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Amended CFRA Regulations Will Take Effect July 1, 2015 – Clarifying the Rules on Eligibility, Medical Certifications, and Posting Requirements

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Beginning July 1, 2015, California employers will need to comply with new amendments to the California Family Rights Act regulations (available at http://www.dfeh.ca.gov/res/docs/FEHC/Final%20Text%20(1).pdf). In adopting the amendments, the Fair Employment and Housing Council (the "Council") intended to conform the CFRA to the federal Family and Medical Leave Act where possible, incorporating the most recent FMLA regulations to the extent they are not inconsistent with the CFRA. However, the state and federal laws continue to diverge in several respects.

Brief Overview of the CFRA

The CFRA provides eligible employees with 12 workweeks of leave in a 12-month period for any of the following purposes:

- A serious health condition of the employee;
- A serious health condition of a child, spouse, registered domestic partner, or parent;
- The birth of a child; or
- The placement of a child with an employee for adoption or foster care.

The CFRA applies to covered employers with 50 or more employees. To be eligible for CFRA leave, an employee must be employed for at least 1,250 hours in the previous 12 months at a worksite located within 75 miles of at least 50 other employees.

Summary of the Amendments

Key aspects of the amendments are discussed below.

Covered Employers

The amendments add successors in interest to the definition of a covered employer. In addition, multiple businesses may be considered joint employers. A determination of whether a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality based on the economic realities of the situation.

Eligible Employees

Employees must now be employed for "at least" (instead of "more than") 12 months in order to be eligible. The regulations generally exclude from the 12-month length of service requirement employment periods prior to a break in service of 7 years or more.

In order to determine whether there are 50 employees within a 75-mile radius of an employee with no fixed worksite, the amendments explain that the employee's "worksite" is the site to which the employee is assigned, the site from which the employee's work is assigned, or the site to which the

employee reports. If a joint employment situation exists, an employee's worksite is the primary employer's office to which the employee is assigned or reports.

The new regulations clarify that an employee who has met the 1,250-hour requirement but not the 12-month length of service requirement at the start of a leave can become eligible for CFRA leave upon reaching the 12-month anniversary date, since the leave to which the employee is otherwise entitled counts towards the length of service. In this case, the employer should designate the portion of the leave in which the employee has met the 12-month requirement as CFRA leave.

Responding to Requests and Designating Leave

The Council reduced the amount of time employers have to respond to CFRA requests from 10 calendar days to 5 business days after receiving the employee's request. An employer may not retroactively designate leave as CFRA leave after the employee has returned to work unless the employer's failure to timely designate the leave does not cause harm or injury to the employee and the employer gives notice to the employee.

Purposes and Usage

As noted above, an employee may use CFRA leave for a serious health condition of a spouse, the definition of which now includes a registered domestic partner and a same-sex partner in marriage.

If an employee would normally work overtime but for a CFRA-qualifying reason that limits the employee's ability to work overtime, the new regulations clarify that the hours the employee would have worked may be counted against his or her CFRA leave entitlement. The amendments provide the following example: If an employee normally would be required to work 48 hours in a particular week, but due to a serious health condition the employee works 40 hours that week, the employee would utilize 8 hours of CFRA-protected leave out of the 48-hour workweek. Voluntary overtime hours that an employee does not work due to a serious health condition are not counted against the employee's CFRA leave entitlement.

Reinstatement

The amendments provide that an employee is entitled to return to the same or a comparable position, even if the employee was replaced or his or her position was restructured to accommodate his or her absence. However, an employee who fraudulently obtains or uses CFRA leave is not protected by the CFRA's job restoration or maintenance of health benefits provisions.

The Council also clarified how to determine whether an employee is a "key employee" who does not need to be reinstated where it would cause substantial and grievous economic injury to the employer's operations. A key employee is one who is paid on a salary basis and is among the highest paid 10 percent of employees working within 75 miles. The amended regulations detail procedures employers must follow in order to deny reinstatement to a key employee.

Interaction with other Time Off or Leave Policies

Under the CFRA, an employee may elect or an employer may require an employee to use accrued vacation or paid time off during the unpaid portion of CFRA leave.

With regards to sick leave, the amended CFRA regulations differentiate between leave for the employee's own serious health condition and other reasons. If an employee is using unpaid CFRA leave for the employee's own serious health condition, the employee may elect or an employer may require the employee to use sick leave. If an employee is using unpaid CFRA leave for another purpose, the employer and employee can agree to substitute sick leave.

The new regulations explain that Paid Family Leave is not unpaid leave, and so employers cannot require the use of accrued vacation, paid time off, or sick leave during a Paid Family Leave portion of a CFRA leave. The regulations also reiterate that Pregnancy Disability Leave is not covered under the CFRA. The regulations clarify that employers must, therefore, maintain group health benefits for the entire time an employee is on unpaid, protected pregnancy disability leave of up to four months, in addition to CFRA leave of up to 12 weeks.

Medical Certifications

Under the amended CFRA regulations, an employer must have a "good faith, objective reason" to doubt the validity of a medical certification in order to seek a second opinion. The amended regulations prohibit an employer from contacting a health care provider for any reason other than to authenticate a medical certification. Furthermore, an employer cannot ask employees to provide additional information (such as symptoms or diagnoses) in the medical certification.

A sample Certification of Health Care Provider form is available at the end of the amended regulations.

Notice and Posting Requirements

Employers must post a notice explaining employee's rights under the CFRA and the procedures for filing complaints of violations of the CFRA in a conspicuous place where it can be readily seen by employees. The new regulations extend this requirement to applicants and provide that employers can meet this posting requirement through an electronic posting.

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Employers should review their leave policies, procedures, and forms to ensure compliance with the amended CFRA regulations by July 1, 2015. Please contact us if you have any questions about the amendments to the CFRA regulations.