BCLP. Client Intelligent

BCLPatWork.com

NEW CALIFORNIA FAMILY RIGHTS ACT DRAMATICALLY EXPANDS EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS

Nov 20, 2020

On September 17, 2020, California Governor Gavin Newsom signed Senate Bill (SB) 1383, which repealed the current California Family Rights Act (CFRA), eliminated the California New Parent Leave Act, and replaced those statutes with a new CFRA, codified in California Government Code Section 12945.2, *et seq*. Effective January 1, 2021, CFRA will cover employers with as few as five employees and expand the reasons for which CFRA leave may be used, among several other changes. Important aspects of the new law, as well as key considerations for employers to consider in developing compliance plans, are set forth below.

Expanded to Cover Smaller Employers

Currently, CFRA (modeled largely after the federal Family and Medical Leave Act (FMLA)) applies to private employers with 50 or more employees and public employers of any size. The new CFRA lowers the employee threshold and applies to private employers with five or more employees.

Therefore, CFRA will now apply to much smaller employers. Many smaller employers likely never had to comply with FMLA or CFRA, so there may be a steep learning curve between now and January 1, 2021.

Expanded to Cover More Employees: 75-Mile-Radius Eligibility Requirement Eliminated

To be eligible for leave under the current CFRA, employees must (1) have more than 12 months of service with the employer; (2) have at least 1,250 hours of service with the company during the previous 12-month period; and (3) work for an employer with at least 50 employees in a 75-mile radius. These three requirements mirror the FMLA's eligibility requirements.

The newly amended CFRA eliminates the third requirement. Therefore, under the new CFRA, employees who work for a covered employer with five or more employees (or public employer of any size) will be eligible for the leave if they meet the 12-month length of service and 1,250 hours of credit eligibility requirements.

Expanded to Cover Additional Family Members

Currently, CFRA allows up to 12 weeks of leave to be taken to care for the employee's: (1) parent; (2) child; (3) spouse; or (4) registered domestic partner with a serious health condition. Under the current CFRA, a child must be under 18 years of age or an adult dependent child.

Under the newly amended CFRA, an employee may also use CFRA leave to care for the employee's: (5) grandparent; (6) grandchild; and (7) sibling with a serious health condition. SB 1383 also expands the definition of "child" to cover children of a domestic partner and all adult children, regardless of whether they are dependent children.

SB 1383 also creates a unique dilemma for employers who are covered under both the CFRA and the FMLA. Generally, leave under CFRA and FMLA runs concurrently, meaning an employee is generally only eligible for a total of 12 weeks of unpaid leave under both laws. However, because SB 1383 now expands the definition of "family member" under the CFRA in a manner inconsistent with the definition under the FMLA, these two laws no longer mirror each other. This creates a stacking problem in which an employee is eligible for 12 weeks of leave under the CFRA and eligible for an additional 12 weeks of leave under the FMLA.

For example, an employee working for an employer with 50 or more employees is eligible take up to 12 weeks of CFRA leave to care for a brother with a serious health condition. However, because siblings are not covered under the FMLA, that same employee is potentially still eligible to take 12 weeks of leave under the FMLA for a child, parent, or spouse. Under this example, an employer could be faced with providing up to 24 weeks of leave to such an employee.

Qualifying Exigency is now a Basis for CFRA Leave

Unlike the FMLA, a qualifying military exigency is not a basis for leave under the current CFRA. However, the new CFRA permits an eligible employee to take up to 12 weeks of leave for a qualifying exigency related to active duty or a call to duty of an employee's spouse, registered domestic partner, child, or parent in the U.S. armed forces.

Key Employee Exception Eliminated

Under the current CFRA and the FMLA, employers may refuse to reinstate "key employees" who are among the highest 10% of paid individuals employed within 75 miles of the employee's worksite, if the denial is necessary to prevent substantial and grievous economic injury to the company's operations. The amended CFRA eliminates this exception.

Bonding Leave for Parents Not Combined

Under the current CFRA, parents who are employed by the same employer may be limited to taking a combined total of 12 weeks of leave to bond with their new child. SB 1383 eliminates this restraint. Under the new CFRA, even if both parents work for the same employer, each parent may request up

to 12 weeks of leave to bond with a new child, as long as the parent meets the CFRA eligibility requirements. The parents could also request leave for the same period.

New Pilot Mediation Program

Assembly Bill (AB) 1867 establishes a new "small employer family leave mediation program" for businesses with between five and 19 employees. The pilot program will be in effect until January 1, 2024. AB 1867 outlines that within 30 days of receiving a right-to-sue notice from the California Department of Fair Employment and Housing (DFEH) alleging a CFRA violation, either the employer or the employee may ask all parties to participate in the DFEH's dispute resolution division. In the event either party requests mediation, the employee cannot pursue any civil action until the mediation is complete. The employee may proceed to file in court if the parties do not resolve the matter at mediation.

What to do Next?

Employers of all sizes should quickly become familiarized with the newly expanded CFRA and update relevant policies, procedures, and forms before January 1, 2021. Please contact us to discuss any necessary changes to existing policies or to create new, compliant policies.

RELATED PRACTICE AREAS

- Employment & Labor

MEET THE TEAM

Allison Eckstrom

Irvine

allison.eckstrom@bclplaw.com
+1 949 223 7173

Christopher J. Archibald

Kansas City / Irvine

christopher.archibald@bclplaw.com
+1 949 223 7341
