

**New California Family Rights Act Regulations
Effective July 1, 2015****June 29, 2015****By Jennifer L. Nutter, Amy B. Messigian, and Marisa S. Ratinoff**

The California Fair Employment and Housing Council (“FEHC”) has amended numerous sections of Title 2 of the California Code of Regulations that implement, interpret, and clarify the California Family Rights Act (“CFRA”). These revised regulations go into effect on July 1, 2015, and can be found [here](#), redlined against the previous version.

The FEHC’s stated purpose in implementing these amendments is to “clarify rules, make technical amendments to ease readability and adopt and modify some of the parallel federal Family and Medical Leave Act regulations.” However, as explained in more detail below, there are some substantive changes from the previous regulations. We highlight some of the more significant ones below.

New Poster Requirement

The “Family Care and Medical Leave (CFRA Leave) and Pregnancy Disability Leave” poster has been revised and can be found [here](#).

The revised regulations specifically provide that “[e]lectronic posting is sufficient” as long as the notice otherwise meets the requirements.¹ No guidance is provided, though, on what would be sufficient to meet this new electronic posting requirement.

Handbook Updates Must Cover CFRA Leaves

Like the previous version, the revised regulations contain a requirement that a handbook updated after their adoption needs to include “a description of CFRA leave” if it describes other types of leaves.²

¹ 2 C.C.R. § 11095(a).

² 2 C.C.R. § 11095(a).

New Certification of Health Care Provider Form

The revised regulations contain language for a new Certification of Health Care Provider form (which can be found on the last five pages of the [revised regulations](#)).³ Use of the revised form is optional but recommended.

Shortened Time to Respond to CFRA Leave Requests

Employers now have five business days, not 10 calendar days, to respond to an employee's request for CFRA leave.⁴ For leaves covered by both the Family and Medical Leave Act ("FMLA") and CFRA, this shortened requirement was already in place.⁵

Intermittent Leave—Employers Must Allow Time to Be Used in One-Hour Increments

For CFRA-only leaves, employers were previously permitted to use whatever the shortest period of time that their payroll systems used to account for any other absences or use of leave. Now, employees must be permitted to use intermittent leave in increments as small as one hour.⁶ The FMLA regulations contain a similar provision.⁷

Employers May Now Require Employees to Use Vacation or PTO During a CFRA Leave

The revised regulations now allow employers to require employees to use vacation or other undifferentiated accrued paid time off ("PTO") during otherwise unpaid portions of their CFRA leaves.⁸ Employers may also require employees to use accrued sick leave, but only if the absence is for an employee's own serious health condition. If the absence is for a family member, the employee may be given the option of using accrued paid sick time but cannot be required to do so.⁹

Specific Notice Requirements and Rights Added for "Key Employees"

The new CFRA regulations mirror the requirements in the FMLA regulations for denying reinstatement to key employees. Because the new CFRA regulations are very specific and the failure to comply with them could now result in the inability of an employer to deny reinstatement to a key employee returning from a CFRA-only leave, we are including them here.

³ 2 C.C.R. § 11097.

⁴ 2 C.C.R. § 11091(a)(6).

⁵ 29 C.F.R. § 825.300(b).

⁶ 2 C.C.R. § 11090(e).

⁷ 29 C.F.R. § 825.205(a).

⁸ 2 C.C.R. § 11092(b)(1).

⁹ 2 C.C.R. § 11092(b)(2).

- Definition: A “key employee” is defined as an employee paid on a salary basis who is amongst the highest paid 10 percent of the employer’s employees within 75 miles of the employee’s worksite at the time that a leave request is made.¹⁰
- Initial Notice: Employers that believe they may deny reinstatement to a key employee are required to inform the employee in writing at the time of the leave request or commencement of the leave (if earlier): (1) that he or she is a key employee, and (2) that there is the potential for non-reinstatement and loss of health benefits in the event that the employer determines that reinstatement “will result in substantial and grievous economic injury to its operations.” **Employers that fail to give this notice lose the right to deny the employee reinstatement even if substantial and grievous economic injury will, in fact, occur.**¹¹
- Notice of Intent Not to Reinstatement and Opportunity to Return Early: Additional written notice to the employee is required as soon as the employer makes a good faith determination based on the facts available that substantial and grievous economic injury would occur as a result of reinstating the employee. The regulation presumes that an employer “should ordinarily be able to give such notice prior to the employee starting leave.” The notice must “explain the basis for the employer’s finding.” Also, if the employee’s leave has already begun, the employer “must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the duration of the leave and the urgency of the need for the employee to return.”¹²
- One More Chance to Return Anyway: A key employee given notice that the employer intends to deny reinstatement still has the right at the end of his or her leave to request that he or she be reinstated. This request obligates the employer to reassess whether reinstatement would result in substantial and grievous economic injury based on the facts at that time. If the employer reaches the same conclusion, it must notify the employee in writing.¹³
- Important Compliance Note: There is a specific requirement that all notices, except the initial key employee notice, be delivered “in person or by certified mail.”¹⁴

Extended Health Insurance Continuation Requirement for Maternity Leaves

Under the previous version of the regulations, employers were required to maintain the health insurance coverage of an employee only for a combined total of 12 weeks for

¹⁰ 2 C.C.R. § 11087(k).

¹¹ 2 C.C.R. § 11089(d)(2)(D).

¹² 2 C.C.R. § 11089(d)(2)(E).

¹³ 2 C.C.R. § 11089(d)(2)(G).

¹⁴ 2 C.C.R. § 11087(e)(4)(E) and (G).

leave taken under either the FMLA or CFRA. Under most circumstances, these leaves run concurrently.

In the case of pregnancy, however, it was possible for an employee to run out of insurance coverage protection before she ran out of protected leave time. The reason for this is that California separated leave taken for pregnancy/childbirth (covered by the Pregnancy Disability Leave Law) from baby bonding time (covered by CFRA). Employees in California may take up to four months of pregnancy disability leave, followed by up to 12 weeks of CFRA baby bonding time. Because FMLA runs concurrently with pregnancy disability leave, under previous law, the FMLA/CFRA combined 12-week insurance continuation obligation also ran concurrently with pregnancy disability leave, effectively separating CFRA's insurance coverage requirement from its protected leave time provision.

The revised regulations fix this unintended consequence and now provide that time spent on pregnancy disability leave does not count toward the 12 weeks of continued insurance coverage required by CFRA, effectively rejoining the time-off and insurance continuation protections. Thus, employers are now legally required to provide continued health insurance coverage for employees taking CFRA baby bonding time after pregnancy disability leave.

CFRA's Protections Now Extend to Some Isolated Employees Working in California

One of the most significant revisions to the regulations is that California-based employees with no fixed worksite will be covered by CFRA if the worksite from which their work is assigned or to which they report meets the 50 employee/75-mile threshold coverage requirements—even if the worksite to which they report is in another state. The revised regulations include the following specific example:

For example, for the purpose of counting 50 employees, if a salesperson works from home in California, but reports to and receives assignments from her corporate headquarters in New York, the New York headquarters, not her home, would constitute the worksite from which there must be 50 employees within a 75-mile radius in order for the salesperson to be eligible under the CFRA.¹⁵

Anti-Retaliation Provisions Extended to Individuals Who Do Not Qualify to Take Leave

In another expansion of coverage, the revised regulations now provide that individuals who do not themselves qualify to take CFRA leave are protected from retaliation for

¹⁵ 2 C.C.R. § 11087(e)(4)(A).

opposing any practice prohibited by CFRA or that they reasonably believe is prohibited by CFRA.¹⁶

Joint Employer Provisions

The revised regulations reflect that workers may be employed by two or more employers for CFRA purposes using a “totality of the circumstances” test based on the “economic realities of the situation.”¹⁷

In a joint employer situation (e.g., an employment agency or borrowed employees), an employee’s worksite for determining CFRA coverage is the primary employer’s office from which the employee is assigned or reports. However, if the employee works on site for a “secondary employer” for at least one year, then that becomes the employee’s worksite for CFRA purposes. In that case, the secondary employer must also count the on-site employee for determining CFRA coverage for its other employees.¹⁸

Inpatient Care/Continuing Treatment Component of “Serious Health Condition” Expanded to Include Substance Abuse Treatment and Hospital Admission Without an Overnight Stay

The revised regulations now specify that substance abuse treatment meets the “continuing treatment” component of having a serious health condition.¹⁹

It is also now sufficient that an overnight stay at a hospital, hospice, or residential health care facility was anticipated at the time of admission, even if the employee does not actually remain overnight.²⁰

Light Duty May Be Required for Employees Who Only Need Intermittent Leave But Cannot Take It Due to the Nature of Their Jobs

Where the nature of an employee’s job makes it physically impossible to take intermittent leave (e.g., a pilot, flight attendant, train conductor, or a laboratory employee who cannot leave and reenter a sealed “clean room”), the employee “shall be permitted to return to work” if he or she is able to perform “other aspects of the work that are not physically impossible, such as administrative duties.”²¹

¹⁶ 2 C.C.R. § 11094(d).

¹⁷ 2 C.C.R. § 11087(d)(3).

¹⁸ 2 C.C.R. § 11087(e)(4)(B).

¹⁹ 2 C.C.R. § 11087(q).

²⁰ 2 C.C.R. § 11087(q)(1).

²¹ 2 C.C.R. § 11090(e)(3).

Reminder That Protected Leave Time May Extend Beyond 12 Weeks

The revised regulations now contain an explicit reminder that extended leaves may be required as reasonable accommodations for mental or physical disabilities.²²

What Employers Should Do Now

- Obtain and post the new [CFRA poster](#) or confirm that it is part of your current all-in-one poster (all-in-one posters that included the new Paid Sick Leave law likely include the new CFRA poster as well). This must be translated into any language spoken by at least 10 percent of the workforce.
- Start using the new Health Care Provider Certification Form (the text can be found on the last five pages of the [revised regulations](#)).
- Respond to requests for CFRA leave within five business days.
- If an employee requests intermittent CFRA leave, be prepared to provide it in as little as one-hour increments, if needed.
- If you decide to require the use of accrued vacation, PTO, and/or sick time during CFRA leaves, make this change to your written policy and distribute it to employees prior to implementation. (Note: You cannot require, but may permit, employees to use standalone sick time for CFRA leaves taken for a family member's serious health condition. Use of sick time may be required for a leave taken for an employee's own serious health condition.)
- Your next handbook or leave policy update should include a description of employees' CFRA rights and reflect any necessary changes to comply with the revised regulations.
- Identify who your key employees are and follow the specific notice requirements in the event that a key employee requests CFRA leave.
- Offer continued health insurance coverage for the entire time that an employee is on pregnancy disability leave and CFRA bonding leave.
- Determine whether you need to extend CFRA protections to additional employees:
 - Are there any isolated employees working in California who remotely report into a worksite where there are at least 50 employees within a 75-mile radius (even if that worksite is outside California)?

²² 2 C.C.R. § 11093(d) and (e).

- In a possible joint employment situation, are there employees being assigned by or reporting to a worksite where there are at least 50 employees within a 75-mile radius?
- Consult counsel prior to terminating the employment of an employee who is on an extended leave of absence beyond the expiration of CFRA leave.

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