

## Managing Employee Leaves

Presented by  
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## The Major Points

- When an employee can't work because of medical reasons, a California **leave law** may **protect** the employee.
- In some situations, the company should offer “**extra**” **time off**.
- Updated **medical documentation** and continuous written **communication** is essential.
- Terminations during a leave, or close in time to a leave, are **risky** absent good evidence of a legitimate reason.




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## Sick Pay

### Key Points:

- California and local laws mandate it
- California special rate of pay (“regular rate”)
- Specify how to call off – can require employees to comply with reasonable rules
- Medical notes probably not feasible
- Use of accrued sick pay is **protected / no retaliation**
- Discipline for **proven** abuse of sick pay is permissible




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## Common Leaves: FMLA and CFRA



### FMLA and CFRA Cover:

- Employed 12 months / 1250 hours
- FMLA: 50 or more employees / 75 miles
- CFRA: 5 or more employees anywhere

### Leaves for:

- Employee or family member serious health condition
- Baby bonding time
- Military reasons

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## FMLA/CFRA

### Employer Notice Requirements

Within **5 business days** of receipt of an FMLA leave request or of becoming aware that an employee's absence may qualify for FMLA leave, employer must give the employee an "eligibility" notice and a "rights and responsibilities" notice.




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## FMLA/CFRA

### Medical Certification

- When an employee requests FMLA leave, the employer may require certification from a health care provider.
- The employer must give the employee at least **15 calendar days** to obtain the required medical certification.




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**FMLA/CFRA****Certification Not Returned or Incomplete/Insufficient?**

- Written notice to employee with 7 days to cure.
- Longer if reasonable under circumstances.
- May deny leave if fail to comply.




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**FMLA/CFRA****Contacting Health Care Providers**

- Employer **may not** contact health care provider if employee submits a **complete and sufficient certification** signed by the health care provider.
- Can seek certain kinds of clarification when certification defective / employee given notice.




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**FMLA/CFRA****Designation Notice**

Provide written designation notice to the employee within **5 business days** of having enough information to determine whether the leave is FMLA-qualifying.




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## FMLA

### Amount of Leave

- Up to 12 weeks per "year."
- Need not be used all at once.




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## California Pregnancy Disability Leave

- No waiting time for eligibility
- Up to 4 months of leave for medically certified disability related to pregnancy or child birth.
  - *But:* additional time may be required as ADA/FEHA disability reasonable accommodation.
- Employer may request medical certification
- State provides a sample form
- No second opinion option (contrast to FMLA)




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## California Pregnancy Disability Leave

### PDL also includes:

- Intermittent leave
- Temporary transfer if advised by doctor
- Other workplace accommodation




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### California Pregnancy Disability Leave

#### Paid time off:

- PTO optional right to use (can't require)
  - CrowdStrike FTA not available for PDL
- Sick – non-exempt employees may use

#### Benefits:

- Maintain during leave period, employee contributes regular premium amount.




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### California Pregnancy Disability Leave

#### Reinstatement rights:

- After expiration of pregnancy disability leave, the employee is entitled to reinstatement to the same position at work.
- Reinstatement on previously agreed date, or within 2 days of notice.




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### CFRA + PDL

- PDL used for period of medical disability, and CFRA available for up to 12 weeks of baby bonding leave.
- CFRA begins after medical disability ends.




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## Rights During Pregnancy

### Initial discussion – handling with care

- Wait for employee notice (usually)
- Give DFEH fact sheet: [https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/12/Pregnancy-Disability-Leave-Fact-Sheet\\_ENG.pdf](https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2020/12/Pregnancy-Disability-Leave-Fact-Sheet_ENG.pdf)
- Positive, encouraging remarks
- Train supervisors to refer to HR

### Leave planning

- Refer to handbook
- Discuss leave options, intermittent leave, and reassignment options; reinstatement guarantee
- Acceptable to initiate planning discussions
- Employee choice
- Planning the use of the PDL 4 mo. “bank”




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## Pop Quiz

PDL can be taken for care of newborn.

**FALSE**

PDL eligibility ends once the child is born.

**FALSE**

PDL can be taken if the woman is unable to perform her job functions without undue risk to herself.

**TRUE**

PDL can be taken for prenatal care.

**TRUE**

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## Common Leaves: ADA Disability

### First Steps:

- Employee requests (or takes) time off
- Medical certification of job limitations using job description
- Length of leave needed




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### Leaves of Absence Under Disability Laws

#### Next Steps:

#### Is Leave A Reasonable Accommodation?

- Leaves of absence **may** be a form of reasonable accommodation
- Providing leave is **one of several possibilities** when considering appropriate accommodation for a disabled employee

#### Consider alternative such as:

- ☐ Job restructuring
- ☐ Part-time or modified work
- ☐ Reassignment to a vacant position

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### Leaves of Absence Under Disability Laws

#### Alternatives to Leave:

- Employer may offer accommodation at work and require employee stay on the job / decline leave
- Alternate accommodation must eliminate need for leave
- Limitation: no interference with medical care
- Restoration of duties upon recovery

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### Common Reasons For Disability Leave

- ✓ Obtaining medical treatment (surgery, psychotherapy, substance abuse treatment, dialysis . . .)
- ✓ Rehabilitation services
- ✓ Physical or occupational therapy
- ✓ Treatment for depression
- ✓ Treatment for alcoholism
- ✓ Recuperating from an illness or an episodic manifestation of the disability

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### Length of Leave

- Whatever is “reasonable”
- And, not an “undue hardship”
- Indefinite/ prolonged leave not reasonable
- Leave not required if futile




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### Extending Leave Time

- Communicate with employee verbally and in writing
- Request updated medical certification
- Evaluate “reasonable accommodation” and “undue hardship”

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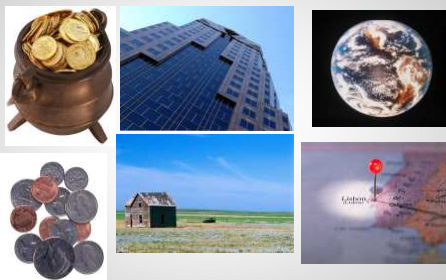
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### “Undue Hardship” Defense




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### Paid/Unpaid Leave

- Exhaust accrued paid leave first, and then provide unpaid leave
- Example from Federal Guidelines:
  - If employees get 10 days of paid leave, and an employee with a disability needs 15 days of leave, the employer should allow the individual to use 10 days of paid leave and 5 days of unpaid leave




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### Rights Upon Return from Leave

*Does an employer have to hold open and employee's job as reasonable accommodation?*

- Yes, according to Federal guidelines
- Return to Same Position
- Undue Hardship Exception
- Vacant Position Alternative

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### Common Leaves: Workers' Compensation

#### Common scenario:

- Employee claims a workplace injury.
- Medical doctor determines employee is temporarily totally disabled and cannot work.
- Leave goes on and on...




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## Workers Compensation

- California Labor Code § 132a prohibits discrimination against any employee who incurs work-related injuries
- Requires:
  - An employer to provide leaves of absence to an occupationally injured employee;
  - Reinstatement of the employee upon recovery from injury.




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## Workers Compensation



- Return to Light Duty
  - Cuts off temporary disability benefits
  - Requires employer to accommodate and pay employee
  - Design a *temporary* light duty program, not permanent light duty
  - Consider limiting to industrial injuries

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## Workers Compensation

### Best practices:

- **Extend** leave (unpaid if no PTO) during temporary total disability
- **Monitor** medical status, obtain documentation, regularly update
- Consider **light duty**
- Continue unpaid leave **until permanent and stationary**
- If unable to return, replace if business justification
- Inform employee that should he request reinstatement, company will evaluate its needs at that time.

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## California Family Temporary Disability Insurance (FTDI)

### What is "Paid Family Leave"?

A California EDD welfare payment available for employees taking certain types of leaves of absence.

#### Characteristics:

- Administered by EDD, not employer
- Employee applies to EDD
- Paid for by payroll taxes
- Does not grant "protected time off" or "reinstatement rights"




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## What are qualifying events?



### Caring for a newborn or newly placed child

- Employees can take leave when they or their spouse or registered domestic partner gives birth to a child or when a foster or adopted child is placed with the employee or his or her domestic partner.

### Caring for a family member with a serious health condition

- An employee can take leave to care for a child, spouse, registered domestic partner or parent's serious health condition.
- Minor illnesses (flu, headache, common cold, etc) do not qualify.

### Military

- Military Deployment events

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## EDD Paid Family Leave

### Not employee's own condition

- PFL is for care of *other* family members
- Employee may apply for EDD disability benefits for his/her *own* condition




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### EDD Paid Family Leave

#### Benefits:

- Employees can receive up to 60-70% of the employee's wages for a period up to 8 weeks in any 12-month period
- Up to a maximum of \$1,357/week in 2022




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### Employer Notice Obligations

#### EDD Form DE 2511 Must Be Given To:

- Each newly hired employee
- Each employee leaving work to care for a seriously ill family member, registered domestic partner, or child of a domestic partner, or to bond with a new child
- Download it from EDD:  
[http://www.edd.ca.gov/pdf\\_pub\\_ctr/de2511i.pdf](http://www.edd.ca.gov/pdf_pub_ctr/de2511i.pdf)

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### Employer Issues

- May require employee to use up to 2 weeks of PTO prior to receipt of benefits.
- No express right to a leave of absence or reinstatement. Follow company policy.

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### Other Leaves of Absence

- Military Duty
- Jury Duty
- Trial Witness
- Voting Time
- Domestic Violence / Crime Victims




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### Other Leaves of Absence

#### Unique in CA:

- Organ/marrow donor
- Bereavement
- Volunteer first responders
- School activities
- Alcohol/drug rehab
- Literacy education
- Civil air patrol




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### General Leave Policies and Strategy

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### General Leave Policies

- Prepare a general written policy
- If no legal mandate, give complete employer discretion
- Address FMLA/CFRA, Pregnancy
- Recommended: other leave laws too
- Right to timely medical certification and recertification
- Require maximum advance notice
- Require use of PTO
- Require regular updates, expected return date
- Reserve right to refuse or delay

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### Prepare Job Descriptions

- Define the job's essential functions
- Provide job description must be provided to health care provider
- Use for reasonable accommodation analysis if "disability."




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### Contents of employee leave request

- Request forms are useful to document the fact that a leave is requested
- Disclose reason (e.g. medical, parental, military, etc.)
- Start date/duration/return date




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### Medical Certifications

- Employer is entitled to verify employee's need for leave.
- Employer should notify employee in writing each time a certification will be required.
- At the time the employer requests certification, it should also advise employee of anticipated consequences of not providing it or inadequate certification.

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### What medical information should be required?

#### Medical certification

Contents include:

- Date which temporary disability began;
- Likelihood of length of disability; and
- Statement regarding the employee's physical condition and functional limitations.
  - Only if such certifications are required for other employees with other types of disabilities seeking leaves.
- "Health care provider" can include nurse (or mid-wife).

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### Retaliation / Discrimination

- Retaliation for requesting the leave
- Retaliation for taking the leave
- Discrimination on account of underlying protected class
- Discrimination – disparate treatment of protected class compared to other employees

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## Termination Strategies

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## Leave-Related Misconduct or Issues

- Failure to certify
- False reason
- Failure to report status
- Exceeding time limit
  - FMLA/CFRA – 12 weeks
  - ADA, Workers Comp. – indefinite
  - USERRA – 5 years cumulative
  - Company policy
- Failure to provide fitness for duty
- Inability to perform




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## For Job Performance/Misconduct (Before, during or after the leave)

- Clear policies
- Consistency
- Warnings
- Immediate cause/effect
- Create a record of performance /other problems
- The problem of discovered skeletons in closet




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### General Considerations

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### General Considerations

- Document *everything*
  - Letters, notices, posters
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  - Memorialize conversations
  - Confirming letters
  - Medical
  - Follow up/warning letters




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### General Considerations

- Give benefit of doubt
- Second chances, if consistently offered, often boost legal defenses
- Always look for alternatives to termination, if consistent with business realities
- Clear, updated policies
- Supervisor training




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## Resources – email me for these:

### Government Resources:

- PDL notice
- EDD Paid Family Leave

### More Resources:

- Leaves of Absence Chart
- Policy drafts for our clients
- Our Firm's Complimentary Email Employment Law Newsletter

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## Questions?

Thank you!

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