Employment claims arising out of California leave-laws violations

California law – some of it new – provides many protections for employees who require a leave of absence

By Stephen M. Murphy and P. Bobby Shukla

California law provides many protections for employees who require a leave of absence. This article will address leaves required by an employee's own health condition or that of a family member. Lawyers representing victims of third-party torts as well as workers' compensation claimants need to know their clients' rights to take time off work due to injury. Often tort and workers' comp victims have additional employment claims when they are disciplined or terminated due to absences caused by their injuries. Their family members also may have employment claims if they were disciplined or terminated for missing work to care for the victim.

FMLA and CFRA leave

The Family Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA") protect employees who miss work due to their own serious health condition as well as the serious health condition of a family member, which includes spouse, registered domestic partners (CFRA only), son or daughter, and parent. (29 USC § 2612(a); Gov. Code, § 12945.2(a).) To be eligible for protection under FMLA/CFRA, a private employee must have: a) been employed by the employer for at least 12 months; and b) worked for at least 1,250 hours during the 12-month period immediately preceding the first day of leave; and c) worked at a worksite where 50 or more employees are employed by the employer within 75 miles. (Gov. Code, § 12945.2(a)-(b); 2 Cal. Code Regs 11087(d)-(e).)

It is unlawful for an employer to interfere with, restrain, or deny the exercise of any right granted by the FMLA or the CFRA and/or to discharge or in any other manner discriminate against an individual for exercising any right under the FMLA or CFRA. (29 U.S.C. § 2615(a)-(b); Cal. Gov. Code, § 12945.2(l); 2 Cal Code of Regs. 11094; 29 CFR § 825.220.) Under CFRA, an employee may recover full FEHA-type damages: past and future lost income and benefits, emotional distress damages, punitive damages, and attorneys' fees. Under FMLA, however, the damages are more limited.

The FMLA and CFRA make it unlawful for an employer to discipline, discriminate against, or terminate employees who miss work due to their own or a qualified family member's "serious health condition." A "serious health condition" is defined as an illness or injury which involves either: (1) inpatient care or (2) continuing treatment or continuing supervision by a health care provider. (2 Cal. Regs., § 11087(q).) What constitutes "inpatient care" – an overnight hospital stay – is generally straightforward. The confusion (and litigation) occurs with determining whether certain situations qualify as "continuing treatment."

• What constitutes "continuing treatment"?

There are four situations that fall under the "continuing treatment" definition of a serious health condition:

(1) a period of incapacity (i.e., inability to work ... or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) treatment two or more times by a health care provider ... .; or

(ii) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider;

(2) any period of absence to receive multiple treatments by a health care provider either for restorative surgery or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment.

(3) any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) requires periodic visits for treatment by a health care provider...;

(ii) continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) may cause episodic rather than a continuing period of incapacity... ."

(4) any period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective.

(29 CFR § 825.800. Accord 2 Cal Regs. § 11097.)

To evaluate whether an employee is qualified for FMLA/CFRA leave, it is important to keep in mind these definitions of "serious health condition" and "continuing treatment." Many employers make the mistake of thinking that an employee's illness must be "serious," as that term is generally understood, in order to qualify for leave. The definition that comes closest to this lay interpretation is that for a "chronic serious health condition." Note, however, that the first definition does not even mention the type of illness. The focus is on incapacity and treatment. Thus, unless otherwise excluded, any illness or injury that incapacitates the employee (or the employee's family member) for more than three days and satisfies the other provisions qualifies as continuing treatment.

This definition is broad and far-reaching. Not only does it cover employees who are incapacitated from work, it also covers employees who are incapacitated from their regular daily activities even outside of work. Thus an employee who is incapacitated from working two consecutive days, then remains incapacitated from his regular daily activities over a non-working weekend, may qualify for leave as having continuing treatment.

•Employees may take intermittent leave

FMLA/CFRA leave may be taken intermittently or on a reduced leave schedule under certain circumstances. Intermittent leave is defined as leave taken in separate blocks of time due to a single qualifying reason. (29 CFR § 825.203(a).) Intermittent leave may be taken for a serious health condition which requires periodic treatment by a health care provider. (29 CFR § 825.203(c)(1).) Intermittent leave may also be taken for "[a]bsences where the employee ... is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider." (29 CFR § 825.203(c)(2).)

Thus, employees (or their family members) who suffer from a serious health condition may take leave for a day or part of a day due to incapacity caused by the condition or to receive treatment from a health care provider. Many employers violate the intermittent leave provisions of FMLA/CFRA by denying employees time off to attend, or punishing employees who miss work for, medical appointments.

•FMLA/CFRA leave is protected under "no fault" attendance policies

Employers with "no fault" attendance policies are at considerable risk of violating FMLA/CFRA. Such policies allow employees a maximum number of absences without regard to cause. Employees who exceed that maximum are subject to discipline or termination. Because employers often fail to recognize that certain absences qualify for FMLA/CFRA protection, they violate the law by considering such absences when taking adverse action against the employee.

For example, in *George v. Associated Stationers* (N.D. Ohio 1996) 932 F. Supp. 1012, 1017, the court held that FMLA/CFRA-qualifying leave cannot be counted under "no fault" attendance policies. The court stated: "employer cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under 'no fault' attendance policies." (*Id.*, citing 29 C.F.R. § 825.220(c).)

Paid sick leave

California's Healthy Workplaces, Healthy Families Act of 2014 went into effect on July 1, 2015. (Lab. Code, § 245-249, 2810.5.)[1] All employees who work in California for 30 or more days within a year qualify for paid sick leave except for certain employees covered by a collective bargaining agreement, providers of in-home supportive services, and certain individuals employed by an air carrier.

Paid sick leave accrues at the rate of not less than one hour per every 30 hours worked. (Lab. Code, § 246(b)(1).) An employer may cap total accrual of sick leave at 48 hours or 6 days. (Lab, Code, § 246(i).) An employee's entitlement to use accrued sick leave begins on the 90th day of employment. After that, an employee may use sick leave as it is accrued. (Lab. Code, § 246(c).) An employee must provide "reasonable advance notification" if the need for sick leave is foreseeable. If the need is unforeseeable, then the employee must provide notice "as soon as practicable." (Lab. Code, § 246(l).) The notice may be written or oral. (Lab. Code, § 246.5(a).

Employers must allow eligible employees to use accrued sick leave for the "[d]iagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member." (Lab. Code, § 246.5(a)(1).) Family member includes a child, parent, spouse or registered domestic partner, grandparent, grandchild, and sibling. (Lab. Code, § 245.5 (c).) The definition of family member for paid sick leave is thus broader than for FMLA/CFRA leave since it includes grandparents, grandchildren, and siblings.

An employer may not discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for attempting to use or using accrued sick days, filing a complaint with the Department of Industrial Relations or alleging a violation of the Healthy Workplaces, Healthy Families Act of 2014, cooperating in an investigation or prosecution of an alleged violation of the Act, or opposing any policy, practice, or act prohibited by the Act. (Lab. Code, § 246.5(c)(1).) Violations of the Act may be enforced by the Labor Commissioner who may order "any appropriate relief" including reinstatement, backpay, payment of sick days unlawfully withheld, payment of administrative penalty, and interest. (Lab. Code, § 248.5(b)(1), (f).) The Act

does not appear to provide a private right of action and also appears to limit the available remedies for an employee who enforces the Act through the Labor Code Private Attorneys General Act of 2004 (PAGA), (Lab. Code, §§ 2698-2699.5.) In such cases, the employee may recover only equitable, injunctive, restitutionary relief, and reasonable attorney fees and costs. (Lab. Code, § 248.5(e).)

•Interaction with FMLA/CFRA leave

An employee may choose, or the employer may require the employee, to use accrued paid sick leave while the employee is on FMLA/CFRA leave. The time off will still count against the employee's overall FMLA/CFRA leave entitlement. (29 USC § 2612(d)(2)(B); Gov. Code, § 12945.2(e).)

Kin Care Law [Lab Code, § 233]

The Kin Care Law applies only to paid time that falls within the statute's definition of "sick leave." (*McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110 (Kin Care Law "does not apply to any and all forms of compensated time off for illness").) The statute defines "sick leave" as "accrued increments of compensated leave provided by an employer to an employee as a benefit of the employment for use by the employee during an absence from the employment" because the employee is physically or mentally unable to perform his or her duties due to illness, injury, or a medical condition; the employee is absent to get a professional diagnosis or treatment for a medical condition; or the employee is absent for other medical reasons, such as pregnancy or getting a physical examination. (Lab. Code, § 233(b)(4).)

In a calendar year, an employee may use accrued sick leave up to an amount not less than what he or she accrues in six months to attend to the illness of a child, parent, spouse, or domestic partner. The Kin Care Law does not permit an employee to use more sick leave for this purpose than he or she has accrued at the time the employee takes leave. (Lab. Code, § 233(a).) For example, an employee who accrues eight sick days per calendar year may use up to four of those days to care for a covered family member. But if that employee has accrued only three paid sick days as of the time he or she needs to take time off, the employee can only use those three days.

The Kin Care Law prohibits an employer from denying an employee the right to use sick leave. It also prohibits an employer from discharging, threatening to discharge, demoting, suspending, or in any manner discriminating against an employee for using or attempting to use sick leave to care for a family member's illness. (Lab. Code, § 233(c).) In addition, an employer may not use an "absence control policy" that counts sick leave taken under the Kin Care Law as an absence that may lead to discipline, demotion, suspension, or termination. (Lab. Code, § 234.)

For an employer that provides only the minimum amount of paid sick days required under the Healthy Workplaces, Healthy Families Act of 2014, the Kin Care Law will have limited impact because under the paid sick leave law, an eligible employee will have the right to use all of his or her accrued sick days to care for an ill family member. For an employer that provides more than the minimum amount required by the paid sick leave law, the impact of the Kin Care Law will depend on the number of additional days provided and the employer's policy regarding the use of those additional days.

An employee aggrieved by an employer's violation of the Kin Care Law is entitled to reinstatement, actual damages or one day's pay, whichever is greater, and appropriate equitable relief. The employee may file a complaint with the Labor Commissioner or bring a civil action in court. If the employee is successful, the court may award reasonable attorney's fees to the employee. (Lab. Code, § 233(e).

Leave of absence as an accommodation for a disability

A physical disability is defined as a condition which "limits a major life activity." (Gov. Code, § 12926(k)(1)(B).) Under FEHA "major life activities" is broadly construed and includes physical, mental, and social activities, including working. (*Ibid.*) FEHA also requires an employer with at least five employees to provide reasonable accommodations to a disabled employee. (Gov. Code, § 12940(m).) "Under the express provisions of the FEHA, the employer's failure to reasonably accommodate a disabled individual is a violation of the statute in and of itself." (*Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 256.) Where an employee is temporarily unable to work due to a disability, time off without penalty is an accommodation as a matter of law. (*Humphrey v. Memorial Hospitals Assn.* (9th Cir. 2001) 239 F.3d 1128, 1135-1136, 1139; see also, e.g. 29 CFR pt 1630, App. § 1630.2(o) ("accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave...").) "[W]here a leave of absence would reasonably accommodate an employee's disability and permit him, upon his return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA" (*Id.* at 1135-1136 (citation omitted).)

FEHA entitles a disabled employee to a reasonable accommodation, which may include leave with "no statutorily fixed duration," as long as the leave does not impose an undue hardship on the employer.[2] (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1338, citing *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 263 ("Holding a job open for a disabled employee who needs time to recuperate or heal is in itself a form of reasonable accommodation . . .") and *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 226 ("[A] finite leave can be a reasonable accommodation

under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties.")

The duty to provide leave as accommodation is independent of the duty to provide FMLA/CFRA leave. Thus, an additional leave of absence may be required after exhaustion of FMLA/CFRA leave. (2 Cal. Code Regs. 11068(c).) Indeed, in *Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, the Court held that exhaustion of leave under one part of FEHA, in that case the Pregnancy Disability Leave Law ("PDLL"), did not serve to cap the medical leave an employee may be entitled to. The Court also held that upon expiration of job-protected leave, the employee may still be entitled to reasonable accommodation to keep her job under the other provisions of FEHA regarding reasonable accommodation. (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331.) The *Sanchez* court reasoned that to interpret the PDLL's leave protection of four months as a cap where case law makes clear that disability leave may in some circumstances exceed four months, would be to interpret the PDLL as "diminshi[ing] the coverage" otherwise provided under any other provision of FEHA. (*Id.* at 1139.)

Leave due to a pregnancy-related disability

If an employee suffers from a disability due to pregnancy or related medical condition, an employer must provide up to four months disability leave under the Pregnancy Disability Leave law ("PDLL"). (Gov. Code, § 12945. Employees are entitled to such leave regardless of length of employment or whether they work full-time. 2 Cal. Regs. § 7291.4.) The leave may also be taken intermittently and includes time off needed for prenatal care, severe morning sickness or doctor-ordered bed rest. PDLL also provides leave for a reasonable period of time for recovery from childbirth. (2 Cal. Regs. § 7291.2(f)(o).)

If an employee returns from pregnancy disability leave within the four-month period allotted, she is guaranteed reinstatement into the same position. (2 Cal. Regs. § 72941.10(a).) If the position is no longer available due to a layoff or site closure, the employer must offer a comparable available position. (2 Cal. Regs. § 7291.10(c).)

PDLL also prohibits retaliation against women who take pregnancy disability leave. (2 Cal. Regs. § 7291.6(a)(2)(F).) An employer may not refuse to return a woman to work who takes such leave simply because it prefers her temporary replacement or if during the leave, it identifies performance deficiencies that existed prior to her leave. (2 Cal. Regs. § 7291.10.) Notably, employers are also prohibited from forcing a pregnant woman to take leave when she has not requested leave. (2 Cal. Regs. § 7291.6(H).)

Conclusion

Practitioners should be on the alert for any instances in which a client or client's relative is fired or disciplined for missing work. In many instances, the absences from work are protected by law and the client or relative may have viable employment claims.

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Endnotes

[1] Some local entities also have paid sick leave ordinances. See, e.g., Chapter 12W of the San Francisco Administrative Code.

[2] However, "(W)hen 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." 2 Cal. Code Regs. 11068(c).