

On The Employment Law Horizon For 2023 – Leaves Of Absence



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Leaves of absence just got a bit more complicated with the passage of two new California laws for 2023. Historically, leaves of absence under the California Family Rights Act (CFRA) allowed an employee to care only for an ill or injured “family member.” The statute contains a laundry list of potential recipients of that care, all relations of one sort or another, including in-laws. California paid sick leave (PSL) has a similar laundry list.

Under both the CFRA and PSL, employers will now be required to allow employees to take leave to care for a “designated person” who may not be a relative. Interestingly, the two laws are not quite the same as to how they define a “designated person.” Let’s deal with CFRA first.

Under the CFRA, the designated person must be a blood relative, but it doesn’t have to be someone within the previous laundry list. For example, Great Aunt Sally may be a blood relation, but she was not otherwise included in the previous CFRA laundry list. But now, because she’s a relative, however distant, she could be designated for the employee to take off time to take care for her.

Leave for a “designated person” under PSL is more expansive. The designated person does not have to be a relative at all. An employee could have an elderly next-door neighbor that they help out with food, trash cans, etc., and they may designate that person as the individual for whom the employee is going to provide care under the paid sick leave law.

Under both laws, the employee must designate one person at the time they want to go out on leave. Once they designate that person, that’s the only “designated person” that they can take care of for the entire year from that date under the specific law, in order to be covered by either of those statutes. The two statutes are consistent on that point (although the employee could designate a different person under each law).

Remember that CFRA used to be consistent with the FMLA in requiring the employer to have 50 employees before CFRA (or FMLA) applied. That changed a couple of years ago. The CFRA only requires the employer to have five employees, and only one of them needs to be in California (and that’s the only one to whom CFRA would apply). The employee still needs to have worked 1250

hours over the prior year and worked for at least a year for the employer (with some exceptions for past employment tacked on).

With respect to PSL, as long as the employee has PSL available on the books (or PTO), the employee may exercise their “designated person” rights.

A few last general points on FMLA/CFRA. Remember that when an employee goes out on worker’s compensation leave, the employer should give them a notice regarding their FMLA/CFRA rights and applicability of those rights to the workers compensation leave. Workers compensation leave and FMLA/CFRA leave run concurrently. Even if the worker’s compensation leave extends many months, the 12 weeks of FMLA/CFRA will run out much earlier. If that occurs, the employer then has the option to discontinue paying its share of health insurance premiums. In the absence of the notice, however, the employer will need to provide the notice and let the 12 weeks run out before discontinuing payments (and only after providing a COBRA notice). Clients occasionally call me and indicate that the employee has been on workers compensation leave for six or seven months, and “Can we stop paying medical premiums?” Yes, but only if the employer has given the 12 weeks of notice. If not, then we immediately give the 12 weeks’ notice and let that time run out before the employer stops paying the premiums.

CFRA/FMLA generally run concurrently, except when it comes to pregnancy disability leave in California. Then, there is a morass of laws that overlap (FMLA/PDL and, separately, CFRA/PFL), as well as SDI and PFL for benefits from the state. This is all complicated further when the employee only qualifies for CFRA/FMLA during the leave because they have reached a year with the employer during the leave. Some of the laws are available immediately, further complicating matters. But the dissection of this alphabet soup of leave and benefits laws during pregnancy and baby bonding is best left for another installment.

Although not technically a leave of absence in my world, note a new California law allowing up to five days of unpaid bereavement leave for employees of companies with at least five employees. The employee must have worked for at least 30 days, and may apply paid leave benefits such as PTO, vacation or sick time. There are the usual restrictions on the family members applicable to this leave. There is no limit on the number of times the five days can be used in a year, however.