

The Far-Reaching Impact of FMLA: Employee Benefits and Leave Management Issues

Welcome!

Thank you for joining us. We have a great many participants in today's call. Your phone is currently muted so that the noise level can be kept to a minimum. If you have any questions, you can send them to the host using the Chat feature in the bottom right corner during the webinar.

The webinar will start momentarily.



**The Far-Reaching Impact
of FMLA: *Employee Benefits
and Leave Management Issues***

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The purpose of this workshop is to communicate legislative and regulatory information that may be of interest to our clients.

This summary is for general information purposes only.

Keenan is an employee benefit consultant and insurance broker; we cannot provide legal advice.

We cannot address details of wage and hour requirements or eligibility for benefits specific to any individual.

You should seek the advice of legal counsel in applying this information to your own situation.



Overview of FMLA

Presented by:

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FMLA Overview

Family And Medical Leave Act

- **Topics**
 - **FMLA Basics**
 - **NEW Notice Rules**
 - **NEW Military Leave Rules**
 - **Special Rules for Schools**
 - **Intermittent Leave and Reduced Schedules**
 - **Return from Leave**



Family And Medical Leave Act

- **Employees Eligible for Leave:**
 - **Employed for at least 12 months**
 - **Worked 1,250 hours during previous 12 months...BUT full-time teachers and exempt employees are deemed to meet this test**
 - **Work in a location where 50+ employees are within 75 surface road miles**
 - **Not a "key employee"**



Family And Medical Leave Act

- **Leave available:**
 - **Up to 12 workweeks during any 12-month period (26 workweeks for some military family leaves)**
 - **Spouses employed by same employer may be limited to a total of twelve taken to bond with new child**
 - **The 12 weeks may include accrued sick time taken to care for sick relative under Labor Code Section 233 (1999)**



Family And Medical Leave Act

- **Qualifying Reasons for Taking Leave:**
 - **Birth of employee's child**
 - **Placement of child with employee for adoption or foster care**
 - **To care for employee's child, spouse, or parent who has a "serious health condition"**
 - **For a "serious health condition" of employee that prevents employee from working**
 - **To care for a "covered service member"**
 - **For military family members, a "qualifying exigency"**



Family And Medical Leave Act

- **Definition of “Spouse”:**
 - **Husband or wife, as defined by state law**
 - **A spouse CAN NOT be a significant other or registered domestic partner under federal law**
 - **CFRA adds domestic partner**



Family And Medical Leave Act

- **What is a “Serious Health Condition”?**
 - **Defined by final regulations as an illness, injury, impairment, or physical or mental condition that involves either:**
 - **Inpatient care in a hospital, hospice or residential medical care facility**
 - **“Continuing treatment by a health provider”**
- **Inpatient Care:**
 - **Includes any periods of incapacity or any subsequent treatment in connection with inpatient care**



Family And Medical Leave Act

- **What is a “continuing treatment”?**
 - **Period of incapacity (at least 3 consecutive days) and treatment (2 visits to a health care provider within 30 days of the period of incapacity)**
 - **Period of incapacity (at last 3 consecutive days) and a regimen of continuing treatment (first visit to health care provider must be within 7 days of initial incapacity)**
 - **Period of incapacity due to pregnancy**
 - **Period of incapacity due to chronic serious health condition (for which employee visits a health care provider at least twice a year)**
 - **Permanent or long-term period of incapacity**
 - **Absence to receive multiple treatments**



Family And Medical Leave Act

- **Definition of “Health Care Provider”:**
 - **Can vary, whether under FMLA/CFRA or Workers’ Compensation**
 - **FMLA:**
 - MD, DO or other capable service provider
 - PA, nurse-practitioner, nurse-midwife, podiatrist, dentist, clinical psychologist, chiropractor, clinical social workers
 - Christian Science practitioner (with certain limitations); any provider from whom employer or benefits manager would accept to substantiate a claim for benefits
 - **CFRA refers to FMLA definition**



Family And Medical Leave Act

- - **Workers Compensation**
 - **Primary Care physician, per Cal Rules and Regs 9780**
 - **Pre-designated physician by the employee as outlined in the Cal Rules and Regs 9780**
 - **Physician within your Medical Provider Network according to LC 4616**



Family And Medical Leave Act

- **Employee Notice Obligations:**
 - If necessity for leave is foreseeable, employee must provide at least thirty days' notice
 - If need for leave is not foreseeable, or there was a change in circumstances, then notice must be provided “as soon as practicable”
 - New regulations clarify within 1 or 2 business days of when the need for the leave becomes known to the employee



Family And Medical Leave Act

- **NEW Employer Notice Obligations**
 - **General Notice**– posted in language in which employees are literate, if significant portion of employees can't read English
 - **Eligibility Notice**– 5 business days after acquiring knowledge leave may be FMLA-qualifying to issue written Rights and Responsibilities notice to employee (DOL website for template)
 - **Designation Notice**– 5 days after receipt of employee's complete certification and accompanying information to designate leave as FMLA qualifying
- **Failure to Provide Notice**– employer may be sued for money damages



Family And Medical Leave Act

Military Family Leave Rules

- **Covered Service Member Leave:**
 - up to 26 weeks in a 12 month period
 - Regular categories of eligible family members, plus next of kin
 - To care for a covered service member who has a serious illness or injury incurred in the line of duty
 - “covered service member” is member of Armed Forces who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status or is otherwise on the temporary disability retired list



Family And Medical Leave Act

Military Family Leave Rules

- **Qualifying Exigency leave:**
 - up to 12 weeks in a 12 month period
 - Spouses, parents and children of active duty service members in “contingency operations” (military operation against enemy of U.S. or opposing military force that results in the call to or order for retention of active duty of members of the uniformed services during a war or national emergency declared by the President)
 - To attend to a “qualifying exigency”
 - The following events when they arise out of the call to active duty of a reservist or National Guard member:
 - Short-notice deployment, military events, childcare and school activities, financial & legal arrangements, counseling, rest and recuperation, post-deployment activities sponsored by the military, to address issues arising from death, additional activities agreed to by the employer and employee



Family And Medical Leave Act

Military Family Leave Rules

- **Employee notice obligation:**
 - For covered service member leave, same as other FMLA leaves
 - For qualifying exigency, as soon as practicable— both possible and practical under the circumstances



Family And Medical Leave Act

Military Family Leave Rules

- **Certifications:**
 - **Covered Service Member leave:**
 - Certification from health care provider, including whether injury or illness incurred in line of active duty, dates, medical facts regarding health condition, information necessary to establish need for care and duration/frequency of need
 - Certification from employee of name and relationship of covered service member, branch of service of covered service member, rank and current unit assignment, whether service member is assigned to a military medical facility, whether service member is on the temporary disability retired list, description of the care to be provided and the amount of leave needed



Family And Medical Leave Act

Military Family Leave Rules

- **Certifications:**
 - **Qualifying exigency:**
 - Copy of active duty orders or other military documentation of active duty in contingency operation and dates of service
 - Employee certification setting forth need for leave, dates, whether leave will be intermittent or reduced schedule, contact information for third party if need for leave is for meeting with third party



Family And Medical Leave Act

Military Family Leave Rules

- **Military Leave Rules the Same for:**
 - Intermittent leave
 - Substitution of paid leave
 - Limits on leave for spouses of the same employer
 - Special rules for schools



Family And Medical Leave Act

Military Family Leave Rules

- **Additional information on military family leave rules:**
 - http://www.keenan.com/news/brief/2008/1231_actchanges.pdf
 - http://www.keenan.com/news/brief/2008/0129_benefit.pdf



Family And Medical Leave Act

- **Special Federal Rules for Instructional Employees of Schools:**
 - School breaks don't count
 - Leave is somewhat flexible for employers
 - Leaves at the end of term
 - For more information, see:
[www.dol.gov/dol/allcfr/ESA/Title 29/Part 825/Subpart F.htm](http://www.dol.gov/dol/allcfr/ESA/Title%2029/Part%20825/Subpart%20F.htm)



Overview of Family and Medical Leave Act

- **Minimum Duration of Leave For Childcare:**
 - Federal law requires that such leave be taken in one block of time **BUT**
 - California law states that the basic minimum duration is two weeks, and the employer is required to grant a request for such leave in increments of at least one day but less than two weeks on two occasions.
 - California law is more favorable and takes precedent over federal law



Overview of Family and Medical Leave Act

- **Intermittent Leave and Reduced Schedules – Birth and Adoption:**
 - FMLA does not allow leaves for birth or adoption of child to be taken intermittently or on reduced schedule without agreement between employer and employee.
 - However, CFRA allows.



Overview of Family and Medical Leave Act

- **Intermittent Leave and Reduced Schedules:**
 - Leave due to serious health condition may be taken intermittently or on a reduced schedule when medically necessary.
 - “Intermittent leave”
 - “Reduced leave schedule”



Overview of Family and Medical Leave Act

- **Intermittent Leave and Reduced Schedules:**
 - **FMLA regulations require the employee to consult with the employer when planning medical treatment requiring intermittent leave**
 - **Employee must make a reasonable effort to reschedule when an appointment may unduly disrupt the employer's operations, subject to approval of healthcare provider**
 - **Employer may require that the employee transfer temporarily to a position that accommodates better than regular position, so long as employee receives equivalent pay and benefits while in the position**



Overview of Family and Medical Leave Act

- **Medical Certifications FMLA—**
 - **Must be complete and sufficient. If not, employer must give employee written notice of additional information required and 7 calendar days to cure defect**
- **When can an employer call a doctor? FMLA—**
 - **Under new regulations, to authenticate and clarify the medical condition, but only AFTER opportunity to cure defect has been given and 7 days have elapsed.**
 - **Still prohibited from inquiring beyond what is required in certification form.**
 - **Direct supervisor CANNOT be the person making the call.**



Overview of Family and Medical Leave Act

- **Medical Certifications CFRA—need not identify serious health condition**
 - date on which condition began, estimate of amount of time needed, statement that condition warrants care from employee, or statement that due to condition, employee can't work
 - Can ask for 2nd opinion. If different from 1st, can ask for 3rd. 3rd governs. Employer pays.
- **When can an employer call a doctor? CFRA—**
 - No mention.



Overview of Family and Medical Leave Act

- **Fitness for Duty Certifications**
 - Employer may provide employee with list of essential job functions and ask provider to certify employee can meet them
 - Must notify employee of fitness for duty certification and essential job functions in Designation Notice
 - For intermittent leave, can request every 30 days if leave taken during that time and reasonable safety concerns exist
- **When can employer call doctor?**
 - Same as medical certifications



Overview of Family and Medical Leave Act

- **Pregnancy, Birth and Leaves:**
 - **Prior to Birth:**
 - PDL – 16 weeks (CA)
 - FMLA – 12 weeks
 - **Post-delivery:**
 - FMLA – remaining portion of 12 weeks
 - CFRA – 12 weeks for bonding



Interaction Between PDL, FMLA & CFRA

Example: “Typical Pregnancy”

Weeks in Pregnancy: D

1, 2, 3, 4 →→→→→→→→→34→→→→38→→→42→→→46→→→→→→→→54

FMLA



PDL

CFRA





Overview of Family and Medical Leave Act

- **Reinstatement Obligations:**
 - Employee must be reinstated to the same or to an equivalent position
 - An equivalent position has:
 - the same pay, benefits and working conditions
 - the same privileges, perquisites and status
 - the same or substantially similar duties and responsibilities entailing substantially equivalent skills, effort, responsibility and authority
 - **HOWEVER**, there is no requirement to hold a position to which an employee has stated he/she does not wish to return



Family And Medical Leave Act

- **Compensation During Leave:**
 - FMLA leave may be unpaid under both federal and state law.
 - Employee may elect to take accrued paid vacation leave, accrued PTO or accrued paid sick leave concurrently with FMLA for employee serious health condition.
 - Employer may require that accrued paid sick leave or accrued paid vacation be used (with proper notice).
 - For serious health condition of family member, employee may choose to use up to one-half of annual accrued sick time (Labor Code Section 233).



Overview of Family and Medical Leave Act

- **Return from FMLA Leave**
 - **Seniority need not accrue during leave**
 - **Upon return from leave, if insurance coverage lapsed, the employee must be restored to benefits with no pre-existing condition, no waiting period, and no health exam**



Overview of Family and Medical Leave Act

- **Employers May Not:**
 - **Reduce benefits to minimum to comply with the law if current benefits are more generous than the law requires**
 - **Interfere with an employee's rights to exercise family and medical leave**



Overview of Family and Medical Leave Act

- **DOL website—**

<http://www.dol.gov/whd/fmla/>

Includes guidance, fact sheets, posters, forms and other useful information



FMLA and Employee Benefits

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FMLA and Employee Benefits

Family And Medical Leave Act

- **Topics**
 - **Continued Health Insurance Coverage Requirement During FMLA Leave**
 - **FMLA and COBRA**
 - **Collective Bargaining and FMLA**



FMLA and Employee Benefits

Family And Medical Leave Act

- **Continued Health Insurance Coverage During FMLA Leave:**
 - Employers are required to maintain coverage under any group health plan (medical, dental, vision) for up to twelve workweeks per twelve-month period at same level and conditions as active employees.
 - Employers may continue non-health benefits for “administrative ease.” Examples are:
 - Life/AD&D
 - Income Protection (STD/LTD)



FMLA and Employee Benefits

Family And Medical Leave Act

- **Conditions of Health Plan Coverage**
 - **Employee must continue to pay share of premium within 30 days of due date or coverage may be dropped.**
 - **Employer must send notice once premium is 15 days late.**
 - **If employer pays premiums, they may be recovered from employee who doesn't return unless there is a "serious health condition" or circumstances beyond the control of the employee.**



FMLA and Employee Benefits

Family And Medical Leave Act

- **Options for Employee Health Premium Contribution During FMLA Leave:**
 - Due at same time if by payroll deduction
 - Due on schedule used for COBRA premiums
 - Prepaid under a cafeteria plan at the employee's option
 - Application of other employer rules for “leave without pay”
 - (NO prepayment requirement or higher contribution than if employee continued work)
 - Another *voluntarily* arranged agreement between employer and employee (which could include prepayment if FMLA leave is foreseeable)



FMLA and Employee Benefits

Family And Medical Leave Act

- **When FMLA and PDL Collide:**
 - Employee may have up to 12 weeks of unpaid federal FMLA leave due to pregnancy disability; health benefits must be continued.
 - Employee may have up to 16 weeks of unpaid California FEHA/PDL leave due to pregnancy disability; health benefits do not have to be continued unless continued for other disability leaves (usually employee goes on COBRA).



FMLA and Employee Benefits

Family And Medical Leave Act

- **FMLA and COBRA:**
 - **IRS released Notice 94-103, which clarified that:**
 - **FMLA leave is not a qualifying event for COBRA**
 - **Failure to return from FMLA leave is a qualifying event for COBRA**



FMLA and Employee Benefits

Family and Medical Leave Act

- **Treasury Regulations released in 1999 further state:**
 - **If employee does not return to work, the COBRA qualifying event occurs on the LAST day of FMLA leave**
 - **If employer has paid premiums to continue benefit during FMLA leave, employer CANNOT condition COBRA continuation upon repayment of premiums**



Sick Leave For Classified Employees Under the Education Code

- 12 days annual sick leave, accumulated year to year.
- At the end of accumulated sick leave and all other paid leave, sub-difference pay for up to 5 school months (100 workdays).
- If no substitute is hired, the Classified employee receives full pay.
- Based on Bargaining Agreement, 50% pay may be in effect in lieu of sub-difference pay.

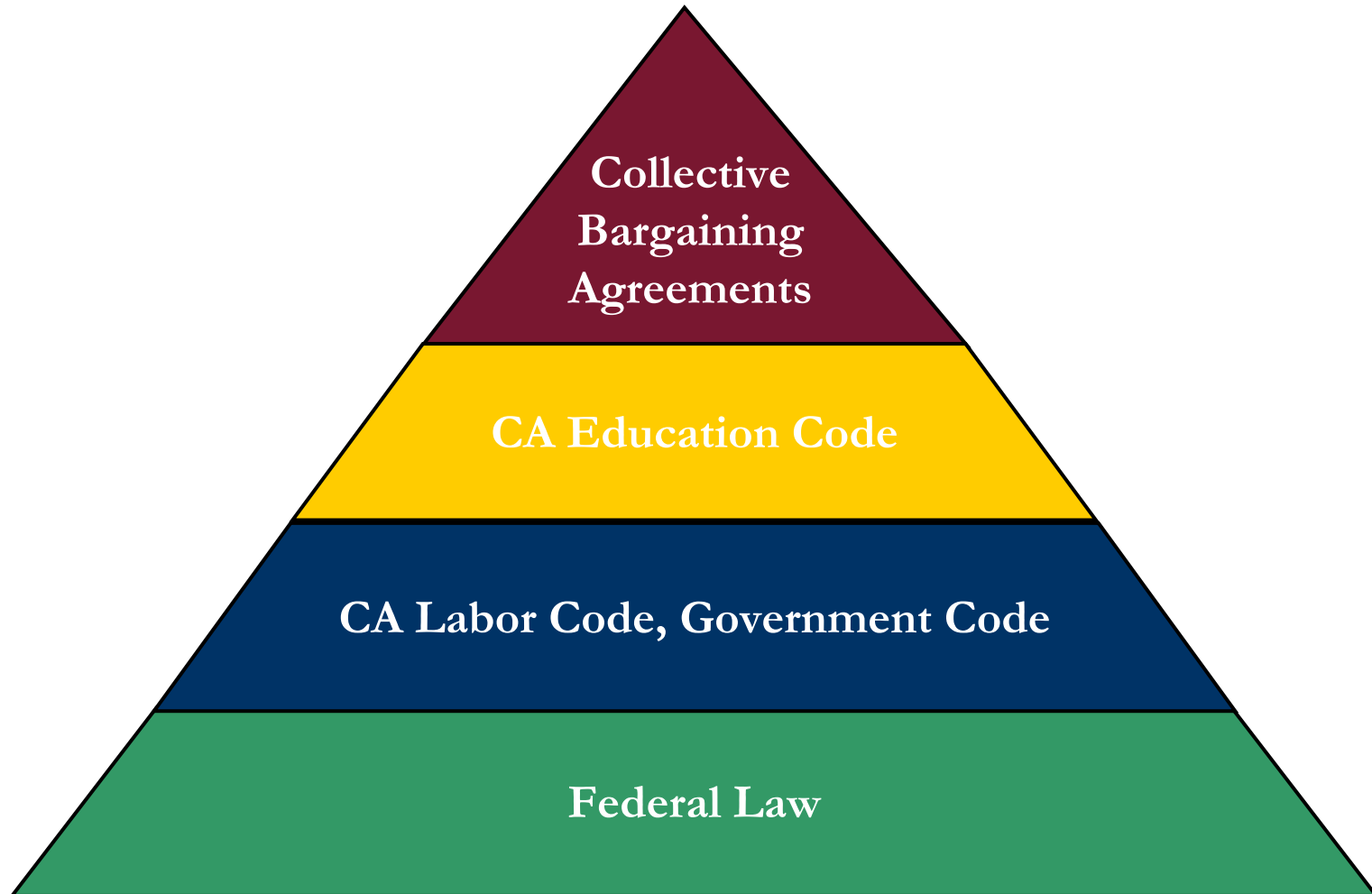


Sick Leave For Certificated Employees Under the Education Code

- 10 days annual sick leave, accumulated year to year.
- At the end of accumulated sick leave, sub-difference pay up to 110 days total sick leave and sub-difference pay.
- If no substitute is hired, employee receives the difference between their salary and what a substitute would have been paid.
- Based on Bargaining Agreement, 50% pay may be in effect in lieu of sub-difference pay.



The Benefit Pyramid





FMLA and Employee Benefits

Family and Medical Leave Act

- **Collective Bargaining Impact:**
 - Employee's right to FMLA cannot be waived or bargained away
 - Employee's right to reinstatement under FMLA supersedes provisions of bargaining agreement
 - Any greater rights provided under a collective bargaining agreement must be observed



FMLA and Workers' Compensation

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Workers' Comp may trigger FMLA

- **Workers' Compensation claim-may be an automatic qualifier if they are taken off work or requested a reduced work schedule (transitional duty)**
- **Offer of modified or alternative work – employee declines offer**
 - **Employee may be entitled to other paid leave, if available refer to your bargaining agreements and board policies**
- **Unable to permanently accommodate an employee – if FMLA has not already been provided**



Critical Questions

- **Determine if the employee is eligible for FMLA, while receiving Workers' Compensation benefits**
 - Is employee an “eligible employee”?
 - Is there a qualifying reason?
 - Has the employee used any FMLA time in the past? If so, how much time remains available?



Employer Obligations/Rights

- Provide the employee with rights and obligations for FMLA right away
- Can require employee to use accrued paid vacation or sick leave benefits concurrently with FMLA
- May dock accrued benefits for any full day absence
- Refer to bargaining agreements and board policies when applicable
- Continue to provide health & welfare benefits
- Return to work clearance
- Consider FMLA leave for the employee prior to placing them on 39-month rehire



The FMLA-WC-FEHA Collision

- **Day one of the off-work slip – natural connection**
- **12 weeks start running from first day of the employee's off-work slip or when modified duty is not accommodated**
- **FMLA should run concurrently**
- **Transitional work – reduced work schedule**
- **FMLA may need to be considered an accommodation – FEHA**



Best Practices FMLA/Workers' Compensation

- **Run FMLA concurrently with Workers' Compensation - avoids the risk of violating FMLA if you do not reinstate the employee when returning from a WC injury.**
- **Instant and constant communication between the District's Workers' Compensation administrator and HR**
- **FMLA Notice sent immediately**
- **Document the FMLA qualifying reasons**
- **Place FMLA on your Interactive Process checklist**
- **Language in Bargaining Agreements and Board Policies**



Questions

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Keenan

Thank you for your
participation!

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