

TOP FIVE THINGS TO CONSIDER WHEN EVALUATING A LEAVE OF ABSENCE CLAIM

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Employee leave laws can be a complex minefield. There are federal, state, and local laws that govern various protected employee leaves. This article provides an overview of situations in which employees may be entitled to time off and suggests the top considerations for plaintiff's attorneys when evaluating a potential leave of absence claim.

OVERVIEW OF LEAVE LAWS

The Family and Medical Leave Act of 1993 (FMLA) protects the right of employees to take protected leave in the event of the employee's own, or a family member's, serious health condition; in the event of a new child coming into the employee's family; or for a family member's exigency in active duty military status. FMLA provides up to twelve weeks of leave for a health condition or new child, or up to twenty-six weeks for caregivers of military family members. FMLA applies to employers who have fifty or more employees within a seventy-five mile radius, and to

employees who have been employed by the employer for at least a year and who worked at least 1,250 hours within the year before the leave.

The California Family Rights Act (CFRA) provides up to twelve weeks of leave for bonding with a new child and in the event of a serious health condition of an employee or family member. However, it excludes pregnancy-related disability from its definition because California's pregnancy disability leave (PDL) applies in that instance. The CFRA has the same threshold requirements as FMLA for employers and employees.

For employees in California who work for employers with five or more employees, there is PDL. PDL provides an employee who has a pregnancy-related disability with up to four months of protected leave.

Employers with five or more employees also may be required to accommodate an employee's leave of absence related to a disability under the Fair Employment and Housing Act (FEHA). Whether an employer must grant such an accommodation involves a fact-intensive analysis.



All employers are subject to paid sick leave laws. These California and municipal laws (for example, San Francisco's and Oakland's) entitle employees to accrue and use a certain number of paid sick days.

California also has many lesser-known protections for employee leaves. Situations covered include:

- Jury duty
- When a crime victim or family member of a crime victim must appear in court or to respond to a subpoena
- When a victim of domestic violence, sexual assault, or stalking needs time to obtain relief, such as a restraining order, or to protect a child, or to obtain other types of assistance
- When a volunteer firefighter, reserve peace officer, or emergency rescue personnel perform emergency duties
- When a parent or guardian must appear at school for a child who is suspended
- When a parent must take time off to enroll a child in school or a childcare provider or to address a childcare provider or school emergency
- When an employee is called to active military duty

- When an employee donates an organ or bone marrow

The leaves discussed above, aside from sick leave, only set forth the rights of an employee to take unpaid time off. The employer can always allow employees to use accrued leave, and under some of these laws the employer can actually require the employee to use accrued sick leave or vacation. Moreover, an employee who takes time off to bond with a new child or to care for a seriously ill family member may also qualify for partial wage replacement through California Paid Family Leave (PFL). San Francisco requires certain employers to supplement an employee's PFL so that the employee will receive full wage replacement for up to six weeks.

An employee must provide reasonable notice of the need for a leave to the employer. Many leave laws also require employers to provide or post notices to their employees of their right to take leave. The protected aspect of these leaves is that the employee is entitled to return to the same or an equivalent position after the leave and that the employee maintains any benefits that the employer usually provides during the leave, such as health benefits. Additionally, employers cannot retaliate against an employee who uses or

asks to use a protected leave.

In sum, there are many protections for employee leaves of which an employer must be aware, each with its own requirements and nuances. That is why legal counsel is important to any employer who is considering denying an employee's leave request.

EVALUATING A LEAVE OF ABSENCE CLAIM

Handling a leave of absence claim requires consideration of multiple issues, just like any legal claim. What follows is a discussion of five issues:

1. TYPES OF CLAIMS

First, what types of claims are available? FMLA and CFRA claims arise when the employee requests or takes leave after reasonable notice to the employer, and the employer refuses to grant leave or takes retaliatory adverse action. A request for leave as a reasonable accommodation under FEHA gives rise to a claim if the employer takes retaliatory adverse action. Americans with Disabilities Act (ADA), PDL, and FEHA disability claims exist when the employee's disability was a substantial motivating factor for or "but-for" cause of the adverse action. Uniformed Services Employment and Reemployment Rights Act (USERRA) claims require a showing that the employee's service in the uniformed services was a motivating factor in the employer's adverse employment action. Paid sick leave law violations occur when there is a failure to provide accrued paid sick leave or retaliation against employees who use or attempt to use accrued sick days. Labor Code retaliation claims arise when the employee's protected activity (for example, taking leave for jury duty) was a substantial motivating factor for adverse action.

2. VENUE

Second, in which venue can you present the claim? Is there an enforceable arbitration agreement? Absent an enforceable arbitration agreement, the choice is between an administrative agency and court. In terms of the former, the Equal Employment Opportunity Commission (EEOC) has juris-

isdiction over ADA claims. The federal Department of Labor (DOL) takes FMLA and USERRA claims. California's Department of Fair Employment and Housing hears CFRA, PDL, and FEHA disability claims. The Division of Labor Standards Enforcement (DLSE) has exclusive jurisdiction over California's paid sick leave law, and can also hear Labor Code retaliation claims. Finally, San Francisco's Office of Labor Standards Enforcement considers San Francisco's paid sick leave claims. If you present the claim in court, you will need to decide whether to file in federal or state court.

3. ADMINISTRATIVE EXHAUSTION

Third, are there any administrative exhaustion requirements before presenting the claim to an arbitrator, administrative agency, or court? Employees of California state and municipal agencies must satisfy the Government (Tort) Claims Act for Labor Code retaliation claims. There is no administrative exhaustion required for FMLA and municipal paid sick leave claims. ADA claims require filing a complaint with the EEOC within 180 days of the violation and receipt of a "right to sue" letter after the commission closes the matter. CFRA, PDL, and FEHA disability claims require filing a complaint with the California Department of Fair Employment and Housing (DFEH) within one year of the violation and obtaining the right to sue. Federal employees have their own administrative exhaustion requirements. For ADA claims, they must contact their agency's Equal Employment Office (EEO) within 45 days of the violation, after which the agency investigates the complaint. The matter can only proceed to the EEOC or federal court after the agency makes or fails to make a decision within 180 days from when the complaint was filed. For USERRA claims, federal employees must file a claim with the US Department of Labor, after which the matter may proceed to the Merit Systems Protection Board.

4. STATUTES OF LIMITATIONS

Fourth, the statutes of limitations vary widely for leave claims. An FMLA claim carries a two-year limitations period (three years for a "willful" violation) for commencing either the administrative or arbitration/court proceeding. An ADA claim must be filed within ninety days of receiv-

ing the right to sue. USERRA claims have no statute of limitation, but the doctrine of laches may apply. CFRA, PDL, and FEHA disability claims must be commenced in arbitration or court within one year of receiving the right to sue. Sick leave claims must be presented to the DLSE or court within three years of the violation. Labor Code retaliation claims must be commenced with the DLSE within six months of the violation. In court, the limitations period can be as short as two years from the retaliation.

5. REMEDIES

Finally, which remedies are available? Lost compensation can be claimed under all of the laws. Actual damages (for example, costs of medical care) can be claimed under FMLA. Liquidated damages are claimed under FMLA and USERRA (except against federal employers). Emotional distress damages and punitive damages (against private sector employers) can be claimed under ADA, CFRA, PDL, FEHA, and Labor Code retaliation claims. Withheld sick leave pay and administrative penalties can be claimed

equal to three times the withheld pay under the California and San Francisco sick leave laws or a civil penalty up to \$1,000 under Oakland law. A civil penalty up to \$10,000 can be claimed for Labor Code retaliation claims. Finally, attorney's fees and costs are available under all of the laws except the California sick leave law and Labor Code retaliation claims.

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