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We hope that you will find the information in this guide helpful and informative.

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CHAPTER GUIDE

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Employee Leave Introduction

This Guidebook answers questions about basic issues relating to leaves of absence:

• Which employers must provide leave?
• Who is an eligible employee?
• What can leave be taken for?
• What information must employers and employees provide about leave?
• How long does leave last?
• What job or position does an employee have a right to return to from leave?

There are a number of overlapping federal and state statutes that potentially apply to any employee leave issue. In any particular case, one or more of these statutes might apply:

• The federal Americans With Disabilities Act (ADA)
• The federal Family and Medical Leave Act (FMLA)

• The California Moore-Brown-Roberti Family Rights Act (CFRA)
• The California Pregnancy Disability Leave Law (PDLL)
• The California Fair Employment and Housing Act (FEHA)
• The California Workers’ Compensation Statute (CWC)
• California Family Temporary Disability Insurance Leave (FTDI) (effective 1/1/04)

Generally speaking…

• the employer must consider all of the applicable statutes and provide the employee with the broadest or most generous protection that would apply to any particular leave benefit or employer obligation

• if the employer has policies that provide more generous benefits or protections for other types of leave, the employer must provide equal treatment for family and medical leave

• employers must allow an employee who was on covered leave to return to his or her same job (or under some statutes an equivalent job)

• employers are prohibited from interfering with or retaliating against an employee for exercising his or her leave rights

• employers should be very cautious before terminating or reassigning an employee who is on covered leave or is returning from such leave. If possible, an employer considering such action should seek the advice of an employment attorney
Which Statutes Apply to Which Employers?

Although the statutes contain specific definitions of who is a covered "employer," the following table provides a quick general guideline by size of employer:

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<sup>1</sup> Under the ADA, an "employer is (1) a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and (2) any agent of the employer." 42 U.S.C. § 12111(5)(A).

<sup>2</sup> Under the FMLA and CFRA, a private employer who employs 50 or more full or part-time employees within a 75-mile radius for each working day in each of any 20 or more calendar weeks in the current or preceding calendar year is a covered employer.

<sup>3</sup> The PDLL is part of the FEHA. Religious organizations that are non-profit are exempt under the FEHA.
Family and Medical Leave

Introduction

Family and medical leave is governed by the federal Family and Medical Leave Act (FMLA) and the California Moore-Brown-Roberti Family Rights Act (CFRA). With some important exceptions, CFRA and FMLA provisions are generally identical and the leave runs concurrently. One major exception is with respect to pregnancy and childbirth-related medical leave.

Where the two Acts differ, California employers must generally provide employees with the protections of the more generous Act. Since the CFRA usually provides broader protection, by following the CFRA, employers will generally fulfill their responsibilities under both Acts. Thus, this brochure goes into detail only about the CFRA, but discusses situations in which the FMLA might require additional protections.

Employers must tell their employees which type of leave they are receiving. Normally, unless it is pregnancy or childbirth-related medical leave, it will be both FMLA and CFRA leave as they run concurrently.

In a Nutshell…

For covered employers, the CFRA entitles eligible employees to take up to 12 weeks of accrued paid and unpaid leave in a 12-month period to care for their own serious health condition or that of a child, spouse or parent, or for the birth, adoption by or foster care placement of a child with the employee. CFRA guarantees eligible employees can keep their own job or a virtually identical job when they return from leave. An employer may not deny such leave or retaliate against an employee for taking such leave.

Who is a Covered Employer?

The CFRA applies to all California government employers and any non-government employer that directly employs 50 or more full- and part-time employees.1

Who is an Eligible Employee?

An employee is eligible for CFRA leave if he or she:

- has been employed by the employer for more than 12 months at any time prior to the start of leave;
- has at least 1,250 hours of actual hours worked for the employer in the 12-month period immediately prior to the start of leave; and
- works at a location where the employer has at least 50 employees within a 75-mile radius of that location.

1 An employer "directly employs" 50 or more people if the employer has at least 50 full- or part-time employees on its payroll during each day of any 20 or more calendar workweeks in the current or previous calendar year.
What is CFRA Leave For?

An eligible employee can take CFRA leave to attend to any of the following:

- the birth of a child, or the adoption by or foster care placement of a child with the employee (to bond with the child);
- the serious health condition\(^2\) of the employee's child, spouse, or parent;\(^3\)
- the employee's own serious health condition.

Under CFRA, pregnancy or childbirth-related medical conditions are not considered "serious health conditions." They are covered separately under the California Pregnancy Disability Leave Law, and leave for those conditions can be taken in addition to other family and medical leave. (Under the FMLA, pregnancy, childbirth, and related medical conditions are a "serious health condition" and such leave would be counted toward the 12 weeks of FMLA family and medical leave.)

How Much CFRA Leave Can An Employee Take?

CFRA entitles eligible employees to take up to 12 workweeks of leave in a 12-month period:

- the workweeks of leave are equivalent to an employee's normally scheduled workweeks, so an employee who normally works only half-time is entitled to the equivalent of 12 half-time weeks (e.g., 6 weeks of full-time leave or 12 weeks of half-time leave)
- the leave does not have to be taken all at once, but the employer may require that leave be taken in no smaller amounts than the payroll system uses to account for absences (for example, not less than an hour)
- however, leave for the birth, adoption or foster care placement of a child must not be taken in an amount less than 2 weeks at a time and must be completed within one year of when the event occurred (except that an employee may take less than 2 weeks up to 2 times during that year)
- only the amount of leave actually taken can count against the 12 weeks
- if an employee requests periodic leave or a reduced work schedule for foreseeable medical treatment for the serious health condition of the employee or immediate family member, the employer may temporarily transfer the employee to an available alternative position with equivalent pay and benefits if the employee is qualified and it better accommodates the leave schedule

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\(^2\) "Serious health condition" means an illness, injury (including on-the-job injuries), impairment, or physical or mental condition that involves either (a) inpatient care in a hospital, hospice, or residential health care facility, or (b) continuing treatment by a health care provider. A serious health condition requiring continuing treatment by a health care provider involves either (a) incapacity of more than three days that also requires at least one treatment by a health care provider and at least one additional treatment by or under the supervision of a health care provider, or (b) any period of incapacity or treatment for a chronic serious health condition such as asthma, diabetes, stroke, cancer, severe arthritis or allergies. Common ailments such as colds or flu do not qualify unless they have unusual complications.

\(^3\) In-laws are not considered to be a parent of the employee.
- the employer may not transfer an employee when the request is for leave related to birth, adoption or foster care placement

- if both parents are employed by the same employer, then leave for the birth, adoption or foster care placement of a child can be limited to 12 weeks total between them (but only for these purposes)\(^4\)

- the employer may choose among four methods to determine the 12-month period, but must give written notice of the method it uses, apply it uniformly to all employees, and must give at least 60-days written notice to change the method:
  i. the calendar year;
  ii. any fixed 12-month period, such as the fiscal year or the year starting from the employee's hire date;
  iii. 12 months measured forward from when the employee begins his or her first CFRA leave; or
  iv. 12-months "rolling backwards" measured from the date an employee starts any CFRA leave--i.e., measured each time he or she takes leave\(^5\)

What Benefits Must an Employer Provide to an Employee on Leave?

Generally, employers are subject to an "equal treatment" rule, which means that if they have a policy of providing benefits for other types of unpaid leave that is more generous than the CFRA requirement, they must give the same benefits to employees on CFRA leave.

An employer is not required to pay an employee during a CFRA leave unless the employee substitutes his or her accrued paid leave as allowed below:

- an employee may choose to use any accrued vacation time or other paid leave except sick leave; but…

- the employee may also choose to use paid sick leave if (a) the leave is for the employee's own serious health condition, or (b) the leave is for another reason and the employer agrees to the use of paid sick leave;

- an employer may require an employee to use any accrued paid leave other than sick leave; and

- if the leave is for the employee's own serious health condition, the employer may also require the employee to use accrued paid sick leave.

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4 The FMLA only allows aggregation if both spouses are employed by the same employer, but California does not allow for marital discrimination.

5 This method is most beneficial for the employer. For example, if an employee takes 4 weeks of leave in March 2003, 4 weeks of leave in August 2003, and 4 weeks of leave in December 2003, under the fixed calendar year method he or she could be eligible for another full 12 weeks of leave beginning in January 2004. Under the "rolling backwards" calendar method, the employee would not be eligible for any additional leave until March 2004 and then only for 4 weeks of leave (because each time the employee started leave, the employer would count backwards 12 months and include whatever leave had been taken in those prior 12 months). In August 2004 the employee would be eligible for another 4 weeks of leave, and so on.
If an employer provides group health benefits, then the employer must continue to cover the employee (and any covered family members) who is on CFRA leave as if he or she was not on leave.

• the total obligation for this coverage is 12 work weeks in a leave year unless the employer provides benefits for a longer period under other types of unpaid leave

• however, employees are entitled to resumption of their same benefits with no waiting periods or other requirements or restrictions when they return from leave

• if benefits have changed for the workforce as a whole, the employee is only entitled to the changed benefits

The employee is also entitled to participate in all other employee benefit plans but only to the same extent and under the same conditions as employees on other types of unpaid leave (or paid leave if the employee is using accrued paid leave).

Leave must not be counted as a break in service for purposes of vesting and eligibility for pension and other retirement plans, but does not need to be treated as credited service for purposes of benefit accrual, vesting and eligibility.

An employee is not entitled to accrue any additional benefits or seniority during unpaid leave, but benefits accrued at the time leave began (e.g., paid vacation, sick or personal leave to the extent not substituted for leave) must be available to an employee upon return from leave.

What Guarantee of Employment Must an Employer Provide?

An employer must provide an employee who is taking CFRA leave with a guarantee of employment in the same or comparable position upon the employee's return from leave and must provide the guarantee in writing if the employee requests it.

One exception to this general rule applies to "key employees." If the following factors apply, an employer may refuse to reinstate a key employee. The "key employee" exception factors are:

• the employee is salaried and is among the highest paid 10 percent of the employer's employees who are within the 75 mile radius of the worksite; and

• the refusal is necessary to prevent substantial and grievous economic injury to the operations of the employer.

A comparable position must be virtually identical to the employee's original position in terms of pay, benefits, status, perquisites and working conditions. It must involve the same or similar duties, responsibilities and authority at the same or close-by location as the position held prior to leave.

Another exception to reinstatement would occur if an employee would no longer be employed had he or she continued to work because the employee’s job was eliminated or because of some general action such as a layoff or reduction in force. This is because an employee on leave is not entitled to greater benefits than if he or she had not taken leave. However, an employer would be vulnerable to charges that the employer had retaliated against the employee for taking leave. For that reason, an employer considering terminating or not reinstating an employee on leave should first consult an attorney.
However, the employer must give the employee notice of the intent to refuse reinstatement at the time the employer determines it is necessary, and if the employee is already on leave, must provide the employee a reasonable opportunity to return to work following the notice, rather than remaining on leave.

What are the Employee’s and Employer’s Obligations Regarding a Leave Request?

Generally, an employee must give the employer at least verbal notice as soon as feasible after learning of the need for leave (normally within one or two business days) that provides enough information to make the employer aware that the employee may qualify for CFRA leave. The request must state the general reason for the leave as well as the expected start and length of the leave.

- an employee does not have to state that the leave is CFRA or FMLA-qualifying; it is the employer's responsibility to determine if the leave qualifies and to inquire further if necessary
- the employee does not have to state the specific medical condition or treatment causing the need for CFRA leave
- the employer must designate the leave as CFRA and/or FMLA leave
- if the need for leave is foreseeable, the employer may require 30 days advance notice
- where possible, the employee must make a reasonable effort to schedule any foreseeable leave so as to avoid disrupting the employer's operations (subject to the approval of any health care provider who is providing treatment)

The employer must inform employees in advance of any notice requirements or lose the right to enforce them.

The employer must respond to CFRA leave requests as soon as possible, but in no event later than 10 working days after receiving the request.

- however, if both FMLA and CFRA leave will be used, the employer must respond to the leave request under the more strict FMLA timeframe, which is within one to two business days unless there are special circumstances

May an Employer Require Medical Certification of the Need for Leave?

An employer may require an employee to support a request for medical leave with certification from the employee's health care provider. An employee must provide medical certification within 15 days of the employer’s request for certification unless that is not feasible despite the employee's good faith efforts. Thus, in some cases, the employee's leave may begin before the employer receives the requested medical certification.
The employer may not require that the certification identify the specific medical condition and may not require more than the following:

- for the employee's own serious health condition:
  
i. the date on which the employee's serious health condition started;
ii. the probable duration of the condition; and
iii. a statement that, due to the condition, the employee is unable to work at all or is unable to perform one or more of the essential functions of his or her job.

- for the serious health condition of the employee's spouse, child or parent:
  
i. the date on which the serious health condition started;
ii. an estimate of the amount of time that the health provider believes the employee needs to care for the family member; and
iii. a statement that the serious health condition warrants the participation of the employee to provide care during a period of treatment or supervision of the individual requiring care.

The employer can use the CFRA medical certification form that is reproduced at the back of this brochure, or can use its own form seeking the same information.

When the estimated time needed to care for the employee or family member has expired, the employer may require re-certification if more leave is needed.

For the employee's own serious health condition, if the employer has doubts about the certification provided by the employee, the employer may require the employee to obtain, at the employer's expense, a second opinion by a health care provider designated or approved by the employer; however, the health care provider must not be employed by the employer on a regular basis.

- if the second opinion differs from the first, the employer may require the employee to obtain, at the employer's expense, a third opinion from a health care provider designated or approved by both the employer and the employee
  
- the third opinion is considered binding on both the employer and employee

Under CFRA, the employer may not require second and third opinions regarding the serious health condition of an employee's family member.

As a condition of the return to work, an employer may require certification from the health care provider that the employee is able to resume work, but only if the employer does this for all employees on medical leave.

Employers must remember that a "serious health condition" under the CFRA may also qualify as a disability under the California FEHA or federal ADA, and employers are responsible for complying with restrictions under all of the applicable statutes regarding what types of inquiries can be made and protecting the confidentiality of employee medical records.
What Notice Regarding FMLA/CFRA Rights Must an Employer Provide to its Employees?

Employers must provide general notice to their employees of the right to request CFRA/FMLA leave and must post the notice in a conspicuous place or places where employees tend to congregate.

- employers can find this CFRA notice at the following website, http://www.dfeh.ca.gov/Publications/DFEH-100-21.pdf


- the CFRA and FMLA posters should satisfy the employer's posted notice requirements

If the workforce contains 10 percent or more employees who speak a language other than English as their primary language, the employer must translate the notice.

If an employer publishes a handbook describing other benefits and leave rights available to its employees, the employer must include information about CFRA/FMLA rights and obligations.

If an employer does not publish an employee handbook, the employer must provide a copy of the general notice to an employee at the time it also provides the employee with specific information about the employee's leave request.

An employer must also provide an employee with specific written notice about the employee's leave request detailing benefits and obligations of the leave.

- an example of such a notice for the FMLA can be found at the following website, http://www.dol.gov/esa/forms/whd/WH-381.pdf

- this example meets minimum requirements but employers are free to develop more generous policies and may develop their own notice

- when FMLA and CFRA leave will run concurrently, the employer should include that fact in the specific notice
The Americans With Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA)

The FEHA and ADA also provide for leave related to a qualifying disability.

• many employees who are eligible for leave under CFRA/FMLA will not meet the definition of disability under the FEHA or ADA
• however, if they do qualify, the employer may have to provide more leave than is required under CFRA/FMLA and also has other obligations toward the employee

Both the FEHA and ADA prohibit discrimination against individuals with disabilities, on account of their disabilities, who are otherwise qualified for their job.

• however, under the FEHA a disability qualifies if it simply limits a major life activity without considering corrective measures, whereas the ADA requires that a disability substantially limit a major life activity after considering corrective measures
• the FEHA applies to employers with 5 or more employees
• the ADA applies to employers with 15 or more employees

If an employer is covered by either the FEHA or ADA, and an employee has a disability that meets either statute’s definition of disability, then the employer must:

• provide reasonable accommodation where it will enable an otherwise qualified individual to perform the essential functions of his or her job,
• unless the provision of such accommodation would impose an undue hardship on the employer’s business

Unlike the CFRA, there are no set time limits, such as the 12 workweeks, that limit the employer’s obligation to provide leave; the only limit is determined by whether the leave would impose an undue hardship on the employer.

Therefore, in the context of medical leave:

• this means that, in the case of a disabled employee, reasonable accommodation may require an employer to provide more accrued paid or unpaid medical leave than the employer would otherwise be required to provide

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8 A “disability” is (1) a physical or mental impairment that limits (or substantially limits under the ADA) one or more of an individual’s major life activities (i.e., basic activities that the average person can perform with little or no difficulty such as caring for oneself, talking/seeing/speaking, manual tasks, working); (2) a documented history of such impairment even if no longer impaired; or (3) others’ perceptions that an individual has such an impairment. Conditions that clearly fall under this definition include physical, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, HIV infection, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction and alcoholism, but not current illegal drug use. Temporary, non-chronic conditions such as broken limbs or appendicitis are not disabilities. Pregnancy by itself is not a disability.

9 Undue hardship means the action would impose substantial cost or be unduly disruptive to the nature or operation of the business.
• similarly, reasonable accommodation may require an employer to allow the employee to have a modified or part-time work schedule on a more permanent basis than would be required under CFRA (if there is no other effective accommodation and it would not cause the employer undue hardship)
• but an employee who is provided with a part-time schedule as a reasonable accommodation is only entitled to the benefits, including health insurance, that other similarly-situated, non-disabled employees receive

Under the FEHA and ADA, when an employee requests leave as a reasonable accommodation, an employer can provide a different reasonable accommodation that would allow the employee to remain on the job if it would also meet the employee’s medical needs.

• however, if the employee also qualifies for leave under another statute such as the CFRA, the employer may not require the employee to remain on the job during that covered leave period

Inquiries and Medical Examinations:

An employer may only ask disability-related questions and/or require medical examinations if they are "job-related and consistent with business necessity," such as:

• when there is a need to determine whether an employee can perform the essential functions of his or her job
• when they are necessary to the reasonable accommodation process

All medical information obtained by the employer must be kept confidential and there are only narrow exceptions for disclosing specific, limited information to supervisors/managers, safety personnel, and workers' compensation related personnel.

Return to work:

An employee is entitled to the position held prior to the leave, if he or she is still qualified (even if the employee requires reasonable accommodation) and it would not have been an undue hardship to hold the position open. If the employer could not hold the position open because of undue hardship, the employer must consider reassigning the employee to a vacant and equivalent (in terms of pay, status, etc.) position if one is available or will become available in a reasonable amount of time.

If there are no reasonable accommodations that would allow the employee to remain in his or her current position, and there are no equivalent positions available or soon to be vacant, the employer may reassign the individual to a lower graded position and is not required to maintain the higher position's salary, unless the employer does that for other reassigned employees.
Introduction

As discussed above, this is a major area of difference between the CFRA and FMLA. Under the FMLA, pregnancy and childbirth-related medical conditions are considered "serious health conditions" and therefore are included in the 12 workweeks of leave that an employee is entitled to under family and medical leave.

However, these conditions are not included under the CFRA definition of a serious medical condition, but rather are covered under the California Pregnancy Disability Leave Law (PDLL). Pregnancy disability leave under the PDLL is a distinct entitlement from, and may be taken in addition to, the 12 workweeks of family care and medical leave available under the CFRA. Also, the PDLL covers smaller employers than the CFRA and does not have length of service or hours of work requirements. The rest of this section will describe what is required under the PDLL.

In a Nutshell…

A covered employer must provide up to four months disability leave for a woman who is disabled due to a pregnancy or childbirth-related medical condition in addition to the 12 workweeks that may be available to an employee under the CFRA. On the recommendation of an employee's health care provider, an employer may be required to temporarily transfer the employee (or in some cases may require the employee to transfer) to an alternative position with equivalent pay and benefits, or may be required to provide reasonable accommodation in her current job.

Who is a Covered Employer?

The PDLL applies to all California government employers and any non-government employer that directly employs five or more full- and part-time employees.10

Who is an Eligible Employee?

All employees who work for covered employers are eligible for PDLL pregnancy transfer and disability leave. There is no length of service or hours-worked requirement.

What is PDLL Leave For?

PDLL leave is available for an employee who is disabled by her pregnancy, childbirth, or related medical condition. This includes time off needed for prenatal care, severe morning sickness, doctor-ordered bed rest, childbirth, recovery from childbirth, and any related medical condition.11

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10 Not-for-profit religious organizations are not covered employers.

11 A "related medical condition" must be a medically recognized condition that is related to pregnancy or childbirth. Thus, for example, a diagnostic hysterectomy would not qualify for PDLL leave.
To qualify for PDLL leave, an employee must be "disabled by pregnancy," which means that in the opinion of the employee's health care provider, the employee's pregnancy or related medical condition has rendered her unable to work, 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.

To qualify for a PDLL job transfer or job duties modification, an employee need only be "affected by pregnancy," which means that her health care provider has certified that it is medically advisable for her to transfer.

**How Much PDLL Leave Can An Employee Take?**

An employer must provide up to four months PDLL leave, as needed, for the period(s) of time an employee is actually disabled by pregnancy.

- a "four month leave" means the equivalent of the number of days an employee would normally work in four months, based on an average of 22 days per month for a full-time employee (so, a half-time employee would generally be entitled to 44 full days of leave or 88 half-days of leave)
- FMLA leave runs concurrently with PDLL leave, but CFRA leave does not
- this means that a woman who is also eligible for CFRA leave can take up to four months of pregnancy disability leave and in addition can take up to 12 weeks of CFRA leave to bond with the baby or for another CFRA-qualifying event

However, if an employer provides more than four months of leave for other temporary disabilities (non-occupational disabilities), then the employer must provide the same leave to women who are disabled due to pregnancy or childbirth-related conditions.

An employer can count short, periodic absences toward the four months of leave unless the employer has a policy of not doing so for other temporary disabilities.

Only the amount of leave actually taken can count toward the four months.

**What Other PDLL Accommodation Must an Employer Make?**

At the request of an employee who "is affected by pregnancy," an employer must temporarily transfer the employee to an alternative job with equivalent pay and benefits if:

i. the employee's request is based on the certification of her health care provider that a transfer is medically advisable, and
ii. the transfer can be reasonably accommodated by the employer (the employer is not required to create a job, or discharge or transfer another employee, but can do so if it chooses)

If a woman's health care provider determines that it is medically advisable for her to take intermittent leave or have a reduced work schedule based on foreseeable planned medical treatment, then the employer may require the employee to temporarily transfer to an alternative position that better accommodates the schedule if it has equivalent pay and benefits.
• "transfer" may include temporarily altering an existing position to accommodate the employee's need

Employers are also required to provide reasonable accommodation upon the request of an employee when the request is based on the advice of her health care provider and related to her pregnancy or childbirth-related medical condition.

What Benefits Must an Employer Provide to an Employee on PDLL Leave?

Generally, employers are subject to an "equal treatment" rule, which means that if they have a policy of providing benefits for other types of non-occupational temporary disabilities that is more generous than the PDLL requirement, they must provide equal treatment to the PDLL-disabled employee.

An employer is not required to pay an employee during PDLL leave unless the employer has a policy of paying for other types of temporary disability leaves, in which case they must provide equal treatment to PDLL-disabled employees.12

An employer is generally not required to continue health insurance coverage for an employee on PDLL leave.

• however, the equal treatment rule applies here as well
• also, if the employee's leave is also covered under the FMLA, an employer who has group health coverage is required to provide coverage for up to 12 weeks of leave
• and, if an employee is covered by the FMLA or CFRA, the employer must provide the employee's benefits at the same level and without restrictions upon her return from leave

Similarly, an employee on PDLL leave is entitled to accrual of seniority and to participate in other benefit plans to the same extent and under the same conditions as would apply to other unpaid disability leaves. An employee may elect or an employer may require an employee to use any accrued sick leave during the otherwise unpaid portion of her PDLL leave.

An employee may also choose to use other types of accrued leave (but her employer may not require that she do so during the PDLL portion of her leave).

12 There is a partial exception to this rule for non-Title VII employers with 5-14 employees who need only pay pregnancy disabled employees up to 6 weeks of accrued paid leave for a "normal" pregnancy even if they provide longer paid leave for other disabilities. However, the Department of Fair Employment and Housing has taken the position that any pregnancy involving a disability of more than 6 weeks is not "normal," which effectively does away with this exception.
What Guarantee of Employment Must an Employer Provide?

An employer must provide an employee who is taking PDLL leave with a guarantee of employment in the same position upon the employee's return from leave or from transfer and must provide the guarantee in writing if the employee requests it.

- in this regard, the PDLL is more stringent than CFRA which allows an employer to reinstate an employee to a "comparable" position

- the reinstatement must occur either on an agreed-upon date, or within two days of the employee's notification to the employer that she is ready to return

However, if an employee takes CFRA leave after her PDLL leave to bond with her baby or for another CFRA-qualifying reason, then her reinstatement rights are governed by the CFRA.

If an employee disabled by pregnancy has taken a leave due to her pregnancy or related medical condition for longer than the four months provided by the PDLL, an employer must treat the employee in the same manner it treats any other similarly situated employee who has taken a similar length disability leave and who requests reinstatement.

What are the Employee's and Employer's Obligations Regarding a Leave Request?

An employee must provide at least verbal notice of her need for pregnancy disability leave or transfer and must notify the employer of the anticipated timing and duration of the leave or transfer.

If the need for leave or transfer is foreseeable, the employer must provide 30 days advance notice; otherwise the notice must be as soon as feasible.

Where possible, the employee must make a reasonable effort to schedule any foreseeable leave so as to avoid disrupting the employer's operations (subject to the approval of any health care provider who is providing treatment).

The employer must inform employees in advance of any notice requirements or lose the right to enforce them.

The employer must respond to a PDLL leave request as soon as possible, but in no event later than 10 working days after receiving the request.

- however, if both FMLA and PDLL leave will be used, the employer must respond to the leave request under the more strict FMLA time frame, which is within one to two business days unless there are special circumstances

---

13 The exceptions to this requirement are very limited.
Can an Employer Require Medical Certification of the Need for PDLL Leave?

The employer may require medical certification only if the employer requires such verification from other temporarily disabled employees.

The certification may not require more than the following:

i. the date on which the employee became disabled due to pregnancy or the date on which a transfer became medically advisable;

ii. the probable duration of the period(s) of disability or need to transfer; and

iii. a statement that, due to the disability, the employee is unable to perform one or more of the essential functions of her position without undue risk to herself, to the successful completion of her pregnancy, or to other persons, or that a transfer is medically advisable

Unlike the CFRA, employers may not require second and third medical opinions.

Similarly, the employer can require re-certification and "return-to-work" certification if the employer has a policy of requiring such certifications from employees on other types of temporary disability.

What Notice Regarding PDLL Rights Must an Employer Provide to its Employees?

The employer's notice requirements are the same as those described under CFRA leave. Notice must be provided by employers covered by the PDLL regardless of whether the employer is also covered by the CFRA or FMLA.

Relationship Between PDLL Leave and FMLA and CFRA Leaves

If the employer and employee are covered under both the PDLL and the FMLA, the employer can count up to the first 12 workweeks of the employee's leave toward both her PDLL leave and her available FMLA leave entitlement.

If, at the end of the first 12 workweeks of leave, the employee is still disabled by her pregnancy, she is entitled to up to 1 additional month of PDLL leave.

Finally, the employee, if eligible, may take up to an additional 12 workweeks of birth and bonding leave under her available CFRA leave entitlement after the baby is born.

Illustrations can be found in the back of this brochure.
Other Statutes That May Affect Employee Leave

California Workers’ Compensation (CWC)

The California workers’ compensation statute, Labor Code section 132a, prohibits employers from discriminating against employees who have work-related injuries or disabilities.

An employer may not discharge an employee because of the employee's absence from the job as a consequence of a work-related injury except for "business realities," and there are no set time limits on the amount of leave an employee can take for this purpose.

An employer may be required to assign an injured employee to "light-duty" or an alternative or modified position the employee is qualified to perform if the employer has such positions available and/or has allowed other employees this opportunity.

Employees on workers’ compensation leave receive disability benefits and medical coverage in accordance with the workers’ compensation law.

The CWC statute does not require an employer to retain or reinstate an employee who is no longer competent to perform his or her job or whose job is no longer available.

• however, because these issues are generally not clear-cut, before taking any adverse action against an employee as a result of a work-related injury, an employer should consult an attorney

If an occupational injury also qualifies as a "serious health condition" under CFRA/FMLA, then such leave can run concurrently to the extent the employee is eligible.

• for that period of concurrent leave, employers must follow the CFRA/FMLA where it provides greater protections

Likewise, if the injury rises to the level of a disability under the FEHA or ADA, covered employers must apply the provisions most favorable to the employee.
California Family Temporary Disability Insurance Leave (FTDI)  
(Effective 1/1/04, for leave beginning 7/1/04)  

After July 1, 2004, employees who take time off for (a) the birth of a child, or the adoption by or foster care placement of a child with the employee, (b) the serious health condition of the employee's child, spouse, domestic partner, or parent, or (c) the employee's own serious health condition may be entitled to payments from the State Disability Fund to partially offset wage loss.

Unlike the CFRA, FTDI applies to all employers, and there are no requirements that the employee have worked for a particular amount of time or number of hours.

Also unlike the CFRA, there is no guarantee of reinstatement for employees who take FTDI leave.

- but employers who terminate an employee on leave or soon after returning from leave could still be vulnerable to claims of wrongful discharge

- and if an employee is also covered by CFRA and/or FMLA, those protections apply

Eligible employees receive payments for up to six weeks in any 12-month period, financed by employee contributions at specified rates to the State Disability Fund.

- there is a one-week waiting period and medical certification requirements that may differ depending on the reason for the leave

- an employee is not eligible for FTDI benefits on any day that another family member is available to provide the required care

- an employer may require the employee to take up to two weeks of accrued paid vacation leave before receiving FTDI benefits

If employees are also eligible for CFRA and/or FMLA, the periods run concurrently and the protections of those statutes apply.
Some Basics on Military Leave

Generally speaking, if an employee leaves for military service, the employer must reemploy the employee when he or she returns. This is true whether the individual is called up by the military or volunteers. Employees returning from military service must be reemployed in the job that they would have attained had they not been absent for military service and with the same seniority, status and pay, as well as other rights and benefits determined by seniority.

An employee who meets the following five conditions must be reemployed:

1. The employee must hold a civilian job.

2. The employee must give written or verbal notice that he or she is entering military service.

3. The employee must not have exceeded the 5-year cumulative limit on periods of military service. When a person starts a new job with a new employer, he or she receives a fresh 5-year entitlement. However, there are exceptions that can lengthen the 5-year limit.

4. The employee must have been released from service under conditions other than dishonorable discharge.

5. The employee must report back to the civilian job in a timely manner or submit a timely application for reemployment. The "reporting back" requirement varies based on the length of service:

   a. For military service up to 30 consecutive days, the employee must report back to work for the first full regularly scheduled work period on the first full calendar day following service, plus an 8-hour period for rest.

   b. After a period of military service of 31-180 days, the employee must submit a written or verbal application for reemployment with the employer not later than 14 days after the completion of the period of service.

   c. After a period of military service of 181 days or more, the employee must submit an application for reemployment not later than 90 days after completion of the period of service.

If meeting these deadlines is impossible or unreasonable through no fault of the employee, he or she must submit the application as soon as possible. These deadlines can be extended up to two years to accommodate recovery from a service-related injury or illness. Employers may request documentation of service from employees.
If an employee meets these requirements, the employer must reemploy him or her in a reasonably prompt manner (generally days, not weeks).

**Reemployment and Retraining**

Reasonable efforts must be made to enable returning employees to refresh or upgrade their skills to enable them to qualify for reemployment. If refresh training is not successful, the employee must be reinstated in a position that most nearly approximates the position originally held. Employees who are disabled (temporarily or permanently) due to military service must also be accommodated in a position most nearly approximating the original position.

**Documentation**

Following a period of service of 31 days or more, an employer may request documentation that:

- the application for reemployment was timely
- the employee has not exceeded the cumulative 5-year limit, and
- the character of the employee's service was "honorable"

If this documentation is not readily available, or doesn't exist, the employer can't deny reemployment. However, if documentation later becomes available that shows the employee did not qualify for reemployment, the employer may terminate the employee immediately. Suggested forms of documentation include a DD-214, endorsed orders, or a letter from the employee's command.

**Health Benefits**

Employees returning from military service are entitled to immediate reinstatement of health insurance, including benefits for previously covered dependents, with no waiting period. Employers cannot exclude preexisting conditions, except conditions determined by the government to be connected to military service.

**Vacation Time**

For a period of military service, employees may use any personal vacation accrued with an employer. However, the employer cannot require an employee to use vacation time. If an employer generally allows employees to accrue vacation time while on unpaid leave, the employer should treat service members equally.

**National Guard: Exceptions & State Law**

The above federal regulations do not apply to state call-ups of the National Guard for disaster relief, local riots, or other non-military service. However, under California state law, members of the National Guard are entitled to up to 17 days of unpaid leave per year with full rights to return to their current job.

There are some exceptions to the above rules. For more information, visit: http://www.esgr.org/employers/thelaw.asp.

**If You Have a Problem**

Employers and employees who are unable to resolve disputes related to reemployment of a military service member should contact ESGR Ombudsmen Services at the following toll-free number: (800) 336-4590 (ask for Ombudsmen Services). For more information, visit: http://www.esgr.org.
FAIR EMPLOYMENT & HOUSING COMMISSION
CERTIFICATION OF HEALTH CARE PROVIDER
(California Family Rights Act of 1993 (CFRA))

1. Employee's Name: ____________________________

2. Patient's Name (If other than employee): ____________________________

______________________________________________________________________
3. Date medical condition or need for treatment commenced
   (NOTE: THE HEALTH CARE PROVIDER IS NOT TO DISCLOSE THE UNDERLYING DIAGNOSIS WITHOUT
   THE CONSENT OF THE PATIENT):
______________________________________________________________________

4. Probable duration of medical condition or need for treatment:
______________________________________________________________________

5. The attached sheet describes what is meant by a "serious health condition" under both the federal Family and Medical
   Leave Act (FMLA) and the California Family Rights Act (CFRA). Does the patient's condition qualify under any of
   the categories described? If so, please check the appropriate category.
   (1) (2) (3) (4) (5) (6)

6. If the certification is for the serious health condition of the employee, please answer the following:
   Yes  No
   □  □  Is employee able to perform work of any kind?
   (If "No", skip next question.)
   □  □  Is employee unable to perform any one or more of the essential functions of employee's position? (An-
   swer after reviewing statement from employer of essential functions of employee's position, or, if none
   provided, after discussing with employee.)

7. If the certification is for the care of the employee's family member, please answer the following:
   Yes  No
   □  □  Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety or
   transportation?
   □  □  After review of the employee's signed statement (See Item 10 below), does the condition warrant the
   participation of the employee? (This participation may include psychological comfort and/or arranging
   for third-party care for the family member.)

8. Estimate the period of time care needed or during which the employee's presence would be beneficial:
______________________________________________________________________

9. Please answer the following question only if the employee is asking for intermittent leave or a reduced work schedule.
   Yes  No
   □  □  Is it medically necessary for the employee to be off work on an intermittent basis or to work less than
   the employee's normal work schedule in order to deal with the serious health condition of the employee
   or family member?
   □  □  If the answer to 9. is yes, please indicate the estimated number of doctor's visits, and/or estimated du-
   ration of medical treatment, either by the health care practitioner or another provider of health services,
   upon referral from the health care provider: ____________________________
ITEM 10 IS TO BE COMPLETED BY THE EMPLOYEE NEEDING FAMILY LEAVE.  
***TO BE PROVIDED TO THE HEALTH CARE PROVIDER UNDER SEPARATE COVER.***

10. When family care leave is needed to care for a seriously-ill family member, the employee shall state the care he or she will provide and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced work schedule:

__________________________________________________________________________

__________________________________________________________________________

11. Signature of health care provider:

Date:

12. Signature of Employee:

Date:

A "Serious Health Condition" means an illness, injury, impairment, or physical or mental condition that involves one of the following:

1. Hospital Care
   Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care.

2. Absence Plus Treatment
   (a) A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:
      
   (1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or
   
   (2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

3. Pregnancy  [NOTE: An employee's own incapacity due to pregnancy is covered as a serious health condition under FMLA but not under CFRA.]

   Any period of incapacity due to pregnancy, or for prenatal care.

4. Chronic Conditions Requiring Treatment
   A chronic condition which:
      
   (1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;
   
   (2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and
   
   (3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

5. Permanent/Long-term Conditions Requiring Supervision
   A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions)
   Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.) severe arthritis (physical therapy), kidney disease (dialysis).
Examples of Relationship Between PDLL and FMLA/CFRA Leave

Normal Situation I

Normal Situation II

Atypical Situation

Failure to Designate
<table>
<thead>
<tr>
<th>Covered Employee</th>
<th>FMLA</th>
<th>CFRA</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>&gt; 50 employees</td>
<td>Same (including outside California)</td>
</tr>
<tr>
<td>Eligible Employee</td>
<td>&gt; 1 year &amp; &gt; 1,250 hours</td>
<td>Same</td>
</tr>
<tr>
<td>Amount of Leave</td>
<td>12 weeks in 12 months</td>
<td>Same</td>
</tr>
<tr>
<td>Reasons</td>
<td>Birth, Adoption, “Serious health condition” child/parent/spouse, “Serious health condition” of employee</td>
<td>Same (except for pregnancy)</td>
</tr>
<tr>
<td>Pay &amp; Benefits</td>
<td>Pay not required, Health insurance continues as if working</td>
<td>Same</td>
</tr>
<tr>
<td>Designation of Leave</td>
<td>Up to employer</td>
<td>Same</td>
</tr>
<tr>
<td>Substitution of Vacation &amp; Sick Leave</td>
<td>Employer or employee option</td>
<td>Same, except for birth, adoption &amp; family care—employee may use sick leave only on mutual agreement</td>
</tr>
<tr>
<td>Measuring Period</td>
<td>Options: Calendar year, Other fixed year, 12 months forward, 12 month rolling back</td>
<td>Same</td>
</tr>
<tr>
<td>Covered Employee</td>
<td>PDLL</td>
<td>FMLA/CFRA</td>
</tr>
<tr>
<td>------------------</td>
<td>------</td>
<td>-----------</td>
</tr>
<tr>
<td></td>
<td>≥ 5 employees</td>
<td>≥ 50 Employees</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(including outside California)</td>
</tr>
<tr>
<td>Eligible Employee</td>
<td>No waiting period or hours</td>
<td>≥ 1 year &amp; ≥ 1,250 hours</td>
</tr>
<tr>
<td>Pregnancy Covered</td>
<td>Yes</td>
<td>FMLA: Yes</td>
</tr>
<tr>
<td></td>
<td></td>
<td>CFRA: No</td>
</tr>
<tr>
<td>Length</td>
<td>Up to 4 months (88 workdays)</td>
<td>12 weeks but FMLA runs concurrently, CFRA can run consecutively</td>
</tr>
<tr>
<td>Pay &amp; Benefits</td>
<td>Pay not required (unless paid for other leaves)</td>
<td>Pay not required</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Health insurance continues as if working</td>
</tr>
<tr>
<td>Substitution of Vacation &amp; Sick Leave</td>
<td>Employee option (employer can require employee to use sick leave)</td>
<td>Employer or employee option</td>
</tr>
<tr>
<td>Reinstatement</td>
<td>Same position; similar position if same no longer exists or business necessity</td>
<td>Same or similar position unless “key employee” invoked</td>
</tr>
<tr>
<td>Covered Employee</td>
<td>FMLA</td>
<td>ADA (and FEHA)</td>
</tr>
<tr>
<td>------------------</td>
<td>------</td>
<td>----------------</td>
</tr>
<tr>
<td></td>
<td>≥ 50 employees</td>
<td>ADA: 15 employees (FEHA: 5 employees)</td>
</tr>
<tr>
<td>Eligible Employee</td>
<td>≥ 1 year &amp; ≥ 1,250 employees</td>
<td>All</td>
</tr>
<tr>
<td>Operative Definition</td>
<td>“Serious health condition”</td>
<td>“Qualified individual with disability”</td>
</tr>
<tr>
<td>Duration of Leave</td>
<td>12 weeks in 12 months</td>
<td>Indefinite: reasonable accommodation</td>
</tr>
<tr>
<td>Essential Functions</td>
<td>Unable to perform one or more essential functions</td>
<td>With or without accommodation must be able to perform all essential functions</td>
</tr>
<tr>
<td>Light Duty</td>
<td>May not require</td>
<td>May constitute a reasonable accommodation</td>
</tr>
<tr>
<td>Examples: Basic Broken Leg</td>
<td>Yes</td>
<td>No, absent lingering complications</td>
</tr>
<tr>
<td>Blindness, Deafness</td>
<td>Generally, no (except for related treatment)</td>
<td>Yes</td>
</tr>
<tr>
<td>Allergies, colds, etc.</td>
<td>No, unless 3 days or more &amp; doctor’s treatment</td>
<td>Generally, no</td>
</tr>
<tr>
<td>Treatment for chronic conditions (e.g., chemotherapy, dialysis)</td>
<td>Yes</td>
<td>Yes, if constitutes reasonable accommodation</td>
</tr>
</tbody>
</table>