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Blog Post

Family Medical Leave Compliance — A New Years' Resolution You Should Keep

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Given the rapidly spreading omicron variant, employers with as few as five employees are well advised to refresh themselves on their obligations under the Family Medical Leave Act (FMLA) and its California counterpart, the California Family Rights Act (CFRA). Generally, FMLA and CFRA provide 12 weeks of job-protected leave during a 12-month period. Private employers are covered under FMLA if they have employed 50 or more individuals in any 20 workweeks in the current or preceding calendar year. As of January 1, 2021, employers are covered under CFRA if they employ as few as five or more persons.

An employee is eligible for leave under FMLA and CFRA if the employee is:

- Employed for at least 12 months;
- Employed for at least 1,250 hours of service during the 12-month period immediately preceding commencement of the leave; and,
- Under FMLA only, employed at a worksite where the employer employs at least 50 employees within 75 miles. CFRA does not contain the "50 employees within 75 miles" requirement.

Broadly, employees are entitled to protected leave under CFRA and FMLA for:

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- Their own serious health condition (unless the disability is due to pregnancy, childbirth, or a related medical condition, in which case the leave is only covered under FMLA);
- To care for a covered family member with a serious health condition;
- Baby bonding time; and,
- A qualifying exigency related to the covered active duty or call to covered active duty of the employee's spouse, domestic partner, child, or parent in the U.S. armed forces. (FMLA does not include domestic partners within the definition of "qualifying exigency" family medical leave.)

Interaction with State and Federal Disability Discrimination Laws

After an employee has taken protected leave under FMLA or CFRA, that employee is entitled to return to their job or an equivalent job, subject to very limited exceptions. Commonly, an employee requests continued leave as an alternative to reinstatement after protected leave has expired. Employers should exercise extreme caution at this critical junction to prevent litigation.

When an employee has exhausted protected leave under FMLA and CFRA, the employee may still be protected by the Americans with Disability Act (ADA) and Fair Employment and Housing Act (FEHA). The ADA is a federal civil rights law that applies to employers with 15 or more employees, while the California civil rights law, FEHA, applies to employers of five or more.

Where a disabled employee has exhausted protected medical leave and requests continued unpaid leave, the employer must grant that request if it is reasonable and doing so does not create an undue hardship. An employer should engage in an interactive process in this situation. Keep in mind that neither FEHA nor the ADA require employers to accommodate disabled employees by granting

indefinite or unlimited leave. However, employers face an uphill battle proving a requested leave was "indefinite." A leave request is not necessarily "indefinite" merely because an approximate return date is provided, for example. Moreover, terminations after lengthy leaves of absence are often hotly contested (and litigated) and must be analyzed carefully.

COVID-19 as a Serious Health Condition and Disability

COVID-19 can qualify as "a serious health condition" sufficient to trigger CFRA and FMLA protection when it meets the definition under applicable statutes. The California Department of Fair Employment and Housing (DFEH) has expressly deemed COVID-19 a serious health condition under CFRA "if it results in inpatient care or continuing treatment or supervision by a health care provider" or "if it leads to conditions such as pneumonia." COVID-19 may qualify as a serious health condition under FMLA if the employee has received inpatient care in a hospital or continuing treatment by a healthcare provider, as defined by the FMLA regulations. An employer must conduct an individualized assessment in each case based on upon the applicable standards.

A separate analysis is needed to determine whether COVID-19 qualifies as a disability under ADA and FEHA should the individual require accommodations upon return from CFRA and FMLA leave.

The ADA limits its coverage to physical and mental conditions that "substantially limit" a major life activity (such as working, walking, and sleeping). The EEOC recently provided lengthy guidance as to when an individual with COVID-19 will be "disabled" within the meaning of the ADA, and emphasized that an individual assessment is required in each circumstance given the considerable variety in symptoms and severity. The EEOC guidelines clarify

that COVID-19 limitations do not need to be long-term to be "substantially limiting" though, consistent with the ADA, "[i]mpairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe."

The FEHA defines a disability more broadly, as it only needs to "limit" a major life activity, as opposed to "substantially limit" under the ADA. Under FEHA, "mild" conditions such as the "common cold; seasonal or common influenza" (and, theoretically, COVID) are not disabilities under FEHA if they do not have residual effects and do not limit a major life activity. Because the impact of COVID-19 ranges from none to severe, each COVID-19 case needs to be assessed individually.

Best Practices

- **Consult Counsel Before Denying a Request for Continued Leave.** Disputes can arise when employers terminate employees after the expiration of FMLA and CFRA leave. Please pay close attention to employee requests upon their return from leave. Consult counsel prior to terminating an employee whose requested leave or accommodation you deem to be an undue hardship.
- **Get Those Papers in Order.** Employers must provide specific notices to employees within five business days of the employees' request for family medical leave, or the employer acquiring knowledge that the employee may require protected leave. These deadlines are easy to miss. Stay on alert.
- **Train Management.** No magic words trigger the obligation of employers to provide leave or engage in the interactive process. Employers must train management to recognize when employees have disclosed a potential disability or have requested disability accommodation. Money and time spent preparing management to recognize protected requests will pay dividends in preventing litigation.

If you have questions regarding leave issues, please contact your Akerman attorney.
