EPSTEIN BECKER GREEN

Take 5 VIEWS YOU CAN USE

LABOR AND EMPLOYMENT

***Take 5* Newsletter: California's Leave Laws Could Potentially Create the Perfect Storm for Employers**

This issue of Take 5 *was written by* ***Marisa S. Ratinoff****, a Member of the Firm in Epstein Becker Green's Los Angeles office.**

National employers often find it challenging to navigate the employment laws of the various states in which they do business. In most cases, the easiest solution may be to adopt national policies that follow federal law. This process will not work, however, for employers that do business in California, where state protections are often more expansive and provide greater employee rights than their federal law equivalents. This is particularly true in the leave of absence arena. California is unique in that it makes numerous types of protected leaves of absence available to employees. The cumulative impact of administering all of the available leaves in California can be quite burdensome and lead to a perfect storm in which an employee may continue to be on a protected leave of absence for more than one year. Here's why:

1. **California Family Rights Act ("CFRA") Provides Similar, But Not Identical, Entitlements to the Family Medical Leave Act ("FMLA")**

The FMLA entitles eligible employees to take up to 12 workweeks of unpaid leave for specified family and medical reasons, including their own serious health condition, the serious health condition of a covered family member, the birth or adoption of a child, or a "qualifying exigency" arising out of a family member being on active military duty. The FMLA also entitles eligible employees to take up to 26 workweeks of unpaid leave to care for a current military servicemember or veteran. To be eligible for FMLA leave, the employee must have one year of service with the employer and at least 1,250 hours of service, and the employer must employ 50 or more employees within a 75-mile radius of the employee's place of employment. Eligible employees who take FMLA leave maintain job protection over the course of their leave and must have their health benefits maintained at the same level as if they were actively working.

CFRA follows the FMLA as to eligibility requirements, reinstatement rights, and health care benefits. As of earlier this year, both the FMLA and CFRA extend to the care of a registered domestic partner, previously only covered under state law. Unlike the FMLA, however, CFRA does not cover military exigency leave, does not provide more than 12 workweeks to care for an injured service member or veteran, and does not consider pregnancy a serious medical condition.

Furthermore, while military caregiver leave under the FMLA extends to next of kin, only the immediate family is covered under CFRA.

While leave taken under the FMLA and CFRA may run concurrently, the distinctions between these two laws complicate coordination. For example, if an employee takes a leave of absence in January due to her own serious health condition, it will trigger and exhaust both the FMLA and CFRA contemporaneously. However, if the employee takes a leave of absence in January to assist her son with childcare because he has been called to active duty in the military, it will trigger and exhaust the FMLA but not CFRA. Therefore, if the employee is diagnosed with cancer in June and needs to take a leave of absence, she will be entitled to another 12 weeks of leave, effectively doubling her protected time off work. The matter is complicated even further if the employee also seeks to take leave for pregnancy or related conditions. In fact, in California, an employee may lawfully be entitled to more than 10 months of protected leave, as discussed below.

2. Pregnant Employees Are Entitled to Up to Four Months of Leave in Addition to CFRA Leave

Since CFRA does not consider pregnancy a serious medical condition, an employee in California who needs to take leave due to pregnancy or related conditions is governed by the California Pregnancy Disability Leave Law ("PDLL") and entitled to up to four months of leave per pregnancy. Unlike CFRA, there is no length of service requirement; an employee may request leave under the PDLL at any time during her employment. Moreover, an employer is covered by the PDLL if it employs more than five employees.

New regulations that went into effect earlier this year clarified that the four-month period is calculated in hours as opposed to days, such that a full-time employee is entitled to 693 hours of leave (i.e., one-third of the total number of hours worked in a year, assuming a 40-hour workweek). Employers with employees who work more or less hours in a typical workweek can calculate their total entitlement under the PDLL by multiplying the hours worked in a typical workweek by 17⅓ (one-third of the total workweeks in a year).

Under the new regulations, employers must account for increments of leave in no greater than the shortest period of time that the employer uses to account for other forms of leave, but not greater than one-hour increments. Therefore, even if an employer's policy requires that leave be taken in two- or four-hour increments, if the employee only needs and uses one hour of leave under the PDLL, her employer may only reduce her available leave by one hour.

Moreover, although the law requires that an employee be "disabled by pregnancy" in order to take leave under the PDLL, a variety of common pregnancy-related issues are expressly covered by the regulations, including severe morning sickness, prenatal and postnatal medical appointments, bed rest, gestational diabetes, pregnancy-induced hypertension, preeclampsia, post-partum depression, and recovery from childbirth or the end of a pregnancy.

As with CFRA and the FMLA, an employer must maintain health care benefits for the duration of leave under the PDLL and reinstate an employee at the end of her leave. However, while an employee who returns from CFRA or FMLA leave may be reinstated to a comparable position,

an employee who seeks to return from leave under the PDLL must be reinstated to the same position unless it no longer exists. Only if the position no longer exists may the employer place the employee in a comparable position.

Once an employee has given birth and is taken off of pregnancy disability leave, it is quite common for the employee to remain out of work under CFRA, which allows leave to be taken for baby bonding. Consequently, a pregnant employee may, at a maximum, take up to seven months of leave surrounding the birth of her child. This leave time can be further extended by a well-timed FMLA leave. For example, if an employee takes FMLA leave in January to assist her son with childcare because he has been called to active duty in the military, it will trigger and exhaust the FMLA but not CFRA. The woman may thereafter take four months of leave under the PDLL, followed by three months of baby bonding leave under CFRA.

3. Reasonable Accommodation May Require Further Leave Even After FMLA, CFRA, and PDLL Are Exhausted

But wait! Even if the employee has exhausted all available leave under the FMLA, CFRA, and the PDLL, further leave may be required as a reasonable accommodation under California law. Earlier this year, a California Court of Appeal held that an employee who exhausts all permissible leave under the PDLL and is terminated by her employer may nevertheless state a cause of action for discrimination. As noted in a recent post on Epstein Becker Green's *Retail Labor and Employment Law Blog* entitled "Court Finds Continuing Duty Exists to Engage in Interactive Process with Employees Who Exhaust Medical Leave," the California Court of Appeals in *Sanchez v. Swissport, Inc.*, ruled that, despite having exhausted her PDLL entitlement, the employee was entitled to continue her leave of absence as a possible accommodation under the provisions of the California Fair Employment and Housing Act ("FEHA") if it will not be an undue hardship to the employer.

Employers in California should be cautious to not base termination decisions simply on the exhaustion of a guaranteed leave entitlement under state or federal law, particularly in California. In all cases, where an employee exhausts his or her guaranteed leave entitlement but seeks to continue his or her leave of absence due to disability, employers should explore if an accommodation, including an extended leave of absence, is necessary.

4. In Addition to CFRA, the PDLL and FEHA, There Are at Least 10 More Laws Providing Protected Leaves of Absence!

Although the majority of leave time taken by employees in California tends to fall under the CFRA/PDLL/FEHA umbrella, California has a host of other laws that provide leave entitlements to employees, including bone marrow leave; crime victim leave; domestic abuse and sexual assault leave; jury duty/witness leave; military spouse leave; organ donation leave; school activities leave; school appearance leave; volunteer firefighter, reserve peace officer, and emergency rescue personnel leave; and voting leave.

While bone marrow leave, military spouse leave, and organ donation leave are of a fixed duration, other leaves, such as domestic abuse and sexual assault leave, do not provide a finite amount of leave time. For example, an employee who takes leave as a result of domestic abuse

may be out an indefinite amount of time to seek medical attention, obtain services from a domestic violence shelter or program, obtain psychological counseling related to the abuse, participate in safety planning, or take "other actions to increase safety from future domestic violence," including relocation. To date, there is little to no case law addressing how much leave may be reasonable in such circumstances.

Moreover, while most of these laws are only applicable if the employer employs a minimum number of employees (typically 15 or 25), even a national employer with a small California presence should tread carefully as none of the above-noted leave laws specify whether the employee minimum must be met in California or if the statutory protections will be triggered so long as the employer employs the minimum number of employees company-wide.

5. San Francisco Employees Have Even More Leave Requirements

And, now, we have the true "perfect storm"—the San Francisco employee. By municipal ordinance, the City of San Francisco has provided yet one more leave entitlement to employees who work in San Francisco. While employers are not required by California state law to provide sick leave to their employees, San Francisco requires that all employers provide to their San Francisco employees a minimum of one hour of paid sick leave for every 30 hours worked.

Taking all of the above into account, it is therefore quite possible that an employee who starts a leave of absence in January 2014 may not return until sometime in 2015. Welcome to California!