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PERSPECTIVE

Amendments to family rights law set to take effect

By Sharon Kirsch and Hilary Weddell

The Fair Employment and Housing Council recently adopted significant amendments to the California Family Rights Act regulations, which take effect July 1. The CFRA provides family and medical leave to eligible employees of employers with 50 or more full or part-time employees. The amendments made a number of significant changes to align the CFRA with the Family and Medical Leave Act. However, there remain several important differences between the two statutory schemes.

Both the CFRA and FMLA provide eligible employees with up to 12 weeks of leave in a 12-month period for the birth, adoption, or placement in foster care of a child; for the employee's own serious health condition; or to care for a parent, spouse, or child with a serious health condition. The 12 weeks provided under the CFRA run concurrently with FMLA.

Some of the changes in the CFRA amendments that make it mirror the FMLA include:

Key employee: The rules for determining who is a "key employee" and whether that employee has reinstatement rights are now the same under both the CFRA and FMLA. A "key employee" is one who is paid on a salary basis and compensated among the highest 10 percent of employees within 75 miles of the worksite. Employers may refuse to reinstate key employees if it would threaten the employer's economic viability or cause substantial, long-term economic injury.

Definition of "spouse": The CFRA now expressly includes same-sex marriages and domestic partners. The FMLA was recently amended to include coverage for spouses in legal same-sex marriages.

Responding to a request for leave: Employees are obligated to notify their employer of a need for leave, although no magic words are required. Employees must respond to the employer's questions to determine if the absence qualifies for CFRA leave. Employers must respond to requests for CFRA or FMLA leave within five days of receiving a request.

Retroactive designation: The CFRA regulations adopted FMLA rules for retroactive designations of leave. An employer may now retroactively designate CFRA leave if notice is given to the employee as long as the failure to timely designate leave does not harm the employee.

Intermittent leave: Intermittent leave under the CFRA is now the same as FMLA with respect to counting missed overtime hours and holidays as part of the leave period. However, there still remain differences in the handling of intermittent leave in other respects.

Joint employers: The amendments change the CFRA regulations to conform with the FMLA's expansive rules covering "joint employer" situations where two or more employers exercise control over the work or working conditions of employees. There are no specific factors to determine "joint employer" status. Instead, the relationship "is to be viewed in its totality based on the economic realities of the situation."

Although many provisions of the CFRA and FMLA are in harmony, key differences remain. Employers should pay close attention to each law's requirements because where the FMLA and the CFRA differ, employees are entitled to the more generous and less restrictive leave provision.

Here are some notable differences:

Use of paid leave: The FMLA allows an employer to require employees to use accrued paid leave, including paid time off, vacation or sick leave for an otherwise unpaid FMLA leave. The CFRA allows an employer to require employees to use any accrued paid leave for the employee's own serious health condition. However, if CFRA leave is taken to care for a family member, the employer and employee must agree to the employee's use of accrued sick leave.

Pregnancy disability as a serious health condition: Under the FMLA, pregnancy related disabilities qualify as a serious health condition, but not under the CFRA. California requires employers with more than five employees to provide pregnancy disability leave (PDL) to employees disabled by pregnancy. Under PDL, employees are permitted to take up to four months of leave. Time taken for PDL runs concurrently with FMLA, but not CFRA because pregnancy related disabilities are not considered a serious health condition under CFRA. Since PDL benefits are in addition to other leave entitlements, California employees may be able take up to four months pregnancy disability leave under PDL, and then an additional 12 weeks of CFRA leave to bond with the baby.

Medical certification: The CFRA states employers may not contact the employee's healthcare provider for any reason but to authenticate a medical certification. However, the FMLA permits employers to contact a healthcare provider to clarify or authenticate a medical certification.

Second opinion: The CFRA allows employers to request a second opinion for leaves based on an employee's own serious health condition when they have a "good faith, objective reason" to doubt the validity of the original certification. Employers are still not permitted to seek second opinions when an employee uses CFRA leave to care for a covered family member. Under the FMLA, employers are allowed to request a second opinion for leaves based on the employee's own serious health condition or the serious health condition of a family member when it has "reason to doubt" the original certification.

Recertification: The CFRA does not allow recertification of a serious health condition every six (6) months. Requests for recertification are permitted only when the time provided by the health care provider has expired and the employee requests additional leave.

Employers should update their handbooks, policies, and forms, and ensure supervisors are trained on the law's new requirements. Although many provisions of the CFRA now align with the FMLA, employers must pay close attention to the unique provisions of both laws and provide employees with whichever provides employees with greater protections.

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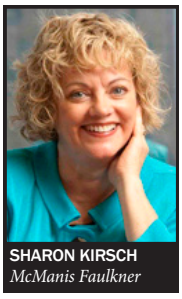

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