

# Watching the Leaves

Federal and state laws protect employee leaves of absence

*By Warren J. Higgins*

While employment law presents many challenges to California employers, one of the most confusing areas involves employee leaves of absence. As any employer is well aware, employees take leave for myriad reasons that range from an individual's inability to perform his or her job to the desire for a sabbatical to enjoy other pursuits.

Many, though not all, leaves of absence are protected under federal or state law. Some are covered under more than one law. Employers, therefore, must be familiar with the various laws that govern leaves of absence and must also understand how these laws are related to one another.

## FAMILY MEDICAL LEAVE

Employees often need time off due to personal illness, injury or disability or to care for a child or close family member. Such leaves of absence are commonly referred to as family medical leave and are protected by the federal Family Medical and Leave Act. The FMLA requires employers to provide up to 12 weeks of leave per year to employees who take leave for any the following reasons:

- The employee suffers from a serious health condition that prevents that individual from performing his or her job.
- The employee must care for the serious health condition of a spouse, child or parent.
- The employee needs time off because of

the birth of a child, to care for a child or as a result of adopting a child or agreeing to provide one with foster care.

The law defines a serious health condition as an illness, injury, impairment or physical or mental condition that involves "inpatient care in a hospital, hospice or residential medical care facility" or "continuing treatment by a healthcare provider." The latter, however, requires the employee to establish at least one among several additional criteria (e.g., an absence from work for three calendar days) to meet the definition of a serious health condition. It is also important to note that under the FMLA, an employee's own serious health condition does not have to be work-related and may fall under the protection of other laws as well.

Not all employers or employees are covered by the FMLA. Only employers that have at least 50 employees are covered. Employees are eligible for leave only if they have been employed for a minimum of 12 months and have at least 1,250 hours of service during the preceding year. In addition, under certain specified circumstances some key employees — those who are among the 10 percent most highly compensated — may not be eligible for FMLA leave.

If both the employer and employee are covered under the FMLA, employees are entitled to as much as 12 weeks of leave — which may be taken all at once or intermittently — during any given leave year. The employer may calculate a leave year several different ways,

but it must utilize the same method for all employees. Leaves of absence under the FMLA are unpaid unless the employer has a policy that provides otherwise.

An employee's family medical leave also is protected under the California Family Rights Act. The CFRA entitles employees up to 12 weeks of leave per year and is similar in most respects to the federal statute. However, there are some key differences. For example, while the CFRA applies to leaves taken due to the birth of a child, it does not apply to leaves taken as a result of pregnancy-related disabilities. The reason is that pregnancy-related disabilities are not included in the definition of a serious health condition under the CFRA.

In general, leaves of absence under these federal and state statutes run concurrently, which means that employees are entitled to a total of 12 weeks of family medical leave per year. An exception for leaves of absence due to pregnancy is discussed below.

## PREGNANCY LEAVE

Federal law protects pregnant employees under the Pregnancy Discrimination Act. Although the PDA does not create specific leave rights, it does prohibit employers from discriminating against pregnant employees with respect to leaves of absence. Therefore, if the employer has a policy of providing leaves of absence for reasons other than pregnancy, it must provide equal rights to pregnant employees.

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California's pregnancy disability leave law applies to employers with five or more employees and entitles employees to unpaid leaves of absence of up to four months due to pregnancy, childbirth or related medical conditions. The state law may require employers to transfer pregnant employees when they are unable to perform their own jobs and to reasonably accommodate pregnancy-related conditions.

An employee returning from pregnancy leave under the state law must be reinstated to her former job unless the position is no longer available for business-related reasons (e.g., a workforce reduction) or the employer can prove that it could not run its business safely and effectively in the employee's absence. If the employer is unable to reinstate the employee, the employer must place the employee in a comparable position, if one is available.

Pregnancy leaves under California law run concurrently with leaves that fall under the federal medical leave statute but not the state version of that law. As a result, once an employee has exhausted her rights under the federal medical leave law and the state pregnancy leave statute, that employee may be entitled to an additional 12 weeks of leave under the California medical leave act.

#### **REASONABLE ACCOMMODATION LEAVE**

Leaves of absence also may be protected under the federal Americans with Disabilities Act and California's Fair Employment and Housing Act. These laws prohibit discrimination against employees with a qualifying disability and further require employers to reasonably accommodate disabled employees unless doing so will impose an undue hardship. Although these laws do not expressly state that disabled employees are entitled to leaves of absence, courts

have recognized leaves of absence as a form of reasonable accommodation under certain circumstances.

In *Hanson v. Lucky Stores*, 74 Cal.App.4th 215 (1999), the Second District Court of Appeal held: "We hold that a finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties."

*Employers are cautioned to understand how various state and federal laws relate to each other.*

Moreover, if an employee's serious health condition also meets the definition of a disability, that individual's leave of absence may be protected under the family medical leave laws, as well as under ADA and FEHA.

One cautionary note regarding ADA and FEHA is that, unlike other leave laws, they do not expressly state for how long an employer must provide a leave of absence. Instead, employers must provide leave for a "reasonable" period, which could exceed the leave required under FMLA, CFRA or other laws providing defined leave rights. Because there is no bright-line test for what is considered reasonable, employers that find themselves needing to accommodate a disabled employee should seek legal counsel to determine whether — and for how long — that individual is entitled to leave.

#### **OCCUPATIONAL INJURY LEAVE**

If an employee's serious health condition or disability is the result of a work-related injury, employers must recognize that leaves of absence may be protected

under California's workers' compensation laws. Specifically, Labor Code §132a prohibits employers from terminating employees who take leave because of a work-related injury. There are narrow exceptions to this rule where the employer has no reasonable expectation that the employee will be able to return to his or her former job or when the termination is justified by business necessity (*Jordan v. WCAB*, 175 Cal.App.3d 162 (1985) ("It

is neither realistic nor reasonable that an employer create a class of absentee employees ... by keeping positions 'open' for an indefinite period of time."); *Judson Steel Corp. v. WCAB*, 22 Cal.3d 658 (1978) ("Section 132a does not compel an employer to ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are no longer available.")). These criteria, however, can be difficult to establish, and the burden is on the employer to justify terminating an employee who has suffered an occupational injury (*Barns v. WCAB*, 54 Cal.Comp.Cas. 433 (1989)). When circumstances arise that require the termination of an employee who has suffered a work-related injury, employers are urged to obtain legal advice.

This article provides only a brief survey of a few of the state and federal laws that protect employee leaves of absence. The important message for employers to understand is that these laws, and others like them, should not be considered in isolation. Employers must be mindful that employees who require leaves of absence may be covered by more than one law and that steering clear of legal trouble means complying with all applicable federal and state laws governing a particular leave of absence. Employers with questions about leaves of absence should seek expert advice to ensure that they balance their business needs with the legal obligations imposed when employees need time away from work. ☀