Honey, I Shrunk the CFRA! – California Extends Job-Protected Parental Leave to Smaller Employers

Insights
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SB 63 requires employers with between 20 and 49 employees to provide up to 12 weeks of unpaid job-protected parental leave to bond with a new child. The signing of SB 63 follows previous unsuccessful efforts to extend job-protected leave to smaller employers not covered by the federal Family and Medical Leave Act or the California Family Rights Act. The new law goes into effect on January 1, 2018.

For several years, labor and worker advocates have pushed for legislation that would extend job-protected unpaid leave rights for new parents who work for smaller employers. Both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) apply to employers with 50 or more employees.

Advocates have alleged that this (combined with the fact that paid leave under California's Paid Family Leave Program is not job-protected) leaves employees that work for small employer without adequate protections. Small employers, on the other hand, have argued that the FMLA and CFRA were limited to employers with 50 or more employees precisely to avoid the burden that leave policies can create for small employers.

Well, that debate ended on October 12, 2017 when Governor Jerry Brown signed Senate Bill 63 (Jackson) – entitled the "New Parent Leave Act" - into law to provide up to 12 weeks of job-protected parental leave for employers with 20 or more employees. The California Chamber of Commerce had labeled SB 63 a "job killer."

Who's Covered?
Employers **-** The new law applies to employers that employ at least 20 employees within 75 miles. It does not apply to an employee who is covered under both CFRA and the FMLA. Those laws apply to employers with 50 or more employees. Therefore, the practical effect is that this bill applies to employers with between 20 and 49 employees within 75 miles.

Opponents of SB 63 noted that, because the bill applies to employers with 20 or more employees *within 75 miles*, employees at multiple worksites are aggregated together to reach the 20 employee threshold. Therefore, the law could impact worksites that have substantially fewer than 20 employees.

Employees – The new law applies to employees with more than 12 months of service with the employer, who have at least 1,250 hours of service with the employer during the previous 12-month period.

What's Covered?
SB 63 makes it unlawful for a covered employer to refuse to allow a covered employee to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. It is important to note that this leave is not for the entire panoply of employee and family member "serious health conditions" for which leave is available under CFRA and the FMLA. Rather, leave under this new law is limited to the "parental leave" purposes described above.

In addition, if, before the start of the leave, the employer does not provide the employee with a guarantee of employment in the same or a comparable position following the leave, they will be deemed to have refused to allow the leave. In other words, a covered employer is required to provide up to 12 weeks of "job-protected" unpaid leave to covered employees for new parental responsibilities.

The leave is unpaid. However, the employee shall be entitled to utilize accrued vacation pay, paid sick time, other accrued paid time off, or other paid or unpaid time off negotiated with the employer, during the period of parental leave.

In addition, (similar to CFRA) it is unlawful for an employer to refuse to maintain and pay for continued group health coverage for employees during the duration of the parental leave at the same level and under the same conditions that would have been provided had the employee continued to work. However, the employer may recover the costs of maintaining this health coverage for employees that fail to return to work following the leave because of a reason other than a serious health condition or other circumstances beyond the employee's control.

Also as under CFRA, where both parents are employed by the same employer, SB 63 specifies that the employer is not required to grant leave allowing the parents leave totaling more than 12 weeks. An employer may, but is not required to, grant leave to both employees simultaneously.

Finally, the new law prohibits an employer from discriminating against an employee for exercising their rights, or from restraining or denying any rights provided under this law.

Mediation Pilot Program – More Than Words?
Last year, Governor Brown vetoed a similar bill, SB 654 (Jackson) that provided only six (6) weeks of parental leave. In his veto message, he raised concerns about the burdens on small businesses and the threat of litigation, stating:

"*This bill establishes an unpaid, job protected parental leave requirement that applies to businesses with 20 or more employees and allows workers to take up to 6 weeks of parental leave to bond with a*

new child.

It goes without saying that allowing new parents to bond with a child is very important and the state has a number of paid and unpaid benefit programs to provide for that leave. I am concerned, however, about the impact of this leave particularly on small businesses and the potential liability that could result. As I understand, an amendment was offered that would allow an employee and employer to pursue mediation prior to a lawsuit being brought. I believe this is a viable option that should be explored by the author."

In an apparent attempt to respond to the Governor's veto message, the author of SB 63 inserted language at the last minute to establish a parental leave mediation pilot program within the Department of Fair Employment and Housing. Under this pilot program, an employer may (within 60 days of receiving a right-to-sue notice) request that all parties participate in mediation. An employee is not allowed to pursue a civil action until mediation is complete.

If the language ended there, the mediation pilot program would represent a meaningful response to the Governor's veto message of last year's bill. However, the new law contains some major flaws that make the mediation program virtually meaningless.

First, the mediation program is contingent on DFEH receiving necessary funding from the Legislature to create the program. This is far from certain. Second, the pilot program sunsets on January 1, 2020. In other words, the program (and the requirement for plaintiffs to mediate before suing) goes away in 2020 unless the Legislature specifically acts to extend the program through future legislation. Again, that is far from certain. Third (and most fatally), the mediation language says mediation is "complete" when, at any time, either party notifies DFEH that it is electing not to participate in, or is withdrawing from, the mediation. Therefore, all a plaintiff has to do to avoid the obligation to mediate it to send a letter stating that they choose not to participate in, or withdraw from, the mediation.

That's a pretty empty promise, and not a very meaningful requirement. This has led some observers in Sacramento to speculate that there was some other agreement or "deal" to sign this bill, and that the Governor merely needed some "cover" to sign it in light of the fact that he had vetoed a similar bill last year and raised concerns about litigation. Hence, the "phantom" mediation pilot program contained in SB 63.

What Should Employers Do Next?

SB 63 goes into effect on January 1, 2018. Prior to that date, California employers with between 20 and 49 employees within 75 miles should carefully review and revise their leave policies to comply with the new requirements of the law.

For more information about this new law, please contact your regular Fisher Phillips attorney, or one of the attorneys in any of our California offices:

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