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CFRA REGULATIONS UPDATED TO ALIGN CALIFORNIA LEAVE TO FMLA

The California Fair Employment and Housing Council (FEHC) recently released the final revised California Family Rights Act (CFRA) regulations. These revised regulations are intended to clarify certain provisions of the state law and more closely align CFRA with the federal Family Medical Leave Act (FMLA). The revised CFRA regulations take effect July 1, 2015. Highlights are below.

Definitions

Covered employer:

- Any business in California who directly employs 50 or more persons nationwide
- Rule clarified to include successors in interest
- No requirement that eligible employees work full-time or work at the same location
- Employee count aggregates all employees on payroll during preceding year, including those on unpaid or paid leaves, disciplinary suspensions or other leaves

Eligible employee:

- Any employee that worked a total of at least 12 months (52 weeks) prior to commencement of CFRA leave and worked 1,250 hours during the 12-month period prior to commencement of CFRA leave
- Breaks in in service of seven years or more need not be counted, except those caused by military service obligations or written agreement to the contrary
- Eligible employees must work within 75 miles of at least 50 employees or where receives assignment controls if no fixed worksite
- If ineligible for CFRA at the start of leave due to not being employed at least 12 months, employees may become eligible during leave so long as hour requirement already met

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CFRA Regulations Updated to Align California Leave to FMLA (continued)

Key employee:

- An employee paid on salary basis and amongst the highest paid 10% of the employer's employees within 75 miles of the employee's worksite
- Employers may deny key employees CFRA reinstatement rights

Spouse:

- Expressly includes state registered domestic partners and same-sex marriage spouses

Other Highlighted Changes

- Permissible defense for CFRA leave that is fraudulently obtained or used: the employer has the burden of proof. Upon proof, the employee is not entitled to reinstatement of position or health benefits
- Recertification requests permitted only upon the end of the prior certification period (unlike FMLA which allows such every six months, (including lifetime conditions))

Differences between CFRA and FMLA

- Pregnancy disability is not covered under CFRA, even though it is a serious health condition under FMLA
- An employer must maintain an employee's group health benefits for the entire time an employee is on pregnancy disability leave (up to four months) and a subsequent CFRA leave (12 weeks)
- CFRA rules prohibit employers from asking employees to provide additional information during the certification process, including the underlying diagnosis
- FMLA rules permit an employee to choose to substitute accrued paid leave during an otherwise unpaid FMLA leave, or an employer to require the substitution of accrued paid leave, while the CFRA rules allow an employee to elect or the employer to require the employee to use vacation or paid time off for any unpaid CFRA leave. Employees cannot use sick leave to care for a family member with a serious health condition or for bonding leave
- An employee receiving Paid Family Leave (PFL) benefits is not on unpaid leave, so the employer cannot require substitution of accrued paid time off during any such portion of a CFRA leave

Notice Requirements

The new CFRA regulations change some of the notice requirements for employers, as well as workplace posters and medical certification forms. Employers should keep an eye out on the following website for updated material releases: www.dfeh.ca.gov . Other notice requirement changes include:

- Employers shall respond to CFRA leave requests within five business days (previously 10 days)
- All California employers must post a notice explaining the CFRA provisions and procedures for filing complaints "in conspicuous places where employees are employed." Electronic posting is sufficient as long as it otherwise meets the requirements
- Employers may post the CFRA notice on an intranet site, but must still post the notice in an area accessible to job applicants

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CFRA Regulations Updated to Align California Leave to FMLA (continued)

Action Required for Some Employers

California employers with 50 or more employees must update their leave policies to include these changes to CFRA. Employers must also ensure by July 1, 2015 the posted notices have been updated, and managers and supervisors trained, where needed.

For complete details, see: http://www.dfeh.ca.gov/res/docs/FEHC/Final%20Text%20(1).pdf

CMS RELEASES MEDICARE PART D PARAMETERS FOR 2016

The Centers for Medicare and Medicaid Services (CMS) recently released the Medicare Part D Parameters for the 2016 plan year. Pursuant to the Medicare Part D regulations, most group health plan sponsors offering prescription drug coverage to Part D eligible individuals (including active or disabled employees, retirees, COBRA participants, and COBRA beneficiaries) must disclose to those individuals and to CMS the creditable status of the group health plan. Creditable coverage must equal or exceed the actuarial value of defined standard Medicare Part D coverage. These parameters are subject to change and highlights of next year's changes are as follows.

- Deductible: $360 (a $40 increase from 2015)
- Initial coverage limit: $3,310 (a $350 increase from 2015)
- Out-of-pocket threshold: $4,850 (a $150 increase from 2015)
- Total covered Part D spending at the out-of-pocket expense threshold for beneficiaries who are not eligible for the coverage gap discount program: $7,062.50 (a $382.50 increase from 2015)
- Estimated total covered Part D spending at the out-of-pocket expense threshold for beneficiaries who are eligible for the coverage gap discount program: $7,515.22 (a $453.46 increase from 2015)
- Minimum cost-sharing under the catastrophic coverage portion of the benefit: $2.95 for generic/preferred multi-source drugs (a $.30 increase from 2015), and $7.40 for all other drugs (an $.80 increase from 2015)

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CMS Releases Medicare Part D Parameters for 2016 (continued)

Action Required

Employers offering group health plans with prescription coverage should ensure their prescription plan participants and CMS are being provided creditable status notices. Reporting to CMS is required annually within 60 days of the beginning of the plan year, while Notice of Creditable or Non-creditable Coverage status to participants is required annually by October 15th of each year. This participant notice may be distributed annually, at the same time of year (e.g., open enrollment) as other materials to meet requirements. Ensure documentation of distribution in the event of an audit.

For complete details, see http://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/Downloads/Announcement2016.pdf

For creditable coverage reporting information, see: https://www.cms.gov/Medicare/Prescription-Drug-Coverage/CreditableCoverage/index.html?redirect=/CreditableCoverage/

DOL DELAYS SBC PROPOSED RULES AND TEMPLATES

The Department of Labor (DOL) recently released a Frequently Asked Questions (FAQ) memo that delayed enforcement of the Summary of Benefits and Coverage (SBC) proposed rules. The proposed rules, released this past December, were to go into effect for the first open enrollment period beginning on or after September 1, 2015. The proposed rules intended to cut the length of the SBC to two pages (from four), increase the number of examples and simplify the timing of distribution of the SBC. The recent FAQ now delays the SBC template finalization to January 2016 and will apply to coverage renewed or beginning the first day of the plan year on or after January 1, 2017.

The SBC is intended to provide group health plan members an easy-to-understand and consistent summary of a health plan's benefits and coverage. Fully-insured employers may rely on their insurance carriers to provide the SBC directly to plan participants or to the employer for distribution while self-funded plan sponsors must create the SBC themselves, or rely on their third-party administrators.

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DOL Delays SBC Proposed Rules and Templates (continued)

No Action Required

Employers should have already been complying with the previous SBC rule. Employers may continue to use the current SBC templates.

For complete details, see:

FAQ on SBC 2015 delay: http://www.dol.gov/ebsa/faqs/faq-aca24.html

FAQs: http://www.dol.gov/ebsa/faqs/faq-aca8.html

DOL Guidance Page, includes templates and proposed rules:
http://www.dol.gov/ebsa/healthreform/regulations/summaryofbenefits.html

FEDERAL COURT BLOCKS APPLICATION OF FMLA TO SAME-SEX SPOUSES IN FOUR STATES

In 2013, following the Supreme Court of the United States (SCOTUS) ruling in the *United States v. Windsor* decision, the Department of Labor (DOL) updated the Family Medical Leave Act's (FMLA) definition of spouse to include same-sex spouses, regardless of where the spouses reside. Recently, the state of Texas sued the DOL to block these changes. The United States District Court for the Northern District of Texas ruled on March 26, 2015 that the FMLA revised definition of spouse is blocked from enforcement in their jurisdiction due to a ban on same-sex marriage. Therefore, there is an injunction in the states of Texas, Arkansas, Louisiana, and Nebraska against requiring employers to provide FMLA rights to same-sex spouses until the injunction is lifted by a higher court ruling. SCOTUS is expected to provide a decision as to the constitutionality of state laws prohibiting same-sex marriage in June. That decision could dictate the outcome of this case, if Section 2 of the Defense of Marriage Act (DOMA) and state bans on same-sex marriage are declared unconstitutional.

No Action Required

Employers operating in Texas, Arkansas, Louisiana and Nebraska should consult legal counsel before refusing FMLA to same-sex spouses in those states.

For complete details, see:

***Texas v. U.S., 2015 WL 1378752 (N.D. Tex. 2015)*, at:** http://www.gpo.gov/fdsys/pkg/USCOURTS-txnd-7_15-cv-00056/pdf/USCOURTS-txnd-7_15-cv-00056-0.pdf

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TACOMA, WASHINGTON PASSES PAID SICK LEAVE LAW

Effective February 1, 2016, Tacoma, Washington will join Seattle, as well as New York City, multiple cities in New Jersey, Oakland, San Francisco, Milwaukee, Portland and Eugene, Oregon, Philadelphia, Connecticut, California, Massachusetts, by requiring employers to provide Paid Sick and Safe Leave (PSSL) to their employees. The city will publish a model notice for employers to provide to employees in the coming months and may issue additional regulations. Highlights of the new law are below.

- One accrual rate for all employers
- Excludes single-employee businesses and public sector employers
- Accrual of leave starts on February 1, 2016, or on an employee's first day of employment, if hired after Feb. 1, 2016
- Employees must wait 180 days from the commencement of their employment before using leave (an employer may make the waiting period shorter)
- Employers are required to provide one hour of PSSL per 40 hours worked to employees who work in Tacoma, up to 24 hours per year
- Employees who work in Tacoma on an occasional basis (defined by the ordinance as more than 80 hours per calendar year) are eligible to accrue and use PSSL
- Employees may carry over up to 24 hours of leave at the end of the year and are permitted to use up to 40 hours during the next calendar year (using a combination of leave that was carried over from the previous year and newly accrued leave)

Highlights of the Differences between the Paid Seattle Sick Leave Law and Tacoma Sick Leave Law

	Seattle	Tacoma
Covered Employers	Private sector, more than 4 employees	Private sector, more than 1 employee
Accrual Differences Based on Employer Size	5-49 employees: 40 hours 50-249 employees: 56 hours 250+ employees: 72 hours (unless an employer has a PTO policy that raises the required amount to 108 hours)	Up to 24 hours per year (employees may also carry over up to 24 hours and use up to 40 hours in the next calendar year)
Accrual Rates	5-249 employees: 1 hour per 40 hours worked 250+ employees: 1 hour per 30 hours worked	1 hour per 40 hours worked (regardless of employer size)
Eligible Employee	Defined as working at least 240 hours in Seattle during a year	Defined as working at least 80 hours in Tacoma during a year
Rehire Provision	If an employee is rehired within 7 months, within 2 calendar years, the employer must reinstate any accrued and unused PSSL to the employee	If an employee is rehired within 6 months in the same calendar year, the employer must reinstate any accrued and unused PSSL to the employee
Bereavement Leave	Not specifically designated as a use under the ordinance	May be used for bereavement
Doctor Certification	Employer may ask for a doctor's note after employee has missed 3 consecutive workdays	Employer may follow its usual policies/practices

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Tacoma, Washington Passes Paid Sick Leave Law (continued)

Action Required

Employers with employees in Tacoma, Washington should ensure their Paid Time Off (PTO) or sick leave policy is up to date and in compliance with this leave law. If the current PTO policy accrues at the same rate and can be used for the same purposes, a new policy is not required.

For complete details, see: http://www.cityoftacoma.org/cms/One.aspx?portalId=169&pageId=69789

FAQs: http://cms.cityoftacoma.org/Finance/paid-leave/Tacoma-Paid-Leave-Ordinance-FAQs.pdf

QUESTION OF THE MONTH

Q: Our company does not offer retiree health coverage. Do we need to make Medicare Part D creditable coverage disclosures?

A: If any of your active employees or their spouses or dependents have Medicare Part A or Part B coverage, the Medicare Part D creditable coverage disclosure rules may apply, even though your company does not offer retiree health coverage. The Medicare Part D disclosure rules apply to group health plans that provide prescription drug coverage to "Part D eligible individuals," which can include active employees and their spouses and dependents, as well as retirees. "Part D eligible individuals" are individuals who satisfy two requirements. They must have coverage under Medicare Part A or Part B. And they must live in a "service area" of a Medicare Part D plan—i.e., a location that meets certain pharmacy access standards (most individuals will meet this second requirement).

Under the disclosure rules, group health plans offering prescription drug coverage must disclose to CMS and to all eligible individuals enrolled in or seeking to enroll in the plan whether such coverage is creditable. (There is no small-employer exception to this requirement.) Coverage is creditable if its actuarial value equals or exceeds the actuarial value of standard prescription drug coverage under Medicare Part D. This disclosure is intended to provide Medicare Part D eligible individuals with sufficient information to avoid unwittingly incurring late enrollment penalties (in the form of higher premiums) because of a break in creditable prescription drug coverage for a continuous period of 63 days or more after the end of the initial Medicare Part D enrollment period. Thus, if your company's prescription drug coverage isn't creditable, then the notice must state that it isn't creditable, that there are limitations on when individuals may enroll in Medicare Part D plans, and that a late enrollment penalty may apply. The notices must be provided (1) prior to an individual's initial enrollment period for Medicare Part D; (2) prior to the effective date of enrollment in your company's prescription drug coverage and upon any change in its creditable status; (3) prior to the annual coordinated election period (ACEP) for Medicare Part D (which begins each October 15); and (4) upon the individual's request. Notice may be provided with other plan participant information materials, such as SPDs, so long as certain formatting and content requirements are met.

Source: Thomson/Reuters

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