HOW THE AMENDED CALIFORNIA F AMILY RIGHTS ACT REGULATIONS WILL IMPACT YOUR BUSINESS

By Jason L. Morris

In March 2015, the Office of Administrative Law approved amendments to regulations promulgated by the Fair Employment & Housing Council (FEHC) interpreting the California Family Rights Act (CFRA). The updated CFRA regulations will take effect on July 1, 2015. When the FEHC announced its proposed changes to the regulations, its stated objectives were to supplement existing CFRA regulations, clarify confusing rules, and adopt some of the parallel Family and Medical Leave Act (FMLA) regulations. This article reviews basic principles under the CFRA and then summarizes the changes that will go into effect on July 1.

1. CFRA Coverage and Entitlements.

Only "covered employers" are subject to the CFRA. A "covered employer" is an employer that engages in any business in California and maintains an aggregate of 50 or more full-time or part-time employees to perform services for a wage or salary for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year in *any* state, territory, or possession of the United States. The amended CFRA regulations clarify two important points in determining whether an employer qualifies as a "covered employer": first, employees who are on paid or unpaid leave, including CFRA leave and disciplinary suspension, count toward the 50-employee threshold; and second, two or more employers may jointly employ the same employee, in which case the employee would count toward both joint employers' 50-employee threshold. Accurately determining "covered employer" status is critical because any miscalculation can have significant negative consequences.

Likewise, only "eligible employees" may take CFRA leave. An "eligible employee" is a full-time or part-time employee working in California who has been employed for a total of 52 weeks by the covered employer at any time before starting CFRA leave, and who actually worked at least 1,250 hours for the covered employer during the 12-month period immediately prior to beginning CFRA leave. Additionally, a "covered employee" must have worked for a covered employer that maintains, on the date the employee gives notice that he/she wishes to take CFRA leave, at least 50 full-time or part-time employees within a 75-mile radius of the worksite where the employee requesting CFRA leave is employed. The amended regulations clarify two important points in determining whether a worker qualifies as an "eligible employee": first, for employees with no fixed worksite, the employee's place of work (at least for CFRA purposes) is the site to which the employee is assigned as his/her home base, from which his/her work is assigned, or to which he/she reports; and second, an employee who is not eligible for CFRA leave at the start of a leave period may become eligible while on leave. In such an instance, the employer must appropriately designate the portion of the leave in which the employee met the requirements for taking CFRA leave. Also, the amended regulations make clear that any periods of employment preceding a break in service of seven or more years need not be counted toward the 12-month aggregate employment threshold, unless the break in service was caused by military leave.

2. CFRA and FMLA Interaction.

Both the CFRA and the FMLA allow eligible employees up to 12 weeks of leave in a 12-month period for the birth, adoption, or placement in foster care of a child. Likewise, both allow eligible employees up to 12 weeks of leave in a 12-month period for an employee's own serious health condition, or to care for a parent, child, or spouse with a serious health condition. In all of these cases, the 12 weeks of CFRA leave runs concurrently with the 12 weeks of FMLA leave. One important difference, however, is that pregnancy disability qualifies as a serious health condition under the FMLA, but not under the CFRA. Under separate regulations, California law allows an employee to take up to four months of pregnancy disability leave when she is unable to perform the essential functions of her job because of pregnancy, childbirth, or a related medical condition. The net result is that FMLA leave runs concurrently with pregnancy disability leave, but CFRA leave does not. A California employee may take up to four months of pregnancy disability leave, followed by an additional 12 weeks of CFRA leave to bond with her child.

3. Summary of Amendments to CFRA Regulations.

The amended regulations implement a number of changes that affect covered employers. Although space restrictions preclude a comprehensive listing in this article of all the amendments, the following list contains notable changes that are likely to impact many covered employers:

- The term "spouse" now includes registered domestic partners and same-sex partners in marriage.
- Upon granting CFRA leave, an employer is required to inform the employee of its guarantee to reinstate the employee to the same or a comparable position.
- Employees are entitled to reinstatement to the same or a comparable position even if the employee has been replaced or the employee's position has been restructured to accommodate the employee's absence.
- The CFRA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or geographic location, or from complying with its obligation to provide reasonable accommodation of disability.
- There are new, detailed provisions governing "key employees," i.e., employees who are paid on a salary basis and compensated among the highest 10 percent of employees within 75 miles of the worksite. Under the amended regulations, specific notice must be provided to key employees, and employers can refuse to reinstate key employees if reinstatement would threaten the economic viability of the firm or cause substantial, long-term economic injury. Minor inconveniences and costs will not justify an employer's refusal to reinstate key employees.
- If an employee normally would work overtime, but is unable to do so because of CFRA leave, the hours that the employee would have been required to work may be counted against the employee's CFRA entitlement.
- For intermittent CFRA leave, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences, provided it is not greater than one hour.

- Employers may not retroactively designate leave as CFRA leave after the employee has returned to work, except with appropriate notice to the employee and when the failure to designate did not cause harm or injury to the employee.
- Employers must respond to CFRA leave requests as soon as practicable but in no event later than five business days after receiving the request.
- Employers may not contact health care providers for any reason other than to authenticate medical certifications.
- An employer with a "good faith objective reason to doubt the validity of the certification the employee provides for his/her own serious health condition" may require an employee to obtain the opinion of a second health care provider designated or approved by the employer, provided the employer pays all of the associated costs.
- Employers may require that employees returning from medical leave obtain a release to return to work from the employee's physician if the employer has a uniformly applied practice or policy of requiring such releases. Employer may not, however, require employees to undergo fitness-for-duty examinations as a condition of reinstatement.
- An employee may elect or an employer may require that an employee use accrued vacation time or other accrued paid time off, other than accrued sick leave, during the otherwise unpaid portion of CFRA leave.
- An employee may elect or an employer may require that an employee use accrued sick leave during the otherwise unpaid portion of CFRA leave taken for the employee's own serious health condition.
- An employee receiving Paid Family Leave to care for the serious health condition of a family member or to bond with a new child is not on unpaid leave and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation.
- Employees are not permitted to waive, and employers are prohibited from inducing employees to waive, their prospective CFRA rights.
- There is an updated Certification of Health Care Provider form.

The full text of the amended CFRA regulations is available at http://www.dfeh.ca.gov/res/docs/FEHC/Final%20Text%20(1).pdf .

Despite the FEHC's stated goal of more closely aligning the CFRA regulations with federal FMLA regulations and clarifying existing law, important differences remain. With the July 1 effective date quickly approaching, covered employers should review and revise their policies, forms, and employee handbooks to ensure conformity with the amended CFRA regulations.

Jason Morris is an associate in the Newport Beach office of Newmeyer & Dillion, LLP. Jason's practice concentrates on the areas of employment law, business litigation, and construction litigation. You may reach Jason at Jason.morris@ndlf.com.