How to Manage Pregnancy-Related Leave in California

December 4, 2020

Editor's Note: This content has been updated to reflect changes to the CFRA effective Jan. 1, 2021.

Introduction

Given the breadth of state time-off laws in California as well as of federal laws related to pregnancy leave, there is considerable opportunity for two (or more) laws to apply to the same employee time-off scenario. In addition to complying with the requirements of the federal Family and Medical Leave Act (FMLA), covered California employers are also required to comply with the provisions of the California Family Rights Act (CFRA) and the California Fair Employment and Housing Act's (FEHA's) Pregnancy Disability Leave (PDL). Employers not covered by the provisions of the FMLA, the CFRA or PDL leave law must then treat pregnant employees the same in terms and conditions of leave and employment as they would for employees with other types of temporary disabilities in accordance with company policy or practice.

Leave for Pregnancy Disability

With respect to pregnancy disability leave, the California FEHA, the same state law that prohibits discrimination, also provides protection for pregnancy-related disabilities. PDL applies to all private employers that have employed at least five or more full- or part-time employees for each working day in any 20 consecutive calendar weeks in the current or preceding calendar year. California public employers are also covered regardless of the number of employees. A religious association or religious corporation not organized for private profit is not an employer under the meaning of this act; any nonprofit, religious organization exempt from federal and state income tax is presumed not to be an employer under this act. There is no eligibility criteria for PDL, and women are eligible for PDL upon hire.

The California Code of Regulations allows employees disabled by pregnancy, childbirth or a related medical condition to take up to four months of protected PDL. A four-month leave, as defined in §7291.2l, means the number of days the employee would normally work within four calendar months (one third of a year equaling 17 1/3 weeks), if the leave is taken continuously, following the date the pregnancy disability leave begins. If an employee's schedule alternates from month to month, the monthly average of the hours worked over the four-month period prior to the beginning of the leave must be used to determine the employee's normal work month. Thus, the total amount of leave available will be based on a one-third year measurement of an employee's normal work schedule.

For example, a full-time employee who works 40 hours per week would be entitled to 693 hours of PDL based on 40 hours per week times 17 1/3 weeks. Similarly, an employee who normally works 20 hours per week would be entitled to 346.5 hours of PDL, whereas as an employee who normally works 48 hours per week would be entitled to 832 hours of PDL.

However, if an employer provides more leave time for other types of temporary disabilities, the same leave must be made available to women who are disabled due to pregnancy, childbirth or a related medical condition.

The California Code of Regulations further details pregnancy as a disability in §7291.2g: "A woman is disabled by pregnancy if, in the opinion of her health care provider, she is unable because of pregnancy to work at all or is unable to perform any one or more of the essential functions of her job or to perform these functions without undue risk to herself, the successful completion of her pregnancy, or to other persons."

The term "essential functions" is defined in California Government Code §12926, subdivision (f). These essential functions include needed time off for prenatal care, severe morning sickness, doctor-ordered bed rest, childbirth, recovery from childbirth and any related medical condition. Additionally, postnatal care, bed rest, gestational diabetes, pregnancy-induced hypertension, preeclampsia, post-partum depression, childbirth, loss or end of pregnancy and recovery from childbirth are examples of other medical conditions that could give rise to a leave of absence. With respect to breastfeeding, lactation, without medical complications, is not considered a disabling related medical condition entitling the employee to pregnancy disability leave, although it may require another reasonable accommodation.

PDL does not provide for any time off for bonding time after the birth or placement of a child in foster care or adoption. Under PDL, if an employee has no complications with her pregnancy, she could be entitled to a PDL recovery period of approximately six weeks (or eight weeks depending on the type of delivery), as most doctors would deem this period to be disability-related. In the case of an uncomplicated pregnancy, an employee's PDL would begin at approximately the time of her delivery. After exhausting all PDL entitlements, CFRA leave would begin. In this case, the employee would be entitled to an additional 12 weeks of job-protected CFRA leave to bond with her child.

The FMLA also provides leave for pregnancy disability that may run concurrently with PDL if an employee is eligible for both. An FMLA-covered employer is one that is engaged in commerce or in any industry or activity affecting commerce that employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. An eligible employee is one who works for a covered employer, has worked for the employer for at least 12 months, has at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave and works at a location where the employer has at least 50 employees within 75 miles.

Leave for Bonding

Leave to bond with a new child is allowed under the CFRA and the FMLA. Employers subject to the CFRA are those employers that directly employ 5 or more persons within the United States or any of its territories and are engaged in business in California. "Directly employs" means that the employer maintains an aggregate of at least 5 part- or full-time employees on its payroll(s) for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The workweeks do not have to be consecutive. There is no requirement that the 5 employees work at the same location or work full time. Covered employers also include the state of California and any of its political and civil subdivisions and city and county governments, regardless of the number of employees. To be eligible for CFRA leave, an employee must be either a full- or part-time employee working in California, have more than 12 months (52 weeks) of service with the employer, have worked at least 1,250 hours in the 12-month period before the date the leave begins.

The CFRA allows for up to 12 weeks of bonding time with a new child and does not cover pregnancy disability. An employee's own disability due to pregnancy, childbirth or related medical conditions is not a "serious health condition" under the CFRA. At the end of the employee's period(s) of pregnancy disability, or at the end of four months of pregnancy disability leave, whichever occurs first, a

CFRA-eligible employee may request to take CFRA leave of up to 12 workweeks for reason of the birth of her child, if the child has been born by this date.

The FMLA also allows for leave to bond with a new child in addition to leave for pregnancy-related disability. A maximum of 12 weeks is available in a 12-month period for all FMLA leave purposes. FMLA leave may run concurrently with both PDL and CFRA leave.

Steps to Handle Pregnancy-Related Leave

This guide focuses on the steps involved when handling a request for a leave of absence for pregnancy-related reasons. The guide is not meant to be nor should it be construed as legal advice, and employers should consult a California labor law attorney for further guidance with making pregnancy-related leave-of-absence decisions in their respective workplaces.

STEP 1: EMPLOYEE PROVIDES NOTICE OF NEED FOR LEAVE

The employee must provide at least verbal notice sufficient to make the employer aware the employee needs CFRA, FMLA or PDL-qualifying leave. The notice should state the reason for the leave and its anticipated timing and duration.

Organizations may require 30 days' advance notice before FMLA, PDL or CFRA leave is to begin if the need for the leave is foreseeable. If 30 days is not feasible (e.g., not knowing when leave will be required to begin, a change in circumstances or a medical emergency), notice must be give as soon as practicable.

However, employers may not deny leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide advance notice of the need for the leave or transfer.

STEP 2: EMPLOYER DETERMINES EMPLOYEE ELIGIBILITY AND LEAVE ENTITLEMENT

Once the employer receives a notice from the employee of her need for leave for pregnancy-related reasons, it must then determine which leave(s) she is eligible for and therefore entitled to.

There is no length-of-service requirement for an employee to be eligible for PDL, and the legal protections apply to all employees, so long as they work for a covered employer. As a result, female employees are eligible for pregnancy disability leave upon hire. Therefore, eligibility for PDL exists when an employee's health care provider determines that the employee is unable to perform the essential functions of the job due to pregnancy or a related medical condition without undue risk to her or to others or to the successful completion of the pregnancy. Conditions include disability due to severe morning sickness and time off for prenatal care.

An FMLA-eligible employee is one who works for a covered employer, has worked for the employer for at least 12 months, has at least 1,250 hours of service for the employer during the 12-month period immediately preceding the leave and works at a location where the employer has at least 50 employees within 75 miles.

To be eligible for CFRA leave, an employee must be either a full- or part-time employee working for a covered employer in California, have more than 12 months (52 weeks) of service with the employer and have worked at least 1,250 hours in the 12-month period before the date the leave begins.

The following comparison chart can be used as a guideline in determining eligibility for FMLA, CFRA leave and PDL leave under the FEHA.

COMPARISON OF THE FMLA, CFRA, PDL AND NEW PARENT LEAVE

	Family and Medical Leave Act	California Family Rights Act	California Pregnancy Disability Leave
Pregnancy disability covered as a serious health condition?	Yes, covers both pregnancy disability and birth or adoption.	Pregnancy not a serious health condition. For baby bonding only.	Yes, covers employees disabled by pregnancy only.
Covered employer	50+ employees.	5+ employees.	5+ employees.
Eligible employee	12 months and 1250 hours.	12 months and 1250 hours.	None.
Duration	12 weeks.	12 weeks.	4 months.
Discrimination provision	No provision for discrimination.	No provision for discrimination.	Pregnancy-related discrimination prohibited.
Certification	Employer may require.	Employer may require.	Employer may require.
Employee notice	30 days if foreseeable, or as soon as practicable.	30 days if foreseeable, or as soon as practicable.	30 days if foreseeable, or as soon as practicable.
Employer response	Within 5 business days unless extenuating circumstances.	As soon as practicable, no later than 10 calendar days.	As soon as practicable, no later than 10 calendar days.
Intermittent/reduced leave	When medically necessary, in increments no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided that it is not greater than 1 hour. For baby bonding, must have employer's consent.	For baby bonding, in 2-week increments; however, an employer may grant a request for CFRA leave of less than 2 weeks' duration on any 2 occasions.	When medically necessary, increments no greater than the shortest period of time that the employer uses to account for use of other forms of leave, provided it is not greater than 1 hour.
Use of sick leave	Employee may choose, or employer may require. Employer need not permit use of sick leave for reasons other than specified in leave policy.	Employee may choose, or employer may require. Sick leave for other than employee's own medical illness requires both employer and employee to agree.	Employer or employee may require use of paid sick leave. Employee may choose to substitute paid vacation or personal leave, but employer may not require.
Continuation of benefits	Employer must maintain coverage under group health plan under same conditions. Can require employees to pay their portions of the premiums.	Employer must maintain group health benefits and all other benefits and seniority under same conditions as applicable to other unpaid disability leaves.	Employer must maintain group health benefits and all other benefits and seniority under same conditions as applicable to other unpaid disability leaves.
Right to reinstatement	Same or equivalent position. Key employee exception.	Same or comparable position. No key employee exception.	Same or comparable position. Undue hardship defense.

STEP 3: EMPLOYER NOTIFIES EMPLOYEE OF LEAVE ELIGIBILITY AND ENTITLEMENT

Once the employer has determined which leave(s) the employee is eligible for and entitled to, the employer must then provide the employee with a response to her request as soon as possible, but in no case later than 10 days from the date the request for CFRA

leave or PDL was received. The eligibility response should clearly state whether the employee is eligible for CFRA leave or PDL. In addition to the response to the request for leave, the employer must also provide the employee with a notice informing the employee of her rights and responsibilities under the CFRA and PDL. Model notices are available on the DFEH website (https://www.dfeh.ca.gov/Posters/?target=employment). *Your Rights and Obligations as a Pregnant Employee* is provided to employees covered only by PDL. *Family Care and Medical Leave (CFRA Leave) and Pregnancy Disability Leave* is provided to employees covered by both PDL and the CFRA.

FMLA notice WH-381 (http://www.dol.gov/whd/forms/WH-381.pdf) must be sent within five days informing the employee of her rights and responsibilities under the FMLA. When an employee is using FMLA and CFRA leave concurrently, some employers will provide a combined notice.

STEP 4: EMPLOYER REQUESTS CERTIFICATION

Before an employer designates leave as either FMLA or PDL leave, it should request that the employee provide any necessary certification to support the need for leave. An employer may require that the employee provide a health care provider certification to determine the medical necessity of PDL or FMLA leave. The employer may require that PDL certifications include the following:

- The date on which the pregnancy-related disability commenced.
- The probable duration of the disability.
- A statement that, due to such disability, the employee is unable to perform the function of her position.

A sample health care provider certification form (https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/DFEH-Pregnancy-CertificationHealthCareProvider.pdf) for pregnancy disability leave is available via the Department of Fair Employment and Housing's website. The FMLA also provides a model medical certification form (http://www.dol.gov/whd/forms/WH-380-E.pdf) to establish FMLA eligibility for the employee's own serious health condition; however, California employers are cautioned in using the federal model form due to medical privacy rules in California. The PDL certification is often sufficient in determining FMLA leave eligibility as well.

Employers must inform employees if they find the medical certification inadequate or incomplete, and provide the employee a reasonable opportunity to cure any deficiency.

Under the FMLA, if the employer doubts the validity of the employee's medical certification, the employer may require a second health care opinion, designated and paid for by the employer. However, the PDL regulations do not include provisions regarding an employer's ability to obtain a second opinion.

Medical certification is not necessary for CFRA leave bonding time with a new child is available without regard to medical necessity.

STEP 5: EMPLOYER DESIGNATES LEAVE AS CFRA LEAVE, FMLA LEAVE OR PDL AND NOTIFIES EMPLOYEE

Under all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA leave, CFRA leave or PDL.

Employers should notify the employee of the designation of FMLA leave using Form WH-382 (http://www.dol.gov/whd/forms/WH-382.pdf). A combined Designation Notice for FMLA/CFRA/PDL leave can be used to notify the employee whether her FMLA/CFRA/PDL request has been approved or denied. If the employer has enough information when the employee initially requests leave to approve or deny, the employer may supply the Designation Notice at the same time as the Rights and Responsibilities (http://www.dol.gov/whd/forms/WH-381.pdf) notice.

If the employer does not designate leave as required by the provisions of the FMLA, the CFRA or PDL, the employer may retroactively designate leave as FMLA leave, CFRA leave or PDL with appropriate notice to the employee provided that the employer's failure to

timely designate leave does not cause harm or injury to the employee. It is always safest to make retroactive designations with the consent of the employee. If the employer wishes to make the designation retroactive despite the employee's objections, it should do so only with the advice of an attorney.

STEP 6: EMPLOYER MAINTAINS BENEFITS

An employee must retain employee status during the period of the PDL.

An employer must maintain and pay for health care insurance coverage for an eligible employee who takes FMLA leave or PDL for the duration of the leave at the same level and under the same conditions that coverage would have been provided if the employee had continued in employment for the duration of the leave.

Additionally, during her FMLA leave, CFRA or PDL, the employee must be able to maintain participation in employee benefits plans, including life, short- and long-term disability or accident insurance, pension and retirement plans, stock option plans, and supplemental unemployment benefits plans to the same extent and under the same conditions as would apply to any other unpaid leave granted by the employer for any reason other than a pregnancy disability.

If the employer's policy allows seniority to accrue when employees are on other types of leave, such as paid sick leave, vacation leave or unpaid leave, then the employee must accrue seniority during any part of a paid or unpaid pregnancy disability leave. The leave may not constitute a break in service for purposes of longevity or seniority under any collective bargaining agreement or under any employee benefit plan.

The employee returning from a pregnancy disability leave must return with no less seniority than the employee had when the leave commenced. Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualification period, physical exam or other qualifying provisions.

STEP 7: EMPLOYER TRACKS CFRA/PDL LEAVE TAKEN

FMLA leave, CFRA and PDL may be taken all at once or on an intermittent or reduced schedule basis. When tracking CFRA leave or PDL taken all at once, the employer simply deducts the total number of weeks, days or hours the employee has been absent from work against her total leave entitlement.

For the purpose of tracking the amount of FMLA leave, CFRA leave or PDL the employee has taken on an intermittent or reduced schedule basis, an employer may account for increments of intermittent leave using the shortest period of time that the employer's payroll system uses to account for other forms of leave, provided it is not greater than one hour. For example, if an employer accounts for sick leave in 30-minute increments and vacation time in one-hour increments, the employer must account for PDL in increments of 30 minutes or less. If an employer accounts for other forms of leave in two-hour increments, the employer must account for PDL in increments no greater than one hour.

Additionally, although all pregnant employees are eligible for up to four months of PDL if that leave is taken in one period of time, taking intermittent leave or working a reduced work schedule throughout an employee's pregnancy will differentially affect the number of hours remaining that an employee is entitled to take for a pregnancy disability, depending on the employee's regular work schedule.

For example, a full-time employee, who normally works a 40-hour workweek is entitled to 693 working hours of PDL. If that employee takes 180 hours of intermittent PDL throughout her pregnancy, she would still be entitled to take 513 hours of PDL, or approximately three months, leading up to and after her childbirth, where medically unable to work.

In contrast, a part-time employee who normally works 20 hours per week would be entitled to 346.5 hours of PDL. If that employee

takes intermittent PDL of 180 hours throughout her pregnancy, she would be entitled to only 166.5 more hours of PDL, approximately two months of leave, leading up to and after her childbirth, where medically unable to work.

If a holiday falls within a week taken as a FMLA leave, CFRA leave or PDL, the week is nevertheless counted as a week of leave. If, however, the employer's business activity has temporarily ceased for some reason and employees are generally not expected to report for work for one or more weeks (e.g., a school closing for two weeks for the Christmas/New Year holiday or summer vacation or an employer's closing the plant for retooling), the days the employer's activities have ceased do not count against the employee's PDL entitlement.

STEP 8: EMPLOYER REINSTATES THE EMPLOYEE

An employee who exercises her right to take PDL is guaranteed a right to return to the same position, and not a comparable position, and the employer must provide the guarantee in writing on request of the employee. However, if the employer has a permissible defense as described below, the employee may be reinstated to a comparable position instead. As a condition of the employee's return from PDL, the employer may require that the employee obtain a release-to-return-to-work certification from her health care provider stating that she is able to resume her original job duties but only if the organization has a uniformly applied practice or policy of requiring such releases from other similarly situated employees returning to work after a nonpregnancy-related disability leave.

Per regulation 7291.10(a), it is an unlawful employment practice for any employer, after granting a requested pregnancy disability leave or transfer, to refuse to honor its guarantee of reinstatement unless the refusal is justified under 7291.10(c). If the employee takes intermittent leave or works a reduced work schedule, only one written guarantee of reinstatement is required.

Under 7291.10(b)(2), if the reinstatement date differs from the employer's and the employee's original agreement, or if no agreement was made, the employer must reinstate the employee within two business days, or, when two business days is not feasible, as soon as the employer can expedite the employee's return, after the employee notifies the employer of her readiness to return, to the same, or, where applicable, to a comparable position.

However, as with FMLA and CFRA leaves, an employee has no greater right to reinstatement to the same position or to other benefits and conditions of employment than those rights she would have had if she had been continuously at work during the pregnancy disability leave. This is true even if the employer has given the employee a written guarantee of reinstatement. A refusal to reinstate the employee to her same position or duties is justified if the employer proves, by a preponderance of the evidence, either of the following:

- That the employee would not otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking a pregnancy disability leave or transfer (such as a layoff pursuant to a plant closure).
- That each means of preserving the job or duties for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently.

Similarly, as the California Code of Regulations further mandates, an employee has no greater right to reinstatement to a comparable position or to other benefits and conditions of employment than an employee who has been continuously employed in another position that is being eliminated. If the employer is excused from reinstating the employee to her same position, or with the same duties, a refusal to reinstate the employee to a comparable position is justified if the employer proves, by a preponderance of the evidence, any of the following:

- The employer would not have offered a comparable position to the employee if she would have been continuously at work during the pregnancy disability leave or transfer period.

- There is no comparable position available.
- A position is available if there is a position open on the employee's scheduled date of reinstatement or within 60 calendar days for which the employee is qualified, or to which the employee is entitled by company policy, contract or collective bargaining agreement. An employer has an affirmative duty to provide notice of available positions to the employee by means reasonably calculated to inform the employee of comparable positions during the requirement period. Examples include notification in person or by letter, telephone or e-mail, or by links to postings on the organization's website if it contains a section for job openings. If a comparable position is not available on the employee's scheduled date of reinstatement, but the employee is later reinstated under the 60-calendar day period, the period between the employee's scheduled date of reinstatement and the date of her actual reinstatement cannot be counted for purposes of any employee pay or benefit.
- If an employee takes a pregnancy disability leave that does not qualify as FMLA leave and a comparable position is available, the employer must prove that filling the available position with the returning employee would substantially undermine the employer's ability to operate the business safely and efficiently.
- If an employee is laid off during a pregnancy disability leave or transfer for legitimate business reasons unrelated to her leave or transfer, the employer's responsibility to continue the pregnancy disability leave or transfer, to maintain benefits and to reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement, or otherwise.

At the expiration of PDL, if an employee takes CFRA leave for reason of the birth of her child, the employee's right to reinstatement to her job is governed by the CFRA and not the provisions of the PDL. Once an employee returns to work at the end of CFRA leave, she is entitled to the same reinstatement rights as those under the FMLA. As with FMLA leave, employees returning from CFRA leave within their 12-week entitlement must be reinstated either to their same or to a comparable position.

STEP 9: EMPLOYER MAINTAINS ACCURATE RECORDS

Employers should maintain detailed, written records of all aspects of the leave process and maintain them in a lawful manner (securely and separately from regular personnel files) for the required length of time in accordance with California laws regarding record retention requirements and periods.