

MEMORANDUM

To: PERSONNEL MANAGEMENT LIAISONS  
Date: February 14, 1994  
Reference Code: 94-10

**THIS MEMORANDUM SHOULD BE DISTRIBUTED TO:**

Labor Relations Officers  
Personnel Officers

From: Department of Personnel Administration

Subject: California Family Rights Act/Federal Medical Leave Act

On October 4, 1993, Governor Wilson signed AB 1460 into law. This bill generally conforms the State's Family Rights Act (FRA) with the provisions of the Federal Family and Medical Leave Act (FMLA). The bill took effect immediately for excluded employees and on February 5, 1994 for employees covered by collective bargaining agreements. This memorandum supplements PML 93-48 with additional information on AB 1460 and FMLA.

AB 1460

Previously, FRA entitled an employee to 16 weeks of unpaid leave every two years for the birth or adoption of a child or to care for an ill child, parent or spouse. Under the provisions of AB 1460, and similar to the provisions of the Federal law, an employee is now entitled to take 12 weeks of unpaid leave every year for these purposes as well as for the employee's own illness. As with the Federal law, the employer is required to maintain the employee's health benefits during these leaves.

The most immediate impact of AB 1460 will be on employees who are currently taking a family care leave under the State provisions. Departments that have granted family care leaves under the earlier provisions should allow these leaves to go "full term." (For example, an employee who began leave on November 12, 1993 would be permitted to take the full 16 weeks through March 4, 1994.)

Additionally, the State law on pregnancy disability leave (Government Code section 12945) has been coordinated with AB 1460 in a manner that is more generous than the Federal FMLA provisions. Under State law, a pregnancy/childbirth-related disability leave is not deducted from an employee's FMLA or AB 1460 entitlement. Therefore, an employee who is on a maternity leave for childbirth is entitled to at least six weeks (and, in some cases, up to four months) of disability leave under Section 12945 in addition to the 12 weeks provided under the provisions of FMLA and

AB 1460. The attached summary from the Department of Fair Employment and Housing (DFEH) (Attachment A) indicates that such an employee would be entitled to no more than a combined total of 12 weeks of employer-paid health coverage under FMLA and/or FRA. However, this may be changed or further clarified as DFEH develops its implementation regulations.

Attached for your information is a summary of the AB 1460 provisions as well as a comparison of the Federal and State provisions. This information has been prepared by DFEH.

### FMLA

The Department of Personnel Administration (DPA) received the following questions from departments regarding the operational impact of FMLA. In response to these questions, DPA staff met with the U.S. Department of Labor (DOL) to seek clarification and guidance regarding these issues. DOL has provided DPA with the following interim guidance. DPA is also seeking a formal administrative ruling from DOL regarding the impact of these regulations on our personnel rules and regulations. DOL has advised us that the interim guidance provided below may change when the final Federal rules are published later this year.

#### Substitution of Paid Leave

1. When an employee uses leave credits intermittently while on a FMLA-qualified (and otherwise unpaid) leave, the continuity of dock may be broken. This conflicts with an existing regulation that prohibits granting paid absences to break the continuity of a leave of absence without pay. Does FMLA supersede the State's existing dock provision?

Yes. DOL Regulation section 825.207(d) specifies that vacation or personal leave may be substituted for unpaid leave and "no limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes."

The employer can require an agreement from an employee prior to taking leave that specifies how the employee intends to use leave credits during the leave period. The employer may also mandate the use of leave credits (where consistent with the State's own practice). If an employer requires a leave agreement up front or mandates the use of leave credits, this requirement must be stated in the employer's FMLA notice to employees (Section 825.301). However, the employee still retains the discretion to modify the use of paid vs. unpaid leave time.

2. Do the provisions of Section 825.207 apply to an employee who has been placed on a leave restriction?

Section 825.207(d) prohibits an employer from limiting an employee's right to use vacation or personal leave credits regardless of whether the employee has been placed on a leave restriction. This provision does not specify any limitation with regard to sick leave. Therefore, an employee who has been placed on attendance restriction for sick leave could be prohibited from using sick leave for a qualifying FMLA event.

#### Equivalent Position/Benefits

3. Section 825.214 provides that an employee has the right to return to an "equivalent" position at the conclusion of the leave. Section 825.215 further defines "equivalent" to include such things as life insurance benefits, disability insurance, available overtime hours, etc. Some of these benefits differ between "excluded" and "rank and file" employees. Therefore, does an excluded employee (e.g., confidential) who is returning from a FMLA leave have the right to be returned to an excluded position as opposed to an equivalent "rank and file" position. Section 825.215.(e) defines equivalent terms and conditions of employment as, "An equivalent position having substantially similar duties, conditions, responsibilities, privileges and status as the employees's original position." As such, the employer would be required to return the employee to a position in the same classification and with the same bargaining designation.

#### Intermittent Employees

4. Intermittent employees are required to work a minimum number of hours within a specified "control period" to qualify for benefits. Intermittent employees who have taken an unpaid FMLA leave may sometimes not requalify for benefits at the end of their control period. However, Section 825.214 provides that "on return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay and other terms and conditions of employment." How does FMLA impact the requirement that intermittents are required to requalify for benefits?

Section 825.214 provides that an employer is required to provide benefits upon an employee's return from leave. However, Section 825.312(d) also provides that "an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee has been continuously employed during the FMLA leave period. This means that if the employer can show that the employee would not have normally been working during the FMLA leave, the employee could be required to requalify for benefits. However, if the intermittents would have otherwise worked during their FMLA leave, they would not have to requalify for their benefits.

#### Cafeteria Benefits - Cash Option

5. Will employees who currently receive the "cash option" (in lieu of health benefits) under the State's cafeteria program still be eligible while on a FMLA leave?

No. Section 825.209 provides that "During any FMLA leave an employer must maintain the employee's coverage under any group health plan . . . on the same conditions as coverage would have been provided if the employee had been continuously employed . . . Benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care . . . etc. must be maintained during leave if provided in an employer's group health plan . . . whether or not provided through a flexible spending account or other component of a cafeteria plan." A cash option benefit would not qualify as a benefit that the employer would be required to maintain because the employee has elected to receive cash in lieu of health benefits. The cash option would fall under the definition of other benefits [Section 825.215(d)(1)] which provides that "at the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels provided as when the leave began . . ."

#### Alternate Positions

6. How do the provisions on alternate positions affect leave accrual for employees who reduce their work time?

If an employee's family or medical needs require a reduced schedule, the regulations (Section 825.204) provide that an employer may transfer the employee to a part-time position. In doing this, the employer may proportionately reduce earned benefits, such as vacation leave, where such a reduction is normally made by an employer for its part-time employees. This is consistent with State practice.

This provision applies only when an employee changes positions (i.e., moves to an "alternate position"). Therefore, if a full-time employee remained in his/her time base and position, but did not work enough time in a month to have a qualifying pay period, the resulting failure to earn leave credits would not be a violation of this section.

#### Designation of FMLA Leave

How is the employee notified that a request for leave will be designated and counted as FMLA?

In order for leave to be counted against an employee's 12-week entitlement, the employee must normally be notified in advance by the employer that the leave will be counted as such. (The notification may occur during the leave when the employer didn't have sufficient information at the beginning.) If the employee is not notified before the leave is over, the leave time cannot be counted as FMLA. Therefore, it is in the employer's interest to screen each paid or unpaid leave request in advance to determine if it should be counted as part of the employee's 12-week FMLA benefit. This is particularly important since unpaid FMLA leaves can generate employer health benefit costs that other unpaid leaves do not.

Normally, the employee's supervisor would be in the best position to have or obtain the information needed to determine if a requested leave is covered by FMLA. However, this may present operational problems, since it will be difficult to ensure that all supervisors have the necessary knowledge of FMLA, and apply it consistently. This could be particularly difficult for short-duration paid leaves (e.g., is an employee's two-hour sick leave request for a medical purpose covered by FMLA?). Given this, each State agency should establish a FMLA leave screening approach that balances its ability to screen (and predesignate) consistently with the overall State employer interest in managing its FMLA obligation as tightly as possible.

If you have questions or need additional information, you may contact Sydney Perry, Policy Development Office at (916) 445-9244 or CALNET 485-9244.

  
Wendell M. Coon, Chief  
Policy Development Office

Attachments

SUMMARY OF THE PROVISIONS OF AB 1460

## \* Employee's Own Disability

Like the FMLA, the FRA has been amended to provide disability leaves for an employee's own "serious health condition." Unlike the FMLA, this provision does not include coverage for pregnancy-related disabilities. Coverage for pregnancy-related disabilities under California law is subject to the provision of Government Code Section 12945.

## \* Coordination of FRA Leave With Pregnancy Disability Leave (Section 12945)

The provisions which limited the amount of FRA leave which can be taken in conjunction with pregnancy disability leave have been eliminated. Employees may take four months of pregnancy disability leave and still be entitled to the maximum (now 12 weeks in a 12-month period) amount of FRA leave.

Employees taking leave pursuant to Section 12945 may not be required to use vacation time, regardless of provisions in the FRA and the FMLA which allow an employer to require the use of vacation time.

## \* Amount of Leave Available

Like the FMLA, the FRA has been amended to provide 12 weeks leave in a 12-month period. The 12-month period under the FRA commences for an employee when the employee first takes leave which qualifies as FMLA leave, including leave for a pregnancy disability.

Although the FMLA allows several different ways to calculate the 12-month period, this is the only way to calculate that period under the FRA. The period must be calculated in this fashion in order to implement the provisions of the FRA which prevent employees from "stacking" federal and state leave - taking more leave in combination (except for pregnancy disability) than they are entitled to take under one or the other.

## \* Maintaining Health Benefit Coverage

Like the FMLA, the FRA has been amended to require employers to maintain health benefit coverage (as defined in Section 5000(b)(1) of the Internal Revenue Code of 1986) for employees on leave in the same fashion as if the employee was working. This is limited to no more than 12 weeks in a 12-month period.

An employee on pregnancy disability leave whose health benefits have been paid for because the leave qualifies under FMLA does not qualify for more than 12 weeks paid health benefits, even though the employee is entitled to FRA leave after their pregnancy disability leave has ended.

An employer can recover the premiums paid from the employee if the employee fails to return from the leave and the failure is not because of a recurrence or continuation of the serious health condition which brought about the leave, or because of some other reason beyond the employee's control.

\* Employee Qualifications

Like the FMLA, the FRA has been amended to define employees qualified for leave as persons who have worked at least 1,250 hours in the 12 months preceding the leave, and who have worked for the employer more than a year. This disqualifies many part-time workers who previously could have been covered. The requirement that employees be "otherwise qualified for benefits" has been stricken.

\* Employer Qualification

Like the FMLA, the FRA covers employers of 50 or more persons, but only if there are 50 or more persons in California. Public agencies of any size are covered.

Also like the FMLA, the FRA has been amended to limit coverage to worksites where an employer employs 50 or more people within 75 miles of the worksite. This disqualifies employees working in small, isolated worksites, who previously could have been covered.

\* Persons Whose Serious Health Condition Warrant Granting A Leave

The FRA requires employers to provide leave for an employee's serious health condition, or the serious health condition of a parent, spouse, or child, or the birth or adoption of a child.

Like the FMLA, the FRA has been amended to provide leave for the placement of a foster child. It has also been amended to allow an employee a leave to care for somebody other than a natural parent who stood "in loco parentis" to the employee when the employee was a child.

\* Use of Paid Leave Time

The FRA and the FMLA allow an employee to elect, or an employer to require, that the employee substitute accrued vacation time or other paid leave for unpaid leave taken for FRA or FMLA leave purposes other than the individual's own serious health condition. An employee may elect or an employer may require an employee to take paid sick time if the leave is for the employee's own serious health condition.

The employee may use paid sick leave to cover leaves for purposes other than the employee's own serious health condition if mutually agreed on with the employer.

\* Certification of Need for Leave

Under both the FRA and the FMLA employers may require employees to obtain a medical certification of the need for a leave from a "health care provider."

Health care providers are physicians and surgeons or osteopathic physicians and surgeons licensed to practice in California or in other states or jurisdictions, or any other persons determined by the U.S. Secretary of Labor.

The U.S. Secretary of Labor has determined that Christian Science Practitioners are "health care providers."

Unlike the FMLA, the FRA does not allow an employer to require the certification to identify the "serious health condition." California employers should not use the federal certification form developed by the Department of Labor unless reference to the nature of the health condition is stricken.

\* Employer's Right to Review Certifications

Like the FMLA, the FRA has been amended to allow employers, at their own cost, to seek a second medical opinion. If the second opinion differs from the certification, the employer then may seek (again at their own cost) a third opinion, and may deny leave if the third opinion supports that denial.

Unlike the FMLA, the FRA only allows the second and third medical opinion process to be applied to requests for leave based on the employee's own serious health condition. The process does not apply when the request is for leave to care for another person.

\* Effect on Collective Bargaining Agreements

The amendments to the FRA will not affect existing collective bargaining agreements during the life of the contract or until February 5, 1994, whichever event occurs first.

\* Limitation of Leave Available to Parents

Like the FMLA, the FRA has been amended to allow an employer to limit the total leave available to both parents for birth, adoption or foster care of a child to 12 weeks, if both parents work for the same employer. The FMLA allows the same limitation for the care of a parent with a serious health condition, while the FRA does not.

The amendments eliminated provisions which allowed employers to deny leave if the other parent of a child was available to care for it, or to limit the available leave in circumstances where both parents were not employed by the same employer.

\* Employer's Right to Deny Leave

Provisions in the FRA which allowed employers to deny leaves based on an "undue hardship" or to deny leaves to certain key employees were stricken by the amendments.

Like the FMLA, the FRA has been amended to allow employers to refuse to reinstate from leave certain "key employees" if the employer has followed a required notice process, and if the reinstatement of the employee would cause "substantial and grievous economic injury" to the employer's operations.

\* Posting of Notices

The FMLA requires employers to post a specified notice. There is a fine for failure to do so.

There is no statutory requirement to post a notice in the FRA. The Regulations of the California Fair Employment and Housing Commission provide for a notice, and specify the required language. The language of that notice has been made obsolete by the passage of AB 1460, and the notice should not be posted.

PROVISIONSTATE LAW (FRA)FEDERAL (FRA)AB 1460

Within what period must leave for the birth or adoption of a child be taken?

Regulations require leave to be commenced within a year.

Leave must be completed within a year of the qualifying event.

No change in state law.

May employers restrict the leave available to a parent based on the availability of the other parent, or the other parents use of leave?

Yes. Employer need not grant leave if other parent is unemployed and available to care for the child, or is on family care leave. Regardless of whether or not both parents work for the same employer, an employer need only give leave for birth or adoption which totals to 4 months between two parents.

Only if both parents are employed by the same employer and both are independently eligible for leave. The employer may limit leave for birth or adoption so as not to exceed a total of 12 weeks between them in a year. Parents may be on leave simultaneously as long as there is a certification of the need for both their participation.

Changes state law to conform to federal.

What kind of medical certification to the need for care may an employer require?

Date (if known) when condition commenced, probable duration, estimate of the amount of time needed for care, and a statement that the condition warrants the participation of a family member. The certification need not identify the condition.

Same as state law, with the exception that the employer may require the "appropriate medical facts"

No change in state law.

<u>PROVISION</u>	<u>STATE LAW (FRA)</u>	<u>FEDERAL (FRA)</u>	<u>AB 1460</u>
What kinds of health care providers may an employer require certify to the need for leave?	Physician or osteopath licensed in California.	Licensed physician or osteopath, and such other kind of health care provider as might be designated by the Secretary of Labor.	Extends to out of state practitioners and psychologists, as well as to professions designated by the Department of Labor.
How may an employer dispute the certification of a health care provider?	No specific provision.	At employers expense, may require examination by an independent (not on employer's payroll) second provider. If second provider differs from employee's provider, at employer's expense may require third opinion. Third opinion binding.	May require second and third opinions as federal law permits for requests for leave based on the employee's disability, but not for the serious health condition of another person.
To what job must an employee be reinstated at the termination of his or her leave?	The same or a comparable position.	The same or an equivalent job. Corresponding in duties, terms and conditions of employment, and privileges. Same or equivalent shift, same or geographically proximate worksite.	No change in state law.

PROVISION

What rights does an employee have if their job is eliminated during the period of their leave?

May an employer refuse to grant a leave based on business considerations?

STATE LAW (FRA)

According to regulation, the employer is required to "make reasonable accommodation by alternative means that will not cause undue hardship."

Yes, if an undue hardship can be demonstrated.

FEDERAL (FRA)

An employee has no greater right to reinstatement than as if the employee had been continuously employed.

No general hardship defense is allowed.

AB 1460

No change in state law.

Hardship defense in state law is eliminated.  
(Conformity)

PROVISIONSTATE LAW (FRA)FEDERAL (FRA)AB 1460

Do employers have to continue paying for the employer's share of an employee's health benefits while the employee is on leave?

Only if employer maintains benefits for employees on other kinds of leave. Otherwise employee must be allowed to maintain health care at own cost.

Yes. However, under some circumstances, if an employee fails to return to employment at end of leave, the employer may collect the cost of the premium.

State law conformed with federal law - employers required to maintain health insurance as if employee was still working.

Is there a requirement that employers advise their employees of the provisions of the law?

Yes. The regulations require a notice be posted.

Yes. The law contains a posting requirement.

No change in state law.

In there a penalty for failure to post the required notice?

No. Remedy is to post the notice.

\$100 fine for each violation.

No change in state law.

May paid leave be substituted for unpaid leave?

An employee may elect or an employer may require, the use of accrued vacation or other paid time. Sick leave must only be used if mutually agreed to.

Same as state, except employers are not required to allow the use of paid sick leave for uses other than those which that employer's sick leave policy normally extends to.

Same as federal - employers not required to allow use of sick leave to cover uses other than employee's own disability.

PROVISION

How are the laws enforced?

STATE LAW (FRA)

A complaint must be filed with the Department of Fair Employment and Housing within one year of the alleged violation. Complainant may then either rely on the administrative process, or file a lawsuit on his or her own behalf.

FEDERAL (FRA)

A complaint may be placed with the U.S. Department of Labor (Wage and Hour Division) within two years of the alleged act, or within three years in the case of a willful violation. A lawsuit may be filed within two years of an alleged violation (3 years for a willful violation). Filing with the Department of Labor is not a prerequisite to the filing of a lawsuit.

AB 1460

No change in state law.

<u>PROVISION</u>	<u>STATE LAW (FRA)</u>	<u>FEDERAL (FRA)</u>	<u>AB 1460</u>
What size employers are covered?	Employers (public or private) of 50 or more persons employed anywhere in California.	Private employers of 50 or more persons engaged in interstate commerce, and all public employers however requirement for leave limited to work sites with 50 or more persons within 75 miles of worksite.	Conforms state with federal
How does an employee qualify?	One year continuous service - part time service included, and "otherwise qualified for benefits."	One year of service. Must have worked 1250 hours in the year preceding the leave. No benefit criteria.	Conforms state with federal.
What leave is provided for birth or adoption of a child, or placement of a child for foster care?	Leave provided to either parent for birth or adoption of a child. <u>No provision is made for placement of a child for foster care.</u>	Leave is provided to either parent for the birth or adoption of a child, <u>or placement of a child for foster care.</u>	Provides leave for placement of a child for foster care. (Conforms)
Who qualifies as a "parent" for whom an employee may request leave for care?	Leave is for care of a biological, foster, or adoptive parent.	In addition to those categories of persons covered under state law, <u>leave must be provided for the care of a parent or person who stood "in loco parentis" to the employee when the employee was a child.</u>	Provides leave for a person who stood "in loco parentis." (Conforms)

PROVISION	STATE LAW (FRA)	FEDERAL (FRA)	AB 1460
Who qualifies as a "spouse" for whom an employee may request leave for care?	Partner in marriage, as defined in Civil Code section 4100. Does not include domestic partners.	Husband or wife as recognized under state law. Common-law marriage is recognized in states where recognized. Does not include "domestic partners."	No change. (In conformity)
Is leave required for an employee's own illness or disability?	No leave is required for an employee's own illness or disability. However, up to an additional 4 months leave is required for a <u>pregnancy related disability</u> under <u>other provisions</u> of state law.	Leave is required for an employee's own "serious health condition", <u>which includes pregnancy related disabilities.</u>	Provides leave for an employee's own "serious health condition," but excludes leave taken for pregnancy related disabilities from being counted against Family Care Leave. (Moves towards conformity)
What is the maximum duration of the leave provided for?	A maximum of 4 months in a 24 month period. However, the entire four months may be taken within the first 12 months of the 24 month period.	Up to 12 weeks in a one year period.	Up to 12 weeks in a one year period. (Conforms)

PROVISIONSTATE LAW (FRA)FEDERAL (FRA)AB 1460

What provisions are made for periodic absences or intermittent leave?

Two leaves of less than two weeks may be taken in any two year period. Otherwise, leaves must be taken in increments of at least two weeks, unless in compliance with a plan of treatment for therapy, in which case leaves of at least one day may be taken.

Intermittent leave must be allowed for the care of a spouse, parent, or child, subject to medical certification. Intermittent leave not required for birth, adoption, or foster child placement, but employer may allow.

No change in state law.

Are any provisions made for the scheduling needs of elementary and secondary schools?

No special provisions are made.

Instructional employees whose intermittent absences will exceed 20% of their scheduled hours may be required to take a leave for the duration of the medical treatment or may be required to transfer to an available position which will better accommodate the schedule. If leave of three weeks or more is required within five weeks of the end of the school term, employer may require that the leave extend to the end of the term.

No change in state law.

PROVISION

Are there qualified employees who can be denied leave because of their position?

STATE LAW (FRA)

Yes. Even though he or she is otherwise qualified, leave may be denied to a salaried employee who, at the time of request for leave is either one of the 5 highest paid employees at a location or in the top 10% of employees at the location, whichever number is greater.

FEDERAL (FRA)

If employer can demonstrate that reinstatement would cause substantial and grievous economic injury, employer may deny reinstatement from leave to any employee who is in the top 10% paid at the work location or within 75 miles of the location. Employee must be advised that they are subject to this provision when they request leave. Permitting the employer to deny reinstatement rather than the leave itself has the effect of requiring the employer to carry the individual's health insurance whether or not they actually have a right of return. And of demonstrating that the reinstatement, rather than the leave itself, is a hardship.

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State law amended into conformity with federal.