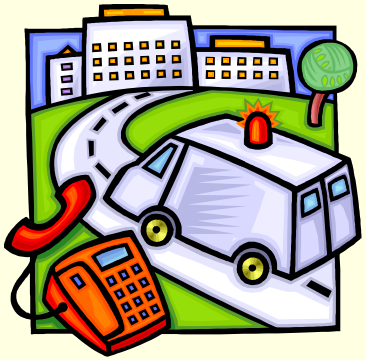
Protected Leaves of Absence in California



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Federal Sources of Leave Rights

- Family and Medical Leave Act of 1993 (FMLA)
  - Purpose: Family and medical leave rights for employees to attend to themselves, a parent, spouse, or child
- Americans with Disabilities Act (ADA)
  - Purpose: "Reasonable accommodation" and non-discrimination for physically and mentally disabled employees
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
  - Purpose: Leave and reinstatement rights for military service, including accommodation for service-related disability.

State Sources of Leave Rights

- California Family Rights Act (CFRA)
  - Purpose: Family and medical leave rights for employees to attend to themselves, a parent, spouse, or child
- Fair Employment and Housing Act (FEHA), covering only the employee, not family:
  - California Disability Law (CDL)
    - Purpose: Provides similar but greater protection than the ADA
  - Pregnancy Disability Leave Law (PDLL)
    - Purpose: Reasonable accommodation and non-discrimination for temporarily physically-disabled pregnant employees
  - Pregnancy Discrimination Law
    - Purpose: Reasonable accommodation and non-discrimination for non-disabled pregnant employees

State Sources, continued

- Workers' Compensation
  - Purpose: Benefits for employees who are temporarily and permanently disabled because of work-related injuries or illnesses
- California Family-School Partnership Act
  - Purpose: Leave rights for parents, grandparents, and guardians to participate in their children's school or child care activities
- Paid Family Leave Act (PFLA)
  - Purpose: Provides six weeks of benefits under the State Disability Insurance (SDI) program for the care of a parent, spouse, child, or domestic partner.

State Sources, continued

- "Kin Care" Law
  - Purpose: Permits use of employer-provided sick leave benefits for care of parent, spouse, child, or domestic partner
- California Healthy Workplaces Healthy Families Act
  - Purpose: every employee must receive at least 3 paid sick days per year
- California Military and Veterans Code §394
  - Purpose: ensure that service members can return to their job after active duty

State Sources, continued

- Leave for victims of Domestic Violence, Sexual Assault or Stalking – reasonable accommodation and confidentiality.
- Leave for Alcohol or Drug Rehabilitation.
- Leave for Bone Marrow and Organ Donations. *This is paid leave.*
- Leave for Crime Victims to Testify.
- Leave for Religious Practices.
- Leave for Volunteer Firefighters, etc.

Local Sources of Paid Sick Leave

- City of Los Angeles:
  - 48 Hours per year.
  - Hotel workers get at least 96 hours per year.
- Santa Monica:
  - 32 hours per year for small employers (25 or less employees).
  - 40 hours per year for larger employers (more than 25 employees).
- Long Beach:
  - Hotel workers get 5 days paid leave per year.

What an employer may not do:

- interfere with your right to take a protected leave.
- deny a valid leave request.
- discipline you or even assess attendance or other "points" or "incidents" for taking a valid leave.
- refuse to hire or promote you because you have taken a valid leave.

What an employer may not do, continued:

- retaliate against you for complaining about a violation of family/medical leave laws.
- refuse to reinstate you to your job after leave.
- discontinue medical plan during leave.
- discontinue other benefits where employer continues them for other type of leave.

Not all leaves….

- The protections just mentioned apply ONLY to the **statutory** ("protected") leaves named earlier.

- The protections just mentioned **DO NOT APPLY** to leaves of absence where company voluntarily **CHOOSES** to give you a leave after you exhaust your statutory leaves, or when you're not eligible for them. Protections do ***not*** apply to CA state disability or CA PAID family leave.

Tips for protecting leave rights:

- When representing a member in *Weingarten* meeting related to attendance points, please be very, very diligent to scrutinize whether any points, even long-ago ones, might have been imposed in violation of FMLA/CFRA.
- If manager scoffs at your protest of old points, say two things:
  - 1. It is not "just cause" to discipline our member for points given in violation of law. Grieve!
  - 2. The limitations period for lawsuit is one year, SO does mgt want to settle now or get sued?

Family and Medical Leave

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

The provisions of the CFRA and the FMLA are nearly identical, but CFRA is better in a few ways. If laws conflict, law that gives greater protection applies.

In a nutshell, both laws permit employees to take up to 12 weeks of unpaid leave to care for themselves, a parent, spouse, or child but certain

conditions have to be met.

Who is eligible for FMLA/CFRA leave?

To qualify for leave under the FMLA/CFRA, an employee must:

- be employed by a "covered employer" at a worksite within 75 miles of at least 50 other employees;
- have worked at least 12 months (which need not be consecutive) for the employer over the past seven years; under CFRA break can be longer than 7 yrs. Under FMLA, this 12 months can happen after leave begins and trigger protection mid-leave. Leave counts.
- have worked at least 1,250 hours during the 12 months preceding the date FMLA/CFRA leave begins.

How are the 1,250 hours counted:

- Leave, paid or unpaid, does not count. This means hours away on FMLA leave don't count.
- This means that an employee on FMLA leave may start an FMLA leave with 1,250 hours worked during the 12 months before that leave, but upon return, can't take a new leave because in the 12 months prior to return, he or she hasn't worked 1,250 hours.
- Even so, the employee remains eligible to use up the rest of the 12 weeks for that leave year *for the same condition as the prior leave.*

Which employers are "covered" by the FMLA and CFRA?

- FMLA: Private sector employees who have 50 or more employees working at least 20 weeks in a year; state and local government agencies; and most federal agencies.

- CFRA: Private sector employers who have 50 or more employees; California state and local governments.

For what reasons can an employee take FMLA/CFRA leave?

- Birth of a child (bonding), or placement of child in the employee's family for adoption or foster care.
- For the serious health condition of a covered family member (spouse, parent, or child, or for CFRA, registered domestic partner or child of reg. domestic partner).
- For the employee's own serious health condition.
- To be with or care for a spouse, parent, child or *next of kin* who serves or served in the military.

Some limits on the reasons for taking leave…

- "Parent" does NOT include a parent "in-law".
- You cannot take FMLA/CFRA leave to care for an adult child age 18 or over ***unless*** he or she is "incapable of self-care" because of mental or physical disability as defined by the ADA:
  - The adult child requires assistance with grooming and hygiene, bathing, dressing and eating, or other daily living activities like cooking, cleaning, shopping taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.
- For bonding with a baby, leave must be taken within one year of the birth or placement.
- Military or veteran family member; more liberal rules.

"*In loco parentis*" means "in place of a parent." No blood relation needed.

- If you act as a parent for a child, or if someone acted as a parent for you, then you can take FMLA/CFRA leave to care for them.
- But not a father-in-law or mother-in-law.
- *In loco parentis* relationship means "acts just like a parent" even if the child also had one or two parents or even other *in loco* parents.
- You qualify for this if you give or receive **daily or constant** care, practically, emotionally, financially or otherwise. More than normal grandparent or grandchild status.

How serious is serious? ("serious health condition")

1. Incapacity related to *inpatient care* in a hospital (overnight stay), hospice, or residential medical care facility; *OR*
2. Incapacity for *more than* three consecutive days that requires continuing treatment, *OR*
3. Incapacity or treatment due to a serious chronic disorder (asthma, diabetes, epilepsy, etc), *OR*
4. Long-term or permanent incapacity due to condition for which treatment may be ineffective (Alzheimer's, stroke, terminal illness, etc.) *OR*
5. Incapacity *or* medical care due to pregnancy, *OR*
6. Multiple treatments to *prevent* incapacity (e.g. chemotherapy where employee is not incapacitated yet).

ANY ONE OF THESE SIX WILL DO.

Don't forget birth/adoption:

- The other triggering event for protected leave is **baby bonding** or **placement** of adopted or foster child.
- This is the one way to qualify for protected leave when nobody is sick!
- More later on baby bonding.

Conditions that *usually* do NOT qualify as a "serious health condition"

- Common cold
- Ear aches
- Upset stomach
- Minor ulcers
- Headaches (other than migraines)
- Routine dental or orthodontia problems,
- Chicken pox
- ***UNLESS ONE OF THESE WORSENS TO BECOME A "SERIOUS HEALTH CONDITION."***

How bad is Incapacity? (of sick employee)

- Recall that for most of the categories of serious health condition, the employee must be **incapacitated** to qualify for protected leave.
- You are "**incapacitated**" if you cannot work at all, **or** you are unable to perform an essential function of your specific position.
  - E.g.: A secretary who can't type, a phlebotomist who can't draw blood, etc.
- In other words, "**incapacitated**" to do YOUR job **does not mean** "**disabled**" from doing any job. Other laws and benefits require "disability" but not FMLA/CFRA.

"Incapacity" of Sick Family Member:

- For FMLA, parent, spouse or child
- CFRA also allows domestic partner or child of D.P.
- Under FMLA, sick family member must be "incapacitated" (unable to work or take part in regular daily activities) *but under CFRA, sick family member must only "require assistance."* Child unable to attend school. Baby must only need care.
- Under both laws, presence of employee must be beneficial or desirable (NO NEED TO BE NECESSARY) for care or comfort or to provide assistance or assist in recovery.

Spouse, Child or Parent must still have "Serious Health Condition:"

- See the earlier six categories.

- Except: under CFRA, family member NEED NOT BE INCAPACITATED -- only requirement is SHC in one of six categories and employee's care would be beneficial or desirable.

Your employer can't force you to take light duty:

- If you are "incapacitated" as defined a moment ago, you're still entitled to FMLA/CFRA leave **even if you could do light duty work**.
- In other words, you can go out on leave even if employer tries to force you into light duty or another job, so long as you are incapacitated to do your regular job.
- But employer can offer, and you can accept, light duty or other work, and it won't count against your 12 weeks of FMLA/CFRA leave.

Serious Health Conditions

- Let's go through the six categories of serious health conditions in greater detail.

- Remember: if your situation, or your family member's situation, fits **any** one of these six categories you are entitled to protected leave if you have any of your 12 weeks left.

1. Inpatient Hospital Care:

- If you stay overnight in the hospital for even one night, you'd better believe you have a "serious health condition."
- If you meet this requirement, the hospital days and all PRIOR or SUBSEQUENT days of incapacity due to outpatient medical appointments, recuperation at home and other absences caused by this condition are covered under your protected FMLA/CFRA leave.

2. Incapacity for more than 3 days, including "continuing treatment":

- No hospital stay required.
- "Continuing treatment" means that during the **more than** 3 days of incapacity, you *either*
  - saw a health care provider at least *twice, with first visit occurring within 7 days of start, and second visit occurring within 30 days of start* , OR
  - you saw the provider once within 7 days of start "resulting in a regimen of supervised treatment," which means you got a prescription for medicine or other treatment with specialized equipment. *Does not include* "prescription" for rest, exercise, or OTC medicines.
- **Note:** There has been a recent, unfavorable ruling on whether a prescription is "supervised treatment." To be safest, the employee should ask the doctor to specify that they should call back if the medication doesn't work.

3. Serious Chronic Condition:

- No hospital stay required.
- *No requirement* of incapacity for "more than 3 days."
- BUT must see Dr. twice a year.
- Diabetes, asthma, orthopedic conditions, cancer, heart disease, migraines, colitis, depressive or stress-related disorders, epilepsy and similar, are all "serious chronic conditions." All might cause episodes of incapacity.
- Incapacity of one day or part-day due to this is covered for FMLA/CFRA leave.

4. Long-term or permanent incapacity:

- None of the other requirements apply.
- Employee might not ever be able to return to work, because they're too sick.
- Nevertheless, FMLA/CFRA apply and can protect medical benefits for up to 12 weeks.
- Examples: Alzheimer's, stroke, terminal disease, paralysis.

5. Pregnancy incapacity.

- None of other requirements apply.
- Protects absence for pre-natal care, severe morning sickness, childbirth, abortion, miscarriage, or recovery for any of these.
- Not necessary to see provider for these, although pregnancy must be under provider's overall care.
- Note: Pregnancy incapacity is NOT covered under CFRA but this is a good thing.

6. Multiple treatments to *prevent* incapacity

- None of other requirements need apply. And, you do not need to be incapacitated!

- This provides right to leave for multiple treatments designed to *either*

  - *Prevent incapacity for more than 3 consecutive days (e.g., cancer patient can work, but needs radiation or chemotherapy), OR*

  - *Provide restorative surgery after an injury.*

ANY one of these 6 categories will do.

- If you meet any one of these 6 categories, you definitely have a "serious health condition" -- don't let anyone tell you it isn't serious and therefore doesn't qualify you for protected leave under FMLA or CFRA.

- HR people get confused on this sometimes. Watch them!

ALSO: 7. Baby Bonding

- No one needs to be incapacitated!
- Leave must end by child's first birthday, or within 12 mos. of adoption or foster placement.
- Parents working for same employer must share the 12 weeks for this type of leave.
- Under FMLA, employer does not have to allow intermittent leave for new child.
- But under CFRA, employer must allow intermittent leave in two-wk increments, and twice for less than two-wk increments

Same-sex marriage

An employee with a same-sex spouse is entitled to the same leave to care for that spouse.

Other FMLA and CFRA differences for Family Care, part 1

- Under FMLA, if husband and wife work for same employer, they must share the 12 wk. leave to attend child's birth or care for new-born or newly adopted child or newly placed foster child.
- *NEW:* same rule for caring for employee's parent. Remember that FMLA/CFRA does not provide leave to care for parent-in-law. So, this rule says that where H & W work for same employer, they must share the 12 wks/yr. to care for two different parents – one of H's and one of W's. Or even baby bonding for two different children, too. Bad rule.

FMLA and CFRA differences for Family Care, part 2

- GOOD NEWS: This limitation on caring for each employee's parent does not exist under CFRA. So, the better law applies, as always.

- But CFRA rule is same as FMLA for birth or placement of child. Must share the 12 wks/yr. for baby bonding for one child or more in same year.

- Note: This "sharing" requirement where H&W work for same employer does not apply to any other qualifying condition other than those listed on these 2 slides.

Medical Certification

- Employer can require you to obtain a health care provider's certification
- They must give you at least 15 days to submit it.
- Under FMLA, the certification is just a brief account of medical facts that identify a "serious heath condition" and an "incapacity" that fits one of the categories. States approx. how long incapacity will last, and whether intermittent leave is needed. Look at form. *Employer may **not** require you to provide a "medical release" to get your records but may require release for these facts.*

CFRA Certification is More Limited, therefore insist on it instead of intrusive FMLA form.

- CFRA is more protective of employee privacy than FMLA. Under CFRA, a valid certification only needs to state 3 things:
  - 1. The date when the serious condition began;
  - 2. The probable duration of the condition; AND
  - 3. A statement that, due to the serious health condition, the employee is unable to perform the function of his or her position.
- The certification must be in writing and must be issued by the employee's health care provider.

Private Health Information:

- HIPAA (Health Information Portability and Accountability Act) prohibits a **health care provider** from releasing **private health information (PHI).**
- Technically, this does not prevent an *employer* from asking for such information.
- Instead, it prohibits a *health care provider* from releasing any PHI of any patient unless the patient or their personal representative (think a parent in the case of a child patient) authorizes the release in writing.

What is Private Health Information?

- PHI is **any information in a medical record that can be used to identify an individual, and that was created, used, or disclosed in the course of providing a health care service.**
- Essentially anything written by a doctor that has the patient's name on it is PHI.

But wait, doesn't the FMLA Certification disclose PHI? How can that be?

- Yes, it does.
- However, when the employee (i.e. the patient), gives an employer the FMLA Certification, he or she is implicitly authorizing its release.
- The health care provider cannot provide any of this information to the employer directly, unless the patient/employee signs a written release.

Can an employer require an employee to provide a release for all medical information?

- **NO!**
- Under the FMLA, the employer can **only** require the employee to release the medical facts that are necessary to confirm the existence of a serious health condition, although not the actual diagnosis.
  - In other words, the FMLA allows the employer to find out what symptoms you have that make it impossible to work, but not the cause of those symptoms.
- But…

CFRA Provides *Extra* Protection

- Under CFRA, an employer *may not* contact your doctor for any reason except to authenticate a medical certification.
- Under CFRA, an employer *must* accept a certification that contains the 3 elements:
  - 1. Date when the serious condition began;
  - 2. The probable duration; AND
  - 3. Statement that, due to the serious health condition, the employee is not able to perform the function of his or her position.
- CFRA does not allow the employer to ask what your condition is. The employer must take the doctor's word for it.

CFRA Extra Protections, cont.

- To Summarize:
  - Under FMLA, the employer can demand that the employee release medical details about the condition sufficient to evaluate whether it is "serious."
  - Under CFRA, the employer can only demand that the employee provide a doctor's certification that a serious condition exists, not the details of what that condition is.
- Since the more protective law controls, as long as you are dealing with employees in California, the employer cannot force the disclosure of medical information unless the employee voluntarily agrees.

Can third party contractors require medical releases?

- Some employers contract with third party companies to manage their medical and disability leaves.
- Those contractors are agents of the employer, and cannot require an employee to release any medical information that the employer would not be entitled to demand.
- In other words, under California law those contractors cannot ask for medical information beyond the medical certification required by CFRA.
- (If these contractors continue to do so, they are probably not aware of CFRA's greater protections for employee privacy.)

What if Employer Doubts the First Medical Certification?

- Employer can require the employee to undergo a **second exam** by employer's health care provider, at employer's expense.
  - However, under CFRA the employer must have a "**good faith, objective reason**" to doubt the validity of the first certification.
- If first and second providers disagree, employer and employee pick a **third provider** to examine and break the tie.
- FMLA *but not CFRA* permits this procedure for family members.
- So, under CFRA, no 2nd or 3rd opinion when caring for family member; employer is stuck with treating doctor's view. The better law trumps.

Re-Certification During Extended Leave; note: diff. from 2nd opinion

- *Ordinarily*, under FMLA, employer cannot require re-certification of medical facts more often than every 30 days and not even then if the certification specified that a leave of more than 30 days was anticipated.

- But where the leave for same condition exceeds 30 days, employer may now, under new regulation, ask for recertification of an ongoing medical condition every 6 months.

CFRA is different from FMLA on Re-Certifications

- CFRA rule is simpler than previous slides on FMLA re-certifications:
- Under CFRA, doctor estimates time of leave needed. For that leave, employer can require re-certification only when that estimate expires, if and only if employee asks for more time on that leave.
  - Example: If the doctor certifies that you will be out for 8 months, the employer cannot request re-certification until 8 months have passed.

- As you can see, CFRA is more protective than FMLA. Since the more protective law prevails, focus on forcing employers to comply with CFRA.

More on Re-Certification

- Employer cannot use "2nd and 3rd Opinion" procedure for re-certification. Is stuck with re-certification by your own doctor.
  - Except: at the beginning of each new leave year, employer can demand new certification and 2nd and 3rd opinions, *but only when employee requests leave in the new year.*
- Re-certification applies to ill family member you're caring for, as well as employee. (Unlike 2nd or 3rd opinion, which is not ok for family under CFRA).

Yet more on FMLA re-certification

- Employer can require more frequent re-certification if the health condition improves or evidence suggests a change.
- Employer can require more frequent re-certification if the number of absences exceeds what the doctor wrote on the initial certification.
- Note: Employer can still require a Dr.'s note to prove a specific absence is related to the certified condition. This is not a re-certification.

Fitness for Duty (Fitness to Return) Certifications

- The employer can require a certification from an employee wanting to return to work, ***but only if***:
  - The collective bargaining agreement allows employer to require "fitness to return" certifications for FMLA or other type of leave; or
  - The employer otherwise has a uniform policy, then employer can require same certification to employee wanting to return from FMLA/CFRA leave.

Fitness to Return Certifications con't…

- The Employer may NOT use the second or third opinion procedure for Fitness to Return Certifications. It's stuck with the certification of your own treating physician.
- Under new FMLA regs, employer may sometimes require this certification to address employee's ability to perform the essential functions of the job or for work during intermittent leaves.

May you take FMLA/CFRA leave for visits to a physical therapist?

Yes.

FMLA permits you to take leave to receive "continuing treatment by a health care provider," which can include recurring absences for therapy treatments such as those ordered by a doctor for physical therapy after a hospital stay or for treatment of severe arthritis.

Elective Surgery

Q: If an employee has elective surgery that is not medically necessary, can that constitute a "serious health condition" entitling the employee to leave under the FMLA or CFRA?

A: **Yes, but the employer may require up to 30 days' advance notice when the employee has discretion over when the procedure is scheduled**. If the procedure (including the recovery process) involves a course of ongoing medical treatment or "incapacity" that is sufficient to meet the definition of a "serious health condition" then the leave rights under the statutes are triggered. However, much elective surgery is outpatient and may not meet any of the six alternative definitions of "serious health condition."

May an employee take leave under the CFRA or FMLA because of her own or a spouse's pregnancy, childbirth, or related condition?

- **Yes**. Under the FMLA, pregnancy and related conditions trigger protected leave for to-be Mom and spouse when Mom is incapacitated or in care.

- Under CFRA, an employee has NO right to a CFRA leave for **her own** pregnancy.
  - A separate, longer leave entitlement is provided by California's Fair Employment and Housing Act (FEHA) pregnancy provisions.

- BUT, CFRA (and FMLA) allow **leave for spouse of future Mom** who is getting inpatient care or continuing treatment or supervision by a health-care provider.

How much leave can I take?

- 12 workweeks in a 12-month period.
- Exception: If both parents of a child work for the same employer, the 12-week leave (FMLA/CFRA) for the birth, adoption, or foster-care placement of their child(ren) must be shared during one 12-month period.
- Note 1: You cannot combine FMLA leave with CFRA leave to get 24 workweeks of family and medical leave. FMLA and CFRA leave run concurrently.

How is the 12 month period measured? i.e., during what 12-month period can you take your 12 weeks of leave?

One of 4 methods; Note: you can bargain about this, although employer must use same method at all sites.

1. The calendar year;

2. Any fixed 12-month period the employer designates as a "leave year," for example, the employer's fiscal year or an employee's anniversary year;

3. The 12-month period measured from the date leave begins; or

4. A "rolling" 12-month period measured backward from the date an employee uses any leave.

Must the leave be taken all at once?

- **No.** The FMLA and CFRA permit intermittent leaves and reduced work schedules (FT to PT) for "serious health conditions." = THIS IS A GREAT BENEFIT!

- Exception: intermittent and reduced FMLA leave is NOT permitted for birth of a child, or placement of a child into employee's family for adoption or foster care, *unless* Employer agrees. ***(But under CFRA, employer must allow intermittent leave for birth or placement of a child in two-wk increments, and twice for less than two-wk increments).***

Measuring intermittent leave increments:

How do you measure the amount of leave taken if it is taken intermittently or on a reduced leave schedule?

On a pro-rata basis.

Examples

- If Larry, who has never before taken FMLA leave, normally works five days a week but takes two days of FMLA leave this week for chemotherapy treatment, he is counted as only having taken 2/5ths of a workweek of FMLA leave. He still has 11 3/5 workweeks of leave available to him in the 12-month period.
- If Linda normally works 36-hour weeks but is too weak to continue full-time after recovering from an automobile accident and works only 20 hours this week, she has taken only 16/36ths (or 4/9ths) of a workweek of FMLA leave.
  - Quick math: Divide the number of hours by which the employee's regular work schedule has been reduced (in Linda's case, 16) by the number of hours the employee regularly works (in Linda's case, 36) to calculate the pro-rata amount of FMLA leave.

Obtaining FMLA/CFRA Leave

- Employee notice required but it need not say "FMLA."

  If foreseeable, employer may require 30 days notice. Otherwise, notice must be given as a soon as practicable (1-2 days AT MOST from when you realize you need leave).

- Reason for leave. Use words to identify generally one of the 6 alternative definitions of "serious health condition. ***Employee need not give diagnosis or details or even ask for protected leave.***

- Duration of leave if you know or can estimate (start date and return date).

Under FMLA, Employer must respond within 5 business days (recently changed from 2); 10 business days under CFRA.

Notice of FMLA/CFRA Leave

Q: If an employer **fails** to tell employees that the leave is FMLA leave, can the employer count the time they have **already been off** against the 12 weeks of FMLA leave?

A: In most situations, the employer cannot count leave as FMLA/CFRA leave **retroactively** if it would harm the employee. But under recent regulatory changes, otherwise FMLA/CFRA leave may be charged against the employee retroactively.

"Harm" to employee probably means discipline or other adverse employment action. It does not mean loss of leave time.

Designation of Leave

- When the employee requests time off, it is the Employer's responsibility to determine whether the leave qualifies as FMLA/CFRA leave based on employee's comments and to ask for more info if needed. Give out form.

- The Employer then has 5 **business days** (changed from 2; 10 business days for CFRA) to provide **written** notice to the employee stating whether the leave has been approved and designated as FMLA leave.

Military FMLA Leave

- **Caregiver leave:** spouse, parent, child or next of kin of Regular military, Guard, Reservist or Veteran may take 26 wks to care for service member with serious injury or illness suffered in line of duty. -OR -
- **Exigency leave:** spouse, parent or child of Regular military, Guard or Reservist may use regular 12 wk FMLA leave to attend to military, family and personal tasks related to active duty in support of a contingency operation. No illness or baby needed.
- **Applies to military or veteran over age 18.**

CFRA does not include military leave

- This is great because it means that if you take either type of military leave – health care or exigency – under FMLA, it ordinarily does NOT count against your CFRA 12 weeks of leave.

- If the injured or ill service member, however, is a parent, spouse or child 17 or younger (or older but unable to care for self at all), then CFRA may apply by its usual terms, and the leave would run concurrently. Exigency leave – never CFRA.

FMLA Military Caregiver Leave

- Covered service member is a current regular, guard or reservist or a veteran who was discharged other than dishonorably within the 5-year period before the family member/employee is needed for care.
- Covered family member/employee is service member or veteran's spouse, child, parent ***or next of kin.***
- Again, age of service member/vet doesn't matter.

FMLA Military Caregiver Leave

- Employer must grant family member/ employee up to 26 wks per year (reg. 12 FMLA plus 14 more) to care for service member or veteran who has a serious injury or illness.
- For current service member, injury or illness must be one that may render him or her medically unfit for military duties.
- For veteran, injury or illness must be one that rendered him or her unfit for continued military duties OR that qualifies him or her for VA benefits OR substantially impairs ability to work in post-discharge employment.

FMLA Military Exigency Leave

- *Covers time just to be with* the employee's spouse, child or parent in military. No illness or injury required here.

- Employee's family member must be either regular armed forces member preparing for or returning from deployment to a foreign country, OR a guard or reservist under a call or order to active duty in a "contingency operation" (will be defined by the military unit).

- Only regular 12-wk FMLA is available, no extra.

What events qualify for exigency leave?

- The 12 weeks of leave are available only for a "qualifying exigency" defined as:
  - Any personal issues arising from deployment on 7 days or less notice, OR
  - Military events like ceremonies or briefings, OR
  - Arranging for childcare or parent care of service member's child or parent, OR
  - Making financial or legal arrangements, or attending counseling, OR
  - Up to 15 days R and R for service member on leave.

Exigency, part 2-- caring for ill parent of service member

- If your child, parent or spouse in the military, guard or reserve is needed to care for his or her parent who is incapable of self-care, but cannot do so because of military service, then your 12 weeks of exigency leave can now be used to care for that person while your child, parent or spouse cannot.
- So, this is an exception to the “not for in-laws” rule under FMLA.

California Family Military Leave

- California statute (CA Mil & Vet Code Section 395.10) creates special rights for employees with a military spouse.
- Provides leave rights for employee/spouse of member of Armed Forces, of National Guard, or of Reserve.
- Spouse may take up to 10 days of unpaid leave while military spouse is on leave from deployment during a period of military conflict.
- Employer is not allowed to require employee to run this leave concurrently with any other

Early return to work from FMLA/CFRA leave

Q: Can my employer require me to return to work before I exhaust my leave?

A: Yes. Subject to certain limitations, your employer may deny the continuation of FMLA leave due to a serious health condition ***if you fail to provide supporting medical certification***.

The employer may not, however, require you to return to work early by offering you a light duty assignment.

Can FMLA/CFRA leave be added onto the end of other forms of leave?

- **Yes**. For example, a pregnant employee can take leave under the pregnancy leave provisions of FEHA (to be discussed) for the period leading up to birth, and thereafter take up to 12 weeks of CFRA leave for the qualifying reason that her child was born.
- **BUT**, You CANNOT combine FMLA leave with CFRA leave to get 24 workweeks of family and medical leave. FMLA and CFRA leave run *concurrently (at the same time).*

Do I get paid when I'm on FMLA/CFRA leave?

- It depends. Generally, FMLA/CFRA leave is unpaid.

- If your leave is for family member, you CANNOT, under the FMLA/CFRA, use accrued sick leave *unless* your employer (or cba) permits you to do so. However, California's "Kin Care" Law permits you to use half of your accrued sick leave to attend to an illness of a child, parent, spouse, or domestic partner.

Do I have to use my vacation for FMLA/CFRA leave? May I use it?

- **Under the law, your employer can require you to take vacation or other accrued time off during your leave, IF CBA allows this.**

"Substituting" paid leave -- a poor word choice for making you run FMLA/CFRA leave concurrently with CBA-protected leave.

When *paid* leave is *substituted* for unpaid FMLA/CFRA leave, it may be counted against your 12-week leave entitlement if you are properly notified by the Employer of the designation when the leave begins.

Health Benefits

- The employer must continue all health benefits during FMLA/CFRA leave to the same extent as it would have had the employee continued to work during the leave period.
- If employee pays part of premium, employee on leave will still have to pay his or her part (poss by check).

Other Benefits

- Other welfare benefits, such as life or disability benefits, must be maintained only if required under CBA, or if employer continues to provide them during other leaves.

Pension benefits

The employer does NOT have to make contributions to an employee's pension or retirement plan during the period of FMLA/CFRA leave, and this period does NOT have to be counted for purposes of calculating time accrued under the plan.

However, the employee is entitled to continue making her own contributions to her pension or retirement plan.

Seniority

- An employer CANNOT characterize FMLA/CFRA leave as a break in service for purposes of seniority accrual.

- When an employee returns from FMLA/CFRA leave, she must be afforded the same seniority status she had when the leave commenced BUT does not have to be accorded seniority accruals during the leave. But whether or not seniority "place in line" says so, the returning employee must be placed in same or comparable position as one he/she left to go on leave. (See next slide).

Returning from FMLA/CFRA leave

General Rule: At the end of FMLA/CFRA leave, the employer is required to reinstate the employee to the same or comparable position.

(*exceptions*)

It is unlawful for an employer to discriminate against an employee for having exercised his right to leave under the FMLA or CFRA.

What is a "comparable position"?

- Position which is virtually identical to the employee's original position in terms of pay, benefits, and working conditions.
- Same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort and authority.
- Same or geographically proximate worksite from where the employee was previously employed.
- Ordinarily means the same shift or the same or an equivalent work schedule.

Four exceptions to reinstatement

1. No greater right of reinstatement or benefit than if the employee had been continuously employed during the leave period. If employee would have been laid off anyway, he may not be entitled to reinstatement, depending on CBA. May bump, etc.

2. If employee hired only for a fixed term or to work on a defined project and term or project has ended.

3. If employee is a "key employee" (salaried *and* very highly paid) and employer can show reinstating would cause substantial economic injury to employer. CFRA – if reinstatement would cause "grave harm" to employer.

4. Employee now physically unable to return to work. In this case, employee may have to look at the Americans with Disabilities Act (ADA).

Enforcement of FMLA and CFRA

US Department of Labor investigates and resolves FMLA violations.

For additional information visit:

www.dol.gov/esa/whd/fmla.gov

For CFRA, go to www.dfeh.ca.gov

California Dept. of Fair Employment and Housing investigates CFRA violations.

California Healthy Workplaces Healthy Families Act (CHWHF)

- California law now requires all employers to provide 3 days of paid sick leave per year.
- Eligible Employees: Must have worked at least 30 days within 1 year to be eligible for paid sick leave.
- Eligible employees are allowed to start taking paid sick days 90 days after start of employment, and after that as soon as they accrue.
- Accrual should be equal to 1 hour of paid sick leave per 30 hours of work. Employer may use a different method of calculation as long as it works out to provide 3 days (24 hours) accrual by the 120th calendar day of employment.

CHWHF – CBA Exemption

- The minimum sick leave requirements can be waived in a CBA where the following conditions are all met:
  - 1. CBA provides for wages, hours of work, working conditions;
  - 2. CBA provides paid sick days, or paid time off that employees can use as sick days if desired;
  - 3. CBA provides for final and binding arbitration of grievances regarding sick days;
  - 4. CBA provides overtime premiums;
  - 5. The employee's regular wage rate is at least 30% more than the state minimum wage. (currently that comes to $13.65/hr)

CHWHF – CBA Exemption Cont…

- **Note:** the CBA exemption is determined individually for **each employee**.
- For example, imagine that some employees under a CBA are being paid minimum wage, while others are receiving $15/hr. The employees making minimum wage do not satisfy all 5 requirements for the CBA exemption, and so they must receive at least 3 paid sick days. Meanwhile, the employees making $15/hr are within the CBA exemption and their sick leave benefits are determined entirely by the CBA, without regard to CHWHF.
- Thus, it is in principle possible for the same CBA to exempt some employees from CHWHF's sick leave requirement but not others.

CA Disability and PFL Insurance – NOT a right to leave, just money

- You pay for SDI and PFL on your paycheck.
- Must be entitled to leave through some other source – sick days, FMLA/CFRA, ADA, other bargained leave, etc. SDI gives you no rights.
- ***SDI can pay you for up to a year*** while unable to work. PFL only 6 weeks. Both 55% of pay. I've handed you a chart.
- 8 day waiting period.
- Must complete claim form within 49 days of disability to get full back benefits.

CA Disability Insurance & PFL, part 2

- Cannot draw SDI/PFL while drawing unemployment comp.
- Cannot draw SDI/PFL for drawing workers comp benefits equal to or greater than SDI/PFL weekly payments would be.
- Must be unable to work, but medical exam is fairly relaxed.
- CANNOT get back pay for discharge if you win arbitration, for any period you were drawing SDI – not true of PFL
- Other pay will usually reduce CA benefits.

Paid Family Leave Act – also pay only, NOT a protected leave

- The Paid Family Leave Act extends the CA SDI program to provide up to six weeks of benefits to employees who take leave to care for a seriously ill parent, spouse, child, or domestic partner, or to bond with a minor child within one year of the child's birth or adoption. (Similar to FMLA/CFRA).
- *Unlike FMLA/CFRA, Paid Family Leave (PFL) **also** covers ill sibling, parent-in-law, grandparent or grandchild. But you need other source to get leave rights for them.* FMLA/CFRA won't help!
- Leave under PFL is taken concurrently with FMLA/CFRA leave. PFL operates to provide partial wage replacement during FMLA/CFRA and other leave.

Who is eligible to receive Paid Family Leave (PFL) benefits?

- Any employee who pays into the SDI program is eligible for PFL benefits.
- However, an employee cannot receive benefits if he is receiving other SDI benefits, unemployment insurance, or workers' compensation benefits.
- Also, an employee is ineligible for PFL benefits for any day that another family member is able and available to provide care at the same time the employee provides the required care. So don't tell unless asked! Usually they won't ask you.

What amount of benefits does the Paid Family Leave Act provide?

- Benefits are based on the employee's income. The exact amount is set according to a schedule found at California Unemployment Insurance Code § 2655, but it is generally about 55% of an employee's gross wages. SAME CHART AS SDI CHART. *Up to 6 weeks pay in a 12-month period.*
- However, the employer can require an employee to take up to two weeks of accrued vacation before drawing any benefits under the Paid Family Leave Act.

How do I apply for these benefits?

- California's Employment Development Department (EDD) maintains an online registration for SDI; go to https://dia.edd.ca.gov/DIA/Pages/Public/ExternalUser/NewAccountRegOptions.aspx?UserCultureInfo=en-US; for PFL benefits there is (Form # DE 2501F), which an employee must obtain from her employer.
- For both, employee must submit the completed claim form within 49 days of the beginning of the leave. Md.cert. req

"Kin Care" Law

- Permits an employee to take **accrued sick leave** to attend to the illness of a child, parent, spouse, or domestic partner.
- Employer must permit the employee to take **at least half** of the sick leave that she **actually accrued** in a calendar year.
- The "Kin Care" Law does **NOT** extend the maximum period of leave to which an employee is entitled under FMLA/CFRA or other laws.

Advantages of the "Kin Care" Law

1. Employer consent to use sick leave not required!

Remember: Under the CFRA/FMLA, an employee cannot, without the employer's consent, use accrued sick leave for leave to attend to the serious health condition of a child, parent, or spouse.

The "Kin Care" Law permits an employee to use accrued sick leave to care for a child, parent, or spouse without the employer's consent.

Advantages of the "Kin Care" Law

2. No doctor's note required!

No medical certification of the illness is necessary unless the employer's regular sick leave policy requires certification of the employee's illness.

Kin Care Law Question

- **Q**: If an employee gets 10 days a year of paid sick leave and uses 8 of the days for his own illness, would he only have two sick days remaining? Or, if he needed to care for a family member, would the employer be required to give him an extra three days of sick leave so that he can actually use a full five days of sick leave for kin care?

- ***A***: The employee would have only **2** days of paid sick leave left to use. This is because the statute (Labor Code § 233) only applies to paid sick time that is already "accrued" and "available" for use. The statute does not require employers to give extra days of paid sick leave that would not otherwise accrue under the employer's existing policy.

  Thus, since the employee is only allowed to accrue a maximum of 10 paid sick days per year, the Kin Care law would not give him any additional sick days and he would have only two remaining (regardless of whether he uses them for his own illness or to take care of a family member).

Pregnancy Disability Leave Provisions Under FEHA

- As previously mentioned, the CFRA does not technically cover an employee's pregnancy. However, provisions of California's Fair Employment and Housing Act (FEHA) do permit leave for pregnant employees. This is called PDLL.

- These provisions permit ***up to 4 months leave*** for an employee disabled by pregnancy, childbirth, or related medical conditions, similar to CFRA/FMLA leave, in addition to CFRA's 3 mos, which is still available for baby bonding after birth. ***So, 7 mos total protected leave for disability and baby bonding during and after a pregnancy, if CFRA not used up already.***

PDLL, cont.

- Pregnancy leave is available when the employee is actually disabled. This includes time off needed for prenatal care, severe morning sickness, doctor-ordered bed rest, childbirth, recovery from childbirth, or any related medical condition.

- Don't mess with pregnant ladies!

Continued…

- The pregnancy leave provisions of FEHA are very similar to leave provisions of the CFRA and FMLA.

Similarities between PDLL leave and CFRA/FMLA:

- Notice requirements
  - Employee must provide 30 days' notice if possible, otherwise as soon as practicable (baby and mom may refuse to comply with the schedule, and that's ok).
  - Employer can require the employee to specify the expected date on which the leave will begin and the estimated duration of the leave.
  - Employer can require a medical certification of disabling pregnancy-related condition that contains:
    - the date on which the employee became disabled due to pregnancy;
    - the probable duration of the disabling condition; and
    - a statement that due to the pregnancy-related disability, the employee is unable to perform her job.

Similarities (continued):

- Benefits while on leave
  - Pregnancy leave is generally unpaid.
  - Employer can require the employee to use sick leave, and the employee can elect to use sick leave.
  - Employee can opt to use vacation time or other accrued time off; BUT employer cannot require use of vacation.
  - Employee is entitled to participate in health plans, employee benefits plans, pension and retirement plans, and supplemental unemployment plans to the same extent as an employee taking any other kind of leave (i.e. CFRA/FMLA leave).
  - Upon return, the employee must be afforded at least the same seniority status as she had when the leave commenced.

Similarities (continued):

- Intermittent or reduced schedule leave is permitted
  - Just as under the CFRA/FMLA, if leave is taken on a reduced leave or intermittent basis, the amount of leave counted against the 4 month maximum is measured on a pro rata basis.
- Reinstatement
  - Employee is entitled to the same reinstatement rights as under the CFRA/FMLA – generally, reinstatement to the same or comparable position.
  - Employer can require the employee to provide a medical certification of fitness to resume work.

Differences between PDLL leave and CFRA/FMLA:

- Eligibility – the pregnancy leave provisions apply more broadly than the CFRA/FMLA coverage provisions.
  - Whereas the CFRA/FMLA apply only to worksites with 50 or more employees, the pregnancy leave provisions apply to any employer with 5 or more employees.
  - There is no minimum service requirement to qualify for pregnancy leave. (Don't mess with pregnant ladies).

Differences (continued):

- Employer's response to request for pregnancy leave --
  - Under the FMLA, the employer has to respond to a request for leave within 5 business days absent extenuating circumstances.
  - The requirement is slightly different under the pregnancy leave provisions of FEHA. The employer must respond "as soon as practicable and in no event later than ten calendar days after receiving the request."
- Benefits while on leave
  - Unlike under FMLA/CFRA, employer CANNOT require an employee to take vacation or other accrued paid time off (except sick leave) during pregnancy leave.

Seven Months of Protected Leave

- Remember that an employee can take both Pregnancy Disability Leave ***and*** CFRA-leave, ***one after the other***. At the end of her pregnancy disability leave, an employee can begin CFRA leave for the qualifying reason that her child was born.
- Accordingly, an employee can receive as many as four months plus twelve weeks (3 months) of leave for pregnancy-related reasons.

Federal and State Disability Laws

- Federal law is Americans with Disabilities Act.
- State law is California Fair Employment and Housing Act.
- "Disability" under these laws is ***much harder to show*** than "serious health condition" under FMLA or CFRA.

Disability law in a nutshell

- Forbids discrimination against "a qualified person with a disability" and requires employers to offer them "reasonable accommodations," which may include leaves of absence in addition to leaves allowed by other laws, or for different reasons.

- "Disability" is a "physical or mental impairment" that "substantially limits one or more of the major life activities."

- "Qualified person" has "disability" but can perform "essential functions of a job" with "reasonable accommodation."

"Major Life Activity" Defined

- Includes only basic functions like caring for oneself, performing manual tasks, seeing, hearing, speaking, learning and working.
- Does ***not*** include a temporary condition.
- "Working" means any work, not just your job. ***This is a more difficult standard than "incapacity" as used under FMLA.***

Must be "substantially limited" in a "major life activity" under ADA

- This means the employee is "significantly restricted as to the condition, manner or duration under which the employee can perform a major life activity, as compared to the average person."

- Does not cover broken bone that will heal, normal pregnancy, "stress". Does cover multiple sclerosis, major depression, paralysis.

"Reasonable Accommodation" Must Not Cause "Undue Hardship" for Employer.

- For example: Large employer might be required to supply a reader for a blind interviewer but not for a blind proof-reader. Large employer might have to supply a driver for a blind service representative, but not for a blind chauffer.
  - Small employer might suffer "undue hardship" for such cases.

Some typical "Reasonable Accommodations":

- Wheelchair ramps, elevators, telephone amplifiers.
- Job re-structuring, including part-time schedule, modified shift, or light-duty work.
- Modified exams and training materials.

ADA/FEHA Leaves of Absence

- Reasonable accommodation may require employer to permit "use of accrued paid leave …or additional unpaid leave for necessary treatment." **Note: no 12-week limit. Also no 12-week entitlement. Just reasonable.**
- Examples:
  - LOA for medical treatment or training on assistive device related to the disability.
  - LOA for repair of prosthesis or equipment.
  - LOA due to temporary adverse conditions in workplace, like failure of air conditioning for disabled employee who can't tolerate heat.

FEHA stronger than ADA:

- In January, 2001, the California legislature amended FEHA to provide broader coverage and protections for employees than the ADA. **California now defines physical disability as a physiological condition which creates a "limitation" in a major life activity *rather than the "substantial limitation"* standard used in the ADA.** "Major life activities" are to be broadly construed under FEHA, and limitations are to be determined without regard to mitigating measures.

ADA/FEHA compared to FMLA/CFRA

- ADA/FEHA apply only to ***employee's*** health condition, while FMLA/CFRA apply also to employee's need to care for incapacitated ***spouse, child, parent or domestic partner.***
- ADA/FEHA have no service requirements to qualify, and no 12-week limit on absence.
- ***Light duty:*** if qualified under FMLA/CFRA, employer cannot force employee entitled to leave to take light duty instead. **Under ADA/FEHA, employer may force light duty if it is "reasonable accommodation."**

California Family-School Partnership Act (1995)

- Permits an employee to take up to **40 hours** off (FT employee) of work each year to participate in activities of his child's school or licensed day care facility. Cannot take more than **8 hours** in any calendar month. Part time worker is pro-rated; half-time is 20 hours, for example.
- Applies to any **parent**, **guardian**, or **grandparent** having custody of a child enrolled in school (K-12) or a licensed day care facility.
- Employee **must** use accrued **vacation**, **personal leave**, or **other compensatory time off**. Cannot be counted against FMLA/CFRA leave, of course.
- Employee may also take **unpaid leave** if such leave is provided by the employer.

Family-School Partnership Absence Notice

- Employee must provide employer "**reasonable notice**" of planned absence.
- If employer requests, you are required to **submit proof** of having participated in the school or child-care activity.
- Acceptable **activities** may include: volunteering in the classroom, parent-teacher conferences, Back-To-School Night, Open House, field trips, sporting events, etc.

USERRA; rights of returning military service members

- Requires employer to reinstate employee gone up to 5 years (or more) on military service.
- Employer must reinstate to position employee would have attained had he or she never served in military; this is the ***"escalator"*** law. This is stronger protection than reinstatement under any other leave laws, which refer to "same or virtually identical" to job occupied just before leave.
- The "escalator" idea applies to pay, benefits and other rights. This may override seniority rights of other employees.
- The employee/service member has notice and communication obligations and deadlines.

USERRA: who is protected, and when?

- Only members serving under **federal authority** are protected by the USERRA.
- Members of the U.S. armed forces, including reservists, are always under federal authority.
- Members of the National Guard might be under state authority depending on **who called them to serve**.
  - If the **governor** calls up the National Guard, such as for disaster relief or civil unrest, then ***they are not serving under federal authority*** and the protections of USERRA do **not** apply.
  - If the **Federal government** calls on the National Guard to support the military, for example if they are deployed overseas, then they are serving under federal authority and all of the protections of USERRA apply.

USERRA: continuity of benefits

- If a continuous period of service is for 30 days or less, employer must continue to provide health insurance without change.
- If a period of service is over 30 days, employer can require service member to pay the full cost of insurance coverage, plus a 2% administrative fee.
  - Employer must offer coverage on these terms for up to 24 months *from the start of the military service* (i.e. the 24 month clock runs concurrently with the 30-day period where employer pays its usual share)
- Any other benefits that the employer normally continues during non-military leaves of absence must be continued.

USERRA: use of accrued leave

- An employer may not *prohibit* an employee on military leave from using his or her accrued vacation time during the leave.
- However, an employer also may not *require* the employee to use accrued vacation or leave time during military leave.
- In other words: the employee who is on protected military leave is free to choose whether he or his wishes to cash out any accrued paid leave they might have.

USERRA disability provisions

- If the employee/service member becomes a disabled veteran, the law requires the employer to make reasonable efforts to accommodate the disability when the employee returns to work.
- The employee/service member has up to two years after completion of service to convalesce before having to report for re-instatement with the employer.
- For non-disabled service member, deadline to report back to work varies depending on duration of military service.

California Military Leave (Mil. & Vet. Code § 395.06)

- California law protects employment for National Guard members (of any state) who are not covered by USERRA.
- California law is a little less protective than USERRA: it has no **escalator** provision.
- Employee must be reinstated to his or her old position, or a position of similar seniority, status, and pay.
- Employee **can not be terminated without cause for 1 year**

California Military Leave, Con't.

- Deadlines to re-apply to old position:
  - Full-time employees must reapply within **40 days** of their release from service.
  - Part-time employees must reapply within **5 days**.
- **EXCEPTION:** The employer does **not** have to reinstate the employee if "circumstances have changed so as to make it impossible or unreasonable."

California Military Leave: Continuity of Benefits (Mil. & Vet. Code § 394)

- Under California law, an employer is required to maintain the benefits (retirement, health care, etc.) of a service member only to the same extent that they normally maintain benefits for employees on other types of leave.
- This is potentially less protective than USERRA, so it is only a last resort for national guard members who are called to serve by the governor and thus not covered by USERRA.

California Military Leave: Incapacitation (Mil. & Vet. Code § 394(e))

- If a National Guard member is **temporarily** incapacitated in the line of duty, **and** their benefits have been maintained thus far, then the benefits must be maintained during the period of incapacity.
- **Temporary incapacity** means an incapacity of no more than 52 weeks (1 year).
- **Note:** since California's law only requires the employer to maintain benefits for military service *to the same extent* as for other types of leave, if the company's policy resulted in a loss of benefits *before* the point at which the service member was incapacitated, then the company does **not** have to provide benefits during incapacity.

Military Training and Drills (Mil. & Vet. Code § 394.5)

- All members of the U.S. reserve forces **and** the state national guard are entitled to **17 days** of unpaid leave per year for the purposes of training, drills, encampment, naval cruises, special exercises, or like activities.
- This is a California law but it applies to **all military service** under State or Federal authority.
- Generally, this will not provide better protection than USERRA, except for a very small number of service members in the California State Military Reserve.

QUESTIONS?