Family and Medical Leave Act (FMLA) and California Family Rights Act (CFRA)

What follows is a brief explanation of the current state of the applicable portions of the Family and Medical Leave Act (FMLA) as well as the California Family Rights Act (CFRA), California’s FMLA counterpart, as they must be applied simultaneously. The CFRA regulations were recently amended, going into effect July 1, 2015.

For an employee to take CFRA/FMLA, the employee must be eligible. In addition to having worked 1250 hours in the 12 months preceding the leave, if the employee is taking it for his or her own illness, the illness must meet the definition of a “serious health condition” and make the employee unable to perform the functions of his or her position.

A “serious health condition” under FMLA and CFRA includes an injury, impairment, or physical or mental condition that involves either (1) inpatient care or (2) continuing treatment by a health care provider. Note that the definition of inpatient care differs between FMLA and CFRA. The regulations interpreting the FMLA still define “inpatient care” as an “overnight stay” (29 C.F.R. § 825.114). However, the new CFRA regulations only require an “expectation” that the individual will remain overnight (Cal. Code Regs., tit. 2, § 11087(q)(1)). This means an individual who is admitted to the hospital with the expectation that he or she will stay overnight, but is discharged later or transferred to another facility, still qualifies as a person with a “serious health condition.” “Continuing treatment” means a period of incapacity lasting more than three consecutive calendar days and involves either (a) treatment by a health care provider two or more times (i.e., at least two office visits) or (b) treatment by a health care provider at least one time and a regimen of continuing treatment, such as being prescribed medication.

An employer may require medical certification for an employee taking family/medical leave for his or her own serious illness. (See, e.g., Cal. Code Regs., tit. 2, § 11097 [sample medical certification form].) The regulations and medical privacy laws limit the type of information you may require on such certification. However, an employer can request information that includes that the employee has a serious health condition (but not identifying what the serious health condition is, only certifying that the various elements are or are not met), the date the serious health condition commenced, the probable duration of the condition, and a statement that due to the serious health condition the employee is unable to perform one or more of the essential functions of the employee’s position. The form also cannot be sent directly by the employer, but must be given to the employee to have their doctor complete.

Additionally, the FMLA regulations (and former CFRA regulations) allow employers to require the employee to obtain a second opinion of his or her own serious health condition, if the employer simply has a “reason” to doubt the validity of the medical certification provided by the employee (29 C.F.R. § 825.307). The new CFRA regulations now clarify that the employer must have a “good faith, objective reason” to doubt the validity of the medical certification before requiring a second medical opinion (Cal. Code Regs., tit. 2, § 11091(b)(2)).

If the College does not require the employee’s health care provider to complete a medical certification form to support her request for FMLA/CFRA leave but rather accepts a note from the health care provider, the College would not be in a position to challenge FMLA/CFRA eligibility after the fact.

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1 FMLA Regulations (link) and Fact Sheet (link)
2 CFRA Regulations (link) and Pamphlet (link)
When an employee returns from FMLA/CFRA leave, the employee is entitled to the same position or to a comparable position that is equivalent (i.e., virtually identical) to the employee’s former position in terms of pay, benefits, shift, schedule, geographic location, and working conditions, including privileges, perquisites, and status (Cal. Code Regs., tit. 2, § 11089(b)). An employer can be liable for refusal to reinstate if the employee proves by a preponderance of the evidence, that the leave was granted by the employer and that the employer failed to reinstate the employee to the same or a comparable position by the date agreed upon (Cal. Code Regs., tit. 2, § 11089(c)(1)).

As part of the recent CFRA amendments, California law added a permissible defense to failure to reinstate for fraud. Specifically, under California law, “An employee who fraudulently obtains or uses CFRA leave from an employer is not protected by CFRA’s job restoration or maintenance of health benefits provisions. An employer has the burden of proving that the employee fraudulently obtained or used CFRA leave” (Cal. Code Regs., tit. 2, §11089(d)(3)). While other states have taken the position that an employer can terminate an employee if it has a good faith belief that an employee is fraudulently using FMLA, in California, an employer’s good faith belief is insufficient. An employer will have to actually prove that the employee either fraudulently obtained or used CFRA/FMLA leave. This is high standard and would likely only take place in the context of litigation, which can be costly.

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