



# \*2024 EMPLOYMENT LAW Conference

Off to work we go!

## 2024 UPDATE CALIFORNIA'S MYRIAD OF COMPLEX LEAVE LAWS





# *Welcome*

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# PRESENTATION OVERVIEW



# OVERVIEW

- ❖ Paid Sick Leave.
- ❖ Bereavement Leave.
- ❖ Reproductive Loss Leave.
- ❖ Family and Medical Leave (FMLA/CFRA): In General.
- ❖ Family and Medical Leave (FMLA/CFRA): Required Notices and Forms.
- ❖ Family and Medical Leave : Obtaining And Authenticating Medical Certifications.
- ❖ Crossover Obligations Between FMLA/CFRA & the Fair Employment and Housing Act (FEHA)/ADA.
- ❖ Pregnancy Disability Leave (PDL).
- ❖ Best Practices for Managing Extended Medical Leave
- ❖ FMLA Cases
- ❖ Key Mistakes in Managing Leaves of Absence
- ❖ Conclusion

# RISK

- ❖ If leave is not managed properly, it can pose significant risk for an employer, including claims for disability discrimination, interference with an employee's family and medical leave rights, wrongful termination, and even wage and hour claims.





# **SB 616**

## **PAID SICK LEAVE (PSL)**



# PAID SICK LEAVE-KEY PROVISIONS

- ❖ California law now requires that all employees are provided 5 days (40 hours) of unpaid paid sick leave, every 12 months. Note: An employer must allow an employee **to use at least five days or 40 hours**, whichever is more. Therefore, for example, if an employee works 10-hour days, the employee will be entitled to use at a minimum 50 hours of paid sick leave.
- ❖ Accrued at the rate of one hour for every 30 worked (or can be provided up front -“front-loaded” so no accrual).
- ❖ Must accrue from date of hire.
- ❖ Employers that use an alternative accrual method must ensure employees accrue 24 hours by the 120th day of the accrual year, and 40 hours by the 200th day of the accrual year.
- ❖ An employer can combine paid sick leave and vacation into one “Paid Time Off” (PTO) policy. However, the employer must still comply with the paid sick time requirements.



# PAID SICK LEAVE-KEY PROVISIONS

## continued...

- ❖ **Length of Service:** Work for the same employer for at least 30 days within a year in California.
- ❖ **Introductory Period:** Employees must complete a 90-day introductory period before using any paid sick leave.
- ❖ **Qualifying reasons:** To recover from physical/mental illness or injury; to seek medical diagnosis, treatment, or preventative care; to care for a covered family member who is ill or needs medical diagnosis, treatment, or preventative care.
- ❖ **Doctor's Note:** The employer cannot ask the employee for a note from their health care provider for the 5-day period of paid time that is used for sick leave purposes. However, the employee should provide as much notice as possible regarding the need to take paid sick time.

# PAID SICK LEAVE-KEY PROVISIONS

## continued...

- ❖ Covered family members include the employee's parent, child, spouse, registered domestic partner, grandparent, grandchild, sibling or designated person.
- ❖ Employers may require an employee to take a minimum of at least two (2) hours of paid sick leave at a time, but otherwise the determination of how much time is needed is left to the employee.
- ❖ Employees must notify their employer in advance if the sick leave is planned, as may be the case with scheduled doctors' visits. If the need is unforeseeable, the employee need only give notice as soon as practical, as may occur in the case of unanticipated illness or a medical emergency.

# PAID SICK LEAVE-KEY PROVISIONS

## continued...

- ❖ Employers may limit an employee's **use** of paid sick leave to 40 hours or five days during a year.
- ❖ Carryover: increases accrual cap from 48 hours to 80 hours or 10 days.
- ❖ Employers must show how many days of sick leave an employee has available on their pay stub, or on a document issued the same day as their paycheck.
- ❖ An employer is prohibited from discriminating or retaliating against, terminating, demoting, suspending, or taking any other adverse actions against an employee because the employee requested or used paid sick leave.

# PAID SICK LEAVE-KEY PROVISIONS

## continued...

- ❖ Preempts local paid sick leave ordinances that are less generous.
- ❖ Provides that certain procedural and non-retaliation provisions of the law apply even to union employees that have a CBA that provides for different paid sick leave amounts.

# PAID SICK LEAVE COMPLIANCE TIPS

- ❖ Update your written paid sick leave policies, employee handbooks, and training materials.
- ❖ Train managers and supervisors.
- ❖ Train your human resources and benefits specialists on these changes to ensure that employees can begin accruing the correct amount of PSL.
- ❖ Make sure you are correctly carrying over and capping the appropriate amounts of PSL to which employees are entitled.
- ❖ Review the new law with your company's payroll processor to ensure that the accrual or frontloading allowances are correct and that wage statements accurately reflect the PSL to which each employee is entitled.



# BEREAVEMENT LEAVE



# BEREAVEMENT LEAVE-IN GENERAL

**AMOUNT OF PAID TIME:** Employees are entitled to five (5) days of unpaid bereavement leave, for the death of a covered family member.

## **COVERED FAMILY MEMBERS:**

1. Spouse
2. Child
3. Parent
4. Sibling
5. Grandparent
6. Grandchild
7. Parent- in-law.



# BEREAVEMENT LEAVE continued...

- ❖ Employees may complete bereavement leave within three (3) months/90 days after the death of the person for whom they are taking leave.
- ❖ The leave does not have to be continuous. For example, following the death of a parent, the employee could take three days of leave immediately and then take two days off from work two months later.

# BEREAVEMENT LEAVE continued...

## MULTIPLE TIMES PER YEAR

- ❖ Employees are entitled to take up to five (5) days of bereavement leave upon the death of each family member (as defined).
- ❖ For example, an employee who loses a parent, child, and grandparent within the same year can take three 5-day periods of bereavement leave during that year (e.g. 15 days).

# BEREAVEMENT LEAVE continued...

## INTERACTION WITH OTHER LEAVES

- ❖ Bereavement leave is separate from, and in addition to, an employee's right to take other types of protected leave from work.
- ❖ In addition to bereavement leave, eligible California employees are entitled to up to 12 weeks of FMLA/CFRA leave from work for their own serious health condition, to care for a family member with a serious health condition, or to bond with a new child.
- ❖ Eligible California employees are also entitled to up to 4 months of unpaid leave when they are disabled by pregnancy, childbirth, or a related medical condition (Pregnancy Disability Leave).

# BEREAVEMENT LEAVE continued...

## DOCUMENTATION

- ❖ An employer may request documentation confirming an employee's need for bereavement leave. Employees are not required to provide such documentation before they begin their leave. Instead, employees must provide this documentation within 30 days of the first day of bereavement leave.
- ❖ The documentation may be in the form of a death certificate, obituary, or written verification of death, burial, or memorial service from a mortuary, funeral home, burial society, crematorium, religious institution, or government agency.
- ❖ Employers must keep this documentation confidential and not disclose it except as necessary to internal personnel or counsel, or if required by law.

# BEREAVEMENT LEAVE continued...

- ❖ Employees must be reinstated following bereavement leave.
- ❖ An employer is prohibited from discriminating or retaliating against, terminating, demoting, suspending, or taking any other adverse actions against an employee because the employee requested or used bereavement leave.
- ❖ Employers also cannot take an adverse employment action against an employee if they provide information or make a complaint to the California Civil Rights Department about their or a coworker's request for bereavement leave.
- ❖ Train managers and supervisors on the new requirements. Update the employee handbook.



# REPRODUCTIVE LOSS LEAVE



# REPRODUCTIVE LOSS LEAVE

- ❖ SB 848 is in effect as of January 1, 2024.
- ❖ Senate Bill 848 makes it an unlawful employment practice for an employer to refuse to grant an eligible employee's request to take up to five (5) days of unpaid leave following a reproductive loss event.
- ❖ California employers with five (5) or more employees are covered under the law.
- ❖ Only employees who have worked for the employer for at least 30 days are eligible for Reproductive Loss Leave.



# REPRODUCTIVE LOSS LEAVE continued...

- ❖ Reproductive Loss Leave is essentially a subset of the Bereavement Leave law, which increases an employee's leave rights for a reproductive loss event.
- ❖ A reproductive loss event is defined as "the day or, for a multiple-day event, the final day of a failed adoption, failed surrogacy, miscarriage, stillbirth, or an unsuccessful assisted reproduction."

# REPRODUCTIVE LOSS LEAVE continued...

- ❖ Reproductive loss leave is limited to a maximum of 20 days within a 12-month period.
- ❖ Thus, although an employee may be subject to multiple reproductive loss events in a 12-month period, an employer is not required to provide more than 20 days of reproductive loss leave.

# REPRODUCTIVE LOSS LEAVE continued...

- ❖ Eligible employees must take the leave within three months of the event triggering the leave (i.e., reproductive loss events), but need not be taken on consecutive days.
- ❖ Leave under the statute is unpaid, unless the employer has an existing policy requiring paid leave. Eligible employees may choose to use any accrued and available paid sick leave or other paid time off for reproductive loss leave.
- ❖ SB 848 does not contain any provision permitting employers to request any documentation in connection with reproductive loss leave.

# REPRODUCTIVE LOSS LEAVE continued...

- ❖ Employers also cannot take an adverse employment action against an employee if they provide information or make a complaint to the California Civil Rights Department about their or a coworker's request for bereavement leave.
- ❖ Train managers and supervisors on the new requirements. Update the employee handbook



# KEY CONSIDERATIONS FOR FMLA/CFRA LEAVES OF ABSENCES



# KEY CONSIDERATIONS FOR FMLA/CFRA LEAVES OF ABSENCES

## IN GENERAL

- ❖ The Family and Medical Leave Act (FMLA), which is the federal law and the California Family Rights Act (CFRA) which is California law, and is very similar to FMLA, provide up to 12 weeks of job protected leave, which can be taken intermittently.
- ❖ FMLA/CFRA is unpaid although accrued paid time off can be used.
- ❖ Medical certification of a “serious health condition” of the employee or a covered family member must be provided.
- ❖ To be eligible, the employee must have worked for the employer for 12 months, and 1,250 hours during the last 12 months.
- ❖ All requests for FMLA/CFRA must be submitted to the employer as soon as possible, preferably 30 days before the need for leave, or as soon as practicable..

# COVERED FAMILY MEMBERS UNDER CFRA

1. Child;
2. Spouse;
3. Domestic partner;
4. Parent;
5. Parent-in-law;
6. Grandparent;
7. Grandchild;
8. Sibling;
9. Or someone else related by blood or in a family-like relationship (“designated person”).

**FMLA:** Spouse, child, parent.



# COMMON MISTAKES IN ADMINISTERING FAMILY AND MEDICAL LEAVE

1. Failure to recognize a FMLA/CFRA request/trigger
2. Requiring prior notice when not appropriate
3. Failure to provide employee with required notices in a timely manner
4. Failure to obtain properly completed medical certification
5. Not handling continuation of benefits properly
6. Counting FMLA/CFRA days as absences for attendance purposes
7. Reinstating an employee to a lesser position
8. Requiring a fitness for duty before reinstatement

# KEY REQUIREMENTS FOR FMLA/CFRA LEAVES OF ABSENCES

## COMMON MISTAKES

- ❖ Counting FMLA/CFRA days as absences for attendance purposes
- ❖ Failure to provide ADA/FEHA rights after expiration of leave
- ❖ Repeatedly contacting an employee on FMLA/CFRA leave
- ❖ Failure to provide intermittent leave
- ❖ Managers and supervisors who fail to notify HR when an employee is on leave or needs leave for a medical condition, which may be FMLA/CFRA qualifying
- ❖ Failing to accurately track FMLA/CFRA days, especially for intermittent leave



# REQUIRED FMLA/CFRA NOTICES AND FORMS



# REQUIRED NOTICES AND FORMS

## FMLA/CFRA

### GENERAL NOTICE

- ❖ Covered employers must display a poster in plain view for all workers and applicants to see, notifying them of the FMLA provisions and providing information concerning how to file a complaint. A covered employer must display this poster even if it has no eligible employees.
- ❖ A covered employer who has any eligible employees also must provide a general notice containing the same information that is in the poster in its employee handbook (or other written material about leave and benefits). If no handbook or written leave materials exist, the employer must distribute a general notice to new employees upon hire, detailing the FMLA/CFRA rights and responsibilities.

# REQUIRED NOTICES AND FORMS

## FMLA/CFRA

### EMPLOYEE NOTICE OF NEED FOR LEAVE

- ❖ The employee needs “to state a qualifying reason for the needed leave.” However, the employee does not need to expressly mention the FMLA/CFRA to trigger notice.
- ❖ Providing information to the employer that the employee needs to be absent from work for a qualifying reason, specifically for an injury, illness, or medical condition of the employee or a family member, or for baby bonding purposes, is sufficient to trigger notice.
- ❖ Front line managers and supervisors must be trained on this.

# REQUIRED NOTICES AND FORMS

## FMLA/CFRA

### NOTICE OF ELIGIBILITY AND RIGHTS AND RESPONSIBILITIES - 5 DAYS

Employee eligibility is determined, and notice of eligibility status must be provided, the first time the employee takes leave for an FMLA/CFRA-qualifying reason in the employer's designated 12-month leave year. The eligibility notice may be either oral or in writing and must:

- ❖ Be provided within five (5) business days of the initial request for leave or when the employer acquires knowledge that an employee leave may be for an FMLA-qualifying reason;
- ❖ Inform the employee of their eligibility status; and
- ❖ If the employee is determined to be *not* eligible for FMLA/CFRA leave, provide the one reason why.
- ❖ The eligibility notice is not required for FMLA/CFRA absences for the same qualifying reason during the same leave year or for FMLA/CFRA absences for a different qualifying reason where the employee's eligibility status has not changed. If the employee requests leave for a different qualifying reason in the same leave year and the employee's eligibility status has changed, the employer must notify the employee of the change in eligibility status within five business days.
- ❖ Each time employers are required to provide the eligibility notice, they must also provide employees with a rights and responsibilities notice, notifying employees of their obligations concerning the use of FMLA/CFRA leave and the consequences of failing to meet those obligations. These notices are usually combined.

# REQUIRED NOTICES AND FORMS

## FMLA/CFRA

### NOTICE OF ELIGIBILITY AND RIGHTS AND RESPONSIBILITIES

The rights and responsibilities notice must be in writing and must include, as applicable:

- ❖ Notice that the leave may be counted as FMLA/CFRA leave;
- ❖ The employer's designated 12-month period for counting FMLA/CFRA leave entitlement; (e.g. rolling back method)
- ❖ Any requirement for the employee to furnish a medical certification and the consequences for failing to do so;
- ❖ Information regarding the employee's right or the employer's requirement for substitution of paid leave and conditions relating to any substitution, and the employee's right to take unpaid FMLA/CFRA leave if paid leave is not available;
- ❖ Instructions for making arrangements for any premium payments for maintenance of health benefits that the employee must make during leave and consequences of failure to pay premium payment);
- ❖ The employee's right to job restoration and maintenance of benefits.

**CANNOT USE FEDERAL DOL FORMS THAT ALLOW MEDICAL DIAGNOSIS**



# REQUIRED NOTICES AND FORMS

## FMLA/CFRA

### MEDICAL CERTIFICATION

- **5 DAYS (TO PROVIDE)**
- **15 DAYS (TO RETURN)**

- ❖ The employer should request that an employee provide medical certification from a health care provider at the time the employee gives notice of the need for leave or within five (5) business days thereafter, or in the case of unforeseen leave, within five (5) business days after the leave commences.
- ❖ The employee must provide the completed medical certificate within fifteen (15) calendar days from the date management makes the request, unless it is not feasible to do so despite the employee's good faith efforts.

# REQUIRED NOTICES AND FORMS

## FMLA/CFRA

### DESIGNATION NOTICE

#### 5 DAYS

The employer is responsible in all circumstances for designating leave as FMLA/CFRA-qualifying and giving notice of the designation to the employee. This notice must:

- ❖ Be provided in writing within five (5) business days of having enough information to determine whether the leave is FMLA/CFRA qualifying;
- ❖ Be provided for each FMLA/CFRA-qualifying reason per applicable 12-month period (additional notice is required for any changes in the designation information);
- ❖ Include the employer's designation determination, and any substitution of paid leave and/or fitness for duty requirements; and
- ❖ Provide the amount of leave that is designated and counted against the employee's FMLA/CFRA entitlement, if known. If the amount of leave is not known at the time of the designation, the employer must provide this information to the employee upon request, but no more often than once in a 30-day period and only if leave was taken in that period.
- ❖ If the requested leave is not FMLA/CFRA-qualifying, the notice may be a simple written statement that the leave does not qualify and will not be designated as FMLA/CFRA leave.

# REQUIRED NOTICES AND FORMS

## FMLA/CFRA

### RECAP ON DEADLINES

1. GENERAL NOTICE: At the time of hire.
2. NOTICE OF ELIGIBILITY AND RIGHTS AND RESPONSIBILITIES: Within 5 business days of notice by employee of need for FMLA/CFRA or employer knowledge.
3. MEDICAL CERTIFICATION TO EMPLOYEE: Within 5 business days of notice of need for FMLA/CFRA (include with notice of eligibility and rights and responsibilities).
4. RETURN OF MEDICAL CERTIFICATION: Within 15 calendar days.
5. DESIGNATION NOTICE: Within 5 business days of having sufficient information to determine if the employee qualifies for FMLA/CFRA. Usually when medical certification is received.



# OBTAINING AND AUTHENTICATING MEDICAL CERTIFICATIONS



# MEDICAL CERTIFICATION

## IN GENERAL

- ❖ Medical certification is required to be provided by the employee. The CRD has provided a form for use by employers ([www.cacivilrights.ca.gov](http://www.cacivilrights.ca.gov)).
- ❖ Pursuant to the CFRA a “serious health condition” is:
  1. Any condition that requires inpatient care and a period of incapacitation following the discharge (does not require overnight stay).
  2. Any medical condition that warrants three or more consecutive days off work, school, and other daily activities, plus treatment by a health care provider.
  3. Any incurable, chronic, or long-term condition that requires ongoing medical care or supervision.
  4. Reconstructive surgery, including dental and plastic surgeries, that resulted from an accident or illness.
- ❖ Under the ADA/FEHA, a disability is a physical or mental impairment that limits a major life function, such as working, sleeping, walking.

# MEDICAL CERTIFICATION continued...

## FMLA/CFRA LEAVE AND ATTENDANCE POLICIES

- ❖ Employers often have attendance policies that require employees to provide a note from their health care provider if they are absent for more than five (5) days. However, such a policy must be properly managed to ensure it does not create a FMLA/CFRA violation. If the absence is due to a FMLA/CFRA qualifying reason, and the employee is eligible for FMLA/CFRA, then the employee should be provided the required notices, and has at least 15 days to submit a medical certification.
- ❖ HR and frontline managers must understand the circumstances that may trigger FMLA/CFRA leave so that the proper notices, information, and medical certification are provided to the employee, and the employee is not subject to disciplinary measures for failing to provide a note after 5 days of a continuous absence, if it is a FMLA/CFRA situation.

# MEDICAL CERTIFICATION continued...

## REQUIRED TIME FRAME FOR SUBMITTING CERTIFICATION

- ❖ Employers must provide employees with at least 15 calendar days to provide the completed medical certification after it is requested. The employer must also provide additional time if, despite the employee's diligent, good-faith efforts, it is not possible for the employee to provide the medical certification by the deadline.
- ❖ If the employee fails to return the requested medical certification with 15 calendar days, the employer may deny FMLA/CFRA leave following the expiration of the 15-day deadline unless a compliant medical certification is provided. When an employer requests medical certification, the employer must advise the employee of the consequences for failure to provide the required certification.

# CFRA MEDICAL CERTIFICATION

## continued...

### INFORMATION REQUESTED FOR EMPLOYEE'S MEDICAL CONDITION

❖ Pursuant to the CFRA (California law) an employer is prohibited from asking for a medical diagnosis in medical certifications (FMLA does permit this). The CFRA medical certification is sufficient if it includes the following:

1. The date on which the serious health condition commenced.
2. An estimated duration of the medical condition.
3. A statement that the employee is unable to perform the essential functions of their job, due to a serious health condition.



# MEDICAL CERTIFICATION continued...

## **FAMILY MEMBER'S SERIOUS HEALTH CONDITION**

If an employee requests leave to care for a family member with a serious health condition, the employee should provide the following information:

1. The date on which the serious health condition commenced.
2. Estimated duration of the serious health condition.
3. Confirmation that the serious health condition requires the employee to provide care for the family member.
4. Estimated time that the health care provider believes the employee needs to care for the family member requiring the care.

# MEDICAL CERTIFICATION continued...

## SECOND AND THIRD HEALTH CARE PROVIDER OPINION

- ❖ If the employer has a good-faith, objective reason to doubt the validity of the employee's medical certification, the employer may obtain a second and third medical opinion from a health care provider. The employer must pay for both the second and third health care provider's opinion. If the first and second opinions conflict, the employer may require a third opinion (with a health care provider mutually selected by the employer and the employee). The third opinion is final and binding. The decision for an additional medical opinion will be made by HR.
- ❖ CFRA prohibits an employer from obtaining a second opinion regarding the validity of a medical certification for a family member's serious health condition. FMLA does permit this.

# MEDICAL CERTIFICATION continued...

## RETURN TO WORK

- ❖ An employer may require employees returning from FMLA/CFRA leave to obtain a release to return to work from their health care provider, as long the employer requires this for other medical leaves.
- ❖ An employer may not require a fitness for duty medical examination as a condition for an employee returning to work after FMLA/CFRA leave. In addition, an employer may not require a second opinion on the release to return-to-work.
- ❖ An employer may require a fitness for duty exam once the employee is reinstated if it is job related and consistent with business necessity.

# MEDICAL CERTIFICATION continued...

## AUTHENTICATION AND CLARIFICATION

- ❖ If an employee submits a complete and sufficient medical certification signed by the health care provider, the employer may not request additional information from the health care provider. Only HR or a Leave Administrator should contact the health care provider, not the employee's manager or supervisor.
- ❖ An employer may contact the health care provider for purposes of clarification (FMLA) and authentication (FMLA and CRFA) of the medical certification. CFRA only permits authentication.

# MEDICAL CERTIFICATION continued...

## AUTHENTICATION AND CLARIFICATION

- ❖ *Authentication* means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested.
- ❖ *Clarification* means contacting the health care provider to confirm the handwriting on the medical certification or the meaning of a response. An employer may not ask health care providers for additional information beyond that required by the certification form.

# MEDICAL CERTIFICATION continued...

## RECERTIFICATION

- ❖ FMLA/CFRA: An employer can ask for recertification any time an employee seeks to extend an existing FMLA/CFRA leave. This should be done by HR/Benefits Administrator only.
- ❖ FMLA: If an employee is taking continuous leave for more than 30 days, the employer may request recertification if the leave extends beyond the original requested leave period. If the employee is out on a leave that has been certified to extend for more than six months, the employer can seek recertification every six months. In addition, the employer may ask for a new certification at the beginning of each leave year. This should only be through HR/Benefits Administrator.

# INTERMITTENT LEAVE

- ❖ Intermittent leave is leave may be taken in separate blocks of time for a single qualifying reason; minimum increments of one hour are permissible. In intermittent leave cases, the qualifying reason is known in advance, even if it is unknown as to when the medical condition could flare and require time off, therefore it is foreseeable leave.
- ❖ The FMLA regulations provide that: “Whether FMLA leave is to be continuous or is to be taken intermittently ...notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave . . . were initially unknown.”
- ❖ The employee only needs to meet the notice requirement when the employee first requests approval for intermittent leave.
- ❖ The employee does not have to give “formal notice” each and every time the employee calls in to use intermittent leave.

# INTERMITTENT LEAVE continued...

## SCHEDULING OF MEDICAL TREATMENT

- ❖ FMLA regulations specify that employees must schedule absences for planned medical treatment in a way that least disrupts the employer's operations.
- ❖ When an employee requests intermittent leave, the employer must obtain details from the employee about the frequency/dates of medical treatment or need for leave and discuss with the employee the need to schedule treatment so that it does not disrupt operations, if possible.



# SUSPECTED FMLA/CFRA MISUSE

## KEY STEPS IN RESPONDING

- ❖ Employers must have an up to date, clear, written FMLA/CFRA policy, which includes call-in policies and procedures that specify timing of calls and information that must be provided.
- ❖ The medical certification form is key in preventing and detecting suspected FMLA/CFRA misuse. Employees must be required to timely submit the medical certification form and when received it should be carefully reviewed.
- ❖ Seek recertification if applicable, and/or if the absence pattern exceeds what is specified in the medical certification form. When seeking recertification, the employer should request that the employee obtain the recertification from the health care provider.
- ❖ Seek a second or third medical opinion if applicable.

# SUSPECTED FMLA/CFRA MISUSE

## KEY STEPS IN RESPONDING continued...

❖ Monitor/investigate unusual absence/leave patterns. For example, if an employee uses FMLA/CFRA intermittent leave frequently on Mondays or Fridays, around holidays, the employer could seek recertification from the health care provider to determine whether this is necessary due to the employee's serious health condition. Unusual leave patterns can include:

1. Always on Fridays or Mondays (or both);
2. Always on weekends, if scheduled to work during the weekend;
3. *FMLA/CFRA leave during the same time that a vacation/PTO request was not approved;*
4. Absences following a holiday;

# SUSPECTED FMLA/CFRA MISUSE

## KEY STEPS IN RESPONDING continued...

- ❖ Gather and document any evidence of misuse. Assess credibility of evidence.
- ❖ Interview the employee about any suspicious circumstances.
- ❖ Consult with legal counsel before interviewing the employee to ensure questions are appropriate under the circumstances. Avoid prohibited medical inquiries.
- ❖ Proceed carefully and do not rush to judgment.
- ❖ Track and monitor leaves closely.
- ❖ Train managers and supervisors.



# CROSSOVER OBLIGATIONS WITH FMLA/CFRA



# CROSSOVER OBLIGATIONS

## CONSIDER ALL APPLICABLE LAWS

❖ If an employee requests time off for a medical condition/disability the employer must consider all applicable laws that could apply to the leave including:

1. FMLA/CFRA
2. ADA/FEHA
3. Paid Sick Leave
4. Work Comp

# CROSSOVER OBLIGATIONS continued...

## EXTENDED MEDICAL LEAVE

- ❖ It is important to understand that leave under the FMLA/CFRA is leave required by law. This means the employee is entitled to job protected leave, which is different than leave provided as an accommodation under the ADA/FEHA. Pursuant to the ADA/FEHA the employer can consider undue hardship, although that can be difficult to establish. The FMLA/CFRA statutes do not provide for undue hardship.
- ❖ There is no bright line test on how much ADA/FEHA leave is appropriate as an accommodation. It must be assessed on an individualized, case by case basis.
- ❖ EEOC: Although employers are allowed to have leave policies that establish the maximum amount of leave an employer will provide or permit, *they may have to grant leave beyond this amount as a reasonable accommodation to employees who require it because of a disability*, unless the employer can show that doing so will cause an undue hardship.

# CROSSOVER OBLIGATIONS continued...

## GOVERNMENT CODE, SECTION 12945.2

“If an employee has a serious health condition that also constitutes a disability [UNDER THE FEHA/ADA]...and cannot return to work at the conclusion of the employee's CFRA/FMLA leave, the employer has an obligation to engage that employee in an interactive process to determine whether an extension of that leave would constitute a reasonable accommodation under the FEHA [ADA].” [Emphasis added]

# CROSSOVER OBLIGATIONS continued...

## 2 CCR § 11068. REASONABLE ACCOMMODATION

### Paid or Unpaid Leave of Absence:

“When the employee cannot presently perform the essential functions of the job, or otherwise needs time away from the job for treatment and recovery, holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer's leave plan may be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further reasonable accommodation, and does not create an undue hardship for the employer. When an employee can work with a reasonable accommodation other than a leave of absence, an employer may not require that the employee take a leave of absence. An employer, however, is not required to provide an indefinite leave of absence as a reasonable accommodation.”



# CROSSOVER OBLIGATIONS continued...

## 2 CCR § 11069 INTERACTIVE PROCESS

“An employer or other covered entity shall initiate an interactive process when the employer... becomes aware of the possible need for an accommodation because the employee with a disability has exhausted leave under the California Workers' Compensation Act, for the employee's own serious health condition under the CFRA and/or the FMLA, or other federal, state, employer or other covered entity leave provisions and yet the employee or the employee's health care provider indicates that further accommodation [such leave] is still necessary for recuperative leave or other accommodation for the employee to perform the essential functions of the job.”

An employer's or other covered entity's offer to engage in the interactive process in response to a request for such leave does not violate California Code of Regulations, Title 2, Section 11091(b)(1) & (b)(2)(A)1., prohibiting inquiry into the medical information underlying the need for medical leave other than certification that it is a “serious medical condition.”

# CROSSOVER OBLIGATIONS continued...

## REQUESTS FOR MULTIPLE EXTENSIONS OF LEAVE

❖ If an employee requests multiple extensions of their medical leave, the employer must request that the employee provide the following information from their health care provider:

1. Medical certification specifying the amount of additional medical leave which is needed by the employee.
2. Anticipated return to work date.
3. Whether additional medical leave will enable the employee to return to work on the date as indicated in the medical certification.

**Conduct an interactive process to discuss the need for additional leave.**



# **PREGNANCY DISABILITY LEAVE (PDL)**



# PREGNANCY DISABILITY LEAVE

## COVERED EMPLOYERS AND EMPLOYEES

- ❖ **EMPLOYERS:** PDL applies to all employers with five or more full- or part-time employees.
- ❖ **EMPLOYEES:** Other than having a qualifying pregnancy-related disability, there is no length of service, hours, or other eligibility requirements, and full- and part-time employees are treated the same.

# PREGNANCY DISABILITY LEAVE

## continued...

### AMOUNT OF LEAVE

- ❖ An employee disabled by pregnancy, childbirth, or a related medical condition is entitled up to four months of disability leave per pregnancy. If the employer provides more than four months of leave for other types of temporary disabilities, the same leave must be made available to employees who are disabled due to pregnancy, childbirth, or a related medical condition.
- ❖ Leave can be taken before and after birth during any period of time the employee is physically unable to work because of pregnancy or a pregnancy-related condition.

# PREGNANCY DISABILITY LEAVE

## continued...

### EMPLOYEE NOTICE REQUIREMENTS

- ❖ If possible, an employee must provide their employer with at least 30 days' advance notice of the date for which the pregnancy disability leave is sought and the estimated duration of the leave.
- ❖ If 30 days' advance notice is not possible due to a change in circumstances or a medical emergency, notice must be given as soon as practicable.
- ❖ The employer may require written certification from the health-care provider of the employee seeking PDL stating the reasons for the leave and the probable duration of the condition. However, the health-care provider may not disclose the underlying diagnosis without the consent of the patient.
- ❖ CRD has created a PDL medical certification form.

# PREGNANCY DISABILITY LEAVE

## continued...

### SALARY AND BENEFITS

- ❖ An employer may not require an employee to use accrued vacation/PTO during any unpaid portion of their pregnancy disability leave.
- ❖ The employee may also choose to use accrued vacation/PTO to receive compensation for which the employee is eligible, but an employer may not require an employee to use vacation leave or other accrued time off during PDL.
- ❖ The employer must pay for the continuation of the employee's group health benefits if the the employer normally pays for those benefits. The employee must pay their share of the premium payment.

# PREGNANCY/BABY BONDING continued...

## ADDITIONAL LEAVE

- ❖ Expiration of PDL (4 months/17 1/3 weeks) could trigger additional leave as an accommodation under the FEHA.
- ❖ Baby bonding time of up to 3 months/12 weeks for eligible employees.
- ❖ Pregnancy related leave could exceed 7 months.





# BEST PRACTICES FOR MANAGING EXTENDED MEDICAL LEAVE



# BEST PRACTICES FOR MANAGING EXTENDED MEDICAL LEAVE

- ❖ Understand the employer's leave or accommodation/work restriction obligations, especially under the FMLA/CFRA, FEHA/ADA, PDL and WC.
- ❖ Understand that an extension of leave may be required as an ADA/FEHA accommodation depending on the circumstances. However, medical certification should be required for each extension.
- ❖ Always conduct an interactive process when determining if extended medical leave will be granted and ask for medical certification. .
- ❖ Be consistent.
- ❖ Conduct an individualized assessment of the need for extended medical leave.
- ❖ Document the process.
- ❖ Follow-up with the employee. If FMLA/CFRA leave has been exhausted and the employee is still on leave, let HR know so that they can contact the employee regarding their absence and determine if extended medical leave is needed.
- ❖ Avoid adverse employment actions immediately following an employee's return from a leave of absent, unless there is a clear, documented good faith personnel reasons for the employment action.



# KEY MISTAKES IN MANAGING LEAVES OF ABSENCE



# KEY MISTAKES

1. No leave policy/policy is not updated, noncompliant policy.
2. Failure to notify employees of their leave rights.
3. Noncompliant forms or no forms.
4. No job descriptions or outdated job descriptions.
5. Inconsistent measuring methods for calculating the amount of leave-pick a method and use it-confirm in the employee handbook (e.g. rolling backwards, calendar year, fixed 12-month period).
6. Not recognizing triggers for leave (supervisors and managers must be trained).
7. Not properly managing benefits when benefit continuation is required.
8. Lack of documentation for leaves.
9. Inaccurate/incomplete medical certification.
10. Frequent contact with the employee during leave (interference with leave) to inquire on their return to work date when it is specified in the medical certification, or for other questions.

# KEY MISTAKES continued...

11. Inconsistent application of leave policies.
12. Failure to reinstate an employee following job protected leave.
13. Failure to properly and timely document performance issues.
14. Not following all laws covering a leave of absence.
15. Failing to comply with record keeping requirements.
16. Disciplining employees for excused absences.
17. Asking for a medical diagnosis (not permitted in California)
18. Not responding in a timely manner to a request for leave.
19. Granting extra leave and then terminating the employee for missing too much work.
20. Not investigating requests for vacation/paid time off that are not approved by the employer, and then followed by a request for family and medical leave for the same time period.



# FMLA CASES





# LAYOFF

## Monday v. La-Z-Boy, Incorporated, 2023 WL 6881066 (E.S. Tenn. October 18, 2023)

- ❖ Plaintiff was furloughed from defendant's manufacturing plant while on FMLA leave and ultimately, was not recalled with other employees. The court granted defendant's motion for summary judgment on plaintiff's interference and retaliation claims under the FMLA.
- ❖ Plaintiff took FMLA leave from March 2 through March 20, 2020, for a qualifying reason. Defendant closed the plant due to the COVID-19 pandemic and imposed an employee furlough on March 7, 2020. Defendant furloughed 1434 of the 1454 employees at the plant. In approximately May 2020 defendant began to recall some of the furloughed employees, post open positions online, and advertise to hire manufacturing employees. In early August 2020 plaintiff was notified that if she was not recalled by September 29, 2020, her classification would change to retirement and her employment would end. Plaintiff's employment was terminated despite multiple efforts by plaintiff to seek recall from furlough, although she did not apply for open positions. ***Defendant followed its recall procedures when determining which employees to recall from furlough.***

# LAYOFF

## Monday v. La-Z-Boy, Incorporated, 2023 WL 6881066 (E.S. Tenn. October 18, 2023) continued...

- ❖ The court agreed that an employee returning from FMLA leave has a right to job reinstatement, but only if they would have continued to be employed if they had not taken FMLA leave. On the day plaintiff would have returned to work, the plant was closed with almost all employees furloughed. Had plaintiff not taken FMLA leave, she also would have been laid off.
- ❖ The FMLA did not give plaintiff any priority rights over other employees to recall or job protection, rendering plaintiff's interference claim without merit. Although plaintiff exercised her FMLA rights and suffered an adverse employment action, the court also found she could not sustain a retaliation claim because she identified no evidence of a causal connection between those two actions.
- ❖ The court held that defendant had articulated a legitimate, non-discriminatory reason for not recalling her. The court again reiterated that taking the FMLA did not give plaintiff any greater rights than other employees.



# RETALIATION

## Thompson v. IKEA US Retail, LLC, 2023, WL 3124725 (E.D. Pa. April 27, 2023)

- ❖ Plaintiff brought suit for interference with her FMLA rights and retaliation. Plaintiff alleged that she informed her supervisor of her intent to take leave for an anticipated surgery early the following year, and she alleged that her supervisor thereafter modified and manipulated her performance evaluation to ensure her termination in December to prevent her from taking the FMLA leave for the upcoming surgery and in retaliation for her seeking leave.
- ❖ Defendant moved for summary judgment on all of plaintiff's claims.

# RETALIATION

## Thompson v. IKEA US Retail, LLC, 2023, WL 3124725 (E.D. Pa. April 27, 2023) continued...

- ❖ The court denied defendant's motion, concluding there were disputed issues of fact as to both the interference and retaliation claims. First, the court found disputed facts as to whether plaintiff sufficiently put defendant on notice of her intent to take the FMLA leave. **Plaintiff told her supervisor of her intent to take leave during an informal conversation**, telling him she had seen a doctor and was going to be absent for hernia surgery after the new year. Plaintiff alleged that this was sufficient notice of her intent to take the FMLA leave. Defendant, on the other hand, claimed that plaintiff failed to provide sufficient information to constitute notice, such as how long she intended to take leave and what type of leave she intended to take (FMLA, sick, or PTO). The court found that a jury could reasonably conclude that plaintiff gave sufficient notice of FMLA leave under the facts presented. The court likewise found that a jury could reasonably conclude that defendant denied plaintiff her FMLA rights when it terminated her after it was on notice of her intent to take leave, and before she was able to take the FMLA leave.
- ❖ Second, the court found a reasonable jury could conclude that defendant retaliated against plaintiff for stated intent to take FMLA leave. Plaintiff had established that her termination occurred within sufficient **temporal proximity** (two to three months after her notice of the need for leave) to establish a prima facie claim. Further, the court found there was sufficient evidence of pretext in the form of disputes regarding who prepared the performance evaluation supporting termination, and conflicting positive comments from her supervisor occurring shortly before plaintiff's termination. Because there were disputed material facts on these points, the court denied defendant's motion and allowed the claims to proceed to a jury.

# RETALIATION

## Luebano v. Office Depot, L.L.C., 2023 WL 4249268 (5<sup>th</sup> Cir. June 29, 2023)

- ❖ Plaintiff worked as an assistant store manager who applied for and was granted FMLA leave for six months, more than the amount of leave statutorily required. **While on leave, plaintiff suspected her job may be in jeopardy when she saw a job posting for her position.** When plaintiff was first cleared to return to work with restrictions, the company extended her leave further but then informed her that her leave had caused an undue hardship, and her role could no longer be guaranteed. The company advised plaintiff she would be considered for any open positions once she fully recovered. When plaintiff failed to return to work after she was notified her leave had expired, defendant terminated her employment.
- ❖ Plaintiff filed a claim against her former employer for violations of the FMLA, including interference and retaliation.

# RETALIATION

## Luebano v. Office Depot, L.L.C., 2023 WL 4249268 (5<sup>th</sup> Cir. June 29, 2023) continued...

- ❖ The district court dismissed plaintiff's FMLA claims, finding she had exhausted her FMLA leave and therefore could neither plead a prima facie case for FMLA interference nor FMLA retaliation. Plaintiff appealed that decision, arguing she adequately pleaded both causes of action and that the district court erred by improperly conflating her FMLA leave with other disability leave. The appellate court affirmed the district court's decision dismissing plaintiff's FMLA interference claim, finding that plaintiff failed to allege that she was denied benefits she was entitled to under the FMLA as she requested and was approved for the full 12 weeks of FMLA leave.
- ❖ Regarding the retaliation claim, however, the appellate court disagreed with the district court's dismissal, stating the district court erred in applying the same reasoning it used to dismiss the interference claim. **The court determined plaintiff sufficiently alleged a causal link between her leave and defendant's decision to fire her based on the temporal proximity of the expiration of her protected leave and the company's advertising of her position one month later and essentially warning plaintiff of her termination two months later.** For those reasons, the court ruled that plaintiff's FMLA retaliation claim should have survived the motion to dismiss and remanded to the district court for further proceedings.

# RETALIATION

## **Simmons v. Success Acad. Charter Sch., Inc., 2023 WL 3304107 (S.D.N.Y. May 8, 2023)**

- ❖ Plaintiff sued defendant alleging interference and retaliation with her FMLA rights, among other claims when defendant terminated her shortly before her FMLA leave was scheduled to begin. Defendant filed a motion for summary judgment on all claims.
- ❖ Defendant argued that it did not interfere with plaintiff's FMLA rights because she was not entitled to take leave under the law due to her termination. The court rejected defendant's arguments, finding the cited regulations applied to issues of reinstatement after an FMLA leave has commenced and not before the leave commenced. In addition, the court rejected defendant's claims that the sole reason for plaintiff's termination was the reorganization decision that eliminated her position. The court found that it was unclear as to whether plaintiff's employment would have continued absent her request for leave.

# RETALIATION

## Simmons v. Success Acad. Charter Sch., Inc., 2023 WL 3304107 (S.D.N.Y. May 8, 2023) continued...

- ❖ The court found that a reasonable jury could determine that plaintiff's FMLA request was a factor in her termination that prevented her from exercising her FMLA rights. For those reasons, the court denied defendant's motion for summary judgment on the interference claim.
- ❖ The court also found that a jury could determine a causal connection between plaintiff's exercising her FMLA rights and defendant's decision to terminate her employment at that specific time. **Because of the short time period of less than a month between when plaintiff declared her right to take FMLA leave and her termination, the court found a jury could find a causal connection between the protected activity and the adverse action.**
- ❖ The court denied defendant's motion for summary judgment on the retaliation claim.



# QUESTIONS?



# 2024 EMPLOYMENT LAW Conference

Off to work we go!



# THANK YOU

