



FMLA/CFRA LEAVE: UNDERSTANDING THE LEAVE PROCESS DURING COVID 19 OUTBREAK

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We have received several inquiries about employer duties during the COVID 19 Outbreak. This article cites both current federal and state law as well as the recently passed Emergency FMLA (EFMLA) Leave. State and federal leave laws, such as the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) - applicable to employers with 50 or more employees - contain overlapping and sometimes conflicting employee rights and employer obligations regarding family leave.

The FMLA and CFRA both require covered employers to provide time off for personal illness, to attend to the illness of a family member and in connection with the birth or adoption of a child. Though this sounds simple, FMLA and CFRA issues are among the most litigated of all employment law cases and can result in large liabilities. Federal and California family and medical leave laws provide eligible employees with up to 12 weeks of time off per year for:

- **Caring for a qualified family member with a serious health condition;**
- **The employees own serious health condition.**

Covered Employers under FMLA and CFRA

FMLA and CFRA laws cover private employers with 50 or more employees on the payroll during each of any 20 or more calendar weeks in the current calendar year or the preceding calendar year, and all public employers regardless of the number of employees. This includes employees on the payroll who received no compensation, part-time employees, commissioned employees and employees on leave who are expected to return to active employment. Employees on layoff do not count.

Employee Eligibility for FMLA/CFRA Leave

There are specific criteria for an employee to be eligible for CFRA and/or FMLA. An employee must have worked for a covered employer for at least 12 months and must have worked for 1,250 hours in the 12 months before the start of the leave. The employee must also work at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

Medical Certification

You may require medical certification for an employee taking family/medical leave for his/her own serious illness or to care for a family member, but not for baby-bonding time. Keep in mind that medical privacy laws limit the type of information you may require on such certification.

- **Common Mistake** - Not understanding the difference between a “serious health condition” and a “common ailment.”
- **Serious Health Condition** - A “serious health condition” is an illness, injury, impairment, or physical or mental condition that involves at least one of several criteria specifically defined in the family leave regulations.

EMERGENCY FMLA (EFMLA) LEAVE

- Applies to employers with fewer than 500 employees;
- Only covers absences due to COVID-19 school and child-care closures;
- First 10 days of leave are unpaid (but employees can use other paid leave);
- Remainder of 12-week leave period is paid at two-thirds of employee's normal rate times normal workweek;
- Cap limits required EFMLA pay to \$200 per day and \$10,000 total;
- Limited carve-outs for health-care providers, emergency responders, and employers with fewer than 25 employees, to be clarified by regulations.

Which Employers Are Covered?

HR 6201's EFMLA provisions apply to all employers with fewer than 500 employees, as do the emergency sick-leave requirements discussed in the next section. The Department of Labor has authority to issue regulations exempting businesses with fewer than 50 employees when requiring EFMLA and/or emergency sick leave "would jeopardize the viability of the business as a going concern."

Which Employees Are Covered?

In contrast to FMLA's 12-month waiting period, employees are eligible to take EFMLA leave once the employee has been employed for at least 30 calendar days. Employers may exempt health-care providers and emergency responders from eligibility for EFMLA leave. The scope of this exemption is unclear but will be clarified by regulations from the Department of Labor.

What Purposes Allow Taking EFMLA Leave?

EFMLA leave under HR 6201 is for a single purpose—inability to work (in person or remotely) because of the need to care for a child under the age of 18 due to a school or child-care facility closure caused by an emergency declared by federal, state, or local authorities related to COVID-19. It does not cover other COVID-19 related absences—although ordinary FMLA and the paid sick-leave provisions of HR 6201 may cover such absences.

What Does EFMLA Leave Require?

EFMLA leave under HR 6201 is a 12-week period of job-protected leave. The first 10 days of leave are unpaid, although an employee may choose to use any available paid leave (vacation, PTO, sick leave, emergency paid sick leave, or personal leave) during the first 10 days. Employers may not require employees to take paid leave to cover the first 10 days of EFMLA.

Emergency Paid Sick Leave Act

Like the EFMLA, the Emergency Paid Sick Leave Act (EPSLA) applies to employers with fewer than 500 employees and allows additional paid leave for employees who cannot work or telework for certain COVID-19-related reasons. Like the EFMLA, this Act became effective on April 1, 2020, and remains in effect until December 31, 2020. Unlike the EFMLA, paid sick leave is available to all employees even if they have not yet worked 30 days. This Act also does not have a 10-day waiting period.

This information is not intended to be legal advice. Please contact your district counsel for further clarification. 🐾

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