

You Can't Make Me Come to Work!

New Laws and New Perspectives
on Absenteeism Policies



Presented by:

Marjorie S. Fochtman

(415) 984-8443

mfochtman@nixonpeabody.com

Leaves of Absence:

You Can't Make Me
Come to Work!

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Untangling the Complex Web of Leave Laws

- FMLA/CFRA
- Pregnancy Leave
- ADA/FEHA
- Workers Compensation
- Military Leave
- San Francisco Sick Leave
- And more!

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Family and Medical Leave FMLA/CFRA

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Covered Employers

- 50 employees for 20+ calendar workweeks (current or preceding year)
- Public agencies are covered employers
- Voluntary compliance not covered by Act, but may create a contractual duty to comply

Eligible Employees

- Employed for at least 12 months
- Worked 1,250 hours in the previous 12 months (presume exempt employees are covered)
- 50 employees within 75 miles

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Reasons For Taking Leave

Family Leave

- Serious health condition of child, parent or spouse
- In California, also domestic partner
- Birth or adoption of child, or placement of child in foster care

Medical leave

- Serious health condition of employee

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Amount of Leave

An employee may take up to 12 workweeks of leave during any 12-month period

An employer may choose how to calculate the 12-month period

- calendar year
- fiscal year
- benefit year
- measured from first leave request
- "rolling" 12-month period (most common)

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Types of Leave

Block Leave

- A single period of leave taken once

Intermittent Leave

- Leave taken in separate blocks of time for one qualifying reason

Reduced-Schedule Leave

- Leave schedule that reduces an employee's usual number of working hours per workweek or per workday

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Also consider . . .

State Family and Medical Leave Acts

- not preempted,
- but employer can run leave concurrently with federal FMLA leave except domestic partner leave,
- **NOTE:** California Pregnancy Disability runs concurrently with leave under the FMLA but not the CFRA

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California Family Rights Act

Leaves identical to FMLA

But disability for pregnancy, childbirth or a related medical condition is not a serious health condition

Potentially 16 weeks pregnancy disability leave plus 12 weeks family leave

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Intermittent Leave
Transfer to an Alternate Position

The employer may require the employee to transfer to an available alternative position that better accommodates intermittent leave

The transfer must be temporary, and only for the overall period of intermittent leave

The transfer cannot be in lieu of intermittent leave

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If the Employee Is Eligible,
What Comes Next?

Inform employee *in writing* that the leave will be designated as FMLA/CFRA leave

- oral notice within **2** business days from time employee gives notice or employer has sufficient notice that leave qualifies as FMLA leave
- oral notice must be followed up in writing by next payday -- otherwise, **may** not be retroactively designated as FMLA

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What Information Should the Written
Notice Contain?

Date leave begins/began

Length of leave

Request for Certification and Periodic Updates
(be sure to specify consequences for not providing)

Leave is unpaid unless vacation or sick leave is used

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What Information Should the Written Notice Contain?

- State disability insurance or paid family leave info, if applicable
- Maintenance of medical benefits info
- Reinstatement rights
- Need to provide certification of ability to return to work, if applicable

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Don't Forget . . .

- To provide the employee with any necessary forms
- Request for Leave of Absence
 - Certification of Healthcare Provider
 - Request for Information

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All Leaves:
Health Care Provider's Certification

- The certification should include the following:
- The date on which the serious health condition commenced;
 - The probable duration of the condition; and
 - A statement that the employee is unable to perform the functions of his/her position **because of** the serious health condition.

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What Information Can Be Provided In A Certification?

For an child, spouse, or parent:

- Date on which serious health condition began
- Probable duration of the condition
- Estimate of amount of time needed to care for individual
- Statement that condition warrants employee's care during period of treatment

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What Information Can Be Provided In A Certification?

For an employee's own serious health condition:

- Date on which serious health condition began
- Probable duration of the condition
- Statement that due to the condition employee is unable to perform job functions

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The "Do Nots" For Certifications

- Do **NOT** request that the certification (or the employee) identify the specific serious health condition
- Do **NOT** request that the certification identify any symptoms of the serious health condition
- Do **NOT** request that certification identify any medications which the employee may be taking

JUST STICK TO THE BASICS!!!

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If you receive “details” of the employee’s serious health condition . . .

Protect the employee’s right to privacy
Don’t allow anyone without the need to know to see the “details”

Keep the medical information in a medical information file

- separate from the personnel file

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How do I know employee needs leave if I limit the information about an employee’s condition?

Don’t forget that individuals have constitutional, as well as statutory rights to privacy

- California Constitutional Right to Privacy
- California’s Confidentiality of Medical Information Act

If know too much information, you may be setting yourself up for a disability discrimination claim

Leave it to the healthcare provider -- that’s what certification is for!

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Pregnancy
Leave

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California Pregnancy Disability Leave (CPDL) Overview

Covered Employers

- Employers with 5 or more full or part-time employees

Eligible Employees

- All female employees, regardless of length of service, who are disabled by pregnancy or pregnancy related medical conditions

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Reason for Taking Leave

An employer has obligation to accommodate an employee who is affected or disabled by pregnancy-related conditions

An employee is disabled by pregnancy if, in the opinion of a licensed healthcare professional, she is unable to perform the essential duties of her job or to perform such duties without undue risk to herself or others

The distinction between "affected" and "disabled" determines the type of accommodation to which the employee is entitled

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Leave Entitlement

A pregnant employee who is disabled by a pregnancy-related condition is entitled to a leave of absence for a reasonable period of time not to exceed four months

A pregnant employee who has a normal pregnancy is entitled to only six weeks' pregnancy leave

Pregnancy leave does not have to be taken in one consecutive period of time

Accumulated periods of leave may be totaled in computing up to four months of leave

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Pregnancy Discrimination Act

When a female employee becomes unable to work due to pregnancy, child birth, or related medical conditions, her disability is to be treated on the same basis as other disabilities

BUT an employee's status as a "new mother" is not protected under the PDA

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Benefits and Pay During Pregnancy Leave

- Can be unpaid
- Same benefits as other temporarily disabled employees
- Can require use of sick leave
- Optional use of vacation
- Other employees' treatment!!!!

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Reinstatement Rights

Same or comparable job

Limited exceptions

- legitimate business reasons unrelated to pregnancy
- keeping job open would substantially undermine business operations

Safest assumption is to make every effort to return her to same job

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**Coordination of FMLA/CFRA
and CPDL**

- CFRA and CPDL are separate and distinct
- FMLA and CPDL run concurrently
- CFRA begins after CPDL ends
- Maximum entitlement in California for both pregnancy disability leave (FMLA and CPDL) and CFRA leave for reason of the birth of a child is four months and 12 workweeks

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California Sick Leave Rights - Kincare

- Can use for "illness" of child, spouse or parent
- Can use for domestic partner or child of domestic partner
- Can use accrued and available only
- Can use one-half of current accrual rate
- Can require compliance with policy
- Does not apply to insurance and ERISA plans

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**Sick Leave – Relationship To CFRA And
FMLA**

Sick leave

- Need not be for serious health condition
- Use is option of employee
- Does not extend FMLA/CFRA leave
- Unless used for domestic partner

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California Paid Family Temporary Disability Insurance

- The first paid family leave program in the U.S.
- Applies to employers of one or more persons whose employees participate in SDI
- Provides up to 6 weeks of wage replacement benefits
- Provides disability compensation to any employee who is unable to work due to the sickness or injury of a family member, or the birth, adoption, or foster care placement of a new child

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Family Temporary Disability Insurance

- No minimum longevity requirements (compare FMLA: 12 months worked, 1,250 hours worked in prior 12 months)
- Family member includes domestic partner (not covered by FMLA)
- Seven-day waiting period
- Employers may require that employees utilize up to 2 weeks of earned but unused vacation leave prior to that employee's receipt of FTDI

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ADA and FEHA

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ADA/FEHA Protects:

A qualified individual with a disability; OR
Any person *regarded as* having such a disability;
OR
Any person with a *record* of such a disability.
ADA-Applies to employers with 15 or more employees.

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Fair Employment Housing Act

- Applies to any employer with 5 or more employees (compare ADA)
- Now provides greater protections than the ADA

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What Is A Disability?

ADA Definition

Physical or mental impairment which substantially limits a major life activity

Clarified FEHA Definition

Physical or mental impairment which limits (California no longer requires substantially limits") a major life activity

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FEHA

Certain conditions are disabilities as a matter of law:

- HIV/AIDS
- Hepatitis
- Epilepsy
- Seizure Disorder
- Diabetes
- Clinical depression
- Bipolar disorder
- Multiple sclerosis
- Heart disease

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FEHA

- "Major life activity" to be broadly construed
- Includes physical, mental and social activities and working (regardless of whether the limitation implicates a broad class of jobs)
- Interactive process

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Is this Individual Protected
by the ADA/FEHA?

Four-Step Inquiry

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Step One:

- Is the individual *limited* in any major life activity *besides* working?
- Erase "*substantially* limited" from your inquiry
- For example: sleeping, reading, interacting with others.

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Step Two:

- If not, is the individual *limited* in the ability to work?
- Forget the ADA Standard: **Inability to do particular job is not enough - broad range of jobs necessary.**
- FEHA: **Limited in a specific job?**

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Step Three:

- If not actually disabled, is the individual "regarded as" disabled?
- Consider Steps 1 and 2.
- "Regarded as" unable to perform job does **NOT** equate to regarded as disabled.

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Step Four:

- Is the Disabled Employee Otherwise Qualified?
- Aside from being disabled, an ADA plaintiff must also be able to perform the essential functions of the job.

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Three Categories of Reasonable Accommodation:

Requires modifications or adjustments to:

1. A job application process;
2. Provide equal benefits and privileges of employment; or
3. The work environment.

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Accommodations Related to Benefits and Privileges of Employment

Includes employer sponsored:

- training;
- services;
- parties or other social functions;
- communications;
- leave of absence.

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According to the EEOC, almost everything is a reasonable accommodation.

The Guidance defines "reasonable accommodation" broadly, to include anything from reassignment to providing qualified readers.

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Burden to Show an Undue Hardship is on the Employer

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Undue Hardship Issues

A determination of undue hardship should be based on several factors including:

- the nature and cost of the accommodation needed;
- the overall financial resources of the particular facility, as well as other facilities owned by the employer;
- the type of operation of the employer;
- the impact the accommodation will have on the operation of the facility.

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Understanding The Consequence Of The Differences Between The ADA And FMLA

Practical Consequences of Substantive Differences

- FMLA/CFRA do not require that employees be “qualified” or that they have a “disability.”
- ADA/FEHA cover both applicants and employees regardless of their length of service.

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Understanding The Consequence Of The Differences Between The ADA And FMLA

Practical Consequences of Substantive Differences

- Unlike the ADA, the FMLA does not have a general “undue hardship” defense for employers who fail to provide the required leave.
- Because the definition of “disability” under the ADA clearly differs from the definition of “serious health condition” under the FMLA an individual may be protected by one statute but not by the other.

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An Individual With A Disability May Receive Greater Benefits Under The FMLA Than Under The ADA

The ADA/FEHA does not require the employer to provide leave if it would create an undue hardship. However, the ADA/FEHA would require additional leave beyond that provided by FMLA/CFRA if it were not an “undue hardship.”

Employers may take into account the initial twelve (12) weeks of FMLA leave in determining whether the additional leave is an undue hardship under the ADA.

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Request for Medical Certification Under the ADA and the FMLA

Under the ADA:

- An employer may ask employees disability related questions or require employees to take medical examinations only if they are "job related" and "consistent with business necessity."

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The Bermuda Triangle Of Leave Due to Occupational Injury or Illness

- Workers Compensation
- ADA/FEHA
- FMLA/CFRA Issues

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Comparing Purposes of the ADA and Workers' Compensation Laws

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The Purpose of the California Workers' Compensation Laws:

- To assist workers who are injured in the course and scope of employment
- To provide medical treatment for job-related injuries, including temporary and permanent disability
- Workers' compensation focuses on what a worker *cannot do*.

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Workers' Compensation Leave

- When do employers need to be concerned about workers' compensation leaves?
- Every employer with 1 or more employees
 - Employee injury arises out of and in the course of employment

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The Purpose of the ADA's Employment Provision:

- To prohibit employment discrimination against qualified individuals with disabilities
- To provide equal access to employment opportunities and benefits
- Focus on what a worker *can do* with or without reasonable accommodation.

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Contrast Workers' Compensation, ADA and FMLA

More employees are entitled to leave under workers' compensation than FMLA

- 1 employee vs. 50 employees within 75 miles

Entitlement to leave for work-related injury, regardless of employee's length of service

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Conflicting Purposes of the ADA and FMLA

The ADA FEHA requires an employer to provide reasonable accommodation with the emphasis on returning employees to work.

The FMLA/CFRA provides workers with an incentive or opportunity to reject alternative work schedules and returning to work.

Under workers' compensation, an alternative work schedule could be available and an employee could reject it and accept FMLA/CFRA leave.

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Temporarily Disabled Workers May Choose Medical Leave or Light Duty.

The DOL has held employers *may not require* injured employees to take "light duty assignments" rather than medical leaves of absence under the FMLA.

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Other Legally Required Leaves

Literacy Leave - Cal. Labor Code 1040 et seq.
 Domestic Violence Leave - Cal. Labor Code §§ 230 and 230.1.
 Crime Victims Leave - Cal. Labor Code §230.2
 Jury Duty Leave – Cal. Labor Code §230(a)
 Drug and Alcohol Rehabilitation Leave – Cal. Labor Code § 1025
 Parental School Function Leave - Cal. Labor Code §230.7 and 230.8
 Volunteer Firefighter Leave - Cal. Labor Code §230.3 and 230.4
 Religious Accommodation Leave – Title VII/FEHA

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**Other Common “Leaves” Contractually
 Provided By Employers
 But Not Required By Law**

- Vacation “Leave”
- Holiday “Leave”
- Bereavement Leave
- Personal Leave

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Going Beyond

What other leaves do you want to provide?
 What other leaves should you provide?
 Treating like cases alike.

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Practical Recommendations

Never assume that compliance with one statute constitutes compliance with all

Do not take employee requests under only one statute at face value

Carefully review each situation as it occurs

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Potential Recommendations

Analyze potential leave obligations in this order:

1. FMLA/CFRA
2. Pregnancy
3. ADA/FEHA
4. Workers Compensation
5. Other Statutory Leave Obligations
6. Contractual Leave Obligations
7. Going beyond: What is the right thing to do?

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Potential Recommendations

Audit your leave policies:

- Have you correctly covered all legally required leaves?
- Have you provided a clear description of the rights and obligations that exist with regard to all other leaves that you want to provide?
- Are your leave policies and procedures consistent with each other?

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Demystifying the New USERRA Regulations:

Employees' Rights and
Employers' Obligations

Demystifying the
New USERRA Regulations:

Employees' Rights and
Employers' Obligations

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Consider the Following. . .

Within days of the tragic events of 9/11, over
10,000 reservists were called to active duty

In the following months, President Bush
authorized the call to active duty of 50,000
reservists

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Consider the Following. . .

Nearly 530,000 reservists and members of the National
Guard have been called up

- About 1/3 of these individuals are in "professional
careers"

Of those activated since 9/11, over 390,000 have been
demobilized

THESE ARE YOUR CITIZEN SOLDIERS

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**Uniformed Services
Employment and
Reemployment Rights Act
("USERRA")**

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Introduction – Purposes of USERRA

To encourage non-career service by minimizing both damage to careers and disruption that can result from service

To minimize disruption to the lives of those performing service (as well as to their employers, fellow employees, and communities) by providing for prompt reemployment

To prohibit discrimination because of military service

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Enactment of USERRA and Accompanying Regulations

October 13, 1994: USERRA signed into law

September 20, 2004: DOL published proposed regulations

November 19, 2004: comment period ended

December 19, 2005: DOL published final regulations

January 18, 2006: final regulations effective

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Relation to Other Laws

USERRA does not supersede any federal or state law that establishes a right or benefit that is more beneficial to or is in addition to a right or benefit provided by USERRA

USERRA does supersede state law, local law, ordinance, contract, Agreement, policy, plan, practice, or other matters that reduces, limits, or eliminates in any manner any right or benefit provided by USERRA

Critical to consult applicable state and local law for added protections

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COVERAGE UNDER USERRA

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Employer (Broad)

Any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities.

- No exceptions to coverage for the type of organization (i.e. charitable or government) or for small employers

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Employer (Broad)

Potential individual liability for those with the authority to hire and fire.

“Employer” is defined to include successors in interest.

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Employer (Broad)

Any person employed by an employer.

This includes any person who is a citizen, national or permanent resident alien of the United States employed in a workplace in a foreign country by an employer that is an entity incorporated or otherwise organized in the United States or that is controlled by an entity organized in the United States

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Employee (Broad)

Applies to temporary, part-time, probationary, and seasonal employees

Unlike the FLSA, no exception for executive, managerial or professional employees

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Employee (Broad)

Exceptions (from reemployment provisions only)

- Those employed for a "brief, nonrecurrent period" with no reasonable expectation of continued employment for an indefinite or significant period
- Independent contractors (consider economic dependence)

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Uniformed Services

Army (and Army Reserve)

Navy (and Navy Reserve)

Marine Corps (and Marine Corps Reserve)

Air Force (and Air Force Reserve)

Coast Guard (and Coast Guard Reserve)

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Uniformed Services

Public Health Service Commissioned Corps (and its reserve component)

Individuals who partake in federal training in the Air National Guard

The President is authorized to designate additional categories through the exercise of emergency or war powers.

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Status of Employee While on Military Leave

Deemed to be on furlough or leave of absence

Although may be considered terminated for IRS purposes only

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EMPLOYEE BENEFIT RIGHTS

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Non-Seniority Based Benefits

Benefits awarded for work performed or subject to a significant contingency

Entitled to such non-seniority rights and benefits as are generally provided by the employer to "similarly situated" employees on furlough or leave of absence

Factors to consider in determining "similarly situated" – seniority, status pay

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Seniority Based Benefits

Entitled to the seniority and other rights and benefits determined by the seniority that the person had before military leave

PLUS the additional seniority, rights and benefits he/she would have attained if he or she had remained continuously employed

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Seniority Based Benefits

If service member misses opportunity or eligibility for promotion based on skill test or examination, employee is entitled to take test upon return, after a reasonable amount of time to adjust (Fink v. City of New York, E.D.N.Y. 2001) fire department promotion exam)

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Use of Accrued Leave During Uniformed Service

Employees may request the right to draw any vacation, annual or similar leave with pay that had accrued before the uniformed service leave began

However, no employer may require such a person to use vacation, annual or similar leave during such period of service

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Entitled to Pay?

Unless state law provides otherwise, employer is not required to pay those absent for military service

“Differential pay”

- Not subject to tax withholdings
- No W-2
- Employer reports any differential pay on a 1099 form

**HEALTH CARE BENEFIT
ENTITLEMENTS**

Health Care Continuation Coverage While
in Uniformed Service

Similar to COBRA, but:

- Applies to all employers (not just those with 20 employees or more)
- Cannot charge more than regular employee contribution during first 30 days of coverage

Health Care Continuation Coverage While in Uniformed Service

- May charge up to 102% of total premiums for coverage when employee serves 31 days or more (starting from first day of continuation coverage)
- Coverage cannot be discontinued if service member is covered under another group health plan

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Health Care Continuation Coverage While in Uniformed Service

Similar to COBRA, but:

- COBRA coverage extension rules (up to 29 or 36 months) do not apply to USERRA
- No specific election/payment rules – follow COBRA policy?
- Does COBRA run concurrently?

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Electing to Continue Health Care Coverage

Only available to employees covered by employer's health plan at time service began

- Not available for a covered spouse's or dependent's entrance into the service

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Electing to Continue Health Care Coverage

Electing continuation: health plan administrators are empowered to develop “reasonable requirements” regarding how to elect coverage

- Exceptions to employee advance notice where impossible or unreasonable to timely elect

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Maximum Coverage Period

The maximum mandated period of coverage (including dependents) ends on the earlier of

- 24 months after service begins; or
- The date on which the person fails to apply for or return to employment following end of service

If the individual's USERRA continuation ends before 24 months and for failure to return to work, finish off continuation coverage under COBRA, if any.

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Health Care Coverage on Reemployment

On reemployment, returning employee entitled to reinstate the health care coverage that he/she had (as well as that had by dependents) prior to the leave of absence for military service.

Reinstatement must be without conditions: in the event that a service member's health care coverage was terminated or lapsed during the course of uniformed service, an exclusion or waiting period may not be enforced by an employer's health care plan when that coverage is reinstated.

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Health Care Coverage on Reemployment

However, if the employee requests a delay in reinstatement of coverage, the employer may comply, but may impose exclusions on the waiting period

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PENSION BENEFIT RIGHTS

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Treatment of Uniformed Service Leaves

USERRA provides that a reemployed individual must be treated as not having incurred a break in service with the employer maintaining a pension plan for purposes of participation, vesting and accrual of benefits (considered "continuously employed")

- Preparation Time
- Lapse between end of service and commencement of reemployment

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Treatment of Uniformed Service Leaves

A reemployed service member need not re-qualify for participation

Only applies if individual becomes reemployed

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Contribution Obligations

USERRA requires employers to make up contributions for periods during which the employee was away on uniformed service after the employee is reemployed

Employer contributions are to be made no later than 90 days following reemployment, or date employer contributions are normally made for the year of service, whichever is later

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Make-Up of Employee Contributions

Plans that provide for elective deferrals (e.g., 401(k) plans) or after-tax contributions must permit the returning employee to make-up missed contributions

- Missed employee contributions may be made following reemployment for a period of up to 3 times the period of the person's uniformed service, not to exceed 5 years
- Service member not permitted to pay interest when making up contributions
- Right to make-up missed contributions conditional on continued employment

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Make-Up of Employee Contributions

Employer match, if any, must be provided

Make-up elective deferrals, employer match and employee after-tax contributions may not exceed otherwise applicable limits for period of leave, but not counted for discrimination testing purposes

Employer is not obligated to credit "missed" earnings or make-up allocation of any forfeitures that occurred during the military leave

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Determination of Compensation

For purposes of computing an employer's liability or the employee's contributions, the employee's compensation during the period of service shall be computed either:

- At a rate the employee would have received but for the period of uniformed service; or
- If such rate is not reasonably certain, on the basis of the employee's average rate of compensation during the 12 month period immediately preceding uniformed service period (or, if shorter, the period of employment immediately preceding such period)

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Plan Loans

Loan re-payments may be suspended during period of leave

Loan term may be extended

Interest charged during period of leave capped at 6% if . . .

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REEMPLOYMENT RIGHTS

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Requirements to USERRA Protection and Benefits

The employee was absent from a position of civil employment to report for military service

Employee must have provided the employer with advance notice of the absence

The cumulative length of his or her absence must not exceed five years with a particular employer

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Requirements to USERRA Protection and Benefits

The individual must timely return to work or apply for reemployment; and

The employee has not been separated from service with a disqualifying discharge

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Requirements to USERRA Protection and Benefits

The individual must timely return to work or apply for reemployment; and

The employee has not been separated from service with a disqualifying discharge

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Notice

Advance Notice (written or verbal)

May be informal (no "buzz" words)

Department of Defense strongly recommends giving at least thirty days notice

No Notice is Required if:

- Precluded by military necessity (as designated by a military authority); or
- Otherwise impossible or unreasonable

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Notice

Employer permission is not required

Employees need not advise civilian employers of their intention to seek reemployment after service is complete. In fact, even if the employee says he or she does not intend to return, this does not forfeit the right to reemployment

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**CUMULATIVE LENGTH OF
ABSENCE**

**Generally:
May not Exceed 5 years**

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Limited Exceptions to "Five Year" Rule

There are certain limited exceptions to the "Five Year" Rule

- The five-year period only includes the time actually spent performing service in the uniformed services (not absences before or after service)
- The five-year service limit does not include periods of service performed while working for previous employers

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Limited Exceptions to "Five Year" Rule

The five-year service limit does include periods of service performed before USERRA was enacted (service before 12/12/1994) that was counted against the service limits of the predecessor statute

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Timely Return to Work

Reemployment Application Guide	
Period of Service	When to Report Back/Apply for Reemployment
Less than 31 days (or absence for an examination to determine fitness to perform service)	Must report back no later than the beginning of the first full regularly scheduled work period on the first day following the completion of service, and the expiration of 90 days
Between 31 and 180 days	Verbal or written application for reemployment must be submitted within 14 days of completion of service
More than 180 days	Verbal or written application for reemployment must be submitted within 90 days of completion of service

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Prompt Reemployment

Returning service members meeting USERRA's eligibility criteria must be "promptly reemployed"

Absent unusual circumstances, service members must generally be reemployed within two weeks of the application for reemployment

If employee is only absent for weekend National Guard duty, reinstatement is next regularly scheduled working day

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Haight v. Katch, L.L.C. (D. Neb. 2005)

Plaintiff, member of Army Reserves, managed a bar/lounge. Also maintained the company's website

8/13/04: last day of work prior to scheduled Iraq deployment

8/28/04: released from service due to non-service related injury precluding him from serving

9/6/04: contacted owner, who told him the only available position was that of a cook

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Haight v. Katch, L.L.C. (D. Neb. 2005)

9/7/04: plaintiff sabotaged the company's website

Plaintiff was not reemployed, and brought an action under USERRA. Court held that employer did not have to hire plaintiff after the misconduct, but there was a genuine issue of fact as to whether he should have been immediately reemployed on 9/6/04. Plaintiff was properly fired, and the sole remaining issue was plaintiff's claim for one day of lost wages and benefits

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**POSITION TO WHICH PERSON
IS ENTITLED ON
REEMPLOYMENT**

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When Can An Employer Avoid Reemployment?

Changed Circumstances

- e.g. Intervening RIF that would have included the absent employee

No Longer Qualified (despite employer's reasonable efforts to qualify the employee)

Employee Was Employed for a Brief, Non-Recurrent Period

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Retention Rights

A person who is reemployed pursuant to USERRA shall not be discharged from such employment except for cause:

- Within one year after the date of such reemployment (if the person's uniformed service was for more than 180 days)

OR

- Within six months of such reemployment (if the person's period of uniformed service was for more than 30 days but less than 181 days)

(Special State Rules Apply)

Returning service members may always be terminated for cause

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Termination after Service: Burdens of Proof

Allegations that other applicants were judged more leniently than plaintiff, without more, is insufficient evidence that prior military service was a "motivating factor" in the employment decision (Cossette v. Dep't of Agriculture (Fed. Cir. 2004))

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Termination after Service: Burdens of Proof

Timing isn't everything: A district court held that an employee terminated one week after returning from military service failed to make a *prima facie* case under USERRA, where the individual, who was repeatedly counseled regarding his performance and managerial skills, would have been terminated regardless of military status (Barretto v. ITT World Directories, Inc. (D.P.R. 1999))

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**Termination after Service:
Burdens of Proof**

Eighth Circuit held that a jury could infer that granting an individual fifteen separate military leaves over three-year period gave the employer a reason to want to terminate the employee (Maxfield v. Cintas Corp. No. 2 (8th Cir. 2005))

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Waiver of Rights Under USERRA

Employees on uniformed service leave have the right to waive coverage of non-seniority-based benefits by knowingly providing a written notice of intent not to return to a position of employment after his or her uniformed service

The employer has the burden of providing the person knowingly provided clear written notice of intent not to return to a position of prior employment after such service in the uniformed service and, in doing so, was aware of specific non-seniority rights and benefits the employee would lose

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Waiver of Rights Under USERRA

Fact intensive inquiry

Wrigglesworth v. Brumbaugh – waiver letter not binding where the employer prepared it and insisted employee sign it before entering military service (W.D. Mich. 2000)

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**PROHIBITION
OF
DISCRIMINATION**

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**Employers May Not Take Adverse
Employment Actions Against Employees
Who Have:**

- Taken an action to enforce USERRA-afforded protections
- Testified, or otherwise made a statement in connection with a USERRA proceeding
- Assisted or participated in a USERRA investigation; or
- Exercised a right provided for by USERRA

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**Snowman v. Imco Recycling, Inc.
(N.D. Texas 2004)**

- Early September 2001: employer decided to terminate employee but did not have the opportunity to tell him prior to the events of 9/11
- 9/12/01: employee notifies employer that he is in the reserves, and is likely to become active
- 9/14/01: employee terminated

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Snowman v. Imco Recycling, Inc.
(N.D. Texas 2004)

The terminated employee brought a suit under USERRA. The employer prevailed, as it was able to document that the decision had been made prior to notice of the employee's military status. The fact that there was "paper trail" was crucial in finding for the employer

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**VETERANS BENEFIT
IMPROVEMENT ACT OF 2004
(VBIA)**

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**Veterans Benefits Improvement Act of
2004**

Signed into law by President Bush on December 10, 2004

Expands the rights and benefits of veterans with regard to housing, education, employment, and other benefits

Employers are required to provide those who are eligible for rights and benefits under USERRA to be provided with notice of same

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Veterans Benefits Improvement Act of 2004

Employers are required to offer employees called to active service the right to continue their employer-provided health coverage for themselves and their dependents for a period of up to 24 months (an expansion from 18 months)

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Employer Posting Obligations

As of March 10, 2005 all employers are required to provide notice of the rights, benefits, and obligations under USERRA

Employers may provide notice by placing a Department of Labor poster where employee notices are customarily placed

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Employer Posting Obligations

Employers may alternatively provide notice in other ways that will minimize costs, provided that the full text of the notice is provided (e.g. handing the notice to each individual employee or distributing via electronic mail)

Copies of the notice are available on the DOL website

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**New York State Military Laws:
Public Sector**

Public officers and employees are entitled to receive their regular State compensation during military State compensation during military absence, provided the absence does not exceed the greater of 30 days or 22 work days per calendar year, and does not exceed the greater of 30 days or 22 work days in any continuous period of such absence

Public officers and employees on military leave shall not suffer any loss of privileges, including vacation and holiday time

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NEW YORK PATRIOT PLAN

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New York Patriot Plan

Signed into law by Governor Pataki on July 3, 2003

Unanimously passed by the legislature

Intended to provide comprehensive package of benefits and protections to NY's military personnel and their families

Provides rights similar to the SCRA

Majority of provisions apply to NYS residents only

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**New York Patriot Plan:
Provisions Include**

- Protection against military status discrimination
- Federal military pay is exempt from MYS income tax
- State family liaison officers
- Electronic transfer of paychecks for public employees
- Certain scholarship programs for military personnel and their immediate families

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**SERVICEMEMBERS
CIVIL RELIEF ACT
(SCRA)**

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SCRA: Purpose

The SCRA replaced the Soldiers' and Sailors' Civil Relief Act

Intent

- Provide for, strengthen and expedite the national defense by enabling service members to "devote their entire energy to the defense needs of the Nation"
- Provide for temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of service members during service

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SCRA: Protections Against Default

If a defendant has not made an appearance in a civil action or proceeding, and it appears the defendant serves in the military, the court is prohibited from entering a judgment until the court appoints a guardian ad litem to represent the defendant

If the defendant does not receive notice, there are procedures for obtaining a stay

There is a toll of the statute of limitations



Other Protections

Interest cap (six percent)

Installment contracts for real or personal property may not be terminated

Court order to evict service members and dependents from premises occupied as a residence whose monthly rent is no less than \$2,465

Protection of life insurance policies

Lease termination protections

Mortgage foreclosure by court order only



Enforcement

Compliance assistance information available on the VETS website

An employee who believes his or her employer has failed or refused, or is about to fail or refuse, to comply with USERRA may file a written complaint with VETS or initiate a private legal action

Can file complaint with VETS in writing or online



Enforcement

VETS has broad investigative powers

If employee elects to use VETS, but VETS cannot resolve the complaint, an employee may ask VETS to refer the complaint to the Attorney General. The Attorney General may then elect to act on behalf of the employee

Any action brought by the Attorney General must be brought in a United States district court

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Enforcement

If an action is brought against a State by an individual, the action must be brought in a United States district court

There is no statute of limitations for an action brought under USERRA, **but . . .**

Laches

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**Jopson v. Maguire
(Sup. Ct. Albany County Jan. 17, 2006)**

Plaintiffs alleged that they were denied employment benefits because of part-time National Guard duty

Plaintiffs had to use annual leave, sick leave benefits and leave-of-absence benefits to meet military commitments

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**Jopson v. Maguire
(Sup. Ct. Albany County Jan. 17, 2006)**

Plaintiffs alleged that they were denied employment benefits because of part-time National Guard duty

Plaintiffs had to use annual leave, sick leave benefits and leave-of-absence benefits to meet military commitments

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Remedies for a USERRA Violation

Require employer to comply with USERRA

Require employer to compensate employee for loss of wages or benefits

Reasonable attorneys' fees, expert witness fees and other litigation expenses

Injunctive relief

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Remedies for a USERRA Violation

If the court finds the employer's failure to comply with USERRA was willful, it can require an employer to pay an employee an amount equal to the amount of lost wages and benefits as liquidated damages

- A violation is considered willful if the employer either "knew or showed reckless disregard for whether its conduct was prohibited" by USERRA

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Justice Department

In September 2004, the Civil Rights Division of the Justice Department received enforcement authority of USERRA

The Justice Department has filed several lawsuits on behalf of service members or veterans

In April 2005, the Justice Department filed a lawsuit against Gulf Stream Academy of Aeronautics after it fired an Air Force reservist several hours after the reservist reminded his employer about his upcoming 5-day active duty tour

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Reinstatement as a Remedy?

Reinstatement is not always an appropriate remedy – courts will consider the relationship between the parties. In one case, a middle school teacher sought to be reinstated to his position after a jury found that the school district discriminated against him on the basis of his military service. The court found the relationship to be so strained that it would be impossible to effectively and efficiently educate children, so reinstatement was denied. See *Carpenter v. Tyler Indep. Sch. Dist.*, 2006 U.S. Dist. LEXIS 24355, a *7-8 (E.D. Tex Apr. 26, 2006).

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Back Pay as a Remedy?

Generally, employees seeking back pay will have a duty to “mitigate” their damages.

In one case, a teacher alleging he was terminated because of his military service claimed that he actively sought a new position, testifying that he submitted resumes, filed job applications, and spoke with contacts regarding possible employment.

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Back Pay as a Remedy?

The court was not satisfied, since there was no documentation supporting this. There were no letters or job applications substantiating the testimony that he sought other comparable teaching positions. As such, the teacher was not awarded back pay.

See Carpenter v. Tyler Indep. Sch. Dist., No. 6:05 CV 124, 2006 U.S. Dist. LEXIS 24355, at *5-6 (E.D. Tex. Apr. 26, 2006)

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Class Action Litigation

The first class action complaint filed by the United States Under USERRA deals with seniority benefits

Complaint filed January 12, 2006 (N.D. Tex.)

Potential class = airline pilots that have taken military leave

Claim – not permitted to bid on flight schedules based on seniority status that other employees on non-military leaves were entitled to bid on

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Presenteeism

Presenteeism

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Presenteeism

What to do when ailing employees drag themselves to work.

Reasons:

- Altruism
- Fear of being suspended or fired
- Lack of income
- Pressure to be at work

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Presenteeism

Issues:

- Sick workers beget more sick workers resulting in lost productivity
- Increased health care costs
- Sick workers may transmit their viruses to customers (e.g., more than 1,000 people at a casino in Reno contracted a gastrointestinal virus that began with a few sick employees who had no sick leave)

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Presenteeism

Recommendations:

- Communicate that sick days are to be taken when an employee is legitimately ill
- State that employees will not be penalized by their supervisors for taking sick days when there is a legitimate need
- Notify employees that the employer will investigate the use of excessive sick days if the employer suspects the benefit is being abused by an employee
- Offer free flu vaccinations
- Expand telecommuting options
- Provide educational programs (e.g., safe coughing practices)
- Provide hand washing stations

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The New San Francisco Paid Sick Leave Law

The New San Francisco Paid Sick Leave Law

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Overview

Who is covered by the new law?

What does "paid sick leave" really mean?

How do paid sick leave hours accrue and is there a limit?

Impact on existing Paid Time Off (PTO) Policies?

New cause of action for employees?

What should employers now do to come into compliance?

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Beginning Feb. 5, 2007 (now June 5, 2007) San Francisco Employers Must Provide Paid Sick Leave

How did this happen? Proposition F

On November 7, 2006, **61%** San Francisco **voters** approved **Proposition F** which requires employers to **provide paid sick leave**.

Law went into effect **February 5, 2007**.

Board of Supervisors voted to **postpone** implementation to **June 5, 2007**.

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Which EMPLOYERS are covered by the new law?

“Employer” is defined **broadly** as any person, association, organization, partnership, business trust, limited liability company, or corporation...**who directly or indirectly or through an agent...**employs or exercises control over the wages, hours, or working conditions of an employee.

Translation: Pretty much everyone!

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Which EMPLOYEES are covered by the new law?

“Employees” eligible for paid sick leave include:

- Full Time Employees
- Part-Time Employees
- Temporary Employees

Who **work** in the City and County of San Francisco.

Employees do **NOT** have to reside in **San Francisco** to receive paid sick leave.

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What Is Paid Sick Leave?

“Paid Sick Leave” is **compensated leave** for an employee absent from work because the employee is:

Physically or mentally **unable to perform** his or her duties due to illness, injury, or a medical condition; OR

Obtaining professional diagnosis or treatment for the employee’s medical condition; OR

Absent for **other medical reasons** of the employee, such as pregnancy or obtaining a physical examination; OR

Taking time off work **to provide care** or assistance to **other persons** with an illness, injury, medical condition, need for medical diagnosis, treatment or other medical reason.

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What "Other Persons" may an employee take paid leave to care for?

"Other Persons" include:

- Children and Grandchildren
- Parents and Grandparents
- Siblings
- Spouses, Domestic Partners

"Designated Persons"

- Employees **without** a spouse or domestic partner may **designate** one person, such as a friend or significant other.

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HOW DOES PAID SICK LEAVE ACCRUE?

Every 30 hours worked = 1 hour paid leave.

For every **30 hours** an employee works after Feb. 5, 2007, employee earns **1 hour** of paid sick leave. According to the City, paid sick leave accrues only in hour-unit increments, not in fractions of an hour. (SF OLSE Fact Sheet). Thus, an employee who works **59 hours** would accrue **1 hour** of paid sick leave and would have to work one more hour to accrue a second hour of paid sick leave.

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Limits on *when* and *how* an employee may use paid sick leave

Reasonable Notification: Employers **may** require employees to give "**reasonable notification**" of a paid sick leave absence.

But what is **reasonable notification**?

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Limits on *when* and *how* an employee may use paid sick leave

Cap on Paid Leave Hours:

- Fewer than 10 persons:
40 Hours
- All Other Employers:
72 Hours

Hours **DO** carry over from year to year
BUT, hours are **forfeited** upon **termination**,
whether voluntary or involuntary.

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NEW RECORD-KEEPING REQUIREMENTS:

Keep Records OR be presumed
to have violated the law!

Records must be kept for **(4) FOUR** years on:

- **Hours worked by employees.**
- **Paid Sick leave taken by employees.**

Failure to keep records will raise **presumption** that
employer **VIOLATED** sick leave law!

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Employers who already have a Paid Time Off
(PTO) Policy

Existing PTO policy must be **equivalent** to or
more generous than Prop. F

Employer must **maintain proof** that its policy **meets**
or **exceeds** requirements of Prop. F.

Policy **must permit** paid leave for the **same**
purposes and permit leave to care for
"designated persons."

Prop F does **NOT** apply to employees covered by a
CBA if such requirements are expressly
waived.

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New Cause of Action for Employees

Employees may be more likely to sue because the law does not require exhaustion of administrative remedies.

A prevailing employee may be entitled to the following relief:

- Reinstatement
- Back Pay
- Payment of sick leave unlawfully withheld, multiplied by THREE!
- Attorneys' fees and costs!

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CAUTION: Don't Retaliate!

Broad Protection from retaliation for taking sick leave:

Employers may **NOT** use a paid sick leave absence against an employee in enforcing an absence control policy.

Activity protected from retaliation includes good faith, **but mistaken**, allegations that employer has violated paid sick leave law

Any adverse action taken within **90 days** against an employee who files a complaint is **presumed to be retaliatory**.

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Posting Requirements

By February 5, 2007:

Sign must be posted "in a conspicuous place" explaining employee rights under new law.

Sign must be in English, Spanish, Chinese, and any other language spoken by at least 5% of employees in workplace.

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GRAY AREAS
UNDER NEW LAW

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GRAY AREAS UNDER NEW LAW

SCENARIO 1: *Employee Bob ALWAYS comes down with a mysterious illness on Fridays, enabling many 3-day weekends!*

New law permits employers to take “**reasonable measures**” to verify legitimacy of leave? But what are reasonable measures?

- **REMEMBER:** *Unreasonable measures* are likely to be the basis of retaliation claims.

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GRAY AREAS UNDER NEW LAW

SCENARIO 2: *Employee Jane is employed by a company based in San Francisco, but works remotely from her home in Dublin.*

Covered employees are those “employed within the geographic boundaries of San Francisco.”

- **Does this mean Jane would be eligible for sick leave?**

Note: The Office of Labor Standards Enforcement is authorized to issue “guidelines or rules” to implement Prop. F.

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What should Employers be doing now?

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Review Existing PTO Policy for compliance with new law

Does existing PTO policy:
Permit accrual at rate and overall amount required by new law?
Permit leave to be taken for the same reasons as the new law? (e.g., leave to care for “designated persons.”)
Permit carryover of hours as required by new law?

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Other Administrative considerations...

Choose a **10-day period for employees to identify their “designated person”** for whom to use sick leave.
If you have a CBA, consider amending it to **clearly and unambiguously** waive entitlements under the new law.
Revise **absence control policies** to **exclude** absences covered by new law.

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And Finally...

Begin retaining records documenting:

- ü Hours worked, and
- ü Paid Sick Leave taken by employees.

Post notice “in a conspicuous place” informing workers of their rights under new law in appropriate languages.

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DEPARTMENT OF ADMINISTRATIVE SERVICES
OFFICE OF LABOR STANDARDS ENFORCEMENT
DONNA LEVITT, MANAGER



San Francisco Paid Sick Leave Ordinance - Fact Sheet

Beginning February 5, 2007, all employers must provide paid sick leave to each employee who performs work in San Francisco

Employees & Employers

An employee is any person who performs work, including on a part-time or temporary basis, within San Francisco for an employer. An employer is any person, as defined in Section 18 of the California Labor Code, who directly or indirectly employs or exercises control over the wages, hours, or working conditions of an employee.

Accrual of Paid Sick Leave

- For employees working for an employer on or before February 5, 2007, paid sick leave begins to accrue on that date. For employees hired by an employer after February 5, 2007, paid sick leave begins to accrue 90 calendar days after the employee's first day of work.
- For every 30 hours worked, an employee accrues one hour of paid sick. Paid sick leave accrues only in hour-unit increments, not in fractions of an hour.
- For employees of employers for which fewer than 10 persons (including full-time, part-time, and temporary employees) work for compensation during a given week, there is a cap of 40 hours of accrued paid sick leave. For employees of other employers, there is a cap of 72 hours of accrued paid sick leave. An employee's accrued paid sick leave does not expire; it carries over from year to year.
- If an employer has a paid leave policy, such as a paid time off policy, that makes available to employees an amount of paid leave that may be used for the same purposes as paid sick leave under the law and that is sufficient to meet the accrual requirements under the law, the employer is not required to provide additional paid sick leave.
- All or any portion of the applicable requirements shall not apply to employees covered by a bona fide collective bargaining agreement to the extent that the law's requirements are expressly waived in the collective bargaining agreement in clear and unambiguous terms.

Use of Paid Sick Leave

- An employee may use paid sick leave not only when he or she is ill, injured, or for the purpose of receiving medical care, treatment, or diagnosis, but also to aid or care for a family member or designated person (discussed below) when they are ill, injured, or receiving medical care, treatment, or diagnosis.
- If an employee has no spouse or registered domestic partner, the employee may designate one person for whom the employee may use paid sick leave to provide aid or care. Employers must offer the opportunity to make a designation no later than 30 work hours after the date paid sick leave begins to accrue. The employee has 10 work days to make this designation. Thereafter, employers must offer the opportunity to make or change the designation on an annual basis, again with a window of 10 work days for the employee to make the designation.

Additional Employee Rights & Employer Responsibilities

- Employers must post a notice informing employees of their rights in a location where employees can read it easily. OLSE provides this notice through the city's annual business registration mailing. A downloadable version of the notice is also available on OLSE's website.
- Employers must retain records documenting hours worked by employees and paid sick leave taken by employees, for a period of four years, and shall allow OLSE access to such records.
- Employees who assert their rights to receive paid sick leave are protected from retaliation.
- Employees who are denied their rights under the law may file a complaint with OLSE.

This document is not intended as a comprehensive recitation of the Paid Sick Leave Ordinance, Chapter 12W of the San Francisco Administrative Code, but rather summarizes its key features. The ordinance and related materials are available at www.sfgov.org/olse. If you have questions about your rights or obligations under the law, please call 554-6271 or email PSL@sfgov.org.

The California Family and Disability Leaves Of Absence Checklist

THE CALIFORNIA FAMILY AND DISABILITY LEAVES OF ABSENCE CHECKLIST*

NIXON PEABODY, LLP
2 EMBARCADERO CENTER, #2700
SAN FRANCISCO, CA 94111
PHONE (415)-984-8200
FAX (415)-984-8300

* This is a complex area of law and this checklist is designed to help employers navigate the complex web of leave laws. However, it is not a full discussion of all the legal issues involved and is not a substitute for legal counsel.

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FAMILY AND MEDICAL LEAVE (FMLA/CFRA)

1. Threshold questions:

Are you a covered employer?

Employ 50 or more employees for 20+ calendar workweeks?

Even if not a covered employer, any contractual language re voluntary compliance?

Is employee eligible for leave?

Employ 50 or more employees within 75 mile radius?

And, employee employed for at least 12 months?

And, employee worked 1,250 hours in preceding 12 months?

2. Reasons for taking leave:

Employee's own serious health condition

Illness, injury, impairment or physical or mental condition which involves inpatient care [i.e., an overnight stay] in a hospital, hospice, or residential health-care facility

Or, any period of incapacity requiring absence from work, or other regular daily activities, of 4 or more calendar days,

Or, continuing treatment by a health-care provider that requires intermittent absences from work.

Or, Family leave

Serious health condition of child, parent or spouse [in California: also domestic partner]

Or, Birth or adoption of a child or placement of child in foster care

Caution!

Remember: disability for pregnancy, childbirth or related medical condition is not a serious health condition under California's Family Rights Act

3. Amount of Leave: Employee is entitled to take up to 12 workweeks of leave during any 12 month period

How do you calculate 12 month period for all employees on leave?

Calendar year

Or, Fiscal year

Or, Benefit year

Or, Measured from first leave request

Or, Rolling 12 month period

Has employee taken any other leave within the preceding 12 month period?

Caution!

Remember: California employees potentially may take 16 weeks pregnancy leave plus 12 weeks family leave.

Caution!

There is no "undue burden" exception under FMLA/CFRA

4. **Type of Leave: What type of leave does the employee seek?**
 - Block leave: single period of leave taken all at once
 - Or, Reduced schedule leave: Leave that reduces employee's usual number of working hours per workweek or workday
 - Or, Intermittent leave: Leave taken in separate block of time for one qualifying reason
 - If the employee is taking intermittent leave, consider whether the company needs to transfer the employee temporarily to an available alternative position that better accommodates the intermittent leave

5. **Concurrent leave:**
 - Domestic partner leave cannot run concurrently under FMLA
 - California Pregnancy Leave (PDL) runs concurrent with leave under FMLA but not under CFRA

6. **Benefits and Pay During FMLA/CFRA**
 - Generally unpaid
 - Caution!**
 - Consider full or partial days of absence for exempt employees
 - Can require use of vacation or sick leave
 - Group health plan: Employer to maintain coverage under group health plan for duration of leave and under conditions which coverage would have provided had employee not taken leave
 - Other benefits: treat the same as employees on other LOAs

7. **Designating the leave for eligible employees:**
 - Inform the employee in writing that the leave will be designated as FMLA/CFRA leave
 - Provide oral notice within two (2) business days from the time employee has given notice or employer has sufficient notice that the leave is FMLA/CFRA qualifying
 - Follow-up on oral notice in writing by next payday—otherwise may not retroactively designate
 - Content of notice:
 - Date leave begins/began
 - Length of leave
 - Request for certification + periodic updates
 - And consequences for not providing
 - Leave is unpaid unless vacation or sick leave used
 - SDI or PFL info, if applicable
 - Maintenance of benefits info
 - Reinstatement rights
 - Need to provide certification of ability to return to work, if applicable
 - Documents for employee:
 - Request for LOA forms
 - Certification of healthcare provider forms
 - Request for information forms

8. Documentation from the health care provider:

Certification should include:

For the employee's own serious health condition:

Date on which serious health condition commenced

Probable duration of the condition

Statement that the employee is unable to perform the functions of his or her position because of the serious health condition

Spouse, domestic partner, child, parent:

Date on which serious health condition commenced

Probable duration of the condition

Estimate of amount of time needed to care for individual

Statement that the condition warrants the employee's care during period of treatment

Certification should NOT include:

the specific serious health condition

any symptoms of the serious health condition

any medication the employee may be taking

If you receive information on the "should not include" list:

Protect the employee's right to privacy

Do not allow anyone without the need to know to see the information

Keep the medical information in a file separate from the personnel file

9. If the employee requests additional leave beyond the 12 weeks provided by FMLA/CFRA

Analyze under ADA/FEHA disability analysis

10. Reinstatement Rights

Restore to same or equivalent position with equivalent benefits, pay and other terms and conditions of employment assuming employee can still perform essential functions of the job

If employee can no longer perform the essential functions of the job analyze under ADA/FEHA disability analysis

PREGNANCY LEAVE (PDL)

1. **Threshold questions:**
 - Are you a covered employer?**
 - Employ 5+ full or part-time employees?
 - Even if not a covered employee, any contractual language re voluntary compliance?

 - Is employee eligible for leave?**
 - Female employee?
 - Disabled by pregnancy or pregnancy related medical conditions?
 - Caution!**
 - Remember: this leave is available regardless of length of service

2. **Reason for taking leave:**
 - Employee is affected by pregnancy
 - Employers have an obligation to accommodate an employee affected by pregnancy-related conditions

 - Or, Employee is disabled by pregnancy
 - Employee is disabled if in the opinion of a licensed healthcare professional she is unable to perform the essential duties of her job or to perform such duties without undue risk to herself or others
 - Employers have an obligation to accommodate an employee disabled by pregnancy-related conditions

3. **Amount of Leave: Depends on whether employee is “affected” or “disabled”**
 - If disabled by pregnancy-related medical condition: she is entitled to a LOA for a reasonable period of time not to exceed four (4) months
 - If a “normal” pregnancy: six (6) weeks.

4. **Type of Leave: What type of leave does employee seek?**
 - Does not have to be taken in one consecutive block
 - Accumulated leave may be totaled in computing PDL

5. **Benefits and Pay During PDL**
 - Generally unpaid
 - Caution!**
 - Consider full or partial days of absence for exempt employees
 - Can require use of sick leave
 - Employee can use vacation
 - Caution!**
 - Remember: must treat employees on PDL consistently with those on other leaves.

6. **Reinstatement Rights**
 - An employee who returns from PDL within the time proscribed by law is entitled to return to the same or comparable job. Comparable means virtually identical in terms of pay, benefits and working conditions, including privileges, prerequisites and status

Exceptions:

Legitimate business reason unrelated to pregnancy

Keeping job open would substantially undermine business operations

7. **Coordinating FMLA/CFRA and PDL**

CFRA and PDL are separate and distinct

FMLA and PDL run concurrently

Start CFRA when PDL ends

Maximum entitlement in CA for both pregnancy disability leave (FMLA and PDL) and CFRA leave for birth of a child is four months AND 12 workweeks.

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FAMILY TEMPORARY DISABILITY INSURANCE (FTDI)/PAID FAMILY LEAVE (PFL)

1. **Threshold questions:**
Are you a covered employer?
Employ 1+ employee who participates in short term disability insurance (SDI)?

Is employee eligible for leave?
Caution!
No minimum longevity requirements.
However the amount of time employed relates to amount of payout available from State of CA
2. **Reason for taking leave:**
Employee is unable to work due to sickness or injury of a family member
Caution!
Family member includes domestic partner
Employee is unable to work due to birth, adoption or foster care placement or a new child
3. **Amount of Leave**
Provides up to 6 weeks of wage replacement benefits
Does not provide an independent right to a leave of absence
Seven day waiting period
4. **Benefits and Pay During FTDI/PFL**
Provides up to 6 weeks of wage replacement benefits
Most workers will receive approximately 55% of their pre-taxed weekly wage, up to a maximum of \$840, while on leave.
Employers may require that employees utilize up to two (2) weeks of earned but unused vacation leave prior to that employee's receipt of FTDI/PFL but not sick leave
5. **Reinstatement Rights**
No job protection under FTDI/PFL alone. Simply provides partial wage replacement when an employee cannot work due to the need to care for a child, parent, spouse, or registered domestic partner, or to bond with a new minor child.
Caution!
Some employees will have reinstatement rights if FTDI/PFL runs concurrently with FMLA or CFRA.
6. **Coordinating FMLA/CFRA and FTDI/PFL**
FTDI/PFL does not change FMLA/CFRA. Merely provides six (6) weeks of paid benefits to employees who suffer a wage loss when they take time off work to care for others.
Employees may be eligible for FTDI/PFL (no longevity) but not for FMLA/CFRA (requires employment 1250 hours in preceding 12 months).
If employees eligible for FMLA/CFRA and FTDI/PFL may run concurrently.

DISABILITY LEAVES: ADA AND FEHA

1. Threshold questions:

Are you a covered employer?

5+ employees? Covered by FEHA

15+ employees? Covered by ADA

Is the employee or applicant covered?

Qualified individual with a disability?

Or, a Person regarded as having such a disability?

Or, a Person with a record of such disability?

Caution!

No minimum longevity requirements.

Caution!

Applies to applicants and employees.

2. Does the individual have a physical or mental disability that limits a major life activity?

Physical or mental disability must limit a major life activity besides working

ADA: physical or mental impairment must substantially limit a major life activity

FEHA: physical or mental impairment must limit a major life activity

Caution!

Under CA law an individual need not to be substantially limited. Just limited. This is a low threshold.

Caution!

Major life activity is broadly defined

Includes physical, mental and social activities and working (regardless of whether the limitation implicates a broad class of jobs)

Examples: sleeping, reading, interacting with others

Certain conditions are now disabilities as a matter of law:

HIV/AIDS

Hepatitis

Epilepsy

Seizure disorder

Diabetes

Clinical depression

Bipolar disorder

Multiple sclerosis

Heart disease

Or, a Physical or mental disability that limits the major life activity of working?

ADA: Inability to perform a broad range of jobs

FEHA: Limited in ability to perform a specific job?

3. Is the individual regarded as having a physical or mental disability that limits a major life activity?

Is individual regarded as having a physical or mental disability which limits a major life activity besides working?

Caution!

Major life activity is broadly defined

Includes physical, mental and social activities and working
(regardless of whether the limitation implicates a broad class of jobs)

Examples: sleeping, reading, interacting with others

Certain conditions are now disabilities as a matter of law. Is employee regarded as having:

HIV/AIDS
Hepatitis
Epilepsy
Seizure disorder
Diabetes
Clinical depression
Bipolar disorder
Multiple sclerosis
Heart disease

Is the individual regarded as having a physical or mental disability which limits the major life activity of working?

ADA: Inability to perform a broad range of jobs

FEHA: Limited in ability to perform a specific job?

Caution!

Regarded as unable to perform does not equate to regarded as disabled.

4. Is the disabled individual otherwise qualified?

Can the individual perform the essential functions of the job with or without reasonable accommodation?

5. If the employee (or applicant) can only perform the job with reasonable accommodation, the employer and employee must engage in the Interactive Process

Areas subject to modification or adjustment as a reasonable accommodation

Job application process

Work environment

Benefits and privileges of employment: must be equal

Training

Services

Parties + social functions

Communications

Leaves of absence

Caution!

The EEOC guidance broadly defines “reasonable accommodation” to include anything from reassignment to providing qualified readers.

Caution!

Failure to engage in the interactive process is a separate violation of FEHA under CA law. Employers must engage in this dialogue.

6. Is the requested or needed accommodation an undue hardship?

Caution!

The burden is on the employer to show an undue hardship

The burden is very high

Undue hardship issues:

Nature and cost of accommodation needed
Overall financial resources of the facility as well as other facilities owned by the employer
Type of operation
Impact the accommodation will have on the operation of the facility

7. What if the requested/needed accommodation is a leave of absence?

Determine whether FMLA/CFRA covered and so designate

Caution!

Do not assume if covered under ADA/FEHA covered under FMLA

If the individual needs a leave of more than 12 workweeks or not

FMLA/CFRA covered:

Undue burden analysis

Permitted to take into account initial 12 weeks of leave to determine whether an undue burden

Caution!

Some California courts have found an unpaid LOA of one year is a reasonable accommodation

Benefits and pay on an ADA/FEHA disability LOA: consistent with other employees on an LOA

8. Request for medical certification from health care provider?

Under the ADA an employer may ask disability related questions or require employees to take medical examinations only if they are “job related” and “consistent with business necessity”

Caution!

Even though an employer may ask disability related questions under the ADA, employers should be careful and limit their inquiries to understanding the individual’s limitations in performing the essential functions of the job and the accommodations that will allow an employee to do so, rather than digging into the medical condition or symptoms underlying the disability or necessitating the accommodation.

Caution! Employers must

Protect the employee or applicant’s right to privacy

Do not allow anyone without the need to know to see the information

Keep the medical information in a file separate from the personnel file

9. Benefits and Pay During an ADA/ FEHA Leave

Generally unpaid

Caution!

Consider full or partial days of absence for exempt employees

Can require use of vacation or sick leave

Group health plan: Employer to maintain coverage under group health plan for duration of leave and under conditions which coverage would have provided had employee not taken leave

Other benefits: treat same as employees on other LOAs

WORKERS COMPENSATION LEAVES

1. **Threshold questions:**
Are you a covered employer?
1+ employees?

Is the employee or applicant covered?
Injury arises out of and in the course of employment
Caution!
No minimum longevity requirements.
2. **Reasons for taking leave:**
To provide medical treatment for employees injured in the course and scope of employment, including temporary and permanent disability work – or because unable to perform duties.
3. **Leave available:**
Employees may reject an alternative work schedule or light duty and accept FMLA/CFRA leave
Leave is provided at least until the employee is permanent and stationary

NON-WORK RELATED INJURIES OR ILLNESSES

1. **Do you provide sick leave through a sick leave policy? If yes:**
Employee can only use accrued and available sick leave
Employee can use for “illness” of self, child, spouse, parent , domestic partner or child of domestic partner (“kincare”)
Caution!
Remember that illness need not be for a “serious health condition”
Caution!
Remember that an employee can use ½ of accrued leave to care for child, spouse, parent , domestic partner or child of domestic partner
Use of sick leave is option of employee
Employer can require compliance with policy
Does not apply to insurance + ERISA plans
Does not extend CFRA/FMLA leave unless used for a domestic partner

DON'T FORGET TO CONSIDER OTHER LEAVE OBLIGATIONS THAT MIGHT APPLY!!

OTHER LEGALLY REQUIRED LEAVES IN CALIFORNIA TO CONSIDER

1. Literacy Leave
2. Domestic Violence Leave
3. Crime Victims Leave
4. Jury/Witness Duty Leave
5. Military Leave
6. Drug & Alcohol Rehabilitation Leave
7. Parental School Function Leave
8. Volunteer Firefighter + Peace Officer Leave
9. Religious Accommodation Leave

OTHER LEAVES THAT EMPLOYERS SOMETIMES PROVIDE BY CONTRACT OR HANDBOOK

1. Vacation "Leave"
2. Holiday "Leave"
3. Bereavement "Leave"
4. Personal "Leave"

You Can't Make Me Come to Work!

New Laws and New Perspectives
on Absenteeism Policies



Presented by:

Marjorie S. Fochtman

(415) 984-8443

mfochtman@nixonpeabody.com