

## Question & Answer Summary

September 22, 2009 Webinar

### Leaves of Absence Part 1: Recent Developments Under the Federal FMLA and California's Family and Medical Leave Law

On September 22, 2009, Miller Law Group presented Part 1 of a two-part webinar on Leaves of Absence. In Part 1, we took a close look at the legal requirements and practical challenges for family and medical leaves under the federal Family and Medical Leave Act (FMLA) and California's Family Rights Act (CFRA). The following are answers to frequently asked questions by webinar attendees.

**Q. HOW IS FMLA COVERAGE DETERMINED WHEN AN EMPLOYER FLUCTUATES BETWEEN HAVING MORE THAN 50 EMPLOYEES AND FEWER THAN 50? FOR EXAMPLE, IF AN EMPLOYEE REQUESTS LEAVE WHEN THE COMPANY HAS 48 EMPLOYEES, SHOULD THE LEAVE BE GRANTED IF THE EMPLOYER HAD 50 EMPLOYEES THE MONTH BEFORE?**

A. *Employer* coverage is determined as of the date the employee requests leave. An employer is covered by the FMLA if, on the day the employee requests leave, the employer had an aggregate of at least 50 employees on payroll for each working day during each of 20 or more (nonconsecutive) calendar work weeks in the current or preceding calendar year. Employees on leave, suspension, etc., are counted toward the total number of employees at a worksite. Thus, an employer that has only 48 employees on the date the employee requests leave could still be FMLA-covered if it had at least 50 employees for at least 20 nonconsecutive work weeks in the current or preceding year.

**Q. DOES VACATION TIME OFF COUNT TOWARDS THE 1,250 HOURS OF SERVICE THAT AN EMPLOYEE NEEDS TO BE ELIGIBLE FOR FMLA LEAVE?**

A. No. To be eligible for FMLA leave, an employee must have worked at least 1,250 hours during the previous 12-month period. Time off for sick leave, vacation, holidays, or personal leave does not count toward the 1,250 hours of work.

**Q. UNDER FMLA AND CFRA, CAN AN EMPLOYEE TAKE LEAVE TO CARE FOR AN IN-LAW?**

A. No. An employee can take FMLA and CFRA leave to care for his or her own parent, but not to care for his or her spouse's parent.

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**Q. IS SWINE FLU CONSIDERED A SERIOUS HEALTH CONDITION?**

A. It depends. The swine flu may be sufficiently serious to constitute a serious health condition if it involves: 1) inpatient care in a hospital or medical care facility; or 2) continuing treatment by a health care provider. While the run-of-the-mill flu often does not meet the definition of a serious health condition, courts have held that the flu may qualify an employee for FMLA leave if the condition otherwise meets the definition of a serious health condition. If an employee is hospitalized as a result of the swine flu, or is absent from work for more than three consecutive days and being treated by a physician with anti-viral medications, then the employee has a serious health condition and is eligible for FMLA leave.

**Q. SUPPOSE AN EMPLOYEE REQUESTS FMLA LEAVE BUT THEN DECIDES TO SIMPLY TAKE THE TIME OFF AS VACATION. DO THE FMLA NOTICE REQUIREMENTS FOR EMPLOYERS STILL APPLY TO THIS SITUATION?**

A. Yes. An employer is required to provide an employee with an FMLA Eligibility Notice when the employee requests leave or the employer *acquires knowledge* that a leave may be FMLA-qualifying. Regardless of whether the employee actually applies for FMLA leave, his or her initial request is sufficient to trigger an employer's obligation to provide the FMLA Eligibility Notice. A California caveat: If an employee requests vacation or paid time off (PTO) without reference to a qualifying purpose, the employer may not ask whether the employee is taking the time off for a CFRA-qualifying purpose.

**Q. AN EMPLOYEE TOOK TIME OFF TO HAVE SURGERY, BUT NEVER NOTIFIED THE COMPANY OF THE REASON FOR THE TIME OFF. THE COMPANY LEARNED OF THE REASON ONLY AFTER THE EMPLOYEE RETURNED TO WORK AND PRESENTED A DOCTOR'S NOTE. CAN THE EMPLOYER COUNT THE ABSENCE AGAINST THE EMPLOYEE'S FMLA ENTITLEMENT?**

A. The employer's obligation to designate time off as FMLA leave arises when the employer has acquired knowledge that leave is being taken for a FMLA-qualifying reason. From that point, the employer has five business days to notify the employee that the leave is counted as FMLA time off. Therefore, in this scenario, the employer can count the absence against the employee's FMLA entitlement even if the employer only learned of the qualifying circumstances after the leave. Keep in mind that while surgery typically relates to a serious health condition, some types of surgery, such as for cosmetic reasons, will not qualify as a serious health condition unless inpatient hospital care is required or unless complications develop.

**Q. WHERE CAN OUR COMPANY OBTAIN COPIES OF THE NEW FMLA NOTICES?**

A. The new Department of Labor poster and forms can be found online at: <http://www.dol.gov/esa/whd/fmla/finalrule.htm>.

**Q. SHOULD CALIFORNIA EMPLOYERS USE THE FMLA MEDICAL CERTIFICATION FORMS PROVIDED BY THE U.S. DEPARTMENT OF LABOR? IF NOT, WHY? AND, IF THE DOCTOR CANNOT DISCLOSE THE DIAGNOSIS, HOW CAN THE EMPLOYER DETERMINE IF THE EMPLOYEE'S AILMENT QUALIFIES AS A SERIOUS HEALTH CONDITION?**

A. California employers should not use the FMLA medical certification forms. The FMLA forms permit the health care provider to specify the diagnosis, but the CFRA prohibits an employer from asking for a diagnosis (although the employee may provide such information at his or her option). Thus, for California employees, only the special CFRA medical certification form should be used. It is available online at <http://www.fehc.ca.gov/commission/pdf/health-provider.pdf>. By soliciting the following information from health care providers, the CFRA form provides employers with enough information to determine whether the leave is FMLA/CFRA-qualifying, even without identifying the diagnosis: 1) the health care provider's opinion regarding whether the medical condition fits the definition of serious health condition; 2) a statement that, due to the serious health condition, the employee is unable to work at all or unable to perform any one or more of the essential functions of his or her position; 3) the date, if known, on which the serious health condition began; and 4) the probable duration of the condition.

**Q. HOW OFTEN CAN AN EMPLOYER REQUEST RECERTIFICATION FROM AN EMPLOYEE WHO IS TAKING INTERMITTENT FMLA LEAVE FOR A CHRONIC HEALTH CONDITION?**

A. Generally, an employer may request a recertification no more often than every 30 days. However, if the intermittent leave was certified for more than 30 days, recertification may take place only when that duration has expired. Note, however, that the employer may request recertification in fewer than 30 days if the circumstances described by the previous certification have changed significantly (for example, the absences are more frequent) or the employer receives information that casts doubt on the validity of the reasons for absence or the continuing validity of the prior certification. And, regardless of the duration of any certification, the employer may request a recertification every six months.

**Q. IF AN EXEMPT-LEVEL EMPLOYEE RESPONDS TO EMAILS AND PARTICIPATES IN A FEW CONFERENCE CALLS DURING AN FMLA LEAVE, DO WE HAVE TO PAY THE EMPLOYEE FOR THIS TIME EVEN THOUGH FMLA LEAVE IS UNPAID UNDER OUR COMPANY POLICIES? IS IT A VIOLATION OF THE FMLA IF THE EMPLOYEE IS WORKING DURING THE LEAVE?**

A. An exempt employee must be paid their full salary for *any week* in which they perform work. Furthermore, an employer could be liable for interference with an employee's right to take FMLA leave if an employee is required to work while on leave. Employers should never require employees who are on full-time leave to work. Employers should beware of employees "voluntarily" working while on leave – they may later claim that the company forced them to work and thereby interfered with their leave rights. In any event, if an employer learns that an employee on FMLA leave is working, the employer must not deduct the employee's time spent responding to emails, participating in conference calls, or otherwise working from the employee's total FMLA leave time entitlement.

**Q. IF A CALIFORNIA EMPLOYEE IS ON PREGNANCY DISABILITY LEAVE FOR 12 WEEKS AND THEN TAKES A BABY-BONDING LEAVE, DOES THE EMPLOYER HAVE TO CONTINUE HEALTH COVERAGE DURING THE BABY-BONDING LEAVE?**

A. It depends. Generally, an employer's obligation to continue providing health benefits during an employee's CFRA leave, FMLA leave, or both, does not exceed 12 work weeks in a 12-month period. In this case, the employer's obligation commences on the first day of the employee's leave under FMLA (for the employee's pregnancy-related disability) and extends through the first 12 weeks of her leave. Although the employee is eligible to take an additional 12 weeks of baby-bonding leave under CFRA, the employer is not required to continue providing health benefits beyond the first 12-week period unless the employer's policies provide for more than 12 weeks of health benefits for other types of unpaid leaves. Under CFRA, the employee is entitled to participate in health plans for more than 12 weeks of leave only to the same extent and under the same conditions that would apply to any other leaves granted by the employer for any reason other than CFRA leave.

**Q. IF AN EMPLOYEE FAILS TO MEET SALES OR OTHER PERFORMANCE OBJECTIVES DUE TO FMLA TIME OFF, CAN THE EMPLOYER REDUCE A BONUS THAT IS BASED ON THOSE FACTORS?**

A. Yes. Under the new FMLA regulations, an employer may deny or reduce a bonus that is based upon achieving a goal, such as hours worked, products sold, or perfect attendance, to an employee who takes FMLA leave and thus does not achieve the goal, as long as the employer treats employees taking FMLA leave the same as employees taking non-FMLA leave.

**For over a decade, Miller Law Group has devoted its practice exclusively to representing business in all aspects of California employment law and related litigation.** If you have questions about your workplace obligations, please contact Michele Ballard Miller ([mbm@millerlawgroup.com](mailto:mbm@millerlawgroup.com)) or Carolyn Rashby ([cr@millerlawgroup.com](mailto:cr@millerlawgroup.com)), or call 415-464-4300.

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