

EMPLOYMENT
& LABOR LAW

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A L A W C O R P O R A T I O N

LEAVES OF ABSENCE

Let Me Count the Ways

Employment Law Workshop

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I. Vacation

- A. Neither federal nor state law requires that an employer provide employees with paid vacation or holiday.
- B. However, if vacation is offered to employees, certain requirements must be met:
 - 1. If vacation policy in effect, cannot have “use it or lose it”; and
 - 2. No forfeiture of vested right.
- C. Employer may choose to provide benefits to particular groups of employees.
- D. Cap on accrual allowed - technical variation of “use it or lose it” - language of policy must be reviewed carefully.
- E. DLSE has taken position that vacation policies which provide that all vacation must be taken in the year that it is earned are unfair and will not be enforced.
- F. Floating holiday or PTO policies may be seen as vacation.
- G. Accrual of Vacation - annual or pro-rata.
 - 1. Vacation accrues on a daily basis, regardless of how employer structures the accrual.
 - 2. Employer must pay pro rata share of accrual at time of termination.
 - 3. If employer really does not want to pay “introductory” employees if they leave, then accrual can start after 90th day, etc., but cannot be a subterfuge to avoid the rule (e.g., 5 days accrued in 9 months).
 - 4. Another example of subterfuge - no vacation accrues in the first year, two weeks in the second year and then back to one week thereafter.
- H. Exempt employees - Cannot reduce vacation bank in less than full day increments.
- I. Payment of vacation - Paid at rate earned at time taken and must pay all accrued at separation.
- J. Interaction with leave laws.
 - 1. Cannot force use during pregnancy disability leave.

2. Can force use for FMLA/CFRA.
 3. Must specify that benefits do not accrue during leave.
- K. Short-term plant shutdowns - Exempt employees may not have their pay or vacation banks reduced unless the shutdown is for an entire work week. Employer may not force the use of vacation by any employee during a plant shutdown unless the employer has given nine months' notice that it intends to do so.

II. Sick Leave

- A. No statutory requirements for employer to have sick leave.
- B. If employer has sick leave, then Labor Code section 233 applies: 50% of all sick leave can be used for care of ill family member ("parent, child or spouse or domestic partners").
- C. Not a vested right - "Use it or lose it" is acceptable.
- D. If an employer uses a PTO system, and thereby lumps vacation and sick time, the employer may not reduce the PTO bank whatsoever if an exempt employee is absent due to illness.
- E. Pros and Cons of implementing a PTO policy.
 1. Pros:
 - a. Easy administration; and
 - b. Employees do not need to lie about being sick or family member sick - more generic.
 2. Cons:
 - a. Loses "use it or lose it" status; (b) exempt employees cannot lose either partial or full day's pay or PTO for illness;
 - b. Employees are entitled to use up to ½ to care for family members; and
 - c. Vested right - must pay out at separation.
- F. Can force FMLA/CFRA leave employees to use sick leave concurrently if employee is ill or injured.

III. Leaves Related To Medical Conditions

A. FMLA/CFRA Leave

1. FMLA - federal Family and Medical Leave Act of 1993 (29 USC §§ 2601 et seq.).
2. CFRA - California Family Rights Act (Cal. Gov. Code § 12945.2).
3. Covers all public employers and private employers with 50 or more employees working within 75 miles of each other.
4. Employee must have worked at least 1,250 hours in the 12 months preceding the leave request.
5. Leave allowed for:
 - a. Birth of a child, placement for adoption or foster care of a child;
 - b. Care for spouse, child or parent with a serious health condition;
 - c. Employee who is suffering from a serious health condition that renders the employee to be unable to perform functions of the position.
6. Serious Health Condition:
 - a. A condition requiring hospital care as an inpatient;
 - b. A condition that requires treatment and causes incapacity lasting more than three (3) consecutive days with treatment during that time period;
 - c. Pregnancy or related conditions (FMLA only);
 - d. Chronic conditions that require ongoing treatment;
 - e. Permanent and long-term conditions that require supervision; or
 - f. A condition that requires multiple treatments.
7. Intermittent leave allowed.
8. Second and third opinions allowed, but employer must pay for subsequent opinions.

9. Notice responsibilities of employer - employer is responsible for designating.
10. Certification requirements - employee may be required to obtain medical certification.
11. Rights:
 - a. Employee is allowed to continue health care coverage.
 - (1) Employer must pay its share of employee medical premiums, but if employee does not return, employer can get reimbursement.
 - b. Employee is entitled to be reinstated to the same or an equivalent position, subject to certain exceptions.

B. Americans With Disabilities Act (ADA)
and California Disability Leave Laws
(42 U.S.C. § 12211; Cal. Gov. Code §§ 12940, 12940.3)

1. California law favors the employee.
2. ADA applies to public agencies, and private employers with 15 or more employees.
3. State law covers public agencies; and private employers with 5 or more employees.
4. Protects an employee who has a physical or mental impairment that substantially limits one or more major life activities, or has a record of such impairment, or is regarded as having such impairment.
 - a. State definition deletes the term “substantially.”
5. Qualified individual with a disability is entitled to a “Reasonable accommodation.”
 - a. “Essential” v. “non-essential” functions and need for job descriptions.
 - b. Other factors involved in whether employer must accommodate (cost, undue hardship).
 - c. Engage in interactive process with employee to determine what accommodation is requested and whether such accommodations are feasible.

6. Types of Accommodation:
 - a. Restructuring of position;
 - b. Leave of absence;
 - c. Modified or part-time schedule;
 - d. Modified workplace policies;
 - e. Reassignment.
7. Disability leave may interact with FMLA/CFRA, Pregnancy, and/or Workers Compensation Leave.

C. Pregnancy Related Disability
(FEHA-Gov. Code § 12945)

1. Must have 5 or more employees.
2. Four months “or equivalent.”
 - a. Generally 88 working days.
 - b. Part-time employees get equivalent so could be longer than 4 mos.
3. No requirement that employee be on payroll for any period of time before benefit allowed.
4. Reasonable accommodation.
 - a. 1st option - modify existing job.
 - b. 2nd option - move to light duty position.
 - c. 3rd option - leave of absence.
5. Coordination with State Disability Insurance payments.
6. Can force use of sick time, but not vacation or PTO.
7. Must return to same position or equivalent.
8. No need to pay medical premiums unless company does so in other medical situations.

D. Interaction of Pregnancy Disability Leave, FMLA and CFRA

1. FMLA and the first 12 weeks of Pregnancy Disability Leave should run concurrently.
2. CFRA may be used after exhaustion of PDL if circumstances are appropriate and job must be held open.

E. Workers Compensation

1. Industrial injuries covered (physical and mental).
2. Length of leave - no maximum.
3. Leave determined by employee's desire/ability to return to same position or utilize vocation rehabilitation benefits.
4. Pursuant to Labor Code §132a, employee cannot be treated differently in regards to the terms and conditions of employee due to the occupational injury.
5. Part-time/reduced duties.
 - a. Not required to place employees.
 - b. Re-training only if training provided in other leave contexts.
 - c. Can adjust wage/salary downward.
 - d. Can discontinue reduced schedule.
6. Filling the employee's position.
 - a. Temporary replacement.
 - b. "Permanent replacement."
 - c. Depends on business necessity, training difficulties, length of time gone.
7. When the employee is ready to return.
 - a. Generally must bring back to same or equivalent position.
 - b. Need not bump replacement if business necessity, passage of time, etc. justify replacement (high standard).

- c. Need not bump employee from other position to accommodate returning employee.

F. State Disability Insurance

1. Employees may receive benefits from the state for a non-industrial illness or injury.
2. Employer need not hold the position, although there may be ADA implications that overlap.

G. Family Temporary Disability Insurance

1. Now referred to as "Paid Family Leave."
2. Effective January 1, 2004, employers will begin deducting, on behalf of the state, from employee paychecks for FTDI. Employees will be entitled to take FTDI beginning July 1, 2004.
3. This program provides up to six (6) weeks per year of partial wage replacement for employees who miss work to care for a sick family member or a newborn, or newly placed adopted or foster child.
4. The law applies even if the employee has only been with the company a short period of time, and would overlap with FMLA and CFRA rights, to the extent the employee (and the employer) qualified.
5. The benefit is similar to SDI, in that the employer need not hold the employee's position.
6. An employer can require employees to use up to two weeks of accrued vacation before using FTDI benefits.
7. There is also a seven (7)-day waiting period before the employee is eligible.
8. Carefully-worded policies should be implemented through handbooks.
9. Notice requirements obligate employees to provide information to new employees and employees utilizing the leave after July 1, 2004.

IV. Miscellaneous Leaves

A. Voting (California Election Code §§ 14000-14002)

1. Applies to all public and private employers.
2. If not enough time to vote outside working hours in statewide election can take time off during work hours.
3. Employer must pay up to two hours and any additional time that is needed is unpaid.
4. Must be at start or end of work.

B. Jury Duty (Labor Code Section 230(a))

1. Applies to all employers.
2. Section 230(a) prohibits discrimination against employees on jury duty.
3. Employer payment for jury duty.
 - a. Not required by statute.
 - b. Non-exempt employees.
 - (1) No need to pay for time missed.
 - (2) Employees may apply vacation or PTO.
 - c. Exempt employees.
 - (1) Must be paid for entire week if only partially on jury duty.
 - (2) Employees who work “after hours” qualify for full week's pay.
 - (3) Cannot force use of vacation or PTO.

C. Witness Duty (Labor Code § 230(b))

1. Applies to all employers.
2. Prohibits discrimination against employees appearing as witnesses pursuant to subpoena or court order.

3. Need not be paid for time off (non-exempt employees only for partial days).
4. Should provide as much notice to employer as possible.

D. Crime Victims (Labor Code § 230(b))

1. Applies to all employers.
2. Prohibits discrimination for appearances in court.
3. Need not be paid for time off.

E. School Visits For Suspended Child (Labor Code § 230.7)

1. Applies to all employers.
2. No discrimination or discharge of employees for attending suspension meeting.
3. Must be meeting called under Education Code section 48900.1 based on infractions specified in section 48900.

F. Family School Partnership Act (Labor Code § 230.8)

1. Applies to employers with 25 or more employees.
2. Parent, guardian or grandparent with custody must give reasonable notice to attend school or day care center activity.
3. 8 hours per month maximum, up to 40 hours per year.
4. If both parents work for same employer:
 - a. Only first parent giving notice may attend.
 - b. Second parent allowed to go only with employer approval.
5. Employer may require documentation to verify activity.
6. Vacation must be used by employee or may use time off without pay if allowed by employer.

G. Victims of Domestic Violence and Sex Abuse (Labor Code §§ 230 and 230.1)

1. No discrimination for taking time off from work to obtain or seek judicial relief to ensure health, safety or welfare of employee or child.

2. Reasonable notice required where possible.
3. If discipline occurs due to employee absence, must be rescinded if employee provides evidence of court appearance within reasonable time after.
4. Employers with 25 or more employees must not discriminate if employee takes time off to seek program services, psychological counseling, or to participate in safety planning (medical attention, shelter, etc.).

H. Volunteer Firefighters (Labor Code § 230.3)

1. Applies to all employers.
2. No discrimination for taking time off to perform volunteer firefighter emergency duties.
3. Does not apply to public safety agency or emergency medical services provider if agency determines that employee's absence would hinder availability of services.

I. Employee Literacy Education Assistance Act
(Labor Code §§ 1040-1044)

1. Must have 25 or more employees.
2. Requires reasonable accommodation and assistance to employee who:
 - a. Discloses illiteracy;
 - b. Requests assistance in enrolling in adult literacy program;
 - (1) Provide information and location; possible on-site by provider.
3. No obligation by employer to pay for program or provide time off with pay.
4. Must reasonably safeguard employee privacy.

J. Military Leave

1. State law protection - Military and Veteran's Code section 394 prohibits discrimination by private employers.
2. Federal law - prohibits discrimination against members of "uniformed services" (broadly defined) 38 U.S.C. § 4301 et seq.

3. **NEW –Military Spouse Leave (AB 392)** This bill was signed by Governor Schwarzenegger on October 9, 2007 and took effect immediately. This new law states that California businesses employing 25 or more people must give up to 10 unpaid days off to any “qualified” employee whose spouse is on leave from military deployment.
 - a. Under AB 392, a qualified employee is one who works more than 20 hours per week whose spouse is a member of the Armed Forces, National Guard or Reserves who has been deployed during a period of military conflict.
 - b. Employees who desire to take time off pursuant to this policy must provide a copy of the official notice that the qualified member will be on leave to their supervisor and the Human Resources Department no later than two (2) business days after the employee receives the official notice.

K. Drug and Alcohol Rehabilitation

1. 25 or more employees required.
2. Employee must come forward voluntarily and request to enter rehabilitation program.
3. No time limit in statute.
4. Employer must hold job.
5. “Last Chance Agreement” allowed.

L. Bereavement

1. No statutory requirements.
2. Can require use of PTO or vacation.

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GUIDELINES FOR MANAGING EMPLOYEE LEAVE LAWS

Prepared by Michael S. Lavenant

TYPE OF LAW	LAW(S) REQUIRING LEAVE	PURPOSE	LENGTH	WHICH EMPLOYEES ARE ELIGIBLE	PAID OR UNPAID
Family and Medical Leave (50 or more employees within a 75 mile radius)	Family and Medical Leave Act (FMLA); California Family Rights Act (CFRA).	To care for newborn, recently adopted children, to care for own illness or illness of spouse.	Up to 3 months in a 12 month period.	Those who have worked for employer for at least 1250 hours over the last 12 months. Employer can deny to certain "key" employees.	Unpaid. Employer must maintain medical benefits during FMLA/CFRA leave. Employee vacation or other paid time may be used during leave.
Pregnancy Disability Leave (5 or more employees)	California Government Code §12945.	To allow leave to any female employee who becomes disabled by pregnancy, childbirth or related medical condition.	Up to 4 months (May be added to CFRA leave for a total of 7 months).	Any female employee with a covered pregnancy-related disability.	Unpaid. Employee may use vacation, sick, or personal. Entitled to same benefits that employer provides to employees on other leaves.
Americans with Disabilities Act (ADA) (5 or more employees)	ADA and California Government Code §12940.	Employers may have to give time off to employees to reasonably accommodate a disability.	No minimum or maximum. Depends upon circumstance, such as whether attendance is essential job function.	Qualified employees with a disability that substantially impairs a major life activity.	Unpaid. Employer may require employee to use accrued paid or unpaid leave such as vacation, sick or personal.
Workers' Compensation (1 or more employees)	Workers' Compensation Act, California Labor Code §3200 et seq.	To allow employee to recover from work related injury.	Indefinite or until job eliminated.	All employees.	Benefits provided by workers comp. insurance provider.
School Visits For Suspended Child (1 or more employees)	California Labor Code §230.7.	To allow parents or guardians to take time off from work to participate in suspension proceedings.	Time required for participation in suspension proceeding.	Any employee who gives reasonable notice to his or her employer.	Unpaid, but back pay liability for violation of this law.
Child's School Activities (25 more employees)	Family School Partnership Act (FSPA), California Labor Code §230.8.	To allow parents, grandparents, or legal guardians to participate in their children's activities at school or licensed day care facility.	Up to 40 hours each calendar year, but no more than 8 hours in a single month.	Employees with children, grandchildren or legal guardian status where child is in licensed day care or between K-12.	Unpaid. Employers may require employees to use vacation, personal leave, or compensatory time off.
Substance Abuse (25 or more employees)	California Labor Code §1025-1028.	To require reasonable accommodation for employees who voluntarily enter and participate in drug or alcohol rehabilitation.	Indefinite, depends on circumstances or until job is eliminated.	Any employee who wishes to voluntarily enter into drug or alcohol rehabilitation program.	Unpaid. Employee may use accrued sick leave.
Unsafe Working Conditions (1 or more employees)	California Labor Code §6311.	No employees may be discharged or laid off because of a violation of work place safety laws that creates a real and apparent hazard.	Employer must remedy hazard before allowing employees to return to work.	All employees who work subject to hazardous conditions.	Unpaid, but back pay liability for violation of this law.
Voting (1 or more employees)	California Elections Code §14000.	To allow time for employees to vote in a statewide election.	Reasonable time during shift or up to two hours at beginning or end of shift if employee does not have time to vote outside of work hours.	Any employee who gives at least two work days notice that time off for voting is desired.	Paid.

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TYPE OF LAW	LAW(S) REQUIRING LEAVE	PURPOSE	LENGTH	WHICH EMPLOYEES ARE ELIGIBLE	PAID OR UNPAID
Jury or Witness Duty (1 or more employees)	California Labor Code §230.	To allow employees to serve jury duty or appear in court as witness.	For juror-until completion of trial. For witness, time required in court.	Any employee who gives reasonable notice to his or her employer.	Unpaid.
Domestic Violence & Sexual Assault Victims (25 or more employees)	California Labor Code §230.1.	To allow employees time off from work to seek medical attention, services, counseling or safety due to domestic violence or sexual assault.	Time required to seek care or services, but limited to time available under FMLA/CFRA.	Any employee who gives reasonable notice to his or her employer, unless advance notice is not feasible.	Unpaid.
Court Appearance for Victims of Crime (1 or more employees)	California Labor Code §230.2.	To allow an employee who is a victim of an enumerated crime or a family member of a victim to take time off to attend judicial proceedings related to that crime.	Time required to attend to each proceeding.	Any employee who gives reasonable notice to his or her employer, unless advance notice is not feasible.	Unpaid. Employee may use vacation, sick or personal time.
Literacy (25 or more employees)	California Labor Code §1040-1044.	Employees have duty to reasonably accommodate illiterate employees, such as leave to participate in literacy program.	Time required to reasonably accommodate employee in a literacy program.	Any employee who reveals a problem with literacy and asks for employer assistance in enrolling in an adult literacy program.	Unpaid.
Military Training and Service (1 or more employees)	Uniformed Services Employment & ReEmployment Act, 38 USC §§4301-1433; California Military & Veterans Code §394.	To treat employees as on leave of absence during military training and service.	Period of training and service.	Employees on active or reserve duty in military service.	Unpaid. No loss of benefits.
Military Spouse Leave (25 or more employees)	California Military & Veterans Code §395.10	To allow a qualified employee who is a spouse of a qualified military personnel to take a leave of absence during a qualified leave period.	Up to 10 days of unpaid leave.	Spouses of a qualified member of the Armed Forces, National Guard, or Reserves who has been granted a deployment period.	Unpaid. No loss of benefits. Employee may use, but is not required to use vacation, sick or PTO.
Volunteer Firefighter - Emergency Duty (1 or more employees)	California Labor Code §230.3.	To allow an employee to take time off to perform emergency duties.	Indefinite during emergency.	Volunteer firefighters, reserve police officers or emergency rescue personnel. Employers who are a public safety agency or a provider of emergency medical services may preclude leave if the employer determines it would hinder the availability of public safety or emergency medical services.	Unpaid, but back pay liability for violation of this law.
Volunteer Firefighter - Training (50 or more employees)	California Labor Code §230.3.	To allow an employee temporary leave for the purpose of engaging in fire or law enforcement training.	Not to exceed fourteen (14) days per calendar year.	Volunteer firefighters.	Unpaid, but back pay liability for violation of this law.

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CAJS-J1-SP

14 December 2007

MEMORANDUM FOR All State Civil Service Employees and State Active Duty Service Members

SUBJECT: State Personnel Programs Policy Memorandum # 2008-02
Military Service – Unpaid Spousal Leave

1. The Department of Personnel Administration announced¹ a new type of unpaid leave for spouses of deployed military personnel while on a leave from their military duty. It is effective October 10, 2007; and, 10 days of unpaid leave will be provided to eligible spouses.

a. Who's Eligible?

- The spouse, State Civil Service employee or State Active Duty service member, of a "qualified member" of the military who works an average of 20 or more hours per week.

b. Who's a "Qualified Military Member"?

- A member of the U.S. Armed Forces, National Guard or Reserves who has been deployed in support of an Operational Mission under Sections 12301 and 12302 of Title 10 of the United States Code or Title 32 of the United States Code.

c. What's a combat zone?

- A zone designated by the President by Executive Order.

d. What are the current combat zones?

- Adriatic Sea, Afghanistan, Albania, Arabian Sea
- Bahrain, Federal Republic of Yugoslavia (Serbia/Montenegro)
- Gulf of Aden, Gulf of Oman
- Ionian Sea – north of the 39th parallel
- Iraq, Kuwait
- Oman, Persian Gulf
- Qatar, Red Sea
- Saudi Arabia, United Arab Emirates

e. How does the employee request leave?

- Notify their employer of their intent to take leave within two business days of receiving official notice their spouses will be on leave from military deployment.
- Certify the spouse's leave from active duty is during the time the leave is requested.

f. What are the department's responsibilities?

- Implement leave in an appropriate and consistent manner.
- Develop/distribute procedures.
- Approve leave for eligible employees.
- Do not retaliate/discriminate against an employee/service member who requests/takes military spouse leave.

¹ The DPA Reference is their Personnel Management Letter # 2007-034 (16 Nov 07)

SUBJECT: State Personnel Programs Policy Memorandum # 2008-02
Military Service – Unpaid Spousal Leave

2. The request form for Spousal Military Leave is attached.

3. If you have any questions regarding Spousal Military Leave, please call Ms. Patricia Ivashin (916) 854-3683 (State Civil Service) or CW5 Vance (916) 854-3077 (State Active Duty).

FOR THE DIRECTOR, JOINT STAFF:

Enclosure
as

DAVID T. TOLLEFSON
CW4, USAR, Retired
Director, State Personnel Programs

DISTRIBUTION:
A, F and M

HUMAN RESOURCES MEMORANDUM

SUBJECT: Military Service-Unpaid Spousal Leave	NUMBER: HR07-036A
	DATE ISSUED: 12/24/07
DISTRIBUTION: PERSONNEL LIAISONS; Attendance Clerks	EXPIRES: Until superseded

Introduction Effective October 10, 2007 eligible spouses of deployed military personnel on a leave from military duty will be provided 10 days of unpaid leave.

Who is eligible? The spouse of a "qualified member" of the military who works an average of 20 or more hours per week.

Who is a qualified military member? A member of the U.S. Armed Forces, National Guard or Reserves who has been deployed in support of an Operational Mission under Sections 12301 and 12302 of Title 10 of the United States Code or Title 32 of the United States Code.

What is a qualified leave? The following leave types qualify for 10 days of unpaid leave:

Military Department	Type of Leave
U.S. Armed Forces	A break during deployment
National Guard	Mid-tour leave during deployment End of tour leave during deployment

What are the current Combat Zones? The following are current combat Zones:

- Adriatic Sea, Afghanistan, Albania, Arabian Sea
- Bahrain, Federal Republic of Yugoslavia (Servia/Montenegro)
- Gulf of Aden, Gulf of Oman
- Ionian Sea-norht of the 39th parallel
- Iraq, Kuwait
- Oman, persian gulf
- Qatar, Red Sea
- Saudi Arabia, United Arab Emirates

**Employee's
leave
request**

The employee is responsible to:

- Notify his/her supervisor of intent to take leave within two business days of receiving official notice of spouse's leave from military deployment.
- Complete the attached Request for Spousal Military Leave form and give to supervisor.
<http://www.documents.dgs.ca.gov/ohr/MilitaryForms/SpousalMilitaryRequest.pdf>
- Provide supervisor with certification that spouse is on leave from active duty during the time the leave is requested.

Posting PAL

Posting PAL for unpaid Spousal Military Leave should reflect the new alias ***MSL***.

**Supervisor's
responsibility**

The Supervisor is responsible to:

- Review the Spousal Military Leave form and certification to ensure the employee is eligible for leave.
- Forward the Military leave form and certification of spouse's leave documents immediately to his/her Specialist.

Questions

If you have any questions, please contact your personnel specialist

/s/

MARIA J. LOPEZ, Manager
Personnel Operations

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INTERACTION OF FMLA/CFRA/PDL

By: Michael S. Lavenant, Esq.

LEAVE	FMLA/PDL	PDL	CFRA
TIME OFF	First Day of Pregnancy Up To 12 Weeks -	Week 13-16 - Usually Up To 6-8 Weeks After Birth	After PDL Exhaustion/Expiration Up To 12 Weeks
BENEFIT	Continue Health Insurance SDI Through State	COBRA/Voluntary Coverage SDI Through State	COBRA/Voluntary Coverage PFL Through State

1. Has Employee worked 1250 hours and 12-months of service?

Yes - Step 2

No - Employee is entitled to PDL for up to 4 months (88 working days) only. No continuing health insurance coverage obligation.

2. Employee is entitled to take FMLA and PDL concurrently. FMLA/PDL cover any time off related to pregnancy - including morning sickness, pre-natal visits, early medical leaves. FMLA runs for first 12 weeks - along with obligation to continue health insurance coverage. After exhausting FMLA, employee is entitled to continue PDL for up to 88 working days from first day of time off. No obligation to continue health insurance after exhaustion of FMLA (12 weeks).

3. Employee is typically considered “disabled by pregnancy” until 6 weeks after vaginal birth (8 weeks for c-section). Some employees may experience additional complications extending their “disability” time. If the employee exhausts PDL either prior to 6-8 weeks after birth, consider some type of reasonable accommodation pursuant to ADA/FEHA rules. CFRA does not start until the employee is no longer considered “disabled by pregnancy.” No requirement to continue health insurance - ensure that COBRA notice is provided. Right to return to work at end of PDL is same position.

4. After exhaustion of PDL, employee is entitled to 12 weeks of “baby bonding” time under the CFRA. No certification form required, and no obligation to continue health insurance. Right to return to work after CFRA is same or comparable position.

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STANDARDS:

Typical Scenarios & Responses

- FMLA - 12 weeks of leave for serious health condition (including pregnancy). Employee is entitled to have current health insurance benefits continue for up to 12 weeks. At the end of the leave, the employee is entitled to be reinstated to the same or comparable position.
- CFRA - 12 weeks of leave for serious health condition (NOT including pregnancy). Employee is entitled to have current health insurance benefits continue for up to 12 weeks, unless period has been exhausted under FMLA. At the end of the leave, the employee is entitled to be reinstated to the same or comparable position. Since CFRA does not run concurrently with FMLA, an additional 12 weeks can be taken by the employee to “bond” with the individual or continue with leave for a serious health condition that occurs after the individual is no longer disabled by pregnancy.
- PDL - Four months (88 working days) of leave while the employee is disabled by pregnancy. At the end of the leave, the employee is entitled to be reinstated to the SAME position. PDL does not come with an obligation to continue health insurance coverage during the leave.
1. Employee has a “perfect” pregnancy - only taking limited time off during the day to attend to pre-natal visits and a brief period of morning sickness. Employee works until the day before she gives birth. What is her leave entitlement if she is eligible for FMLA?
- A. Employee is entitled to take leave during the time that she is “disabled by pregnancy” for up to 4 months under the Pregnancy Disability Leave Laws. During the FIRST 12 weeks of the 4 months, the FEDERAL family and medical leave act (FMLA). Since her pregnancy has gone so well, the employee may be “disabled by pregnancy” (i.e., recovering from childbirth) for 6-8 weeks after birth. This would be designated as FMLA/PDL time and the employee receives continuing health insurance coverage. Assuming that the employee has a healthy baby delivered by c-section, it is safe to assume a recovery period of 8 weeks. FMLA/PDL then would stop at that date. Thereafter, the employee can choose to return to work or take “baby bonding” time for up to 12 more weeks under CFRA. COBRA should issue after the end of the 12th week (8 weeks from birth to recovery and then 4 weeks during bonding).
2. Employee has trouble with her pregnancy and needs to go on disability two months before her due date. What is her entitlement?
- A. Employee is entitled to 2 months of FMLA/PDL before the birth and then another 2 months under PDL (FMLA only covers the first month after birth (8weeks pre-birth+4 weeks post-birth=12 weeks)) after the birth (only 6 weeks if vaginal). CFRA kicks in as in Example 1 above.



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

The Family and Medical Leave Act and National Defense Authorization Act for FY 2008

On January 28, 2008, President Bush signed into law H.R. 4986, the National Defense Authorization Act for FY 2008 (NDAA), Pub. L. 110-181. Among other things, section 585 of the NDAA amends the Family and Medical Leave Act of 1993 (FMLA) to permit a "spouse, son, daughter, parent, or next of kin" to take up to 26 workweeks of leave to care for a "member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness."

The provisions in the NDAA providing this leave are effective as of the date of the President's signing. The Department of Labor is working quickly to prepare more comprehensive guidance regarding rights and responsibilities under this new legislation. In the interim, WHD will require employers to act in good faith in providing leave under the new legislation. Because the NDAA amends the FMLA, FMLA-type procedures should be used as may be appropriate (for example, procedures regarding substitution of paid leave and notice).

The NDAA also permits an employee to take FMLA leave for "any qualifying exigency (as the Secretary [of Labor] shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." By its express terms, this provision of the NDAA is not effective until the Secretary of Labor issues final regulations defining "any qualifying exigency." DOL is expeditiously preparing such regulations. In the interim, DOL encourages employers to provide this type of leave to qualifying employees.

DOL will update this page as additional guidance is developed and published.

To view the amended Title I of the Family and Medical Leave Act:

Title I of the FMLA, as amended by the National Defense Authorization Act for FY 2008

The information at the link below may also be of interest:

Compliance Assistance – Family and Medical Leave Act

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE, TTY: 1-877-889-5627
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