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## TOP 10 QUESTIONS REGARDING LEAVE LAWS

by *Diana Maier*

### 1. What's the Difference between FMLA and CFRA?

The Federal Family and Medical Leave Act (FMLA) and California Family Rights Act (CFRA) are federal and state leave laws, respectively, that allow workers to take up to 12 work weeks of unpaid leave from their jobs in a 12-month period to care for their own serious health condition or the serious health condition of a family member (child, parent, or spouse), or to bond with a new child (adopted or biological). A serious medical condition is defined as any illness, injury, impairment, or physical or mental condition involving in-patient care or continuing medical treatment by a health care provider. The definition includes heart attacks, strokes, appendicitis, severe arthritis, complications from other medical procedures, debilitating migraine headaches, and more. Many provisions of CFRA and FMLA overlap so that a leave that qualifies under one statute often qualifies under another statute. When this occurs leave time runs concurrent.

The main differences between the two are that CFRA does not cover pregnancy as a major health condition whereas FMLA does. Further, employer eligibility is a bit broader under CFRA than FMLA, and family members under CFRA include domestic partners.

### 2. When is a Company Required to Grant Leave Under FMLA and CFRA?

The company is required to grant leave under FMLA and CFRA when all of the following conditions apply: For both FMLA and CFRA, the employer must have had at least 50 full-time and/or part-time employees during 20 weeks of the prior or current year. For FMLA, the employer must have those employees within a single site within a 75 mile radius of person requesting leave; whereas with CFRA the employer merely needs to have at least 50 employees residing in a 75 mile radius (they can be scattered around). In addition, the employee in question must have worked for

the covered employer at least one year, and at least 1,250 hours during the past one year period. Employers may require employees to use available sick leave and vacation leave for either FMLA or CFRA leave.

### 3. How does Pregnancy Leave Work?

Most pregnant employees are entitled to two leaves: one under the Pregnancy Disability Leave Act (PDL) when an employee is disabled by her pregnancy or by a condition relating to her pregnancy (e.g., gestational diabetes), and the second under CFRA, for an employee to bond with her child. The PDL applies when an employee has only five employees or more, and there is no length of service required for an employee to qualify. An employee may take leave for up to four months under this law. An employee may also take twelve weeks CFRA leave once the child is born, if she otherwise qualifies, and thus pregnancy/childbirth leave extends to a possible total of seven months.

### 4. Do I Have to Hold Open an Employee's Job When She's on Leave?

Yes, but not indefinitely. Generally the laws governing leave try to strike a balance between protecting an employee from being terminated due to a condition beyond her control and the need for employers to keep their business viable. Employers need not reinstate the highest paid 10% of the workforce where "substantial and grievous economic injury" would occur to the business in doing so. Otherwise, the employee has the right to return to the same or "equivalent" position he or she held prior to leave. Equivalent is different from "similar" or "comparable." The PDL allows an employer not to keep a position open when a layoff or job elimination would have resulted in her termination regardless of leave or when preserving a job would "substantially undermine" the employer's ability to operate the business "safely and efficiently."



## 5. Should Employers Require Fitness for Duty Exams?

Under both the federal and California family and medical leave laws, an employer may institute a uniformly applied policy practice that requires all similarly situated employees who take leave because of their own serious health conditions to submit a “fitness-for-duty” report as a condition for returning to work.

## 6. What Accommodations are Employers Required to Make Under ADA, and The Fair Employment and Housing Act as it Relates to Leave?

An employee who is deemed to have a “disability” according to the Americans with Disabilities Act (ADA) or the Fair Employment and Housing Act (FEHA), is entitled to a reasonable accommodation. While no specific leave of absence is required, case law generally holds that time-off is a reasonable accommodation if the time off is finite and reasonable in scope, and the employee will be able to perform the essential functions of her job once she returns to work. Under both ADA and FEHA, the qualified employee must (1) have a physical or mental impairment that substantially limits one or more major life activities; (2) have a record of such impairment; or (3) is regarded as having such an impairment.

Upon returning to work after a leave, the employer and the individual with a disability should engage in an informal process to clarify what that employee needs and identify the appropriate reasonable accommodation(s). The employer may choose among reasonable accommodations as long as the chosen accommodation is effective. If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective. Similarly, the employer may choose the one that is easier to provide.

## 7. How Do Payments and Benefits Work During Leave?

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*Please note that some portions of this article and the accompanying chart came from a template made by the Continuing Education of the Bar, “Advising California Employers and Employees,” February ‘09.*

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Employers need not pay for leave and employers may require an employee to use sick or vacation days when on leave. However, employees on leave are generally entitled to enrollment in benefits just as if they weren’t on leave for the first 12 weeks of leave. If the employee fails to return to work for a reason other than medical condition causing leave, employer may ask to be reimbursed for the premium payments. During pregnancy leave an employee must be allowed to use any accrued vacation time, sick leave, or other accrued personal time off during leave. An employer may also choose to have an employee’s sick leave used up by the leave.

## 8. What Do Leave Laws Require An Employee to do vis a vis Notice In Order to be Granted Leave?

An employee must give advance notice of leave to her employer, at least 30 days notice when possible. If 30 days notice is not possible then the employee must notify the employer of her need for leave as soon as possible. The employee must also give an accurate and specific reason that she needs the leave, though a medical certification form will provide much of this. She must also give her employer a projected return to work date and keep the employer apprised of any developments affecting leave status while she’s gone.

## 9. What Do Leave Laws Require An Employer to do Vis a Vis Leave for An Employee?

An employer should give an employee notice of the type of leave being granted to her, a medical certification form for the employee’s medical provider to fill out, information on whether an employee will receive benefits while on leave, and notice if the employer is expecting the employee to use vacation time, sick, or paid time-off while on leave.

## 10. What Can I do if I’m still Confused About Leave or the way Leave Laws Interact?

California leave is a tricky area and it may be worth engaging an HR specialist or HR attorney for advice when making decisions. However, there are also informal avenues to explore the topic further. The Department of Fair Employment and Housing website, for instance, has great summaries of different leave laws, how they interact, and what to do about them. Some law firm and legal websites also explain leave and the differences between leave laws.