Information Sheet – 10/09/18 - Board of Trustees Meeting

TO: Board of Trustees Item: 8.1

FR: Celli Coeville

DATE: October 4, 2018

RE: Revised Administrative Regulation, AR 4161.8/ 4261.8/ 4361.8, Family Care and Medical Leave, Consider Adoption as Presented

Family Care and Medical Leave, Revised AR 4161.8/ 4261.8/ 4361.8:

(AR revised) Regulation updated to reflect NEW LAW (AB 1556) which deletes gender-specific references with regard to pregnancy disability leave and clarifies that all employees are protected against pregnancy discrimination regardless of their gender identity. Regulation also reflects NEW LAW (SB 63) which extends the requirement to grant parental leave to any district that employs 20-49 employees within 75 miles of the worksite where the employee requesting the leave is employed.

Attached please find the CSBA sample administrative regulation followed by the current District administrative regulation.

Recommendation Action: Approve the revised Administrative Regulation.

CSBA Sample
Administrative Regulation
Family Care And Medical Leave

AR 4161.8 4261.8,4361.8
Personnel

Note: The following optional administrative regulation addresses mandatory subjects of bargaining. The laws referenced in this regulation provide minimum amounts of leave which the district must grant its employees if more generous benefits are not provided as part of its collective bargaining agreement. Any covered subject that is already addressed in the district's collective bargaining agreements should be deleted from this administrative regulation.

Note: Both federal and state law provide for family care and medical leave (29 USC 2601-2654, the Family and Medical Leave Act of 1993 (FMLA), and Government Code 12945.1-12945.2, the California Family Rights Act (CFRA)). However, these laws do not always provide identical rights or operate in the same manner. For example, pregnancy as a "serious health condition" is covered under FMLA but not under CFRA. Instead, under California law, an employee who is disabled due to pregnancy, childbirth, or a related medical condition is entitled to pregnancy disability leave (PDL) pursuant to Government Code 12945. Where there is a difference between state and federal law, the law that grants the greatest benefits generally controls. In those situations, legal counsel should be consulted as needed.

Note: As amended by AB 1556 (Ch. 799, Statutes of 2017), Government Code 12945 and 12945.2 delete references to females with regard to pregnancy disability leave and clarify that all employees are protected against pregnancy discrimination regardless of their gender identity.

The district shall not deny any eligible employee the right to family care, medical, or pregnancy disability leave (PDL) pursuant to the Family and Medical Leave Act (FMLA), the California Family Rights Act (CFRA), or the Fair Employment and Housing Act (FEHA) nor restrain or interfere with the employee's exercise of such right. In addition, the district shall not discharge an employee or discriminate or retaliate against him/her for taking such leave or for his/her opposition to or challenge of any unlawful district practice in relation to any of these laws or for his/her involvement in any related inquiry or proceeding. (Government Code 12945, 12945.2; 2 CCR 11094; 29 USC 2615)

(cf. 4030 - Nondiscrimination in Employment)
(cf. 4032 - Reasonable Accommodation)
(cf. 4033 - Lactation Accommodation)

Definitions

The words and phrases defined below shall have the same meaning throughout this administrative regulation except where a different meaning is otherwise specified.

Child (son or daughter) means a biological, adopted, or foster child; a stepchild; a legal ward; or a child to whom the employee stands in loco parentis, as long as the child is under 18 years of age or an adult dependent child. (Government Code 12945.2; 2 CCR 11087; 29 USC 2611)

Eligible employee for FMLA and CFRA purposes means an employee who has been employed with the district for at least 12 months and who has at least 1,250 hours of service with the district during the previous 12-month period. However, these requirements shall not apply when an employee applies for PDL. (Government Code 12945.2; 2 CCR 11087; 29 USC 2611; 29 CFR 825.110)

Employee disabled by pregnancy means an employee whose health care provider states that the employee is: (2 CCR 11035)

1. Unable because of pregnancy to perform any one or more of the essential functions of the job or to perform any of them without undue risk to the employee or other persons or to the pregnancy's successful completion

2. Suffering from severe "morning sickness" or needs to take time off for prenatal or postnatal care, bed rest, gestational diabetes, pregnancy-induced hypertension, preeclampsia, postpartum depression, childbirth, loss or end of pregnancy, recovery from childbirth or loss or end of pregnancy, or any other pregnancy-related condition

Parent means a biological, foster, or adoptive parent; a stepparent; a legal guardian; or another person who stood in loco parentis to the employee when the employee was a child. Parent does not include a spouse's parents. (Government Code 12945.2; 2 CCR 11087; 29 USC 2611; 29 CFR 825.122)

Serious health condition means an illness, injury (including, but not limited to, on-the-job injuries), impairment, or physical or mental condition of the employee or his/her child, parent, or spouse, including, but not limited to, treatment for substance abuse, that involves either of the following: (Government Code 12945.2; 2 CCR 11087, 11097; 29 USC 2611; 29 CFR 825.113-825.115)

1. Inpatient care in a hospital, hospice, or residential health care facility, any subsequent treatment in connection with such inpatient care, or any period of incapacity

A person is considered an inpatient when a health care facility formally admits him/her to the facility with the expectation that he/she will remain overnight and occupy a bed, even if it later develops that the person can be discharged or transferred to another facility and does not actually remain overnight.

Incapacity means the inability to work, attend school, or perform other regular daily activities due to a serious health condition, its treatment, or the recovery that it requires.

2. Continuing treatment or continuing supervision by a health care provider, including one

or more of the following:

a. A period of incapacity of more than three consecutive full days

b. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition

c. Any period of incapacity due to pregnancy or for prenatal care under FMLA

d. Any period of incapacity which is permanent or long term due to a condition for which treatment may not be effective

e. Any period of absence to receive multiple treatments, including recovery, by a health care provider

Spouse means a partner in marriage as defined in Family Code 300, including same sex partners in marriage, or a registered domestic partner within the meaning of Family Code 297-297.5. (Family Code 297, 297.5, 300; 2 CCR 11087; 29 CFR 825.122)

Eligibility

Note: Pursuant to Government Code 12945.2 and 29 USC 2611, a district is required to grant family care and medical leave to an eligible employee for any of the reasons stated below. These requirements generally apply to circumstances where the district employs 50 or more employees within 75 miles of the worksite where the employee requesting the leave is employed.

Note: Government Code 12945.6, as added by SB 63 (Ch. 686, Statutes of 2017), extends the right to parental leave to an eligible employee who is not covered by FMLA or CFRA when the district employs 20-49 employees within 75 miles of the worksite where the employee requesting the leave is employed.

The district shall grant FMLA or CFRA leave to eligible employees for any of the following reasons: (Government Code 12945.2, 12945.6; 29 USC 2612; 29 CFR 825.112)

1. The birth of a child of the employee or placement of a child with the employee in connection with the employee's adoption or foster care of the child (parental leave)

2. To care for the employee's child, parent, or spouse with a serious health condition

3. The employee's own serious health condition that makes him/her unable to perform one or more essential functions of his/her position

***Note: Pursuant to 29 CFR 825.126, FMLA military family leave is available to any eligible employee for a qualifying exigency while the employee's spouse, son, daughter, or parent who is a military member is on covered active duty during deployment to a foreign country. For requirements related to qualifying exigency leave, see the section "Military Family Leave

Resulting from Qualifying Exigencies" below.***

4. Any qualifying exigency arising out of the fact that the employee's spouse, child, or parent is a military member on covered active duty or call to covered active duty (or has been notified of an impending call or order to covered active duty)

Note: Pursuant to 29 CFR 825.127, military caregiver leave is available to any eligible employee who is a family member of a covered servicemember with a serious injury or illness. For requirements related to military caregiver leave, see the section on "Military Caregiver Leave" below.

5. To care for a covered servicemember with a serious injury or illness if the covered servicemember is the employee's spouse, child, parent, or next of kin, as defined

Note: Under federal law, pregnancy as a "serious health condition" is covered as part of FMLA leave. However, disability due to pregnancy is explicitly excluded from coverage under CFRA (2 CCR 11093). Instead, pursuant to Government Code 12926 and 12945, any California employee who is "disabled because of pregnancy, childbirth, or related medical conditions" is entitled to unpaid PDL of up to four months if the employer has five or more employees. Therefore, such an employee is entitled to up to four months of PDL and an additional 12 weeks of CFRA leave following the birth of the child.

Note: Additionally, pursuant to 2 CCR 11037, PDL is not subject to eligibility requirements for other FMLA and CFRA leaves, such as minimum hours worked or length of service.

In addition, the district shall grant PDL to any employee who is disabled by pregnancy, childbirth, or other related medical condition. (Government Code 12945; 2 CCR 11037)

Terms of Leave

Note: Leaves common to CFRA and FMLA run concurrently so that total leave to which an employee is entitled would be 12 work weeks.

An eligible employee shall be entitled to a total of 12 work weeks of FMLA or CFRA leave during any 12-month period, except in the case of leave to care for a covered servicemember as provided under "Military Caregiver Leave" below. To the extent allowed by law, CFRA and FMLA leaves shall run concurrently. (Government Code 12945.2; 29 USC 2612)

Note: To determine the 12-month period in which the leave entitlement occurs, the district may use any of the methods identified in 29 CFR 825.200 and specified in options #1-4 below. However, a district may choose not to use any of these options and may instead choose some other fixed 12-month period. Whichever option is selected, it must be applied uniformly to all employees. If the district fails to select a method for calculating the 12-month period, the method that provides the most beneficial outcome for the employee will be used. Pursuant to 2 CCR 11090, if the district decides to change the calculation method, it must provide at least 60 days' notice to all employees.

OPTION 1: This 12-month period shall coincide with the calendar year. (29 CFR 825.200)

Note: 2 CCR 11042 clarifies that the four months of PDL to which an employee is entitled means the number of days or hours that the employee would normally work within the four calendar months.

In addition, any employee who is disabled by pregnancy, childbirth, or other related condition shall be entitled to PDL for the period of the disability not to exceed four months. For a part-time employee, the four months shall be calculated on a proportional basis. (Government Code 12945; 2 CCR 11042)

Note: While leaves common to CFRA and FMLA run concurrently, PDL is separate and distinct from CFRA leave. Consequently, pursuant to 2 CCR 11046, an employee who is "disabled by pregnancy" may be entitled to up to four months of PDL, followed by 12 work weeks of CFRA leave for the birth of the child (baby bonding). Determining which leaves run concurrently is a complex endeavor and districts should consult legal counsel as needed.

PDL shall run concurrently with FMLA leave for disability caused by an employee's pregnancy. At the end of the employee's FMLA leave for disability caused by pregnancy, or at the end of four months of PDL, whichever occurs first, a CFRA-eligible employee may request to take CFRA leave of up to 12 work weeks, for the reason of the birth of a child or to bond with or care for the child. (Government Code 12945, 12945.2; 2 CCR 11046, 11093)

Leave taken for the birth or placement of a child must be concluded within the 12-month period beginning on the date of the birth or placement of the child. Such leave does not need to be taken in one continuous period of time. (2 CCR 11090; 29 USC 2612)

Note: The following optional paragraph is for use by districts that choose to limit family care and medical leave related to the birth or placement of a child to a total of 12 work weeks when both parents work for the district, as authorized by Government Code 12945.2 and 12945.6. However, pursuant to 2 CCR 11088, such limit on employees' entitlement to family care and medical leave for any other qualifying purpose is prohibited.

If both parents of a child work for the district, their family care and medical leave related to the birth or placement of the child shall be limited to a combined total of 12 work weeks. This restriction shall apply regardless of the legal status of both parents' relationship. (Government Code 12945.2, 12945.6; 2 CCR 11088; 29 USC 2612)

Use/Substitution of Paid Leave

***Note: The district may require employees to use paid leave during an otherwise unpaid portion of CFRA or FMLA leave. Pursuant to 2 CCR 11044 and 11092, the district may only require an employee to use sick leave if the leave is for the employee's own serious health condition or for PDL, unless mutually agreed to by the district and the employee. The district and employee may also negotiate for the employee's use of any paid or unpaid time off instead of

using the employee's CFRA leave.***

OPTION 1: An employee shall use his/her accrued vacation leave, other accrued time off, and any other paid time off negotiated with the district for any otherwise unpaid FMLA or CFRA leave not involving his/her own serious health condition. For PDL, CFRA, or FMLA leave due to an employee's own serious health condition, the employee shall use accrued sick leave and may use accrued vacation leave and other paid time off at his/her option. (Government Code 12945, 12945.2, 12945.6; 2 CCR 11044; 29 USC 2612)

Note: The following paragraph is for use with either option above.

The district and employee may also negotiate for the employee's use of any additional paid or unpaid time off instead of using the employee's CFRA leave. (2 CCR 11092)

(cf. 4141/4241 - Collective Bargaining Agreement)
(cf. 4161/4261/4361 - Leaves)
(cf. 4161.1/4361.1 - Personal Illness/Injury Leave)
(cf. 4261.1 - Personal Illness/Injury Leave)

Intermittent Leave/Reduced Work or Leave Schedule

PDL and family care and medical leave for the serious health condition of an employee or his/her child, parent, or spouse may be taken intermittently or on a reduced work or leave schedule when medically necessary, as determined by the health care provider of the person with the serious health condition. However, the district shall limit leave increments to the shortest period of time that the district's payroll system uses to account for absences or use of leave provided it is not to be greater than one hour. (2 CCR 11042, 11090; 29 USC 2612)

(cf. 4113.4/4213.4/4313.4 - Temporary Modified/Light-Duty Assignment)

Note: Pursuant to 2 CCR 11090, the minimum duration of CFRA parental leave for the birth, adoption, or foster care placement of a child is generally two weeks. However, the district must grant a request for CFRA leave of less than two weeks duration on any two occasions and may grant additional requests.

The basic minimum duration of leave for the birth, adoption, or foster care placement of a child shall be two weeks. However, the district shall grant a request for such leave of less than two weeks on any two occasions. (2 CCR 11090; 29 USC 2612)

The district may require an employee to transfer temporarily to an available alternative position under any of the following circumstances: (2 CCR 11041, 11090; 29 USC 2612)

1. The employee needs intermittent leave or leave on a reduced work schedule that is foreseeable based on a planned medical treatment for the employee or family member.

***Note: Pursuant to 2 CCR 11041, the district must accommodate the transfer request of a

pregnant employee to the same extent that it accommodates transfer requests for other temporarily disabled employees.***

2. A medical certification is provided by the employee's health care provider that, because of pregnancy, the employee has a medical need to take intermittent leave or leave on a reduced work schedule.

3. The district agrees to permit intermittent leave or leave on a reduced work schedule due to the birth, adoption, or foster care placement of the employee's child.

The alternative position must have equivalent pay and benefits and must better accommodate recurring periods of leave than the employee's regular job, and the employee must be qualified for the position. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent leave or a reduced work or leave schedule. (2 CCR 11041, 11090; 29 USC 2612)

Request for Leave

Note: Pursuant to 2 CCR 11050 and 11091, an employee is required to notify the district of the need to take PDL or family care and medical leave. The employee must provide at least verbal notice sufficient to make the district aware that the employee needs qualifying leave, and the anticipated timing and duration of the leave. However, the employee does not need to assert rights under CFRA or FMLA or even mention CFRA or FMLA to meet the notice requirement, but must state the reason the leave is needed. If there is a question about whether leave is FMLA/CFRA qualifying or if the district is considering denying CFRA leave based on an employee's refusal to provide further information, legal counsel should be consulted.

The district shall consider an employee's request for PDL or family care and medical leave only if the employee provides at least verbal notice sufficient to make the district aware of the need to take the leave and the anticipated timing and duration of the leave. (2 CCR 11050, 11091)

For family care and medical leave, the employee need not expressly assert or mention FMLA/CFRA to satisfy this requirement. However, he/she must state the reason the leave is needed (e.g., birth of child, medical treatment). If more information is necessary to determine whether the employee is eligible for family care and medical leave, the Superintendent or designee shall inquire further and obtain the necessary details of the leave to be taken. (2 CCR 11091)

The district shall respond to requests for leave as soon as practicable, but no later than five business days after receiving the employee's request. (2 CCR 11091)

Note: Both 29 CFR 825.300 and 2 CCR 11091 require the district to provide an employee with notice of the designation of leave as either qualifying for CFRA or FMLA protection. See section entitled "Notifications" below for further requirements of this "designation notice" as well as other required notifications.

Note: Pursuant to 2 CCR 11091, an employee has the obligation to respond to questions designed to determine whether an absence is potentially CFRA qualifying. If the district is unable to determine whether requested leave is CFRA qualifying because of employee's refusal to respond to its inquiries, the employee may be denied CFRA protection.

Based on the information provided by the employee, the Superintendent or designee shall designate the leave, paid or unpaid, as FMLA/CFRA qualifying leave and shall give notice of such designation to the employee. Failure of an employee to respond to permissible inquiries regarding the leave request may result in denial of CFRA protection if the district is unable to determine whether the leave is CFRA qualifying. (2 CCR 11091; 29 CFR 825.300)

Note: Pursuant to 2 CCR 11091, the district may require an employee to provide at least 30 days advance notice of the need for family care and medical leave, if the need is foreseeable. If the district requires such advance notice from employees, then the district's notification of FMLA/CFRA rights must so specify; see section below entitled "Notifications."

Note: Pursuant to 2 CCR 11050, an employee requesting PDL is required to provide the district at least 30 days advance notice if the need for PDL is foreseeable.

When an employee is able to foresee the need for PDL or family care and medical leave at least 30 days in advance of the leave, the employee shall provide the district with at least 30 days advance notice before the leave. When the 30 days notice is not practicable because of a lack of knowledge of when leave will be required to begin, a change in circumstances, a medical emergency, or other good cause, the employee shall provide the district with notice as soon as practicable. Failure of an employee to provide required notice may result in a denial of leave. (2 CCR 11050, 11091)

In all instances, the employee shall consult with the Superintendent or designee and make a reasonable effort to schedule, subject to the health care provider's approval, any planned appointment or medical treatment or supervision so as to minimize disruption to district operations. (Government Code 12945.2; 2 CCR 11050, 11091)

Certification of Health Condition

Note: The following optional section is for use by districts that require an employee to submit a medical certification of the need for leave along with the request for PDL or family care and medical leave for his/her own serious health condition or to care for a child, parent, or spouse with a serious health condition. In order to help avoid claims of discrimination, the district should generally treat all employees uniformly; thus, districts using this section should request a medical certification from all employees.

Note: Districts requiring written medical certification from employees who request reasonable accommodation, transfer, or disability leave because of pregnancy may develop their own form, utilize one provided by the employee's health care provider, or use the form provided in 2 CCR 11050 or 11097, as applicable.

Within five business days of an employee's request for family care and medical leave for his/her own or his/her child's, parent's, or spouse's serious health condition, the Superintendent or designee shall request that the employee provide certification by a health care provider of the need for leave. Upon receiving the district's request, the employee shall provide the certification within 15 days, unless either the Superintendent or designee provides additional time or it is not practicable under the particular circumstances, despite the employee's diligent, good faith efforts. (2 CCR 11091; 29 CFR 825.305)

The certification shall include the following: (Government Code 12945.2; 2 CCR 11087; 29 USC 2613)

1. The date on which the serious health condition began

2. The probable duration of the condition

Note: Item #3 below addresses an eligible employee's request for leave to care for his/her child, parent, or spouse. In such a case, 2 CCR 11087 provides that the health care provider's certification need not identify the serious health condition involved.

3. If the employee is requesting leave to care for a child, parent, or spouse with a serious health condition, both of the following:

a. Statement that the serious health condition warrants the participation of the employee to provide care, such as by providing psychological comfort, arranging for third party care, or directly providing or participating in the medical care of the child, parent, or spouse during a period of the treatment or supervision

b. Estimated amount of time the health care provider believes the employee needs to care for the child, parent, or spouse

4. If the employee is requesting leave because of his/her own serious health condition, a statement that due to the serious health condition, he/she is unable to work at all or is unable to perform one or more essential functions of his/her job

5. If the employee is requesting leave for intermittent treatment or on a reduced work or leave schedule for planned medical treatment, a statement of the medical necessity for the leave, the dates on which treatment is expected to be given, the duration of such treatment, and the expected duration of the leave

When an employee has provided sufficient medical certification to enable the district to determine whether the employee's leave request is FMLA/CFRA-eligible, the Superintendent or designee shall notify the employee within five business days whether the leave is FMLA/CFRA-eligible. The Superintendent or designee may also retroactively designate leave as FMLA/CFRA leave as long as appropriate notice is given to the employee and there is no harm or injury to the employee. (2 CCR 11091; 29 CFR 825.301)

If the Superintendent or designee doubts the validity of a certification that accompanies a request for leave for the employee's own serious health condition, he/she may require the employee to obtain a second opinion from a district-approved health care provider, at district expense. If the second opinion is contrary to the first, the Superintendent or designee may require the employee to obtain a third medical opinion from a third health care provider approved by both the employee and the district, again at district expense. The opinion of the third health care provider shall be final and binding. (Government Code 12945.2; 2 CCR 11091; 29 USC 2613)

For PDL, the Superintendent or designee shall request that the employee provide certification by a health care provider of the need for leave at the time the employee gives notice of the need for PDL, or within two business days of giving the notice. If the need for PDL is unforeseen, the Superintendent or designee shall request the medical certification within two business days after the leave commences. The Superintendent or designee may request certification at some later date if he/she has reason to question the appropriateness of the leave or its duration. (2 CCR 11050)

For PDL that is foreseeable and for which at least 30 days notice has been given, the employee shall provide the medical certification before the leave begins. When this is not practicable, the employee shall provide the certification within the time frame specified by the Superintendent or designee which must be at least 15 days after the request, unless it is not practicable under the particular circumstances despite the employee's diligent, good faith efforts. (2 CCR 11050)

Medical certification for PDL purposes shall include a statement that the employee needs to take the leave because the employee is disabled by pregnancy, childbirth, or a related medical condition, the date on which the employee became disabled because of pregnancy, and the estimated duration of the leave. (2 CCR 11050)

If additional PDL or family care and medical leave is needed when the time estimated by the health care provider expires, the district may require the employee to provide recertification in the manner specified for the leave. (Government Code 12945.2; 2 CCR 11050; 29 USC 2613)

Note: Government Code 12940 and other provisions of the California Genetic Information Nondiscrimination Act of 2011 prohibit employers from requesting or requiring genetic information of employees or family members of employees unless specifically authorized by law. A district which believes that an employee's leave may require obtaining this information should consult with legal counsel.

The Superintendent or designee shall not request any genetic information related to an employee except as authorized by law in accordance with the California Genetic Information Nondiscrimination Act of 2011.

Release to Return to Work

***Note: The following optional section is for use by districts that choose to require a return-to-work certification and may be modified to list the specific positions for which certification is required. Pursuant to 2 CCR 11091, the district may require an employee to

submit a return-to-work certification from his/her health provider, stating that he/she is able to return to work. However, this requirement may only be made if the district has a uniformly applied practice of requiring such releases when employees return to work after illness, injury, or disability, the fitness-for-duty examination is job related and consistent with business necessity, and the practice is not forbidden by its collective bargaining agreement. 2 CCR 11050 has similar requirements when an employee is returning to work after PDL.***

Note: Pursuant to 29 CFR 825.312, when the health care provider certifies that the employee is able to resume work, the district may also require the health care provider to address the employee's ability to perform the essential functions of the job. If such a requirement is imposed, then the district must provide the employee with a list of the essential functions of his/her job with the "designation notice"; see section entitled "Notifications" below.

Upon expiration of an employee's PDL or family care and medical leave taken for his/her own serious health condition, the employee shall present certification from the health care provider that he/she is able to resume work. The certification shall address the employee's ability to perform the essential functions of his/her job.

(cf. 4112.4/4212.4/4312.4 - Health Examinations)

Rights to Reinstatement

Note: Pursuant to Government Code 12945.2, 2 CCR 11043 and 11089, and 29 USC 2614, an employee on PDL or family care and medical leave has the right to be reinstated to the same or a comparable position when he/she returns from such leave. However, such an employee has no greater right to reinstatement or other benefits than he/she would have if he/she had been continuously employed. In addition, in certain situations described below, the district may be relieved of the obligation to reinstate an employee.

Note: The process for determining whether an employee is a "key employee" to whom the guarantee of reinstatement would not apply requires a detailed analysis and specific notifications to the employee. Legal counsel should be consulted if the district intends to deny leave or reinstatement.

Upon granting an employee's request for PDL or FMLA/CFRA leave, the Superintendent or designee shall guarantee to reinstate the employee in the same or a comparable position when the leave ends. (Government Code 12945.2; 2 CCR 11043, 11089; 29 USC 2614)

However, the district may refuse to reinstate an employee returning from FMLA or CFRA leave to the same or a comparable position if all of the following apply: (Government Code 12945.2; 2 CCR 11089; 29 USC 2614)

1. The employee is a salaried "key employee" who is among the highest paid 10 percent of district employees who are employed within 75 miles of the employee's worksite.

2. The refusal is necessary to prevent substantial and grievous economic injury to district

operations.

3. The district informs the employee of its intent to refuse reinstatement at the time it determines that the refusal is necessary, and the employee fails to immediately return to service.

(cf. 4117.3 - Personnel Reduction)
(cf. 4217.3 - Layoff/Rehire)

The district may also refuse to reinstate an employee to the same or a comparable position if the FMLA/CFRA leave was fraudulently obtained by the employee. (2 CCR 11089; 29 CFR 825.216)

The district may refuse to reinstate an employee to the same position after taking PDL if, at the time the reinstatement is requested, the employee would not otherwise have been employed in that position for legitimate business reasons unrelated to the employee's PDL. (2 CCR 11043)

Maintenance of Benefits/Failure to Return from Leave

During the period when an employee is on PDL or family care and medical leave, he/she shall maintain his/her status with the district and the leave shall not constitute a break in service for purposes of longevity, seniority under any collective bargaining agreement, or any employee benefit plan. (Government Code 12945.2; 2 CCR 11092; 29 USC 2614)

Note: Pursuant to 2 CCR 11044 and 11092, the time that the district maintains and pays for group health coverage during PDL shall not be used to meet its obligation to pay for 12 weeks of group health coverage during leave taken under CFRA, even where the district designates the PDL as FMLA or CFRA leave. The entitlements to employer-paid group health coverage during PDL and during CFRA are two separate and distinct entitlements.

For up to a maximum of four months for PDL and 12 work weeks for other family care and medical leave, the district shall continue to provide an eligible employee the group health plan coverage that was in place before he/she took the leave. The employee shall reimburse the district for premiums paid during the leave if he/she fails to return to district employment after the expiration of all available leaves and the failure is for a reason other than the continuation, recurrence, or onset of a serious health condition or other circumstances beyond his/her control. (Government Code 12945.2; 2 CCR 11044, 11092; 29 USC 2614; 29 CFR 825.213)

(cf. 4154/4254/4354 - Health and Welfare Benefits)

In addition, during the period when an employee is on PDL or family care and medical leave, the employee shall be entitled to continue to participate in other employee benefit plans including life insurance, short-term or long-term disability insurance, accident insurance, pension and retirement plans, and supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to an unpaid leave taken for any other purpose. However, for purposes of pension and retirement plans, the district shall not make plan payments for an employee during any unpaid portion of the leave period and the leave period shall not be counted

for purposes of time accrued under the plan. (Government Code 12945.2; 2 CCR 11044, 11092)

Military Family Leave Resulting from Qualifying Exigencies

Note: The following optional section reflects 29 USC 2611 and 2612 which authorize an eligible employee to take up to 12 work weeks of unpaid FMLA leave to attend to an "exigency" arising out of the fact that the employee's spouse, child, or parent is on active duty or on call to active duty status in the National Guard or Reserves, or is a member of the regular Armed Forces on deployment to a foreign country.

Note: Pursuant to 29 CFR 825.200, an employee is entitled to 12 work weeks of qualifying exigency leave during each 12-month period established by the district; see section entitled "Terms of Leave" above. According to the U.S. Department of Labor's (DOL) Military Family Leave Provisions of the FMLA Frequently Asked Questions and Answers, an employee may take all 12 weeks of his/her FMLA leave entitlement as a qualifying exigency leave or take a combination of the 12 weeks of leave for both qualifying exigency leave and other FMLA leave, such as leave for a serious health condition.

Note: Because CFRA does not cover similar leave, CFRA leave is not exhausted when utilizing military family leave.

An eligible employee may take up to 12 work weeks of unpaid FMLA leave, during each 12-month period established by the district in the section entitled "Terms of Leave" above, for one or more qualifying exigencies while his/her child, parent, or spouse who is a military member is on covered active duty or on call to covered active duty status. (29 USC 2612; 29 CFR 825.126)

Covered active duty means duty during the deployment of a member of the regular Armed Forces to a foreign country or duty during the deployment of a member of the National Guard or Reserves to a foreign country under a call or an order to active duty in support of a contingency operation pursuant to law. (29 USC 2611; 29 CFR 825.126)

Note: Pursuant to 29 CFR 825.126, a "qualifying exigency" may include "any other event" agreed to by the district and the employee. As an example of such other event, the DOL's Military Family Leave Provisions of the FMLA Frequently Asked Questions and Answers lists leave to spend time with the military member either prior to or post deployment or to attend to household emergencies that would normally have been handled by the military member.

Qualifying exigencies include time needed to: (29 CFR 825.126)

1. Address issues arising from short notice deployment of up to seven calendar days from the date of receipt of call or order of short notice deployment

2. Attend military events and related activities, such as any official ceremony or family assistance program related to the covered active duty or call to covered active duty status

3. Arrange child care or attend school activities arising from the covered active duty or call to covered active duty, such as arranging for alternative child care, enrolling or transferring a child to a new school, or attending meetings

4. Make or update financial and legal arrangements to address a military member's absence

5. Attend counseling provided by someone other than a health care provider

6. Spend time (up to 15 days of leave per instance) with a military member who is on short-term, temporary, rest and recuperation leave during deployment

7. Attend to certain post-deployment activities, such as arrival ceremonies or reintegration briefings

8. Care for a military member's parent who is incapable of self-care when the care is necessitated by the military member's covered active duty

9. Address any other event that the employee and district agree is a qualifying exigency

The employee shall provide the Superintendent or designee with notice of the need for the qualifying exigency leave as soon as practicable, regardless of how far in advance such leave is foreseeable. (29 CFR 825.302)

Note: The district may require the employee to provide certification of the qualifying exigency containing the information specified in 29 CFR 825.309. A form has been developed by DOL for this purpose and is available on its web site.

Note: The following paragraph is optional and should be deleted by those districts that do not require such documentation. In order to help avoid claims of discrimination, the district should generally treat all employees uniformly; thus, districts using this paragraph should request certification from all employees requesting such leave.

An employee who is requesting leave for qualifying exigencies shall provide the Superintendent or designee with a copy of the military member's active duty orders, or other documentation issued by the military, and the dates of the service. In addition, the employee shall provide the Superintendent or designee with certification of the qualifying exigency necessitating the leave. The certification shall contain the information specified in 29 CFR 825.309.

The employee's qualifying exigency leave may be taken on an intermittent or reduced work or leave schedule basis. (29 CFR 825.302)

Note: Pursuant to 29 USC 2612 and 29 CFR 825.207, the district has the option to require or give employees discretion to use paid leave when taking FMLA/CFRA leave; see Options 1 and 2 in the section entitled "Use/Substitution of Paid Leave" above. Whichever option is selected by the district with regards to FMLA/CFRA leave is also applicable to qualified exigency leave.

During the period of qualified exigency leave, the district's rule regarding an employee's use of his/her accrued vacation leave and any other accrued paid or unpaid time off, as specified in the section "Use/Substitution of Paid Leave" above, shall apply.

Military Caregiver Leave

Note: 29 USC 2612 and 29 CFR 825.127 authorize an eligible employee to take up to 26 work weeks of unpaid military caregiver leave, as defined below, during a single 12-month period. As is the case with other FMLA leaves, only districts that employ at least 50 employees within 75 miles of the worksite where the employee requesting the leave is employed are required to grant the military caregiver leave; see the section entitled "Eligibility" above.

Note: According to the DOL's Military Family Leave Provisions of the FMLA Frequently Asked Questions and Answers, if an employee does not use the entire 26-week entitlement in a single 12-month period, unused weeks cannot be carried over into another 12-month period. However, the employee may qualify for nonmilitary FMLA leave.

The district shall grant an eligible employee up to a total of 26 work weeks of leave during a single 12-month period, measured forward from the first date the leave is taken, to care for a covered servicemember with a serious illness or injury. In order to be eligible for such military caregiver leave, the employee must be the spouse, son, daughter, parent, or next of kin of the covered servicemember. This 26-week period is not in addition to, but rather is inclusive of, the 12 work weeks of leave that may be taken for other FMLA qualifying reasons. (29 USC 2611, 2612; 29 CFR 825.127)

Covered servicemember may be: (29 CFR 825.127)

1. A current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy; is otherwise in outpatient status; or is otherwise on the temporary disability retired list for a serious injury or illness

2. A veteran who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran

Note: Unlike the provisions for other FMLA/CFRA leave, 29 CFR 825.127 places no age limit on the definition of "son or daughter," as detailed below. In addition, 29 CFR 825.127 defines "next of kin" of a covered servicemember in relation to military caregiver leave.

Son or daughter of a covered servicemember means the biological, adopted, or foster child, stepchild, legal ward, or a child of any age for whom the covered servicemember stood in loco parentis. (29 CFR 825.127)

Parent of a covered servicemember means the covered servicemember's biological, adopted, step,

or foster parent, or any other individual who stood in loco parentis to the covered servicemember (except "parents in law"). (29 CFR 825.127)

Next of kin means the nearest blood relative to the covered servicemember, or as designated in writing by the covered servicemember. (29 USC 2611, 2612)

Outpatient status means the status of a member of the Armed Forces assigned to a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. (29 USC 2611; 29 CFR 825.127)

Note: 29 USC 2611 defines "serious injury or illness" for active members of the Armed Forces and for veterans, as provided below. Pursuant to 29 CFR 825.127, one of the four conditions listed in item #2 below must be present for a veteran's injury or illness to qualify as a "serious injury or illness" for the purpose of this leave.

Serious injury or illness means: (29 USC 2611; 29 CFR 825.127)

1. For a current member of the Armed Forces, an injury or illness incurred by the member in the line of duty on active duty, or that existed before the beginning of the member's active duty and was aggravated by the member's service in the line of duty while on active duty in the Armed Forces, and that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.

2. For a veteran, an injury or illness incurred or aggravated by the member's service in the line of duty on active duty in the Armed Forces, including the National Guard or Reserves, that manifested itself before or after the member became a veteran and that is at least one of the following:

a. A continuation of a serious injury or illness incurred or aggravated while the veteran was a member of the Armed Forces and rendered him/her unable to perform the duties of his/her office, grade, rank, or rating

b. A physical or mental condition for which the veteran has received a U.S. Department of Veterans Affairs (VA) Service-Related Disability Rating of 50 percent or greater, based wholly or partly on that physical or mental condition

c. A physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of one or more disabilities related to his/her military service or that would do so but for treatment received by the veteran

d. An injury, including a psychological injury, on the basis of which the veteran has been enrolled in the VA's Program of Comprehensive Assistance for Family Caregivers

***Note: As is the case for other types of FMLA/CFRA leave, 29 CFR 825.302 and 825.303 require the employee, when the need for the leave is foreseeable, to provide 30 days advance

notice to the district before the leave is to begin.***

The employee shall provide reasonable and practicable notice of the need for the leave in accordance with the procedures in the section entitled "Request for Leave" above.

Note: 29 CFR 825.310 authorizes the district to require employees to provide certification of the need for the leave, which is to be completed by an authorized health care provider of the covered servicemember.

Note: The following paragraph is optional. In order to help avoid claims of discrimination, the district should generally treat all employees uniformly; thus, districts using this paragraph should request a medical certification from all employees requesting such leave.

An employee requesting leave to care for a covered servicemember with a serious injury or illness shall provide the Superintendent or designee with certification from an authorized health care provider of the servicemember that contains the information specified in 29 CFR 825.310.

Note: Pursuant to 29 CFR 825.127, an employee may take up to a total of 26 work weeks of leave for both regular FMLA and military caregiver leave during the 12-month leave entitlement period. However, the employee may not take more than 12 weeks for regular FMLA leave. For example, according to the DOL's Military Family Leave Provisions of the FMLA Frequently Asked Questions and Answers, an employee could take 12 weeks of FMLA leave to care for a newborn child and 14 weeks of military caregiver leave, but could not take 16 weeks to care for a newborn and 10 weeks of military caregiver leave. If the leave qualifies as both military caregiver leave and leave to care for a family member with a serious health condition, 29 CFR 825.127 specifies that the district must first designate the leave as military caregiver leave.

The leave may be taken intermittently or on a reduced work or leave schedule when medically necessary. An employee taking military caregiver leave in combination with other leaves pursuant to this administrative regulation shall be entitled to a combined total of 26 work weeks of leave during a single 12-month period. When both spouses work for the district and both wish to take such leave, the spouses are limited to a maximum combined total of 26 work weeks during a single 12-month period. (29 USC 2612)

Note: Pursuant to 29 USC 2612 and 29 CFR 825.207, the district has the option to require or give employees discretion to substitute paid leave when taking FMLA/CFRA leave; see Options 1 and 2 in section entitled "Use/Substitution of Paid Leave" above. Whichever option is selected by the district with regard to FMLA/CFRA leave is also applicable to military caregiver leave.

During the period of military caregiver leave, the district's rule regarding an employee's use of his/her accrued vacation leave and other accrued paid or unpaid time off, as specified in the section "Use/Substitution of Paid Leave" above, shall apply.

Notifications

Note: Both 29 CFR 825.300 and 2 CCR 11095 require employers to provide general notification to employees of their rights under the FMLA/CFRA as well as specific notifications when an employee has requested leave, as detailed below. 2 CCR 11049 contains similar notice requirements for PDL purposes. Samples of notices which describe an employee's rights are available on the web sites of the California Department of Fair Employment and Housing and the DOL.

Note: Pursuant to 2 CCR 11095, the district must translate the notice into every language that is spoken by at least 10 percent of the district's employees at any facility.

The Superintendent or designee shall provide the following notifications regarding state and federal law related to PDL or FMLA/CFRA leave:

1. General Notice: Information explaining the provisions of the FEHA/PDL and FMLA/CFRA and employee rights and obligations shall be posted in a conspicuous place on district premises, or electronically, and shall be included in employee handbooks. (2 CCR 11049, 11095; 29 USC 2619)

Note: Pursuant to 2 CCR 11050 and 11091, a district may require an employee, when the need for the leave is foreseeable, to provide at least 30 days advance notice before the leave is to begin; see the section entitled "Request for Leave" above. 2 CCR 11049 and 11091 specify that districts requiring such notice from employees must give them "reasonable advance notice" of their obligation and that incorporation of the requirement into the general notice satisfies the "advance notice" requirement.

Note: The following optional paragraph is for use by districts that require employees to provide advance notice.

The general notice shall also explain an employee's obligation to provide the Superintendent or designee with at least 30 days notice of the need for the requested leave, when the need is reasonably foreseeable at least 30 days prior to the start of the leave. (2 CCR 11050, 11091)

(cf. 4112.9/4212.9/4312.9 - Employee Notifications)

2. Eligibility Notice: When an employee requests leave, including PDL, or when the Superintendent or designee acquires knowledge that an employee's leave may be for an FMLA/CFRA qualifying reason, the Superintendent or designee shall, within five business days, provide notification to the employee of his/her eligibility to take such leave. (2 CCR 11049, 11091; 29 CFR 825.300)

3. Rights and Responsibilities Notice: Each time the eligibility notice is provided to an employee, the Superintendent or designee shall provide written notification explaining the specific expectations and obligations of the employee, including any consequences for a failure to meet those obligations. Such notice shall include, as applicable: (29 CFR 825.300)

a. A statement that the leave may be designated and counted against the employee's annual

FMLA/CFRA leave entitlement and the appropriate 12-month entitlement period, if qualifying

Note: Item #3b below is for use by districts that require medical certification to the effect that the employee is able to resume work. See the section entitled "Release to Return to Work" above.

b. Any requirements for the employee to furnish medical certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active duty status and the consequences of failing to provide the certification

c. The employee's right to use paid leave, whether the district will require use of paid leave, conditions related to any use of paid leave, and the employee's entitlement to take unpaid leave if the employee does not meet the conditions for paid leave

d. Any requirements for the employee to make premium payments necessary to maintain health benefits, the arrangement for making such payments, and the possible consequences of failure to make payments on a timely basis

e. The employee's status as a "key employee" if applicable, potential consequence that restoration may be denied following the FMLA leave, and explanation of the conditions required for such denial

f. The employee's right to maintenance of benefits during the leave and restoration to the same or an equivalent job upon return from leave

g. The employee's potential liability for health insurance premiums paid by the district during the employee's unpaid FMLA leave should the employee not return to service after the leave

Any time the information provided in the above notice changes, the Superintendent or designee shall, within five business days of his/her receipt of an employee's first notice of need for leave, provide the employee with a written notice referencing the prior notice and describing any changes to the notice. (29 CFR 825.300)

4. Designation Notice: When the Superintendent or designee has information (e.g., sufficient medical certification) to determine whether the leave qualifies as FMLA/CFRA leave, he/she shall, within five business days, provide written notification designating the leave as FMLA/CFRA qualifying or, if the leave will not be so designated, the reason for that determination. (2 CCR 11091; 29 CFR 825.300)

If the amount of leave needed is known, the notice shall include the number of hours, days, or weeks that will be counted against the employee's FMLA/CFRA entitlement. If it is not possible to provide that number at the time of the designation notice, notification shall be provided of the amount of leave counted against the employee's entitlement upon request by the employee and at least once in every 30-day period if leave was taken in that period. (29 CFR 825.300)

Note: 29 CFR 825.300 requires the designation notice to specify whether the district requires paid leave to be used during an otherwise unpaid family care and medical leave, whether the district requires an employee to present release to return to work certification, and whether that certification must address the employee's ability to perform the essential functions of the job. See the sections entitled "Use/Substitution of Paid Leave" and "Release to Return to Work" above. The following paragraph should be revised to reflect district practice.

If the district requires paid leave to be used during an otherwise unpaid family care and medical leave, the notice shall so specify. If the district requires an employee to present a release to return to work certification that addresses the employee's ability to perform the essential functions of the job, the notice shall also specify that requirement. (2 CCR 11091, 11097; 29 CFR 825.300)

Any time the information provided in the designation notice changes, the Superintendent or designee shall, within five business days, provide the employee with written notice referencing the prior notice and describing any changes to the notice. (29 CFR 825.300)

Records

Note: Government Code 12946, 29 USC 2616, and 29 CFR 825.500 require districts to maintain records of, among other things, applications, dates, and personnel and employment action related to family care and medical leave. Pursuant to 42 USC 2000ff-1, any individually identifiable genetic information possessed by the district must be treated as a confidential medical record of the employee involved.

The Superintendent or designee shall maintain records pertaining to an individual employee's use of family care and medical leave in accordance with law. (Government Code 12946; 29 USC 2616; 42 USC 2000ff-1; 29 CFR 825.500)

Legal Reference:
EDUCATION CODE
44965 Granting of leaves of absence for pregnancy and childbirth
FAMILY CODE
297-297.5 Rights, protections, and benefits under law; registered domestic partners
300 Validity of marriage
GOVERNMENT CODE
12926 Fair employment and housing act, definitions
12940 Unlawful employment practices
12945 Pregnancy; childbirth or related medical condition; unlawful practice
12945.1-12945.2 California Family Rights Act
12945.6 Parental leave
12946 Fair Employment and Housing Act: discrimination prohibited
CODE OF REGULATIONS, TITLE 2
11035-11051 Sex discrimination: pregnancy, childbirth and related medical conditions

11087-11098 California Family Rights Act
UNITED STATES CODE, TITLE 1
7 Definition of marriage
UNITED STATES CODE, TITLE 29
2601-2654 Family and Medical Leave Act of 1993, as amended
UNITED STATES CODE, TITLE 42
2000ff-1-2000ff-11 Genetic Information Nondiscrimination Act of 2008
CODE OF FEDERAL REGULATIONS, TITLE 29
825.100-825.702 Family and Medical Leave Act of 1993
COURT DECISIONS
United States v. Windsor, (2013) 699 F.3d 169
Faust v. California Portland Cement Company, (2007) 150 Cal.App.4th 864
Tellis v. Alaska Airlines, (9th Cir., 2005) 414 F.3d 1045

Management Resources:
U.S. DEPARTMENT OF LABOR PUBLICATIONS
Military Family Leave Provisions of the FMLA Frequently Asked Questions and Answers
WEB SITES
California Department of Fair Employment and Housing: http://www.dfeh.ca.gov
U.S. Department of Labor, FMLA: http://www.dol.gov/whd/fmla

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FAMILY CARE AND MEDICAL LEAVE

Definitions

Child means a biological, adopted, or foster child; a stepchild; a legal ward; or a child of a person standing in loco parentis as long as the child is under 18 years of age or an adult dependent child. (29 USC 2611; Government Code 12945.2)

Eligible employee means an employee who has at least 12 months of service with the district and who has at least 1,250 hours of service with the district during the previous 12-month period. Full-time teachers are deemed to meet the 1,250 hours of service requirement. (29 USC 2611; 29 CFR 825.110; Government Code 12945.2)

Full-time teacher means an employee whose principal function is to teach and instruct students in a class, a small group, or individual setting and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. (29 CFR 825.800)

Parent means a biological, foster, or adoptive parent; a stepparent; a legal guardian; or another person who stood in loco parentis to the employee when the employee was a child. Parent does not include a spouse's parents. (29 USC 2611; 29 CFR 825.122; Government Code 12945.2; 2 CCR 7297.0)

Serious health condition means an illness, injury, impairment, or physical or mental condition that involves either of the following: (29 USC 2611; 29 CFR 825.113, 825.114, 825.115; Government Code 12945.2)

1. Inpatient care in a hospital, hospice, or residential health care facility

2. Continuing treatment or continuing supervision by a health care provider, including one or more of the following:

a. A period of incapacity of more than three consecutive full days

b. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition

c. For purposes of leave under the Family and Medical Leave Act (FMLA), any period of incapacity due to pregnancy or for prenatal care

d. Any period of incapacity which is permanent or long term due to a condition for which treatment may not be effective

e. Any period of absence to receive multiple treatments, including recovery, by a health care provider

FAMILY CARE AND MEDICAL LEAVE (continued)

Spouse means a partner in marriage as defined in Family Code 300 or 1 USC 7. In addition, for purposes of rights under the California Family Rights Act (CFRA), a registered domestic partner shall have the same rights, protections, and benefits as a spouse and protections provided to a spouse's child shall also apply to a child of a registered domestic partner. (29 CFR 825.122; Family Code 297.5; 2 CCR 7297.0)

Eligibility

The district shall grant family care and medical leave to eligible employees for the following reasons: (29 USC 2612; 29 CFR 825.112; Family Code 297.5; Government Code 12945.2)

1. Because of the birth of a child of the employee or placement of a child with the employee in connection with the adoption or foster care of the child by the employee.

2. To care for the employee's child, parent, or spouse with a serious health condition.

3. Because of the employee's own serious health condition that makes him/her unable to perform one or more essential functions of his/her position. However, for purposes of leave under the CFRA, this does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions.

4. To care for a covered servicemember with a serious injury or illness if the employee is the spouse, child, parent, or designated next of kin of the servicemember.

5. Because of any qualifying exigency arising out of the fact that the employee's spouse, child, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.

The district shall not interfere with, restrain, or deny the exercise of any right provided to an eligible employee under the law. Also, the district shall not discharge or discriminate against any employee for opposing any practice made unlawful by, or because of, his/her involvement in any inquiry or proceeding related to the family care and medical leave. (29 USC 2615; Government Code 12945.2)
(cf. 4030 - Nondiscrimination in Employment)

Terms of Leave

Except in the case of leave to care for a covered servicemember, an eligible employee shall be entitled to a total of 12 work weeks of family care and medical leave during any 12-month period. (29 USC 2612; Government Code 12945.2)

This 12-month period shall coincide with the calendar year. (29 CFR 825.200)

FAMILY CARE AND MEDICAL LEAVE (continued)

In the case of leave taken pursuant to the FMLA for the purpose of caring for a covered servicemember with a serious injury or illness, an eligible employee shall be entitled to a total of 26 work weeks of family care and medical leave during a single 12-month period measured forward from the date an employee's first FMLA leave to care for the covered servicemember begins.

Leave taken pursuant to the CFRA shall run concurrently with leave taken pursuant to the FMLA, except in the following circumstances:

1. Leave taken to care for a registered domestic partner or a child of a domestic partner. Such leave shall count as leave under the CFRA only. (Family Code 297.5)

2. Leave taken under the FMLA for disability on account of pregnancy, childbirth, or related medical conditions. In addition to federal family care and medical leave, an employee may be entitled to take California pregnancy disability leave of up to four months. During the otherwise unpaid portion of pregnancy disability leave, the employee may use any accrued vacation, sick time, or other paid leave. Such FMLA leave shall run concurrently with any pregnancy disability leave taken by the employee, except that CFRA leave shall not commence until the expiration of the pregnancy disability leave. (Government Code 12945, 12945.2; 2 CCR 7297.6)

(cf. *4161.1/4361.1* - Personal Illness/Injury Leave)
(cf. *4261.1* - Personal Illness/Injury Leave)

Leave taken for the birth or placement of a child must be concluded within the 12-month period beginning on the date of the birth or placement of the child. Such leave does not need to be taken in one continuous period of time. The basic minimum duration of the leave for birth or placement of a child shall be two weeks. However, the district shall grant a request for leave of less than two weeks' duration on any two occasions. (29 USC 2612; 2 CCR 7297.3)

If both parents of a child work for the district, their family care and medical leave related to the birth or placement of the child shall be limited to a combined total of 12 weeks. This restriction shall apply whether the parents are married, registered domestic partners, or not married. (29 USC 2612; Government Code 12945.2)

Except for pregnancy disability leave, during the period of family care and medical leave, the district shall require the employee to use his/her accrued vacation leave, other accrued time off, and any other paid or unpaid time off negotiated with the district. During pregnancy disability leave, the employee may elect to use her accrued vacation leave or other accrued time off. If the leave is because of the employee's own serious health condition, the employee shall use accrued sick leave pursuant to the collective bargaining agreement and/or Board policy. (29 USC 2612; Government Code 12945.2)

(cf. 4141/4241 - Collective Bargaining Agreement)
(cf. 4161/4261/4361 - Leaves)

FAMILY CARE AND MEDICAL LEAVE (continued)

Intermittent Leave/Reduced Leave Schedule

Leave related to the serious health condition of the employee or his/her child, parent, or spouse may be taken intermittently or on a reduced leave schedule when medically necessary, as determined by the health care provider of the person with the serious health condition. However, the district may limit leave increments to the shortest period of time that the district's payroll system uses to account for absences or use of leave. (29 USC 2612; 2 CCR 7297.3)

If an employee needs intermittent leave or leave on a reduced work schedule that is foreseeable based on planned medical treatment for the employee or a family member, the district may require the employee to transfer temporarily to an available alternative position. This alternative position must have equivalent pay and benefits, the employee must be qualified for the position, and that could the position must better accommodate recurring periods of leave than the employee's regular job. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent leave or a reduced leave schedule. (29 USC 2612; 2 CCR 7297.3)
(cf. 4113.4/4213.4/4313.4 - Temporary Modified/Light-Duty Assignment)

Request for Family Care and Medical Leave

An employee shall provide at least verbal notice sufficient to make the district aware that he/she needs family care and medical leave and the anticipated timing and duration of the leave. The employee need not expressly assert or mention FMLA/CFRA to satisfy this requirement; however, he/she must state the reason the leave is needed (e.g., birth of child, medical treatment). If more information is necessary to determine whether the employee is eligible for family care and medical leave, the Superintendent or designee shall inquire further and obtain the necessary details of the leave to be taken. (2 CCR 7297.4)

Based on the information provided by the employee or his/her spokesperson, the Superintendent or designee shall designate the leave, paid or unpaid, as FMLA/CFRA qualifying leave and shall give notice of such designation to the employee. (2 CCR 7297.4)

When the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member, the employee shall provide the district with at least 30 days advance notice before the leave. The employee shall consult with the district and make a reasonable effort to schedule, subject to the health care provider’s approval, any planned medical treatment or supervision so as to minimize disruption to district operations. (Government Code 12945.2; 2 CCR 7297.4)

When the 30 days notice is not practicable because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, the employee shall provide the district with notice as soon as practicable. (2 CCR 7297.4)

FAMILY CARE AND MEDICAL LEAVE (continued)

Certification of Health Condition

A request by an employee for family care and medical leave for his/her serious health condition, or to care for a child, parent, or spouse with a serious health condition, shall be supported by a certification from the health care provider of the employee or such other person as applicable. The certification shall include the following: (29 USC 2613; Government Code 12945.2; 2 CCR 7297.0)

1. The date on which the serious health condition began

2. The probable duration of the condition

3. If the employee is requesting leave to care for a child, parent, or spouse with a serious health condition, both of the following:

a. Statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the child, parent, or spouse

b. Estimated amount of time the health care provider believes the employee needs to care for the child, parent, or spouse

4. If the employee is requesting leave because of his/her own serious health condition, a statement that due to the serious health condition, he/she is unable to work at all or is unable to perform one or more essential functions of his/her job

5. If the employee is requesting leave for intermittent treatment or is requesting leave on a reduced leave schedule for planned medical treatment, a statement of the medical necessity for the leave, the dates on which treatment is expected to be given, the duration of such treatment, and the expected duration of the leave

At the time of the employee's request for leave or within five business days, the Superintendent or designee shall request that the employee provide certification of the need for leave. Upon receiving the district's request, the employee shall provide the certification within 15 days, unless either the Superintendent or designee provides additional time or it is not practicable under the particular circumstances, despite the employee's diligent, good faith efforts. (29 CFR 825.305; 2 CCR 7297.4)

When the employee has provided sufficient medical certification to enable the district to determine whether the employee's leave request is FMLA-eligible, the district shall notify the employee within five business days whether the leave is FMLA-eligible. The district may also retroactively designate leave as FMLA/CFRA as long as there is no individualized harm to the employee. (29 CFR 825.301)

FAMILY CARE AND MEDICAL LEAVE (continued)

If the Superintendent or designee doubts the validity of a certification that accompanies a request for leave for the employee's own serious health condition, he/she may require the employee to obtain a second opinion from a district-approved health care provider, at district expense. If the second opinion is contrary to the first, the Superintendent or designee may require the employee to obtain a third medical opinion from a third health care provider approved by both the employee and the district, again at district expense. The opinion of the third health care provider shall be final and binding. (29 USC 2613; Government Code 12945.2)

If additional leave is needed when the time estimated by the health care provider expires, the district may require the employee to provide recertification in the manner specified in items #1-5 above. (29 USC 2613; Government Code 12945.2)

Fitness for Duty Upon Return to Work

Upon expiration of leave taken for his/her own serious health condition, an employee shall present certification from his/her health care provider that he/she is able to resume work.

(cf. 4112.4/4212.4/4312.4 – Health Examinations)

The certification from the employee's health care provider shall address the employee's ability to perform the essential functions of his/her job.

Rights to Reinstatement and Maintenance of Benefits

Upon granting an employee's request for family care and medical leave, the Superintendent or designee shall guarantee to reinstate the employee in the same or a comparable position when the leave ends. (29 USC 2614; Government Code 12945.2)

However, the district may refuse to reinstate an employee returning from leave to the same or a comparable position if all of the following apply: (29 USC 2614; Government Code 12945.2)

1. The employee is a salaried "key employee" who is among the highest paid 10 percent of those district employees who are employed within 75 miles of the employee's worksite.

2. The refusal is necessary to prevent substantial and grievous economic injury to district operations.

3. The district informs the employee of its intent to refuse reinstatement at the time it determines that the refusal is necessary, and the employee fails to immediately return to service.

FAMILY CARE AND MEDICAL LEAVE (continued)

An employee who takes leave has no greater right to reinstatement or to other benefits and conditions of employment than if he/she had been continuously employed during the leave period. If an employee is laid off or was hired for a specific term or to perform work on a discrete project during the leave period, he/she is not entitled to reinstatement or maintenance of group health plan benefits, provided the district has no continuing obligations under a collective bargaining agreement or otherwise. (29 CFR 825.216; 2 CCR 7297.2)

(cf. 4117.3 – Personnel Reduction)
(cf. 4217.3 – Layoff/Rehire)

During the period when an employee is on family care and medical leave, he/she shall maintain his/her status with the district and the leave shall not constitute a break in service for purposes of longevity, seniority under any collective bargaining agreement, or any employee benefit plan. (29 USC 2614; Government Code 12945.2)

For a period of 12 weeks, the district shall continue to provide an eligible employee on family care and medical leave the group health plan coverage that was in place before he/she took the leave. The employee shall reimburse the district for premiums paid during the family care and medical leave if he/she fails to return to district employment after the expiration of the leave and the failure is for any reason other than the continuation, recurrence, or onset of a serious health condition, or other circumstances beyond his/her control. (29 USC 2614; 29 CFR 825.213; Government Code 12945.2)

(cf. 4154/4254/4354 – Health and Welfare Benefits)

In addition, during the period when an employee is on family care and medical leave, he/she shall be entitled to continue to participate in other employee benefit plans including life insurance, short-term or long-term disability insurance, accident insurance, pension and retirement plans, and supplemental unemployment benefit plans to the same extent and under the same conditions as apply to an unpaid leave taken for any other purpose. However, for purposes of pension and retirement plans, the district shall not be required to make plan payments for an employee during the leave period and the leave period shall not be counted for purposes of time accrued under the plan. (Government Code 12945.2)

Military Caregiver Leave

The district shall grant up to a total of 26 work weeks of leave during a single 12-month period, measured forward from the first date of leave taken, to an eligible employee to care for a covered servicemember with a serious illness or injury. In order to be eligible for such military caregiver leave, an employee must be the spouse, son, daughter, parent, or next of kin of the covered servicemember. This 26-week period is not in addition to the up to 12-weeks of leave that may be taken for other FMLA qualifying reasons, but rather is inclusive of such 12 weeks. (29 USC 2611, 2612; 29 CFR 825.127)

FAMILY CARE AND MEDICAL LEAVE (continued)

Covered servicemember means a current member, or member who is on the temporary disability retired list, of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty while on active duty for which he/she is undergoing medical treatment, recuperation, or therapy; is otherwise in outpatient status; or is otherwise on the temporary disability retired list for that injury or illness. (29 USC 2611, 2612; 29 CFR 825.127)

Son or daughter of a covered servicemember means the biological, adopted, or foster child, stepchild, legal ward, or a child for whom the covered servicemember stood in loco parentis, and who is of any age. (29 CFR 825.127)

Parent of a covered servicemember means the covered servicemember's biological, adopted, step or foster parent, or any other individual who stood in loco parentis to the covered servicemember (except "parents in law"). (29 CFR 825.127)

Next of kin means the nearest blood relative to that individual, or as designated in writing by the covered servicemember. (29 USC 2611, 2612)

Outpatient status means the status of a member of the Armed Forces assigned to a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. (29 USC 2611; 29 CFR 825.127)

Serious injury or illness means an injury or illness incurred by the member in the line of duty while on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. (29 USC 2611; 29 CFR 825.127)

The employee shall provide reasonable and practicable notice of the need for the leave in accordance with the procedures in the section entitled "Request for Leave" above.

An employee requesting leave to care for a covered servicemember with a serious injury or illness shall provide the Superintendent or designee with certification from an authorized health care provider of the servicemember that contains the information specified in 29 CFR 825.310.

The leave may be taken intermittently or on a reduced schedule when medically necessary. An employee taking military caregiver leave in combination with other leaves pursuant to this administrative regulation shall be entitled to a combined total of 26 work weeks of leave during a single 12-month period. When both spouses work for the district and both wish to take such leave, the spouses are limited to a maximum combined total of 26 work weeks during a single 12-month period. (29 USC 2612)

FAMILY CARE AND MEDICAL LEAVE (continued)

During the period of military caregiver leave, the district's rule specified in "Terms of Leave" above, regarding an employee's use of his/her accrued vacation leave and other accrued paid or unpaid time off, shall apply.

Military Family Leave Resulting from Qualifying Exigencies

An eligible employee may take up to 12 work weeks of unpaid leave during the 12-month period established by the district while a covered military member is on active duty or call to active duty status for one or more qualifying exigencies. (29 CFR 825.126)

Covered military member means the employee's spouse, son, daughter, or parent on active duty or call to active duty status. Active duty or call to active duty status means a member of the National Guard or Reserves who is under a call or order to active duty, or has been notified of an impending call or order to active duty, in support of a contingency operation. (29 CFR 825.126)

Qualifying exigencies include time needed to (1) address issues arising from short notice deployment (up to seven calendar days from the date of receipt of call or order of short notice deployment); (2) attend military events and related activities, such as any official ceremony or family assistance program related to the active duty or call to active duty status; (3) arrange childcare or attend school activities arising from the active duty or call to active duty, such as arranging for alternative childcare, enrolling or transferring a child to a new school, or attending meetings; (4) make or update financial and legal arrangements to address a covered military member's absence; (5) attend counseling provided by someone other than a health care provider; (6) spend time (up to five days of leave per instance) with a covered military member who is on short-term temporary rest and recuperation leave during deployment; (7) attend to certain post-deployment activities, such as arrival ceremonies or reintegration briefings; and (8) address any other event that the employee and district agree is a qualifying exigency. (29 CFR 825.126)

The employee shall provide the Superintendent or designee with notice of the need for the qualifying exigency leave as soon as practicable, regardless of how far in advance such leave is foreseeable. (29 CFR 825.302)

An employee who is requesting such leave for the first time shall provide the Superintendent or designee with a copy of the covered military member's active duty orders, or other documentation issued by the military, and the dates of the service. In addition, the employee shall provide the Superintendent or designee with certification of the qualifying exigency necessitating the leave which contains the information specified in 29 CFR 825.309.

FAMILY CARE AND MEDICAL LEAVE (continued)

During the period of qualified exigency leave, the district's rule specified in "Terms of Leave" above, regarding an employee's use of his/her accrued vacation leave and any other accrued paid or unpaid time off, shall apply.

Notifications

The Superintendent or designee shall provide the following notifications about state and federal law related to FMLA/CFRA:

4. General Notice: Information shall be posted in a conspicuous place on district premises or electronically explaining the provisions of the FMLA/CFRA and information about employee rights and obligations shall be included in employee handbooks. (29 USC 2619; 2 CCR 7297.9)

The general notice shall also explain an employee's obligation to provide the Superintendent or designee with at least 30 days notice of the need for the leave, when the need for the leave is reasonably foreseeable. (2 CCR 7297.4)

2. Eligibility Notice: When an employee requests leave or when the Superintendent or designee acquires knowledge that an employee's leave may be for an FMLA/CFRA qualifying reason, the Superintendent or designee shall provide notification, within five business days, to the employee of his/her eligibility to take such leave (i.e., whether the employee has met the months of employment, hours of service, and worksite requirements). (29 CFR 825.300)

3. Rights and Responsibilities Notice: Each time the eligibility notice is provided to an employee, the Superintendent or designee shall provide written notification explaining the specific expectations and obligations of the employee, including any consequences for a failure to meet those obligations. Such notice shall include, as appropriate: (29 CFR 825.300)

a. A statement that the leave may be designated and counted against the employee's annual FMLA/CFRA leave entitlement, if qualifying

b. Any requirements for the employee to furnish medical certification of a serious health condition, serious injury or illness, or qualifying exigency arising out of active duty or call to active duty status and the consequences of failing to provide the certification

c. The employee's right to substitute paid leave, whether the district will require substitution of paid leave, and conditions related to any substitution, and the employee's entitlement to take unpaid leave if the employee does not meet the conditions for paid leave

d. Any requirements for the employee to make any premium payments to maintain health benefits, the arrangement for making such payments, and the possible consequences of failure to make payments on a timely basis

FAMILY CARE AND MEDICAL LEAVE (continued)

e. If applicable, the employee's status as a "key employee" and information related to restoration of that status

f. The employee's right to maintenance of benefits during the leave and restoration to the same or an equivalent job upon return from leave

g. The employee's potential liability for health benefits should the employee not return to service

Any time the information provided in the above notice changes, the Superintendent or designee shall, within five business days, provide the employee with a Rights and Responsibilities Notice referencing the prior notice and describing any changes to the notice. (29 CFR 825.300)

4. Designation Notice: When the Superintendent or designee has information (e.g., sufficient medical certification) to determine whether the leave qualifies as FMLA/CFRA leave, he/she shall provide written notification, within five business days, designating the leave as FMLA/CFRA qualifying or, if the leave will not be so designated, the reason for that determination. (29 CFR 825.300)

If the amount of leave needed is known, the notice shall include the number of hours, days, or weeks that will be counted against the employee's FMLA/CFRA entitlement. If it is not possible to provide that number at the time of the designation notice, notification shall be provided of the amount of leave counted against the employee's entitlement upon request by the employee and at least once in every 30-day period if leave was taken in that period. (29 CFR 825.300)

If the district requires paid leave to be substituted for unpaid family care and medical leave, the notice shall so specify. If the district requires an employee to present a fitness-for-duty certification that addresses the employee's ability to perform the essential functions of the job, the notice shall also specify.

Any time the information provided in the Designation Notice changes, the Superintendent or designee shall, within five business days, provide the employee with written notice referencing the prior notice and describing any changes to the notice. (29 CFR 825.300)

Records

The Superintendent or designee shall maintain records pertaining to an individual employee's use of family care and medical leave in accordance with law. (29 USC 2616; 29 CFR 825.500; Government Code 12946)

Legal Reference: See next page

FAMILY CARE AND MEDICAL LEAVE (continued)

Legal Reference:
FAMILY CODE
297-297.5 Rights, protections and benefits under law; registered domestic partners
300 Validity of marriage
GOVERNMENT CODE
12940 Unlawful employment practices
12945 Pregnancy; childbirth or related medical condition; unlawful practice
12945.1-12945.2 California Family Rights Act
CODE OF REGULATIONS, TITLE 2
7291.2-7291.16 Sex discrimination: pregnancy and related medical conditions
7297.0-7297.11 Family care leave
UNITED STATES CODE, TITLE 1
7 Definition of marriage, spouse
UNITED STATES CODE, TITLE 29
2601-2654 Family and Medical Leave Act of 1993, as amended
CODE OF FEDERAL REGULATIONS, TITLE 29
825.100-825.800 Family and Medical Leave Act of 1993
COURT DECISIONS
Faust v. California Portland Cement Company, (2007) 150 Cal.App. 4th 864
Tellis v. Alaska Airlines, (9th Cir., 2005) 414 F.3d 1045
Management Resources:
FEDERAL REGISTER
Final Rule and Supplementary Information, November 17, 2008. Vol. 73, No. 222, pages 67934-68133
U.S. DEPARTMENT OF LABOR PUBLICATIONS
Military Family Leave Provisions of the FMLA Frequently Asked Questions and Answers
WEB SITES
California Department of Fair Employment and Housing: http://www.dfeh.ca.gov
U.S. Department of Labor, FMLA: http://www.dol.gov/esa/whd/fmla