

Department of Personnel Administration
Memorandum
TO: Personnel Management Liaisons (PML)

SUBJECT: Family Medical Leave Act Changes	REFERENCE NUMBER: 2010-009
DATE ISSUED: 03/02/10	SUPERSEDES:

This memorandum should be forwarded to:

Personnel Officers
Labor Relations Officers
Personnel Transactions Supervisors

FROM: Department of Personnel Administration
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Effective January 16, 2009, the federal Department of Labor (DOL) amended the Family Medical Leave Act (FMLA) regulations. This memorandum provides information on administering the amended FMLA regulations.

In addition, effective January 16, 2009, DOL adopted two new regulations to afford leave to military family members. The Department of Personnel Administration (DPA) has already issued PML 2009-028 dated June 15, 2009, that provided information on the new leave for military family members. On October 28, 2009, the Fiscal Year 2010 National Defense Authorization Act (NDAA 2010) amended the FMLA's military family leave entitlements. This memorandum also provides information on these new amendments.

FMLA/CALIFORNIA FAMILY RIGHTS ACT (CFRA) INTERACTION

CFRA is a State law that also provides for unpaid leaves of absence for family reasons or for the employee's own illness. Where the FMLA law and the CFRA law differ, the most generous/less restrictive leave provisions must be applied. **In reviewing amendments to the FMLA regulations DPA has adopted the most generous/less restrictive leave provision in coordination with the Fair Employment and Housing Commission (FEHC) which administers the CFRA.**

Note: FMLA and CFRA run concurrently except during Pregnancy Disability Leave (PDL), Qualifying Exigency Leave (QEL), and Military Caregiver Leave (MCL) if family member is not a covered under CFRA.

Example:

The amended DOL regulation 825.306(a)(3) allows an employer to ask for a diagnosis. CFRA regulation 7297.4(b)(2) however specifies that an employer **cannot** ask for a diagnosis, but it may be provided at the employee's option. Since CFRA is less restrictive, the department cannot ask an employee for a diagnosis under the amended FMLA regulation.

FMLA CHANGES (effective January 16, 2009)

Employer Notice Requirements

The amended regulations create three new employer and or employee notice responsibilities. (1) A mandatory General Notice published by the DOL for departments to use; (2) Notice of Eligibility and Rights and Responsibilities (DPA 752); and (3) Designation Notice (DPA 753). DPA has standardized DPA 752 and 753 as fill in and print forms. [DPA forms may be accessed on the DPA website.](#)

1. General Notice

DOL has published a new general notice poster. Departments must post the new notice entitled "Notice to Employees of Rights under the FMLA" (WH Publication 1420) at the worksite so it is visible to all employees and applicants. Each new employee must be given the information provided in the General Notice. A copy of DOL's General Notice prototype is available at the following DOL website:

<http://www.dol.gov/whd/fmla/finalrule/fmlaposter.pdf>

The General Notice must be accessible to employees by including it in an employee handbook or including all of the information contained in the General Notice in the department's own specific FMLA policy. Employers that post their handbook electronically meet the General Notice requirement only if it is accessible to all employees.

2. ["Notice of Eligibility and Rights and Responsibilities" \(DPA 752\) | Word document fill-and-print version](#)

A new form titled "Notice of Eligibility and Rights and Responsibilities" (DPA 752) is required to be given to the employee within five business days after the employer receives a request for FMLA/CFRA leave or becomes aware that the leave may qualify for FMLA/CFRA (previously the employer only had two days to notice employees). Departments may customize the DPA 752 as long as it includes, at a minimum, the same information specified in the form.

The “Notice of Eligibility and Rights and Responsibilities” (DPA 752) informs the employee whether or not they are eligible for FLMA/CFRA leave (i.e. worked at least 12 months with the employer and worked at least 1,250 hours in the previous 12 months). Eligibility does not mean the leave has been approved for FMLA/CFRA at this point. The form also provides important information regarding the employee’s FMLA/CFRA rights and responsibilities, information on medical certification requirements, and the consequences for not meeting those requirements, as well as information regarding the return-to-work release.

As a reminder, departments may require at least 30 days’ advance notice when the need for FMLA/CFRA is foreseeable. Foreseeable leave includes planned birth, adoption, foster care placement, or medical treatment. In the case of a serious health condition, if it is not possible to give such advance notice, the employee must submit the request as soon as possible.

3. [“Designation Notice” \(DPA 753\) | Word document fill-and-print version](#)

After the medical certification form (see below) is received, the new “Designation Notice” (DPA 753) informs the employee whether the FMLA/CFRA leave is approved. The department has five business days to inform the employee if the leave will be designated as FMLA/CFRA leave. If the leave is not designated as FMLA/CFRA, the department must state in writing the reason why the leave is denied. A return-to-work release may be required to return from leave if that is the department’s policy for returning employees to work after illness, injury, or disability.

The amended regulations clarified that only one Designation Notice is required for each FMLA/CFRA qualifying reason, per leave year, regardless of whether the leave is taken as a continuous block of leave or on an intermittent or reduced leave schedule basis. A retroactive notice is permissible if it does not cause employee harm or injury.

Departments may not retroactively designate leave after the employee has returned to work.

Medical Certifications

The FMLA regulations previously had one medical certification form and the changes now provide for two medical certification forms. The form is to be given to the employee at the same time as the Notice of Eligibility. They are titled (1) “Certification of Health Care Provider for Employee’s Serious Health Condition” (DPA 754); and (2) “Certification of Health Care Provider for Family Member’s Serious Health Condition” (DPA 755). The forms are completed by the employer, employee, and a health care provider.

If the employee is eligible for FMLA/CFRA leave, provide the employee with the “Certification of Health Care Provider for Employee’s Serious Health Condition” (DPA 754) or the “Certification of Health Care Provider for Family Member’s Serious Health Condition” (DPA 755). It is the

employee's responsibility to provide the department with the appropriate medical certification within 15 calendar days. The "Certification of Health Care Provider for Employee's Serious Health Condition" (DPA 754) and the "Certification of Health Care Provider for Family Member's Serious Health Condition" (DPA 755) are maintained as confidential documents.

If the form DPA 754/DPA 755 is incomplete or insufficient, the employer may request in writing to the employee what specific additional information is needed to make a determination for FMLA/CFRA leave.

The employer can ask for a second opinion for the employee's own health condition.

A Physician's Assistance is now an approved a health care provider.

OTHER FMLA REVISIONS

The following are other revisions to the DOL FMLA regulations:

Employee Eligibility

An employee is eligible for FMLA/CFRA leave when the employee has worked for an employer for a total of 12 months, even with a break in service. The employee must also have worked a total of 1,250 hours in the past year.

The regulations clarify the statutory requirement that employee eligibility determinations be made "as of the date leave commences." If an employee reaches the twelve-month eligibility requirement while on leave, the leave period prior to meeting the requirement is non-FMLA leave, and the leave period after the requirement is fulfilled is FMLA leave. The department clarified that periods of leave do not count towards the 1,250 hours requirement but they do count towards the twelve months of employment requirement.

Example:

An employee requests FMLA/CFRA leave but has only worked for the employer 11 months and does not meet the 12-month requirement for FMLA/CFRA. The FMLA/CFRA leave is denied. The employee is allowed to take a non-FMLA/CFRA leave. During the time taken for the non-FMLA/CFRA leave the employee meets the 12-month requirements for FMLA/CFRA eligibility and is now eligible for FMLA/CFRA leave. From that point forward the leave is FMLA/CFRA leave and is counted against the employee's FMLA/CFRA entitlement.

Intermittent or Reduced Scheduled Leave

The regulations clarify that to calculate an employee's leave entitlement when an employee works a schedule that varies from week to week, employers are required to use a 12-month average of hours worked prior to the commencement of the employee's FMLA/CFRA leave.

Holidays

The regulations clarify that when a holiday falls on a normal scheduled work week and the employee is taking a full week of leave, the holiday counts against the employee's 12-week FMLA/CFRA leave entitlement. If the employee is taking FMLA/CFRA leave in increments of less than a week, the holiday counts against the employee's FMLA/CFRA entitlement only if the employee was required to work on the holiday.

Return-to-Work

The regulations provide that as a condition of an employee's return from medical leave, the employer may require the employee obtain a release to "return-to-work" from their health care provider stating they are able to resume work only if the employer has a uniformly applied practice or policy of requiring such release from other employees returning to work after illness, injury, or disability.

Light Duty

If an employee accepts light duty work while recovering from a serious health condition, the period on light duty assignment will not be counted as FLMA/CFRA. Employees may not be required to work light duty jobs in lieu of taking leave, and those who do so voluntarily are not on FMLA/CFRA leave. At the end of the assignment, the employee has the right to be reinstated to the same or an equivalent position.

MILITARY FAMILY LEAVES (effective October 28, 2009)

On October 28, 2009, the Fiscal Year 2010 National Defense Authorization Act (NDAA 2010) amended the FMLA's military family leave entitlements as described below. In addition, DPA has standardized two new fill in and print forms to use for military family leave: (1) "Certification of Qualifying Exigency for Military Family Leave" (DPA 756); and (2) "Certification for Serious Injury or Illness of Covered Servicemember for Military Family Caregiver Leave" (DPA 757).

Qualifying Exigency Leave (QEL)

Previously employees were entitled to take up to 12 weeks of "qualifying exigency leave" in a 12-month period when a spouse, child, or parent in the National Guard or Reserves was called to active duty in support of a contingency operation pursuant to Title 10 of the United States Code. QEL allowed employees time off for reasons related to their family member's call to active duty. With the passage of NDAA 2010, the QEL is now available to employees who have family members serving in the regular Armed Forces. Also, the deployment no longer has to be in support of a contingency operation. Deployments to a foreign country are now covered.

Military Caregiver Leave (MCL)

Previously employees were entitled to take up to 26 weeks of “military caregiver leave” during a single 12-month period to care for a spouse, child, parent, or next-of-kin who is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred while in the line of duty. The new law extends the ability of an employee to take MCL to care for a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. The veteran must have been a member of the Armed Forces (including the National Guard or Reserves) at any time within five (5) years preceding treatment of the serious injury or illness.

FORMS

Departments should ensure their FMLA/CFRA forms meet the requirements of the new regulations either by using the new model DPA forms or ensuring that the department’s versions of the new forms contain the same information as the model DPA forms. The forms described in this PML are listed below and available at the following DPA links:

- [“Notice of Eligibility and Rights and Responsibilities” \(DPA 752\) | Word document fill-and-print version](#)
- [“Designation Notice” \(DPA 753\) | Word document fill-and-print version](#)
- [“Certification of Health Care Provider for Employee’s Serious Health Condition” \(DPA 754\) | Word document fill-and-print version.](#) This new and improved form adds a section for essential functions of the job and adds a section for the health provider to put the actual time an employee may need intermittent leave.
- [“Certification of Health Care Provider for Family Member’s Serious Health Condition” \(DPA 755\) | Word document fill-and-print version.](#)
- [“Certification of Qualifying Exigency for Military Family Leave” \(Family and Medical Leave Act\) \(DPA 756\) | Word document fill-and-print version](#)
- [“Certification for Serious Injury or Illness of Covered Servicemember for Military Caregiver Leave” \(DPA 757\) | Word document fill-and-print version](#)

ATTACHMENTS

- [Questions and Answers – FMLA](#)
- [Comparison between New Family Medical Leave Act \(FMLA\) and California Family Rights Act \(CFRA\) Regulations](#)

/s/ Julie Chapman

Julie Chapman
Chief Deputy Director of Policy

QUESTIONS AND ANSWERS – FMLA

Following are answers to commonly asked questions about the new Family and Medical Leave Act (FMLA) regulations. The effective date of the revised FMLA regulations is January 16, 2009.

The California Family Rights Act (CFRA) is a State law that also provides for unpaid leaves of absence for family reasons or for the employee's own illness. Where the FMLA law and the CFRA law differ, the most generous/less restrictive leave provisions must be applied.

Qualifying Reasons for FMLA Leave

1. **Q. Can I still use FMLA/CFRA leave during pregnancy or after the birth of a child?**
 - A. Yes. An employee's ability to use FMLA leave during pregnancy or after the birth of a child has not changed. Under the regulations, a mother can use 12 weeks of FMLA leave for the birth of a child, for prenatal care and incapacity related to pregnancy, and for her own serious health condition following the birth of a child. A father can use FMLA leave for the birth of a child and to care for his spouse who is incapacitated (due to pregnancy or child birth).

Note: Under CFRA the employee is entitled to Pregnancy Disability Leave (PDL) and an eligible employee can take 12 weeks of CFRA for bonding. The first 12 weeks of PDL can run concurrently with FMLA.

2. **Q. Are there any changes to the definition of a serious health condition under the regulations?**
 - A. No. A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.

Eligibility for FMLA Leave

1. **Q. I have 12 months of service with my employer, but they are not consecutive. Do I still qualify for FMLA?**
 - A. You may. In order to be eligible to take leave under the FMLA, an employee must (1) work for a covered employer, (2) work 1,250 hours during the 12 months prior to the start of leave, (3) work at a location where 50 or more employees work at that location or within 75 miles of it, and (4) have worked for the employer for 12 months. The 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave.

2. **Q. If I have to miss work due to National Guard or Reserve duty, will this affect my eligibility for FMLA leave?**

A. No. The regulations make clear the protections for our men and women serving in the military by stating that a break in service due to an employee's fulfillment of military obligations must be taken into consideration when determining whether an employee has been employed for 12 months or has the required 1,250 hours of service.

Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), hours an employee would have worked but for his or her military service are credited toward the employee's required 1,250 hours worked for FMLA eligibility. Similarly, the time in military service also must be counted in determining whether the employee has been employed at least 12 months by the employer.

Example:

Dean worked for his employer for six months in 2008, then was called to active duty status with the Reserves and deployed to Iraq. In 2009, Dean returned to his employer, requesting to be reinstated under the USERRA. Both the hours and the months Dean would have worked but for his military status must be counted in determining his FMLA eligibility.

Employer Notice Requirements

1. **Q. What are an employer's posting and general notice requirements?**

A. Employers must post a general notice explaining the FMLA's provisions and providing information regarding procedures for filing a claim under the Act in a conspicuous place where it can be seen by employees and applicants. Under the regulations, this posted notice includes additional information regarding the definition of a serious health condition, the new military family leave entitlements, and employer and employee responsibilities. Employers must also include the information in this general notice in any employee handbook or other written policies or manuals describing employee benefits and leave provisions. Additionally, under the regulations, an employer without a handbook or written guidance is required to provide this general notice to new employees upon hiring.

2. **Q. How soon after an employee provides notice of the need for leave must an employer determine whether someone is eligible for FMLA leave?**

A. Absent extenuating circumstances, the regulations require an employer to notify an employee of whether the employee is eligible to take FMLA leave (and, if not, at least one reason why the employee is ineligible) within five business days of the employee requesting leave or the employer learning that an employee's leave may be for a FMLA-qualifying reason.

3. **Q. Does an employer have to provide employees with information regarding their specific rights and responsibilities under the FMLA?**
- A. Yes. At the same time an employer provides an employee notice of the employee's eligibility to take FMLA leave, the employer must also notify the employee of the specific expectations and obligations associated with the leave. Among other information included in this notice, the employer must inform the employee whether the employee will be required to provide certification of the FMLA-qualifying reason for leave and the employee's right to substitute paid leave (including any conditions related to such substitution, and the employee's entitlement to unpaid FMLA leave if those conditions are not met). If the information included in the Notice of Eligibility and Rights and Responsibilities (DPA 752) changes, the employer must inform the employee of such changes within five business days of receipt of the employee's first notice of the need for FMLA leave subsequent to any change. Employers are expected to responsively answer questions from employees concerning their rights and responsibilities.
4. **Q. How soon after an employee provides notice of the need for leave must an employer notify an employee the leave will be designated and counted as FMLA leave?**
- A. Under the regulations, an employer must notify an employee whether leave will be designated as FMLA leave within five business days of learning the leave is being taken for a FMLA-qualifying reason, absent extenuating circumstances. The designation notice must also state whether the employer will require the employee to provide a return-to-work release to return to work (unless a handbook or other written document clearly provides that such certification will be required in specific circumstances, in which case the employer may provide oral notice of this requirement). Additionally, if the amount of leave needed is known, an employer must inform an employee of the number of hours, days, or weeks that will be counted against the employee's FMLA leave entitlement in the designation notice. Where it is not possible to provide the number of hours, days, or weeks that will be counted as FMLA leave in the designation notice (i.e. where the leave will be unscheduled), an employer must provide this information upon request by the employee, but no more often than every 30 days and only if leave was taken during that period.

Employee Notice Requirements

1. **Q. How much notice must an employee give before taking FMLA leave?**
- A. When the need for leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment, an employee must give at least 30 days' notice. If 30 days' notice is not possible, an employee is required to provide notice "as soon as practicable." Employees must also provide notice as soon as practicable for foreseeable leave due to a qualifying exigency; regardless of how far in advance such leave is foreseeable. The regulations clarify that it should be practicable for an employee to provide notice of the need for leave that is foreseeable either the same day or the next business

day. In all cases, the determination of when an employee could practicably provide notice must account for the individual facts and circumstances.

When the need for leave is unforeseeable, employees are required to provide notice as soon as practicable under the facts and circumstances of the particular case, which the regulations clarify will generally be within the time prescribed by the employer's usual and customary notice requirements applicable to the leave.

Example:

When Mandy goes to her Monday physical therapy appointment for her serious health condition, she finds out that the appointment she had previously scheduled for Thursday has been changed to Friday. Upon her return to work after the Monday appointment, Mandy informs her employer that she will no longer need leave on Thursday for physical therapy, but will need leave on Friday instead. Mandy has provided notice of her need for foreseeable leave as soon as practicable.

2. **Q. What information must an employee give when providing notice of the need for FMLA leave?**

A. When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee does not need to specifically assert his or her rights under FMLA, or even mention FMLA. The employee must, however, provide "sufficient information" to make the employer aware of the need for FMLA leave and the anticipated timing and duration of the leave.

The regulations provide additional guidance for employees regarding what is "sufficient information." Depending on the situation, such information may include that a condition renders the employee unable to perform the functions of the job; that the employee has been hospitalized overnight; whether the employee or the employee's family member is under the continuing care of a health care provider; if the leave is due to a qualifying exigency, that a covered military member is on active duty and that the requested leave is for a qualifying exigency; if the leave is to care for a family member, that the condition renders the family member unable to perform daily activities, or that the family member is a covered servicemember with a serious injury or illness; and the anticipated duration of the absence if known.

Additionally, the regulations require an employee seeking leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave either to reference specifically the qualifying reason for leave or the need for FMLA leave.

Certification of Need for FMLA Leave

1. **Q. Do I have to give my employer my medical records for leave due to a serious health condition?**

A. No. An employee is not required to give the employer his or her medical records. The employer, however, does have a statutory right to request an employee

provide medical certification containing sufficient medical facts to establish that a serious health condition exists.

Note: Under CFRA the employer cannot ask for a diagnosis but it may be provided at the employee's option.

2. **Q. What if I do not want my employer to know about my medical condition?**
 - A. If an employer requests it, an employee is required to provide a complete and sufficient medical certification in order to take FMLA-protected leave due to a serious health condition. The employer cannot ask for a diagnosis.
3. **Q. How soon after I request leave does my employer have to request a medical certification of a serious health condition?**
 - A. Under the regulations, an employer should request medical certification, in most cases, at the time an employee gives notice of the need for leave or within five business days. If the leave is unforeseen, the employer should request medical certification within five days after the leave begins.
4. **Q. What happens if my employer says my medical certification is incomplete?**
 - A. An employer must advise the employee if it finds the certification is incomplete and allow the employee a reasonable opportunity to cure the deficiency. The regulations require the employer state in writing what additional information is necessary to make the certification complete and sufficient.
5. **Q. Must I sign a medical release as part of a medical certification?**
 - A. No. An employer may not require an employee to sign a release or waiver as part of the medical certification process. The regulations specifically state that completing any such authorization is at the employee's discretion. Whenever an employer requests a medical certification, however, it is the employee's responsibility to provide the employer with a complete and sufficient certification. If an employee does not provide either a complete and sufficient certification or an authorization allowing the health care provider to provide a complete and sufficient certification to the employer, the employee's request for FMLA leave may be denied.
6. **Q. How often may my employer ask for medical certifications for an on-going serious health condition?**
 - A. An employee does not need to meet the eligibility tests again to requalify for extra leave within the 12-month period if the additional leave is requested for the same qualifying reason.

7. **Q. Can employers require employees to submit a fitness-for-duty/return-to-work certification before returning to work after being absent due to a serious health condition?**

A. Yes. As a condition of restoring an employee who was absent on FMLA leave due to the employee's own serious health condition, an employer may have a uniformly applied policy or practice that requires all similarly situated employees who take leave for such conditions to submit a certification from the employee's own health care provider that the employee is able to resume work. Under the regulations, an employer may require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the position if the employer has appropriately notified the employee that this information will be required and has provided a list of essential functions.

Note: While the general restriction on obtaining a new fitness-for-duty certification following each intermittent leave event remains intact, the final regulations allow an employer to obtain a certification of fitness to return to duty for intermittent absences up to once every 30 days if "reasonable safety concerns" exist regarding the employee's ability to perform his or her duties.

8. **Q. What happens if I do not submit a requested medical or fitness-for-duty certification?**

A. If an employee fails to timely submit a properly requested medical certification (absent sufficient explanation of the delay), FMLA protection for the leave may be delayed or denied. If the employee never provides a medical certification, then the leave is not FMLA leave.

If an employee fails to submit a properly requested fitness-for-duty certification, the employer may delay job restoration until the employee provides the certification. If the employee never provides the certification, he or she may be denied reinstatement.

Miscellaneous Questions

Q. Can I use my paid leave as FMLA leave?

A. Under the regulations, an employee may choose to substitute accrued paid leave for unpaid FMLA leave if the employee complies with the terms and conditions of the employer's applicable paid leave policy. The regulations also clarify that substituting paid leave for unpaid FMLA leave means that the two types of leave run concurrently, with the employee receiving pay pursuant to the paid leave policy and receiving protection for the leave under the FMLA. An employee is not required to exhaust all paid leave, before choosing unpaid leave, unless otherwise required by their applicable memorandum of understanding.

Comparison between New Family and Medical Leave Act (FMLA) and California Family Rights Act (CFRA) Regulations

FOUR BIG DIFFERENCES BETWEEN CFRA AND FMLA

TERM	FMLA (29 C.F.R. 825.100, et. seq.)	CFRA (California Code of Regulations, Title 2, 7297.0, et. seq.)
Pregnancy as a “Serious Health Condition” (SHC)	<p>Covered as a Family and Medical Leave Act (FMLA) serious health condition. (825.120)</p> <p>No change with new FMLA regulations.</p>	<p>**Not covered under CFRA.</p> <p>A pregnant employee is entitled to a pregnancy disability leave (PDL) of up to 4 months. Eligible employees can take a 12-week CFRA baby bonding leave. First 12 weeks of PDL can run concurrently with FMLA for eligible employees and for that period, the employer needs to maintain health benefits. [§7291.2 (o)]</p>
Registered domestic partners equal spouses	<p>Not covered under FMLA.</p> <p>No change with new FMLA regulations.</p>	<p>**Covered under CFRA, just like spouses. (Fam. Code §297.5)</p>
“Qualifying Exigency” because of employee’s or family member’s active military duty	<p>**Eligible FMLA employees are entitled to up to 12 weeks of leave for “any qualifying exigency” arising because the spouse, son, daughter, or parent of the employee is on active military duty, or has been notified of an impending call to active duty status, in support of a contingency operation. Health benefits are included. The family member must be a member of the Guard, Reserve, or be a retired member of the Armed Services. (825.126)</p> <p>Effective October 28, 2009, the Fiscal Year 2010 National Defense Authorization Act (NDAA 2010) amended this entitlement. The amendment now includes the regular Armed Force and deployment no longer has to be in support of a contingency operation. Deployments to a foreign country are now covered.</p>	<p>Not covered under CFRA. Thus, CFRA leave not exhausted when FMLA used.</p>
Care for ill or injured	<p>**An employee who is the spouse, child, parent or next of kin of a covered service member may take a total of</p>	<p>Covered under CFRA <u>if</u> family member is a covered CFRA employee, i.e., a spouse, child or parent. [7297.0(h)(2)] If “next of</p>

****** Indicates which law/regulation is more generous to the employee. *Where there is a conflict between the provisions of the FMLA and State law, the provision which provides the greater family or medical leave rights to the employee will prevail.*

<p>service member</p>	<p>26 weeks of leave during a 12-month period to care for a covered service member who is ill or injured in the line of duty on active duty. Health benefits are included. (825.127)</p> <p>Effective October 28, 2009, the Fiscal Year 2010 National Defense Authorization Act (NDAA 2010) amended this entitlement. The amendment extends the ability of an employee to take leave to care for a veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. The veteran must have been a member of the Armed Forces (including the National Guard or Reserves) at any time within five (5) years preceding treatment.</p>	<p>kin” is not within these categories, CFRA leave would not be exhausted when FMLA used. Furthermore, CFRA leave is only 12 weeks, so last 14 weeks would be FMLA only.</p>
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PREGNANCY AND BABY BONDING

TERM	FMLA (29 C.F.R. 825.100, et. seq.)	CFRA (California Code of Regulations, Title 2, 7297.0, et. seq.)
<p>Minimum duration of bonding intermittent leave</p>	<p>Eligible employees may work an intermittent or reduced schedule for baby bonding <i>only if the employer agrees</i>. [825.120(b) & 825.121(b)]</p> <p>No change with new FMLA regulations.</p>	<p>**No requirement that employer agrees. Basic minimum leave duration is two weeks for CFRA-only baby bonding leave. But, employer must grant a request for leave of less than two weeks’ duration on any two occasions.</p>
<p>Reinstatement</p>	<p>**Reinstatement required to the same or equivalent position. (825.214)</p> <p>No change with new FMLA regulations.</p>	<p>**CFRA has same reinstatement rights as FMLA. [7297.2(a).] ** Pregnancy disability leave (PDL) requires reinstatement to same position (not just comparable). [7291.9(a)]</p>

** Indicates which law/regulation is more generous to the employee. *Where there is a conflict between the provisions of the FMLA and State law, the provision which provides the greater family or medical leave rights to the employee will prevail.*

LIMITATIONS ON LEAVE FOR SPOUSES/PARENTS WORKING FOR SAME EMPLOYER

TERM	FMLA (29 C.F.R. 825.100, et. seq.)	CFRA (California Code of Regulations, Title 2, 7297.0, et. seq.)
Family leave to care for parent, for child's birth; to care for child after birth, or for placement of a child through foster care or adoption.	If both <i>husband and wife</i> work for same employer, leave is limited to 12 weeks between the spouses: <ul style="list-style-type: none"> • to care for a parent's SHC (<i>new regulations</i>); • for child's birth; • to care for the child after birth; or • for placement of a child through adoption; or foster care. <p>Each spouse's unused portion of FMLA leave would still be available for other purposes, such as employee's or child's SHC. If one spouse employee is not FMLA-eligible, other eligible FMLA employee would have entire 12 weeks of leave. [825.120(a)(3); 825.201(b)]</p> <p>No change with new FMLA regulations. *Unmarried parents (including same sex parents) are not subject to these restrictions.</p>	**Employer may limit leave to a combined total of 12 weeks if both <i>parents</i> work for the same employer and leave is for the birth, adoption or foster care placement of their child. The CFRA regulations specifically state, "The employer may not limit their entitlement to CFRA leave for <i>any other qualifying purposes.</i> " [7297.1(c)] <p>**No CFRA limitation on spouses caring for parents.</p>

ESTABLISHING COVERAGE

TERM	FMLA (29 C.F.R. 825.100, et. seq.)	CFRA (California Code of Regulations, Title 2, 7297.0, et. seq.)
Establishing a serious health condition (SHC)	<p><i>No change under the new regulations</i> except for the following clarifications (825.113 & 825.115): An employee establishes that he/she has a SHC by:</p> <ul style="list-style-type: none"> • Visiting a Health Care Provider (HCP) on <u>2</u> occasions & having more than 3 days of incapacity associated with the condition. • The 1st visit establishing a SHC must occur in person within 7 days of the incapacity along with treatment (i.e., prescription medication). • The 2 visits must occur within a 30-day period from the onset of the initial incapacity; and • The HCP, not the employee, must determine if a 	**CFRA references old FMLA regulations to establish a SHC. [7297.0(o)(2)] <p>Note: CFRA does NOT include Pregnancy as a SHC (7297.6(b.)) and that is why a disabled, pregnant woman in California is eligible for up to seven months of leave pregnancy disability leave (PDL)/FMLA (for own pregnancy-related disability) and then CFRA (bonding) [7297.6(d)]</p> <p>DFEH will keep the '95 FMLA regulations and will not implement the :</p> <ul style="list-style-type: none"> • Full days provision

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	<p>2nd visit is needed during the 30 day period.</p> <p><i>New regulations:</i> For purposes of establishing a chronic condition, “periodic” visits to a HCP means visiting a HCP twice or more per year for the same condition.</p>	<ul style="list-style-type: none"> • 7 day requirement • 2 treatments within 30 days
Establishing need to care for a family member with a SHC	<p><i>New regulations:</i> Clarify that “incapable of self-care because of a mental or physical disability” is determined at the time the FMLA leave commences, not later. As the ADA has been amended to make it easier to establish a disability, more conditions might be determined to be disabilities which would qualify employee to take FMLA leave. [825.122 & 825.124]</p>	<p>**CFRA regulations state that employee may take leave for a covered family member when the family member’s SHC “warrants the participation of the employee.” [7297.0(a)(1)(D)(1)] The definition of SHC does not reference the term disability, instead uses the terms “illness, injury, impairment, or physical or mental condition.” [7297.0(o)]</p> <p>Continue using CFRA – DFEH will not implement new FMLA regulations.</p>

EMPLOYEE ELIGIBILITY FOR LEAVE

TERM	FMLA (29 C.F.R. 825.100, et. seq.)	CFRA (California Code of Regulations, Title 2, 7297.0, et. seq.)
Break in service	<p><i>New regulations:</i> Clarify that an employee is eligible for FMLA leave so long as the employee has worked for an employer for a total of 12 months, even with a break in service. The break can be up to 7 years & even longer in certain circumstances, .e.g., where the break occurred because of military obligations. [825.110(b)(1)]</p>	<p>** Employee is eligible for leave so long as employee has worked for employer a total of 12 months (even if there’s been a break in service) and worked 1,250 hours in past year. [7297.0(e)]</p>
Re-qualifying for leave	<p>**<i>New regulations:</i> Clarify that an employee does not need to meet the eligibility tests again to requalify for extra intermittent leave within the 12-month period if the additional leave is requested for the same qualifying reason. [825.110(e)] <i>No change from interpretation of old regulations.</i></p>	<p>**Same requirement. [7297.0(e)(1)]</p>
Counting leave as FMLA leave when	<p>**If an employee is not eligible for FMLA leave at the start of a leave because the employee has not met the 12 month length-of-service requirement, the employee may nonetheless meet this requirement while on leave,</p>	<p>No comparable guidance in CFRA regulations.</p>

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eligibility commences “Midstream”	because leave time counts toward length of service (although not for the 1,250 hour requirement). The employer should designate the portion of the leave where the employee has met the one year requirement as FMLA leave. (825.110)	
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COMPUTATION OF TIME PERIODS

TERM	FMLA (29 C.F.R. 825.100, et. seq.)	CFRA (California Code of Regulations, Title 2, 7297.0, et. seq.)
Treatment of holidays	** <i>New regulations:</i> When a holiday occurs during an employee’s scheduled workweek and the employee is taking a full week of leave, the holiday counts against the employee’s 12-week leave entitlement. If the employee is taking FMLA leave in increments of less than a week, the time counts against the FMLA entitlement only if the employee was required to work on the holiday. [825.200(h)]	CFRA regulations have no similar provision for leave taken in less-than-a-week increments. CFRA regulations do follow the remaining part of this FMLA regulation, 825.200(h), which provides that if a holiday falls within a CFRA leave week, the entire week is counted as CFRA leave. If however, the employer’s business activity has temporarily ceased for some reason and the employees are not expected to report for work for 1 or more weeks (e.g., a two week holiday school closing, summer vacation or a plant retooling closing), the days the employer’s activities have ceased do not count against the employee’s CFRA entitlement. [7297.3(c)(3)]

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INTERMITTENT LEAVE

TERM	FMLA (29 C.F.R. 825.100, et. seq.)	CFRA (California Code of Regulations, Title 2, 7297.0, et. seq.)
Scheduling Intermittent Leave	<i>New regulations:</i> Employees who need intermittent or reduced schedule leave for planned medical treatment must make a “reasonable effort” to schedule the treatment to unduly disrupt their employer’s operations. (825.202)	Same requirement. CFRA regulations: If the employee’s need for leave pursuant to this section is foreseeable due to a planned medical treatment or supervision, the employee shall make a reasonable effort to schedule the treatment or supervision to avoid disruption to the operation of the employer, subject to the approval of the health care provider of the individual requiring the treatment or supervision. (GC 12945.2 (i))
Intermittent leave increments	<i>New regulations:</i> Employer may use a time increment for absences or leave use no greater than the <i>shortest</i> time period that the employer uses for other forms of leave provided that it is not greater than 1 hour and that an employee’s FMLA leave entitlement is not reduced by more than the leave amount actually taken. Limited exception where it is physically impossible for the employee to begin/end work mid-shift (e.g., pilot or firefighter); then entire period that employee is forced to be absence is FMLA leave (825.205)	**An employer may limit leave increments to the shortest period of time that the employer’s payroll system uses to account for absences or use of leave. [7297.3(e)]
Calculating intermittent leave	** <i>New regulations:</i> To calculate an employee’s leave entitlement when an employee works a schedule that varies from week to week, employers are required to use a 12 month average of hours worked prior to the commencement of the employee’s FMLA leave. [825.205(b)]	CFRA regulations: Employee is entitled to 12 of the employee’s “normally scheduled workweeks” for intermittent leave with no guidance on how to average those hours to come up with a “normally scheduled workweek.” [7297.3(c)]
Overtime and intermittent leave	<i>New regulations:</i> If an employee would have been required to work overtime hours but could not because of a FMLA-qualifying condition, the employee may be charged FMLA leave for the hours not worked. Employers cannot discriminate in the	**No comparable CFRA requirement.

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	assignment of OT to deplete FMLA leave takers from their FMLA leave entitlement. [825.205(c)]	
Docking pay of exempt employees	Employers may dock exempt employees' pay for FMLA intermittent leave/reduced work schedule when paid leave exhausted. [825.206(a)]	**CFRA does not cover this issue. But in a CA DLSE Opinion Letter 2002-03-01 , the then-Labor Commissioner stated that CA employers may treat exempt employees like non-exempt employees for the amount of CFRA leave taken (for leave that runs concurrently with FMLA).

SUBSTITUTION OF PAID LEAVE

TERM	FMLA (29 C.F.R. 825.100, et. seq.)	CFRA (California Code of Regulations, Title 2, 7297.0, et. seq.)
Vacation, compensating time off, sick leave and disability benefits	<p><u>Paid leave policy</u>: Employer may <i>require</i> that employees meet the terms and conditions (e.g., give requisite notice or use leave in certain increments) of using paid leave if they want to substitute it for unpaid FMLA leave (i.e., have the paid leave run concurrently). [825.207(a)]</p> <p><u>Supplementing disability benefits</u>: Employer and employee may agree (but can't require) that other forms of accrued time (sick leave, vacation, and CTO) can augment paid disability payments while on FMLA. [825.207 (d) and (e)]</p>	<p>**The MOU does not allow the employer to require use of leave credits. Employees may elect to use leave credits.</p> <p>No distinction made in CFRA regulations between employers w/without paid leave policies. Employer or employee may <i>require</i> use of vacation, other CTO [7297.5(b)(1) and (b)(2)] or sick leave (for employee's own SHC). Employer or employee may mutually agree to use sick leave for any other reason. [725.5(b)(3)]</p> <p>No regulation on supplementing disability benefits with other forms of paid leave.</p> <p>Employers must give employees notice of SDI/PFL benefits at time of hire and when given notice of qualifying event.</p>
No mention of qualifying leave reason	<p>If employee does not give "sufficient information" for the employer to know requested leave is potentially FMLA-qualifying (whether paid or unpaid), the employee will not be entitled to have the leave designated as FMLA protected.</p> <p><i>New regulations</i> clarify what is "sufficient information." [825.301(b)]</p>	<p>**If an employee requests vacation or CTO without reference to a qualifying purpose, the employer may not ask whether the employee is taking the time off for a CFRA-qualifying purpose. [7297.5(b)(2)(A)]</p>

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Denied leave request, employee then gives family leave-qualifying reason	If the employer denies the employee's request, and the employee then provides information that the requested time off is (or may be) for FMLA leave, the employer may inquire further into the reasons for the absence. If it's a FMLA purpose, employer must grant leave but can then charge it against employee's vacation or CTO. [825.301(b)]	Same requirement. [7297.5(b)(2)(A)(1)] **The MOU does not allow the employer to require use of leave credits. Employees may elect to use leave credits.
Sufficient notice of leave	Calling in sick in the case of unforeseeable leave is not enough to trigger an employer's obligation to determine if the leave is possibly FMLA-protected. When an employee seeks leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the <i>employee</i> must <i>specifically reference</i> the qualifying reason for leave in notifying the employer. (825.302(d).)	**No comparable CFRA regulation.

EMPLOYER NOTICE REQUIREMENTS

TERM	FMLA (29 C.F.R. 825.100, et. seq.)	CFRA (California Code of Regulations, Title 2, 7297.0, et. seq.)
For all types of leave	<p>Employers must post a specific notice for employees explaining their leave rights. (825.300) New regulations now clarify electronic posting is okay.</p> <p>Notice must be posted in a conspicuous place where applicants and employees tend to congregate. [825.300(a)(1)]</p> <p>If the employer publishes an employee handbook or other written guidance to employees on employee benefits or leave rights, employers must include all information contained in the poster in the handbook/guidance. If no written guidance exists, all of the poster's information must be distributed to employees upon hiring in writing or electronically. [825.300(a)(3)]</p>	<p>**Same posting requirements. (7297.9)</p> <p>In addition to the required notification, California's Department of Fair Employment and Housing (DFEH) provides informational brochures that may, but are not required, to be distributed to employees. A sample copy of the DFEH brochures, California Family Rights Act Brochure - English, or the California Family Rights Act Brochure - Spanish, may be viewed on DFEH's website, www.dfeh.ca.gov. This may be copied and distributed to employees.</p>
Notice	Federal law requires posting WH 1420 (FMLA	State law requires a combined PDL/CFRA notice. [7297.9(a)]

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requirements: employers subject to PDL and family leave	Poster) (App. C to Part 825.)	and (d)]
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LEAVE DESIGNATION

TERM	FMLA (29 C.F.R. 825.100, et. seq.)	CFRA (California Code of Regulations, Title 2, 7297.0, et. seq.)
Notifying employee leave was approved	**When the employee puts the employer on notice of the need for leave, the employer must provide employee with notice of their rights and responsibilities if leave taken should qualify for FMLA. When the employee has sufficient information to determine whether leave is FMLA protected (e.g., once medical certification is returned), an employer must notify an employee within <u>5 business days</u> (old regulations, 2 days) whether the employee is leave eligible and, if not, state at least one reason why not. If the employer wants a fitness for duty certification before employee can return to work, the designation notice must include this requirement and a statement of the employee's essential job functions. [825.300(d)]	CFRA regulations require <u>10 business days</u> notice. [7297.4(a)(6)] CFRA regulations don't require employer to give reason for failure to grant CFRA leave nor to provide employee with a list of employee's essential job functions to give to the employee's health care provider.
Retroactive Designation	<i>New regulations:</i> Employers may retroactively designate leave as FMLA leave, as long as there is no individualized harm. If there is harm, employer may be liable. (825.301)	**CFRA regulations follow FMLA regulations: "Employers may not retroactively designate leave as 'CFRA leave' after the employee has returned to work, except under those same circumstances provided for in FMLA & its implementing regulations for retroactively counting leave as 'FMLA leave.'" [7297.4(a)(1)(B)]

MEDICAL CERTIFICATION

TERM	FMLA (29 C.F.R. 825.100, et. seq.)	CFRA (California Code of Regulations, Title 2, 7297.0, et. seq.)
Identifying the employee's own serious health condition (SHC)	<i>New regulations:</i> Allow employers to ask for a diagnosis of what is the SHC. [825.306(a)(3).] If additional leave is requested at the end of the period that the health-care provider originally	**CFRA regulations specify that an employer <i>cannot</i> ask for a diagnosis, but it may be provided at employee's option. [7297.4(b)(2)] Employees have provided sufficient information to make a

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	estimated the employee needed for family leave, the employer may require the employee to obtain recertification. (825.307)	<p>determination under the CFRA if they provide:</p> <ul style="list-style-type: none"> • The date, if known, on which the SHC began; • The probable duration of the condition; and • A statement that, due to the SHC, the employee is unable to work at all or is unable to perform any one or more of the essential functions of his/her position. <p>Departments may use the fill in and print forms DPA has standardized. The forms are: (1) "Notice of Eligibility and Rights and Responsibilities" (DPA 752); (2) "Designation Notice" (DPA 753); (3) "Certification of Health Care Provider for Employee's Serious Health Condition" (DPA 754); (4) "Certification of Health Care Provider for Family Member's Serious Health Condition" (DPA 755); (5) "Certification of Qualifying Exigency for Military Family Leave" (DPA 756); and (6) "Certification for Serious Injury or Illness of Covered Servicemember for Military Caregiver Leave" (DPA 757).</p>
Second and third opinions for employee's SHC	If the employer doubts the validity of the employee's medical certification, the employer may require a second health care opinion, designated & paid for by employer. If first & second opinions conflict, then require and pay for a third opinion (with a provider mutually selected by employer & employee). Third opinion is final and binding. [825.307(b)]	Same requirements.
Identifying the family member's serious health condition	Certification may identify the SHC involved. [825.306(a)(3)]	<p>**The certification need not but, at the employee's option, may identify the <u>serious health condition</u> involved. [7297(b)(1).]</p> <p>Employees have provided sufficient information to make a CFRA eligibility determination if they provide:</p> <ul style="list-style-type: none"> • The date, if known, on which the SHC came into existence; • The probable duration of the condition; • An estimate of the amount of time the health care provider believes the employee needs to care for the child, parent or spouse; and

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		<ul style="list-style-type: none"> A statement that the SHC warrants the participation of the employee to provide care during a period of treatment or supervision of the child, parent or spouse, including providing psychological comfort and arranging “third party” care for the child, parent or spouse and directly providing, or participating in, the medical care. <p>Employers may use same certification forms as described for employee’s own SHC, see above.</p>
Second opinion to care for family member	<i>New regulations:</i> Authorize employers to get second and third medical opinions regarding the serious health condition of a family member, same as for an employee. [825.307(b)]	**No such authorization is allowed under CFRA regulations. Even if the employer doubts the medical certification for an employee needed to care for a family member, the employer must accept the certification. [7297.4(b)(1)]
Background information for second and third opinion providers	Employees (or family members) are required to authorize the release of relevant background medical information regarding the condition for which leave is sought from the employee’s (or family member’s) healthcare provider to the second or third opinion provider. (825.308)	**No comparable provisions in CFRA regulations.
Time frame to correct deficient certification	If certification is incomplete or insufficient, the employer must state in writing what additional info is necessary and allow the employee 7 calendar days to cure the deficiency. Employee can have extra time to fix medical certification if the employee notifies the employer within the 7 day period that she/he is unable to obtain the additional info despite diligent, good faith efforts. If the deficiencies are not fixed in the resubmitted certification, the employer may deny leave. [825.305(c)]	**No comparable provisions in CFRA regulations.
Employer contact with health care provider	Employer representative (but not employee’s direct supervisor) may contact the provider to authenticate a certification or to obtain clarification of the provided information after employer has given employee seven days to fix deficiencies (or employee waives this period). Employee or family member must sign a	**No comparable provisions in CFRA regulations.

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	HIPAA release for HCP to discuss employee's or family member's condition. If HIPAA release is not signed and employer does not have sufficient information to establish a SHC, leave can be denied. (825.307)	
Frequency of recertification	<p><i>New regulations:</i> An employer may request recertification:</p> <ul style="list-style-type: none"> • Every 30 days in connection with an absence unless the medical certification indicates that the minimum duration is more than 30 days. • If a longer period is provided, certification cannot occur before the time period expires, unless circumstances change, or an employer has reason to doubt the validity of the initial certification. • In all cases, employers will be able to request recertification every 6 months, even where the certification states a longer period. A certification which indicates a "lifetime" condition exists is info that indicates the condition will last more than 6 months. <p>Each new year gives the employer the opportunity to obtain a new "initial" certification, and thus obtain a second and third opinion if there's reason to doubt the validity of the certification. 825.308.</p>	<p>** CFRA regulations provide that "Upon expiration of the time period which the health care provider originally estimated that the employee needed to take care of the employee's child, parent or spouse, the employer may require the employee to obtain recertification if additional leave is requested." [7297.4(b)(1)]</p> <p>** No provision that a new year gives the employer the opportunity to start over with the certification process.</p>
Fitness for duty returning from medical leave for employee's own SHC	<p><u>Intermittent Leave:</u> Employer may require an employee to furnish a fitness-for-duty statement every 30 days if employee's has used intermittent leave and reasonable safety concerns to return exist, provided that the employer includes that requirement in its designation notice. Employer cannot terminate the employee's employment while awaiting the fitness for duty certification for an intermittent or reduced schedule leave of absence.</p> <p><u>*Return from a Block of Leave:</u> With new regulations,</p>	<p>**CFRA regulations are silent about fitness for duty statements for intermittent medical leave.</p> <p>CFRA regulations provide that as a condition of an employee's return from medical leave, the employer may require that the employee obtain a release to "return-to-work" from his/her health care provider stating that he/she is able to resume work only if the employer has a uniformly applied practice or policy of requiring such releases from other employees returning to work after illness, injury, or disability. [7297.4(b)(2)(E)]</p>

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	when an employer provides the employee with a list of the employee's essential job functions in its designation notice, and advises the employee that the certification must address the employee's ability to perform the essential functions of the job, the employer may require the employee's health care provider to certify the employee can perform those duties. (825.312)	
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