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New California Family Rights Act Regulations: Employers with 50 or More Employees in California Should Ensure Existing Policies, Practices, Forms and Postings Are up to Date

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Employers of 50 or more employees should familiarize themselves with the updated California Family Rights Act ("CFRA") regulations, which took effect July 1, 2015. CFRA is California's counterpart to the federal Family and Medical Leave Act ("FMLA").

Like the FMLA, CFRA allows eligible employees to take up to 12 weeks of family or medical leave for qualifying reasons, such as the serious health condition of the employee or a family member of the employee, and the birth, adoption or foster care placement of a child. (The FMLA also allows leave for qualifying exigencies relating to a family member's military service or to care for the medical needs of covered service-members or veteran family members).

CFRA-covered employers are almost always covered by FMLA, and must comply with both statutes. In many respects, the new regulations conform the CFRA with the FMLA; however, there are still several significant differences between CFRA and FMLA which California employers need to be aware of. For covered employers who already have CFRA/FMLA policies in place, the new regulations will likely require changes to current practices, policies, forms and notices. Highlights of the new regulations and the significance of their impact on covered employers are summarized below.

Covered Employees, Eligible Employees, Response to Leave Requests and Designation of Leave

Covered Employers and Eligible Employees: Previously the CFRA regulations were silent on the following issues related to who constitutes a covered employer under CFRA, but the new regulations now align CFRA with the FMLA in several respects, including:

- Employees on paid or unpaid leave, including CFRA leave, a leave of absence, or disciplinary suspension must be counted when determining if the employer meets the 50 or more full or part-time employee threshold.

- Multiple entities can be "joint employers"—and therefore combined for purposes of determining CFRA coverage and employee eligibility—in the following situations: (1) where there is an arrangement between employers to share an employee's services or to interchange employees; (2) where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or (3) where the employers

are not completely disassociated with respect to the employees employment and may be deemed to share control of the employee.

- Successors in interest of a covered employer are now treated as a covered employer under CFRA.

- For employees with no fixed worksite, their worksite for purposes of CFRA is the site to which they are assigned as their home base, from which their work is assigned, or to which they report.

Response to Leave Requests: The CFRA previously required an employer response within 10 calendar days of the request. Under the new CFRA regulations the employer response time is the same as under the FMLA regulations: **five business days** after receiving the employee's request.

Retroactive Designation of Leave: The new CFRA regulations align with the FMLA regulation prohibiting employers from retroactively designating leave as CFRA leave after the employee has returned to work, except with appropriate notice to the employee and where the employer's failure to timely designate does not cause harm or injury to the employee. Previous CFRA regulations prohibited retroactive designation after the employee returned to work in all circumstances.

Medical Certifications

New Medical Certification Form*:* The new CFRA regulations contain a sample medical certification form for CFRA leaves. Previously, there was no sample certification form specific to CFRA, and employers typically modified the Department of Labor's FMLA form to meet California's specific restrictions on the release of information relating to symptoms and diagnosis. Employers should be aware, however, that the medical certification forms in the amended CFRA regulations may need revision to fully address issues that arise under federal laws. For example, the model CFRA certification form mentions the California Genetic Information Non-Discrimination Act (CALGINA), but does not specifically mention the federal counterpart, The Genetic Information Nondiscrimination Act of 2008 (GINA). Additionally, the CFRA model form uses a CFRA-specific "Hospital Stay" definition that differs from the FMLA definition (see below) and does not contain specific questions about the timing of treatment that are relevant to the "absence plus treatment" definition of a "serious health condition" under FMLA (but not CFRA). Employers should consult with counsel to determine whether the certification form they intend to use complies with all potentially applicable laws.

***Contacting the Employee's Healthcare Provider*:** The new CFRA regulations prohibit employers from contacting an employee's health-care provider for any reason, other than to authenticate a medical certification. The FMLA, by contrast, allows an employer to contact a healthcare provider "for purposes of clarification and authentication of the medical certification after the employer has given the employee an opportunity to cure any deficiencies." ("Clarification" as defined by the FMLA regulations means contacting the health care provider

to understand the handwriting on the medical certification or to understand the meaning of a particular response on an FMLA certification form.) Nonetheless, it is important to keep in mind under both CFRA and FMLA, employers may not ask health care providers for additional information beyond that required by the certification form.

***Second and Third Opinions*:** Under both the FMLA and CFRA, if an employer doubts the validity of an employee's medical certification, the employer has a right to require a second health care opinion, designated and paid for by the employer. If the second opinion conflicts with the original, then the both laws provide the employer with the right to request a third opinion (to be mutually selected by the employee and employer and paid for by the employer) which is binding on the employer and employee. The new CFRA regulations clarify that employers must have a "good faith, objective reason" to doubt the validity of a medical certification in order to use the procedures for seeking a second opinion. The FMLA, by contrast, requires only that the employer have "reason" to doubt the validity of the first medical certification. So while the process for seeking second and third opinions is largely the same under CFRA and FMLA, CFRA appears to set a higher standard for the employer to initiate the procedure.

Recertifications: Employers should keep in mind that the CFRA regulations continue to prohibit requests for re-certification until the expiration of the time period the health care provider originally estimated. The FMLA, by contrast, allows employers to require recertification every six months where the certification states a period longer than 30 days or "lifetime" period.

Fitness for Duty Certifications and Intermittent or Reduced Schedule Leave: CFRA regulations were previously silent about fitness for duty certificates during intermittent or reduced schedule leave. The new CFRA regulations align with FMLA regulations on this issue, i.e., an employer can require a fitness for duty certificate for intermittent or reduced schedule leaves once every 30 days if reasonable safety concerns exist about the employee's ability to perform his or her duties. (This is in contrast to return to work certificates from full time leave, where FMLA and CFRA allow employers to require return to work certificates as part of a uniformly applied practice of requiring such releases for employees returning to work after illness, injury or disability.)

Counting Leave Time

Regularly Scheduled Overtime: While previously silent on the issue, the new CFRA regulations now align with the FMLA by allowing employers to count overtime hours the employee would have normally been required to work towards the employee's CFRA entitlement. Voluntary overtime hours, however, that the employee does not work due to CFRA leave, may not be counted against his or her CFRA entitlement.

Incremental Time for Intermittent Leave Cannot Exceed One Hour: The new CFRA regulations align with FMLA regulations in that increments of intermittent CFRA leave may be the shortest period of time the employer uses to account for other leaves of absence, **provided**

that increment is not greater than one hour. Previously, the CFRA regulations did not contain the one hour maximum increment.

Holidays Occurring During Intermittent Leave: The CFRA regulations were previously silent about holidays occurring during intermittent CFRA leaves of less than a full week. The new CFRA regulations align with FMLA's regulations that in such cases the holiday only counts against the employee's CFRA entitlement if he or she would normally have been scheduled to work that day.

Reduction of Exempt Employee's Pay for Intermittent Leave: The new CFRA regulations confirm that—like under FMLA—an employer can reduce exempt employees' pay for CFRA intermittent or reduced leave scheduled, provided the reduction is not inconsistent with a collective bargaining agreement, existing employer leave policy, FEHA, or any other state or federal law.

Use of Paid Leave Benefits

Paid Sick Leave for Employee's Own Health Condition: Under the new CFRA regulations, employees are permitted to elect, or employers may require employees, to use paid sick leave during an unpaid portion of CFRA leave for the employee's own serious health condition. Unlike FMLA, however, the new CFRA regulations prohibit employers from requiring the use of paid sick leave when the CFRA leave is for the health condition of a family member (although the regulations do permit the employer and employee to agree to the use of paid sick leave in this situation). It is important to note that there is a potential conflict between this provision and California's kin care and paid sick leave laws, as well as local ordinances, which allow employers to charge paid sick leave for the employee's care of a family member. In addition, employers should keep in mind that, as before, both the CFRA and FMLA regulations allow employers to require, or employees to elect, to use accrued vacation or paid time off benefits (PTO) during CFRA leave.

Use of Paid Leave While the Employee Is Receiving Disability Payments or Paid Family Leave: The CFRA now aligns with FMLA regulations prohibiting employers from requiring the use of paid leave (sick leave, vacation or PTO) while the employee is receiving a partial wage replacement benefit, (e.g., state disability or employer-sponsored disability insurance or workers compensation payments). Rather, the employer and employee can agree to supplement paid leave with such payments. Further, the new CFRA regulations expressly address the integration of the state administered Paid Family Leave (PFL) payments, stating that employers cannot require the use of paid leaves (sick leave, vacation, or PTO) while employees are receiving PFL payments during CFRA leave. Employers should make sure that their FMLA/CFRA policies and forms address the use of paid leave during CFRA and FMLA leave and that the use of paid leave is at the employee's election where required.

Interplay with Other Protected Leave Laws

Pregnancy Disability Leave Is Not CFRA Leave. The new CFRA regulations confirm the longstanding rule that an employee who takes Pregnancy Disability Leave ("PDL") (up to four months, which runs concurrently with FMLA), is entitled to 12 weeks of bonding leave following the end of PDL/FMLA leave.

Maintenance of Health Insurance During Leaves of Absence for Pregnancy and Childbirth: Both FMLA and CFRA require that the employer maintain an employee's health insurance benefits during leave on the same terms as if the employee has continued to work, up to a maximum of 12 weeks. The new CFRA regulations follow the Pregnancy Disability Leave regulations issued in 2013, requiring that this 12 week obligation under CFRA start once Pregnancy Disability Leave ends. The result is that, under these regulations, an employer must maintain health insurance benefits during all of an employee's pregnancy disability leave (up to four months) plus an additional 12 weeks of bonding leave for CFRA eligible employees.

Continued Leave of Absence After Exhaustion of CFRA Leave Rights: Another notable part of the new CFRA regulations is the reminder to employers that further leave beyond the 12 weeks of CFRA leave may be required as a reasonable accommodation of a disability under the FEHA or ADA. Although this is not a new concept and is relevant to all protected leaves, employers should be mindful of the obligation to engage in an interactive process with a disabled employee requesting leave beyond the FMLA, CFRA and PDL (or other) entitlements, and that there is no bright line limit for the amount of leave that a disabled employee may take.

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Needless to say, complying with CFRA and FMLA simultaneously—and leaves of absence in general—remain a challenge for California employers. The new CFRA regulations in some ways make this task easier by aligning FMLA and CFRA. In other respects, the changes further accentuate differences between the two statutes. To ensure compliance with the law and avoid risk of liability, employers should update their notices, policies, forms, and handbooks to reflect these new regulations, and also make sure their supervisors and administrative personnel are trained on these issues. If you employ workers in California and have questions on how the new CFRA regulations will affect you, please contact Rogers Joseph O'Donnell.

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The content of this article is intended to provide a general guide to the subject matter, and is not a substitute for legal advice in specific circumstances.