California Dramatically Expands Coverage Under State Leave Law, Creating New Obligations For Employers

Insights
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Governor Newsom just signed legislation that will greatly expand the California Family Rights Act in a manner that will impact both small and large California employers. The CFRA requires covered employers to provide up to 12 weeks of unpaid leave during each 12-month period for purposes of family and medical leave.

Senate Bill 1383 expands CFRA to apply to employers with five or more employees, and expands the scope of "family members" for whom employees can take leave to include many additional categories. It will go into effect on January 1, 2021 – giving you a short window of time to take action and develop compliance plans. The first of the year will be here before you know it, so the time to take action is now.

Expansion to Cover Smaller Employers
The current CFRA (modeled largely after the federal Family and Medical Leave Act) applies to private employers with 50 or more employees within 75 miles of the worksite (and public employers of any size). SB 1383 expands CFRA to now apply to private employers with **five or more employees** and eliminates the requirement that employees work within 75 miles of the worksite.

Therefore, CFRA will now apply to much smaller employers. Many smaller employers have likely never had to comply with a family and medical leave law such as CFRA, so there may be a steep learning curve between now and January 1.

Expanded Definition of "Family Members"
CFRA currently allows employees to take unpaid leave for a number of purposes, including to care for a "family member" with a serious health condition. CFRA currently defines "family member" to include a minor child (unless the child is an adult and a dependent child), a spouse, or a parent.

SB 1383 significantly expands the definition of "family members." First, the list of family members is expanded to include siblings, grandparents, grandchildren, and domestic partners. Second, the definition of "child" is expanded to cover all adult children (regardless of whether they are dependent) and children of a domestic partner.

Therefore, even larger California employers will have to provide leave to employees who are caring for a wider swath of family members with a serious health condition.

Other Changes To Existing Law

SB 1383 also makes two other important changes to the CFRA. First, it deletes the provision of law that specifies that if both parents work by the same employers, the employer is not required to provide more than a total of 12 weeks for leave in connection with the birth, adoption or foster care placement of a child. Therefore, such an employer may now be required to provide 12 weeks to both employees in that situation.

In addition, SB 1383 deletes language from the CFRA that authorizes an employer to refuse reinstatement to salaried employees who are among the highest 10% of the employees and where the refusal is necessary to prevent substantial and grievous economic injury.

New Law Creates A "Stacking" Problem With The Federal FMLA

SB 1383 also creates a unique dilemma for employers that have 50 or more employees and are therefore 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 federal FMLA, the two laws are no longer in sync. This creates the unfortunate situation in which an employee is eligible for 12 weeks of leave under the CFRA but remains eligible for a full additional 12 weeks under the FMLA.

For example, suppose an employee working for an employer with 50 or more employees needs to take family leave to care for a sister with a serious health condition. Under SB 1383, the employee would be eligible to take up to 12 weeks of leave in order to do so. However, because "siblings" are not covered under the federal FMLA, that same employee would potentially still be 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.

Mediation Pilot Program

As SB 1383 was making its way through the legislative process, the employer community (and particularly small businesses) expressed concern about the increased litigation risk that will now be faced by employers with five or more employees if they make a mistake in implementing or administering the new requirements of the CFRA that now apply to them.

In an attempt to address this concern, a companion measure (AB 1867) was amended to include a "small employer family leave mediation pilot program." This pilot program will apply only to employers with between five and 19 employees and provides that such employers may, within 30 days of receipt of a DFEH right-to-sue letter, request mediation through DFEH. The employee is not permitted to pursue a civil claim in court until the mediation is complete. This pilot program remains in effect only until January 1, 2024.

While it attempts to address the litigation concern, this mediation pilot program is really little more than window dressing. It only applies to employers with between 5 and 19 employees, is temporary in nature, and does not require the parties to resolve the claim via mediation. Savvy plaintiffs' attorneys will likely advise their clients not to settle during the mediation process and they will still be able to proceed to court.

What California Employers Need to Do Now

This is essentially Governor Newsom's own proposal, as he announced in January when he released his proposed state budget that he wanted this policy change made this year. After the COVID-19 pandemic decimated the economy and businesses small and large, the employer community implored the governor and the legislature not to impose this mandate at the worst possible time. Nevertheless, the governor insisted on moving forward with this proposal and the legislature passed it by the slimmest of margins. Despite these unfortunate circumstances, California employers must immediately begin to prepare for this new law.

Smaller employers who previously were not covered by the CFRA need to immediately begin the process of preparing for January 1, 2021. You should work with employment counsel and their HR personnel to develop policies and procedures to begin implementing and administering these new leave requirements.

However, due to the expanded definition of "family member" in the new law, even employers that were already covered by the CFRA will need to update their policies, procedures and forms to be compliant with the new provisions of the law.

The time to begin that process is now, and 2021 will be here before you know it. For further assistance with how to prepare for compliance with these new requirements, contact your Fisher Phillips attorney, or any attorney in one of our six California offices.

This Legal Alert provides an overview of a specific law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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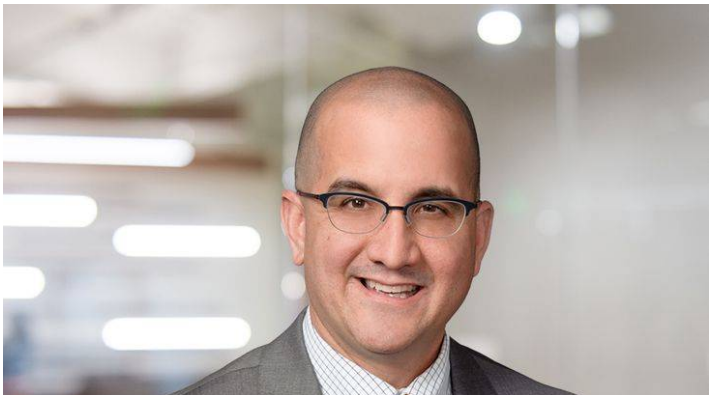

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