
**FMLA / CFRA – LANDMINES
FOR EMPLOYERS**

The Americans with Disabilities Act can still send shivers down the spine of employers, but new rules that took effect January 16th for the federal Family Medical Leave Act (FMLA) make complying with the ADA child's play. While the FMLA [and, similarly, the California Family Rights Act (CFRA)] was confusing before, the new rules nearly defy comprehension, to say of nothing of compliance.

What is FMLA?

In a nutshell, since 1993 the FMLA has provided employees working for employers with 50 or more employees with up to 12 weeks of unpaid, job-protected leave during any 12-month period. Covered employers are required to maintain any preexisting group health coverage during the leave. When the employee returns to work, the employer is required to reinstate the employee to the same or an equivalent job with equivalent benefits, pay, and all other terms and conditions of employment. Sounds easy, right? As they say, "the devil is in the details."

For example, how do you determine who is a covered employer? Variables include computations including part-time and seasonal employees, whether some employees work in satellite facilities outside a 75-mile radius, whether the 50 or more employees have worked 20 or more calendar workweeks in the current or preceding calendar year, and so forth.

Similarly, who is a covered employee? An *initial* test of eligibility requires determining if the employee has been employed for at least 12 months at the time the leave begins AND has completed at least 1,250 hours of service during the previous 12-month period AND works at a location in the U.S. where the company employs at least 50 employees within a 75-mile radius. What if the company was recently acquired? Does an employee's service record follow to the new employer for purposes of determining eligibility? Answer: sometimes.

What is CFRA?

Like the FMLA, the CFRA (in existence since 1991) requires covered employers to provide up to 12 weeks of unpaid, job-protected leave during any 12-month period. The employee is entitled to reinstatement to the same or an equivalent job.

The two laws are obviously very similar, but there are some important differences. The FMLA obligates the employer to maintain an employee's group health benefits (medical, dental, vision, EAP, and medical FSA plans) while the CFRA requires an employer to maintain ALL group benefits (medical, dental, vision, life, disability, EAP, FSA, etc.) while the employee is on an eligible leave.

A second important difference is that the CFRA allows employees to take a leave to care for a seriously ill spouse, domestic partner, child or parent while the FMLA limits its use to leave to care for a seriously ill spouse, child or parent.

Finally, while the CFRA specifically excludes pregnancy-related disabilities, at the expiration of a Pregnancy Disability Leave, a new mother is eligible to take an additional 12 weeks of leave under CFRA for the birth of her child regardless of the existence of a disability. Clear as mud?

**Changes to the FMLA
Effective January 16, 2009**

To further confuse employers making a good-faith effort to administer these laws correctly, the Department of Labor has enacted numerous revisions to the FMLA that are now in effect. Some of those revisions, in very brief summary, are as follows:

- Employees are required to follow call-in policies "absent unusual circumstances." Previously, employees had up to 2 days after a business

Providing current news and information for individuals and institutions.

absence to notify the employer about their need for leave;

- To establish a “chronic condition” that qualifies for FMLA leave, employees now must certify they have visited a doctor at least twice a year for the condition;
- Direct supervisors are now prohibited from getting an employee’s medical information when an FMLA certification is needed in order to protect the employee’s privacy rights;
- Light duty status now does not count against the employee’s FMLA leave entitlement;
- The regulations now provide additional clarification regarding the type and frequency of treatments necessary to qualify as “chronic” or as “continuing treatment”;
- The regulations now provide more detailed guidance on substitution of unpaid leave for FMLA leave and substantial new notice requirements for employers; and
- Significant changes related to military families.

Penalties for Violations

Under both the FMLA and CFRA, an employee denied benefits can recover lost wages and benefits (both past and future), plus interest, as well as attorneys’ fees and all costs incurred in bringing an action against the employer. However, if the employee can establish they were discriminated against or retaliated against for seeking rights or exercising rights under either of these laws, the employee could also be entitled to emotional distress damages. All in all, a potentially expensive mistake.

Summary

Both the FMLA and CFRA are chock-full of traps for the unwary employer (or even the wary one, for that matter!). In addition to a pro-active, well-informed approach to administration of these benefits, employers should consider employment practices liability insurance that may include coverage for violations.

	FMLA	CFRA
Group Benefits	Employer must continue MEDICAL benefits for an employee on an eligible leave.	Employer must continue ALL benefits for an employee on an eligible leave.
Purpose of Leave	Seriously ill spouse, child or parent only.	Adds DOMESTIC PARTNER to FMLA list.
Pregnancy	Pregnancy disability is included.	Pregnancy disability is excluded, but new mother may be eligible for post-delivery leave.
Denial of eligible benefits	Employee may recover lost wages and benefits (both past and future), plus interest, attorney’s fees.	
Emotional Distress Damages	Recoverable if employee proves discrimination or retaliation.	

Bottom line: Consult your attorney whenever an employee requests leave; and look into good employment practices insurance coverage.

Shapiro Buchman Provine LLP continues to provide its clients, professional advisors and its friends with up to date reports on recent developments in business, real estate, employment, estate planning and taxation.

For further information please feel free to contact rshelton@sblp.com.

Authored by Rhonda D. Shelton, Esq.

The summary which appears above is reprinted for informational purposes only. It is not intended to be and should not be considered legal advice nor substitute for obtaining legal advice from competent, independent, legal counsel. If you would like to discuss these matters in more detail, please feel free to contact us so that we can provide the clarification and resources you need to make effective decisions.