRA and the FMLA (triggered when the employer employs 50 or more employees) may be faced with a "stacking" problem in limited circumstances.

Generally, when CFRA and the FMLA overlap, time taken off can be treated as covered by both laws, and the leaves

run concurrently. However, the possibility of "leave stacking" may arise when an employee takes time off for a reason covered by CFRA only (for example, caring for a sibling) and then seeks additional leave through FMLA for a reason covered under both statues (to care for a parent, for example). In this situation, the issue presented is whether the California' legislature's clear direction to have the leaves run concurrently would apply when the second leave is available under federal law only. In this situation, it seems that the employer could potentially be faced with providing up to 24 weeks of unpaid protected leave in a 12-month period. In contrast, if FMLA leave is taken first and exhausted (excluding leave for pregnancy-related reasons), there is no entitlement to additional leave benefits under CFRA given the law's express limitation on the aggregate amount of leave to 12 weeks.

This scenario is arguably already a possibility given that CFRA covers domestic partners while FMLA does not, but CFRA's further expansion of "family members" makes that possibility even more likely to present itself. In the absence of federal regulatory or judicial guidance on this issue, it is an open question whether SB 1383's provision limiting the aggregate amount of leave to 12 weeks would prevent this result. Employers are advised to closely monitor guidance on this issue after SB 1383 goes into effect.

Employer Strategies for Leave Policies

With the passage of SB 1383, CFRA will cover virtually all but the smallest employers (those with fewer than five employees). Employers must make some strategic decisions regarding the amendment, adoption, implementation and administration of their CFRA leave policies. As a practical matter, large employers already subject to CFRA will need to update their existing policies, procedures and forms to include the new qualifying reasons for time off.

Smaller employers not previously covered by CFRA will have to create and implement a CFRA leave policy and protocol. For both types of employers, this includes revising employee handbooks, updating leave administration procedures and leave forms, and training human resources and managerial staff on the new CFRA requirements. All employers must obtain and display a new poster that includes the updates.

In addition, larger employers should give careful consideration to policy revisions, given that CFRA offers a significantly wider range of rights than those available under the FMLA. For example, many employers with employees outside the State of California have adopted a combined FMLA/CFRA leave policy that applies to all employees, regardless of location. In the past, this strategy worked well because the rights available under CFRA essentially mirrored those under the FMLA. With the passage of SB 1383, however, this will no longer be the case. With the potential for "stacking" of leave time and parents taking "baby bonding" leave, the new law could provide 12 additional weeks of protected leave to California employees. Thus, larger employers should consider whether to institute a separate California-only leave policy applicable only to employees working in California.

Moreover, large employers must consider whether to point out differences in FMLA/CFRA coverage in their employee handbook (for example, stating that leave to care for grandparents is protected by CFRA only), or to present their leave policy as a combined policy and educate human resource on the differences between the two. These differences may be important, as in the case of an employee who is eligible to take leave under CFRA only, but may be eligible to take an additional 12-week leave under the FMLA.

Conclusion

With little time until the effective date of the new law, all employers must focus on compliance with these new requirements. While smaller employers must adjust to a law that currently does not apply to them, larger employers must make sure that leaves are properly tracked under both CFRA and FMLA. In short, instituting procedures to make sure that leaves are properly tracked is a high priority for compliance. ■

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