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California Creates New Family Medical Leave Law Applicable to Small Employers

October 19, 2020

On September 17, California Gov. Gavin Newsom signed into law SB 1383, which dramatically expands the scope of the California Family Rights Act and will now require most employers in California to provide certain unpaid medical leaves to eligible employees starting in 2021.

Currently, many employers in California are not required to provide unpaid medical leave to employees. The CFRA generally only applies to larger employers with **50 or more employees** located within a 75-mile radius. If the company meets those requirements, employees who have worked for the company for at least 12 months and worked at least 1,250 hours in the 12-month period prior to the leave are eligible for 12 weeks of unpaid, job-protected leave within a 12-month period to take time off to care for themselves or a family member due to a serious health condition, or to bond with a new child. These requirements and protections largely mirror those provided by the similar federal Family and Medical Leave Act, and, in fact, CFRA and FMLA leaves generally run concurrently with each other.

Effective January 1, 2021, however, small employers in California – those with just **five or more employees** – will be covered by the CFRA and will be required to provide this unpaid medical leave to their employees. SB 1383 also made several other broad changes to the existing law that will generally expand leave entitlements, even among employers that are already covered. Thus, while often characterized as a simple amendment to CFRA, SB 1383 actually creates significantly expanded leave rights.

In addition to reducing the 50-employee requirement to only five, gone is the requirement the employees all be employed within a 75-mile radius. Now, even **remote workers** in California may be eligible for CFRA coverage, provided that they have worked for the company for at least 12 months and worked at least 1,250 hours in the 12-month period prior to the leave.

The new law also does considerably more than just include small employers. First, it expands CFRA's definition of family members. Existing law allows employees to use CFRA leave to care for the employee's spouse, child or parent with a serious health condition. Under SB 1383, employees may now take CFRA leave to care for a domestic partner, grandparent, grandchildren, sibling or child of a domestic partner with a serious health condition. The new CFRA also creates a new definition of child by generally including adult children (the old law only applied to adult *dependent* children). In addition, SB 1383 provides leave rights to employees in the military or with family members in the military (akin to those existing under FMLA) and permits leave for a "qualifying exigency related to the covered active duty" or "active duty of an employee's spouse, domestic partner, child or parent in the Armed Forces."

If an employer is otherwise covered by federal FMLA, these changes create the possibility of an employee potentially receiving double leave entitlements – for example, an employee could take 12 weeks of leave to care for a grandparent (allocated to CFRA) and an **additional 12 weeks of leave** to tend to their own serious medical condition (allocated to FMLA).

Notably, SB 1383 removed several portions of CFRA that provided employers some flexibility to manage leaves of absence. It eliminated the provision that gave employers the option to limit the amount of child bonding leave that employees could take if both parents were employed by the employer to a total of 12 weeks. Now, if the employer employs both parents, the employer must provide up to 12 weeks of CFRA leave to each parent. SB 1383 also struck the provision that allowed employers to deny reinstatement to key employees (or, employees who were salaried and among the highest paid 10% of employees) who take CFRA leave. Here too, CFRA will now diverge from the FMLA and, practically speaking, the key employee exception will no longer apply in California.

Given the wide scope of the new law, many employers will be confronting these leave requirements for the first time. Perhaps recognizing this, Newsom also signed AB 1867 into law. In addition to providing certain

employees with COVID-19 supplemental paid sick leave, AB 1867 requires that the California Department of Fair Employment and Housing create a "small employer family leave mediation pilot program." This will create a mediation program for disputes over leaves of absence, but it is only available to employers with five to 19 employees. This program would allow an employer, after receiving notice of an employee's right-to-sue, to request to mediate the claim through the DFEH before the employee is permitted to pursue a civil claim in court. We anticipate the DFEH releasing more information about this program in the weeks to come.

Employers should prepare now for this new law to take effect in 2021. The new CFRA requires that all employers include a leave policy in their handbook, and so a good first step will be to implement this policy or update your current leave policy to comply with SB 1383. For companies without a specific human resource function, a member of management should be designated as the contact point for leave requests. In addition, the state of California is developing a new poster informing employees of their rights, which should be made available here and must be displayed by January 1, 2021. Presumably, the state will also provide updated leave certification forms, which may be a helpful resource for newly covered employers. All other employers should update their existing leave certification forms to comply with the new law.

For questions or more information on how to comply with these new requirements, please contact a member of Cooley's employment group.

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