

Key Changes to the California Family Rights Act

The California Fair Employment and Housing Council has approved updates to the CA Family Rights Act (CFRA) to add clarification and also align the CFRA more closely with the federal version of this law – the Family and Medical Leave Act (FMLA). The new regulations were effective July 1, 2015. Although the CFRA regulations assist in syncing the numerous provisions around family and medical leave, there are still many pieces of the CFRA that differ from the FMLA. Most notably, pregnancy disability leaves are not covered under CFRA, but remain so under FMLA. As a result, a pregnant employee may have up to seven months of protected leave time between these two laws.

Many employers do not manage volumes of medical leaves each year. That’s the good news! However, when a potential medical leave of absence is on the forefront it is difficult to be on top of the documentation and timing requirements. If you are a retained client, please give us a call. (Keep in mind the employee does not have to use the specific reference to the laws to be covered. Saying “I want to take CFRA leave next week.” is not required on the employee’s part. The employer is supposed to recognize a potential protected leave opportunity and take action.)

Our intent here is not to cover every nuance of the changes, but to give you a heads up as to the key changes that may impact current or upcoming leaves. We’ll offer more “nerdly” training on these aspects for those with a high interest (uhhh...tolerance?) for the details.

Topic	Key Change
Further definition of a “covered” employer and employee eligibility	<p>The new regulations add an “economic realities test” to aid in determining if two entities are joint employers. If a joint employer, then both employers must count all employees toward the “50 employees” coverage requirement. In cases where a contract-employee is used through a temporary services agency and both employers benefit from the employee’s work and exercise control over the employee’s employment, then both will be considered joint employers and may be subject to CFRA.</p> <p>Employees working remotely – Employees who travel or work remotely may be eligible for CFRA coverage if they report to or receive assignments from a very distant corporate headquarters or regional office. If the office the employee reports to has 50 or more employees within 75 miles then the employee is eligible for CFRA.</p> <p>The new regs also clarify that an employee who may not meet the eligibility requirements</p>

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	<p>at the <i>beginning</i> of a leave period (say, the employee had not worked 12 months) but becomes eligible during the leave period will then become covered by the law's benefits once the minimum eligibility has been met during the leave period. This will make writing Eligibility and Designation letters a little trickier!</p>
<p>Medical certifications</p>	<p>The FMLA allows an employer (an HR Representative, not the employee's manager) to clarify or authenticate a medical certification. However, the new CFRA regs only allow an employer to contact a health care provider to <i>authenticate</i> the medical certifications. No clarification or further questions allowed. However, the employer may ask the <i>employee</i> to inquire with the health care provider for further information.</p> <p>As always, CA employers may not inquire about a diagnosis or any details/symptoms about the health condition. This is why we have a unique medical certification form and not the one the Dept. of Labor offers for FMLA leaves. Our updated medical certification form is available on our HR Library.</p>
<p>Using accrued time off during leave</p>	<p>The two laws differ here. Bottom line - If an employee is receiving any type of compensation during the FMLA/CFRA leave period (compensation includes disability pay, workers' compensation, wage replacement or Paid Family Leave Insurance) then the employer cannot require the employee to use vacation, PTO or accrued sick leave. It is the employee's choice.</p>
<p>Intermittent Leaves</p>	<p>Intermittent leaves are the more challenging types of leaves under these laws. CFRA clarifies a bit more about how to manage them. For example, where it's physically impossible for the employee to start or end work midway through a shift then the full shift the employee cannot work will be counted toward CFRA leave. (Consider the flight attendant who can't leave the plane mid shift.)</p> <p>The regs also state an employee must be allowed to return to work if s/he is able to perform some aspects of the job, so as to reduce leave time.</p>

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	<p>One of the employer-friendly pieces here is that employees on intermittent leave must make a “reasonable effort” to schedule their absences (e.g., medical appointments) so as to not unduly disrupt the employer’s operations.</p>
<p>Defining Key Employees</p>	<p>Key employees are those who are the top 10% salaried wage earners within 75 miles of the work location. If an employer deems a key employee may not have a return to work guarantee at the end of the FMLA/CFRA leave then the employee must be notified in writing at the beginning of the leave. It is extremely rare and somewhat risky that an employer would use this provision.</p>
<p>Fitness for Duty Examination prior to returning to work</p>	<p>A recent court case (<i>White v. City of Los Angeles</i>) set this expectation and now the CFRA regs clarify it. An employer may not require an employee to have a fitness for duty exam <i>prior to</i> returning to work.</p>
<p>Second and third opinions</p>	<p>The CFRA is more restrictive about an employer asking for a second opinion on a medical certification. The employer may only ask if there is a “good faith, objective reason” to question the validity of the certification. Of course, the employer must pay for the second opinion and may not request this from a health care provide who is not employed by the employer on a regular basis. A third opinion must also be paid by the employer and will be the final and binding decision if there is a difference of opinion between #1 and #2.</p>
<p>Recertification</p>	<p>Sometimes employers want the health care provider to recertify the original medical certificate limiting the employee’s work ability. Although the FMLA allows an employer to do this every six months, the CFRA does not allow this. The employer may only request a recertification when the original medical certification expires. Bottom line: An employee with a “lifetime” restriction will never have to show a recertification for that restriction again.</p>
<p>Reinstatement</p>	<p>One of the guarantees with FMLA and CFRA is the return to the same or similar position at the end of the protected leave period. The CFRA regs clarify that an employee must be reinstated even if s/he has been replaced or the position has been restricted to accommodate for the employee’s absence.</p>

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	<p>The CFRA regs also address an employee who returns to his/her former position and is no longer qualified for the position (such as the need to renew a license.) The employer must give the employee a reasonable opportunity to meet the requirement upon returning to work.</p> <p>Of course, if the employer had a layoff that affected the employee's position while on leave and the employee would have been laid off in any case, then there is more bandwidth to place the employee in another position or lay off.</p>

What you need to do:

1. Post the updated Joint CFRA and Pregnancy Disability Leave poster found on the Silvers HR library at <http://www.silvershr.com/wp-content/uploads/2010/03/DFEH-100-210-rev072015.pdf>
2. Use the updated Family and Medical Leave policy offered by Silvers HR and insert this into your employee handbook on the next publication. A copy is on the Silvers HR library for our clients.
3. Ensure you use the appropriate FMLA/CFRA checklist to cover the essential steps of all family and medical related leaves. Copies of the checklists are on the Silvers HR Library.
4. Ensure you use the updated Medical Certification form when requesting medical information from a health care provider for an employee requesting or on Family and Medical Leave. A copy is on the Silvers HR library.