Christina M. Coleman
LAW OFFICES OF CHRISTINA M. COLEMAN, APC

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California leave laws offer numerous protections

EMPLOYEES IN COMPANIES OF 50 OR MORE WORKERS ARE ENTITLED TO MANY TYPES OF STATUTORY LEAVE, AND EVEN THOSE IN SMALLER FIRMS (5 OR MORE) ARE ENTITLED TO PREGNANCY LEAVE

California has a reputation for being a very protective state when it comes to employee rights and offers many different leave laws for this purpose: some well-known, and others not so much.

Everyone has heard of the FMLA, and most people have heard of the CFRA, but if you have never heard of the PDL, the NPLA, or Kin Care, you're not alone. This article discusses and compares these various leave laws.

FMLA and CFRA

Both Federal and California laws provide protected leave to injured workers. Under the Federal Family Medical Leave Act ("FMLA"), "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." (29 U.S.C. § 2612(a)(1)(D).) "The term 'serious health condition' means an illness, injury, impairment, or physical or mental condition that involves: (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health-care provider." (29 U.S.C. § 2611(11).) "A serious health condition involving continuing treatment by a health-care provider includes . . . A period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition. . . ." (29 C.F.R. § 825.115(a)(1)-(2).)

The FMLA also provides protected leave for family members with a serious health condition, disability because of pregnancy, and protected bonding leave for a birth or adoption, as well as foster care placement. (29 U.S.C. § 2612(a)(1)(A)-(C).)

The 12 weeks of protected leave need not be taken all at once; it can be taken in increments of only a few hours at a time. (29 U.S.C. § 2612(b)(1); 2 Cal. Admin. Code, § 11090(c).) Bonding leave may only be taken intermittently if the employer agrees, and regardless of any agreement, and all of it must be taken within one year of the birth. (29 U.S.C. § 2612(a)(2), (b)(1).) Leave for the serious health condition of the employee or family member may be taken intermittently if medically necessary. (29 U.S.C. § 2612(b)(1).)

The California counterpart is the California Family Rights Act ("CFRA"), which provides for the same amount of leave for an employee due to his or her serious medical condition.

50 or more employees

The FMLA and CFRA both only apply to private employers with 50 or more employees, public employers regardless of number of employees, and the FMLA also expressly includes public or private elementary or secondary schools. The

employee must work at a location that has 50 or more employees within a 75-mile radius. (29 U.S.C. § 2611(2)(B), (4); 2 Cal. Admin. Code, § 11087(d), (e)(4); Gov. Code, §12945.2(b).)

Further, under both FMLA and CFRA, the employee must have been employed for 12 months, and have worked a minimum of 1,250 hours in the previous twelve months. (29 U.S.C. § 2611(2)(A); 2 Cal. Admin. Code, § 11087(e).)

An employer can be liable for an FMLA violation if it interferes with the employee's attempt to exercise the right to FMLA leave, or if it retaliates against the employee for opposing practices made unlawful by the FMLA or for taking the leave. (29 U.S.C. 2615(a)(1)-(2); 29 C.F.R. 825.220(c).) The same theories of liability are available under the CFRA. (2 Cal. Admin. Code, § 11094.)

Interestingly, under the FMLA (but not the CFRA), individuals can be held personally liable for violations. (See, e.g., *Nardodetsky v. Cardone Industries, Inc.*, et al., No. 09-4734 (E.D. Pa. Feb. 24, 2010) [holding human resources manager, CEO, plant manager, director and representative can be liable as "employers" based on evidence that each of the individual defendants exercised control over plaintiff's employment and the decision to terminate]; *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 234, 287 [granting summary judgment in favor of an individual defendant on CFRA retaliation claim on the basis that "there is .... no individual liability for retaliation."].)

Remedies available under the FMLA include reinstatement, front and back pay, liquidated damages, but *not* emotional distress *nor* punitive damages. (29 U.S.C. § 2617; *Farrell v. Tri-County Metro. Transp. Dist.* (9th Cir.2008), 530 F.3d 1023, 1025.)

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Under the CFRA, these same remedies are available *as well as* emotional distress *and* punitive damages. (*Taylor v. Trees, Inc.* (E.D. Cal. 2014) 58 F.Supp.3d 1092, 1103-1104.) Both the FMLA and the CFRA permit recovery of attorney's fees *and* expert witness fees. (29 U.S.C. § 2617(3); Gov Code, § 12965(b).)

A notable difference between the FMLA and the CFRA is that the CFRA expressly *excludes* leave relating to pregnancy- or birth-related disabilities or conditions. (Gov. Code, § 12945.2(c)(3)(C); 2 Cal. Admin. Code, § 11093(b).) This is because California provides a separate and more inclusive leave for pregnancy- and childbirth-related disabilities: The PDL. An employee is entitled to take *both* types of leave in their full amounts. (2 Cal. Admin. Code, §§ 1146(c)-(d), 11093(a), (c)-(d).)

Pregnancy Disability Leave

California provides special and more-inclusive protections for workers disabled by pregnancy and/or childbirth. While these disabilities are excluded from the CFRA and are included in the FMLA, California's Pregnancy Disability Leave laws ("PDL") cover far more employees than does the FMLA.

The PDL provides up to *four months* of leave to an employee disabled by pregnancy, childbirth, or a related medical condition. (Gov. Code, § 19245(a)(1); 2 Cal. Admin. Code, § 11042(a).)

Unlike FMLA and CFRA, which require the employer employ at least 50 employees, the PDL applies to all employers in California who employ *five* or more employees. (2 Cal. Admin. Code, § 11035(h).) Further, unlike the FMLA and CFRA, there are *no* eligibility requirements based upon length of employment or hours worked. (2 Cal. Admin. Code, § 11037.)

An employer can be liable for a PDL violation if it harasses an employee because of pregnancy or perceived pregnancy, childbirth, breastfeeding, or any related medical conditions. (2 Cal. Admin. Code, § 11036.) An employer is also liable for a PDL violation if it interferes with the employee's attempt to exercise the right to PDL leave, or if it retaliates against the employee for opposing practices made unlawful by the PDL or for taking the leave. (Gov. Code, § 12945(a)(4).)

The PDL also makes it unlawful to refuse and fail to accommodate pregnancy- and childbirth-related disabilities if requested with the advice of the employee's health care provider, including transfer to a less strenuous position if the transfer can be reasonably accommodated. (Gov. Code, § 12945(a)(3); 2 Cal. Admin. Code, §§ 11040, 11041.)

Because the PDL is part of the Fair Employment and Housing Act ("FEHA"), remedies available under the PDL are the same as those recoverable under the FEHA, including reinstatement, front and back pay, emotional distress, punitive damages, plus attorney's fees and expert witness fees. (Gov. Code, § 12965(b).)

NPLA

The newest addition to California's protective leave laws is the New Parent Leave Act ("NPLA"), which became effective January 1, 2018.

The NPLA takes those best portions of the CFRA relating to bonding after birth, adoption, or foster care placement, and applies it to smaller employers. Whereas under the CFRA, the employer must employ at least 50 employees, the NPLA only requires 20 employees within 75 miles of the worksite, and effectively covers all employers employing between 20 and 49 employees (since if there are 50, the FMLA and CFRA kick in). (Gov. Code, § 12945.6(a)(1), (c), (i)(1).)

Like the CFRA, under the NPLA, the employee must have been employed for 12 months, and have worked a minimum of 1,250 hours in the previous twelve months. (Gov. Code, § 19245.6(a)(1).)

Like the CFRA, an employer can be liable for an NPLA violation if it interferes with the employee's attempt to exercise the right to FMLA leave, or if it retaliates against the employee for opposing practices made unlawful by the NPLA or for taking the leave. (Gov. Code, § 12945.6(g), (h), (j).)

Finally, the same remedies available for violations of the CFRA are available for violations of the NPLA. (Gov. Code, § 12945.6(j) [all portions of CFRA not inconsistent with the NPLA are incorporated by reference].)

Non-statutory leave for disabilities and pregnancy-related disabilities

The FMLA, CFRA, PDL and NPLA are not the exclusive provisions pursuant to which leave may be sought, and with respect to the California statutes, each expressly confirms that its protections are *in addition to* and not in lieu of other protections available under the law, including pursuant to the FEHA.

Under the FEHA, an employer has an affirmative duty to make reasonable accommodation for its disabled employees, and further requires that the "employer...shall ascertain through the interactive process suitable alternate, vacant positions and offer an employee such positions, for which the employee is qualified." (2 Cal. Admin. Code, § 11068(a) and (d).) When accommodation is required to enable the employee to perform the essential functions of the job, the employer has a duty to gather sufficient information from the applicant and qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform the job..." (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 949 (internal quotations omitted), accord, *Spitzer v. The Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1386-1389 [affirmative duty to accommodate means even where employer's prior attempts failed, it had ongoing obligation to take "affirmative action" to find suitable accommodation].) An employer has an affirmative duty to consider "any and all reasonable accommodations." (2 Cal. Admin. Code, § 11068(e).)

A reasonable accommodation under the FEHA can be a finite leave of absence, which may be longer than the leave permitted by the FMLA, CFRA or

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PDL. (2 Cal. Admin. Code § 11068(c) ["holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer's leave plan may be a reasonable accommodation" but "An employer…is not required to provide an indefinite leave of absence as a reasonable accommodation"].)

The right to take CFRA leave is separate and distinct from the right to take a disability leave under the FEHA. If an employee has a serious health condition that also constitutes a disability as defined by the FEHA and cannot return to work at the conclusion of her CFRA leave, the employer has an obligation to engage that employee in an interactive process to determine whether an extension of that leave would constitute a reasonable accommodation under the FEHA. (2 Cal. Admin. Code, § 11093(3).) The same is true with respect to the right to take PDL leave. (2 Cal. Admin. Code, § 11047; *Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1338-1341 [FEHA may require more disability leave for a pregnant employee than the PDL provides].)

An employee may be entitled this additional leave as an accommodation of a disability if the employer is subject to the FEHA, e.g., employs five or more employees. (Gov. Code, § 12926(d).) Unlike the CFRA, there is no waiting period or minimum employment requirement to be entitled to accommodation. Further, unlike the CFRA and the PDL, there is no maximum amount of leave available. Each request for leave is determined on a case-by-case basis, with the only limitation being that the leave cannot be "indefinite." (*Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 968; *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226 [limited leave of absence may be reasonable accommodation]; 2 Cal. Admin. Code, § 11068(c).)

A failure to provide a reasonable leave of absence as an accommodation under the FEHA gives rise to a claim for the failure to accommodate and/or failure to engage in the interactive process, which provide for the same remedies as other FEHA violations, including past and future lost wages, general damages, punitive damages, and injunctive relief, plus statutory attorney's fees *and* expert costs.

Miscellaneous leave laws

In addition to those leave laws relating to disability, pregnancy and/or bonding, California has a number of statutes which provide for various other types of protected leaves an employee has the right to take, and which the employer is required to provide. These laws include, but are not limited to, the following:

Kin care, Labor Code section 233: If an employer provides sick leave to an employee (which is now mandatory), the employee must be permitted to use the sick leave to care for a sick family member. This law prevents retaliation for taking or attempting to take leave under this provision. An aggrieved employee is entitled to reinstatement and actual damages or one day's pay, whichever is greater, and to appropriate equitable relief, which remedies are cumulative to any others that may apply. This law applies to all employers, regardless of size.

Jury duty and subpoena, Labor Code section 230(a): This law prevents retaliation for taking or attempting to take time off for jury duty, or to testify as a witness pursuant to subpoena, so long as reasonable advance notice is given, if feasible to do so. An aggrieved employee is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, as well as appropriate equitable relief. This law applies to all employers, regardless of size.

Crime victims, Labor Code section 230.2: This law requires employers to permit time off for domestic abuse or sexual assault victims to seek medical attention and counseling, and to participate in actions to increase safety from future violence or assault. This law prevents retaliation for taking or attempting to take leave under this provision. An aggrieved employee is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, as well as appropriate equitable relief. This law applies to all employers who employ at least 25 employees.

School activities, Labor Code sections 230.7 and 230.8: These laws permit employees (parents, grandparents or guardians of children up to grade 12) up to 40 hours per year, no more than eight hours per month, to attend or participate in school activities, school emergencies, enrolling children in school, and attending schools for suspension and discipline meetings, if reasonable notice is provided. These laws prevent retaliation for taking or attempting to take leave under this provision. An aggrieved employee is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer; and if the violation is willful, possibly a civil penalty in an amount equal to three times the amount of the employee's lost wages and work benefits. This law applies to all employers who employ at least 25 employees.

Voting, Elections Code section 1400: This law permits employees to take up to two hours at the beginning or end of the shift of paid time off to vote, if the voter does not have sufficient time outside of work to vote. This law applies to all employers, regardless of size.

Literary education, Labor Code sections 1040-1044: These laws permit employees reasonable time off from work to enroll in literacy programs, which the employer must accommodate unless it creates an undue hardship. The employer must maintain the confidentiality of this leave and cannot terminate the employee if the employee is satisfactorily performing his or her work. This law applies to all employers who employ at least 25 employees.

Alcohol/drug rehab, Labor Code sections 1025-1028: These laws permit employees reasonable time off from work to voluntarily enter an alcohol or drug

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rehabilitation program, provided it doesn't impose an undue hardship for the employer. The employer must maintain the confidentiality of this leave. This law applies to all employers who employ at least 25 employees.

Conclusion

These are not all the types of leave available but are the most common and/or applicable to average workers in California; there are additional or comparable Federal leave laws. Claims for violation of leave laws usually afford significant remedies, including punitive damages, as well as attorney's fees, making them lucrative claims to pursue. Familiarity with the various leave laws permits the studied practitioner to not only successfully litigate these cases, but also to advise clients and employees of their rights to take leave when the employee may not be aware.

Christina M. Coleman recently launched her solo practice of the Law Offices of Christina M. Coleman, APC*, and is the former supervising attorney of the civil litigation division at the Law Offices of Ramin R. Younessi, APLC. She has 20 years of experience representing consumers, businesses and employees in enforcement and protection of their rights She is a member of California Employment Lawyers Association, CAOC, and sits on the CAALA Board of Governors.*