



Leave Laws and Employee Benefits in a Pandemic

2022 APMA Forum – January 20, 2022
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Agenda

- An Overview of Federal and State Leave Laws (FMLA/CFRA/PDL)
 - When They Apply and How They Interrelate
 - Benefit Mandates and Who Has to Pay for Them
- COVID-19, Leaves, & Benefits
- Wage Replacement
- Workers' Compensation
- Cafeteria Plans
- A Few More Administrative Considerations
- Action Plan and Resources



Scenarios: Carol

Background: Alpha Corp. has one location in Marina del Rey, CA and all 80 employees work at that location. All leaves are unpaid. Alpha does not have any paid or unpaid leave policies other than those required by law.

- Carol has worked for Alpha for 2 years; she has worked 1,300 hours in the past 12 months
- Carol is enrolled in Alpha's group health and dental plans and must contribute \$100/month for the coverage; Alpha pays \$400/month
- Carol has no accrued vacation or sick leave
- **Scenario 1:** Carol has COVID-19 and needs to take 12 weeks of leave for treatment and recovery
- **Scenario 2:** Carol has just provided HR with a doctor's note indicating that she is disabled by pregnancy and the doctor anticipates Carol will need 4 months of pregnancy disability leave; Carol informs HR that following the baby's birth, she would like to take 12 weeks of baby bonding leave

➤ **What are Carol's rights?**

➤ **What are Alpha's obligations?**

Overview of Leave Laws



Family & Medical Leave Act (FMLA)

- Applies to employers who employ 50 or more employees
 - Part-time employees are counted
- Applies to government employers, regardless of size
- Applies to employees who have been employed for at least 12 months and have at least 1,250 hours of service during the previous 12 months, and employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite

➤ **Does FMLA apply to Alpha?**

➤ **Is Carol eligible for FMLA leave?**

➤ ***New Facts:* What if Alpha has 40 employees in Marina del Rey and 40 in Monterey?**

FMLA – Qualifying Leaves

- Eligible employees may take up to **12 weeks** of **unpaid** leave in a 12-month period due to:
 - The “**serious health condition**” of the **employee**, spouse, son, daughter, or parent;
 - The birth of a son or daughter, and to care for the newborn;
 - The placement of a son or daughter for adoption or foster care;
 - Any “qualifying exigency” arising out of the fact that the employee’s spouse, son, daughter, or parent is a military member on covered active duty (or has been notified of an impending call or order to covered active duty status)
- Eligible employees may take up to **26 weeks** of **unpaid** leave in a 12-month period to care for a covered service member (spouse, son, daughter, or next-of-kin) with a serious injury or illness

➤ **What about Carol?**

FMLA - Benefits

- **Health:** Employer must maintain coverage under a group health plan on the same terms and conditions as coverage would have been provided if the employee was continuously employed
 - Obligation ends (a) if and when the employment relationship would end, (b) if and when the employee says he/she will not be returning to work, and (c) at the end of 12 weeks
- **Other Benefits:** The availability of other benefits is based on employer policies for other leaves (paid or unpaid, as appropriate)
 - Employer may maintain benefits to ensure reinstatement of equivalent benefits

➤ **What about Carol?**

FMLA - Premiums

- Employer pays employer's portion
 - Employee pays employee's portion:
 - If **paid** leave, follow usual payment method (payroll deduction)
 - If **unpaid** leave, may require payment to employer or insurer, but no administrative charge may be added
 - **Note:** Voluntary benefits are solely the employee's responsibility; arrange with carrier
- **What about Carol?**
- Employee payment methods:
 - Payment due at same time as payroll deduction or COBRA
 - Prepaid through cafeteria plan at employee's option
 - Use employer's existing rules for payment by employees on leave without pay (cannot require prepayment)
 - Another system voluntarily agreed to by employer & employee
 - **Note:** Employer must provide **advance written notice** of terms/conditions for making payments

FMLA - Premiums

➤ What if Carol fails to pay her premium?

- Obligation to provide benefits ends when the employee fails to pay:
 - Provide no less than 30-day grace period & 15 days advance written notice
 - **Note:** Must reinstate upon return to work (or employer may be liable)
 - **Note:** COBRA qualifying event?

FMLA - Premiums

➤ What if Carol fails to return to work at the end of her leave?

- If employee fails to return to work, employer may recover its share of premiums paid during unpaid leave (and any amount employer paid for employee's share of premium) unless,
 - Failure to return due to continuation, recurrence, or onset of a serious health condition of employee, family member, or service member (may request medical certification)
 - Other circumstances beyond employee's control
- Employer may recover debt through sums due to employee (consistent with state and federal law) or take legal action (consult legal counsel)

California Family Rights Act (CFRA): What's New?

- Effective **January 1, 2021**, S.B. 1383 changed CFRA—significantly!
 - Now applies to private employers that employ 5 or more (was 50)
 - Worksite mileage requirement is eliminated (previously employer could deny leave “if the employer employs less than 50 employees within 75 miles of the worksite where that employee is employed”)
 - May now take leave for the serious health condition of a sibling, grandparent, or grandchild
 - Definition of “child” expanded to include non-dependent adult children and children of domestic partners
 - Parents working for same employer no longer have to split leave
 - May now take leave due to a “qualifying exigency”
 - Reinstatement exception for highly paid employees is eliminated
 - New small employer (5-19) mediation program offered by DFEH until 2024
 - New Parent Leave Act repealed
- Effective **January 1, 2022**, A.B. 1033 adds leave for “parents-in-law” and amends mediation program
- **Action Items:** Update/create posters, forms, handbooks, wraps

CFRA - Eligibility

- Applies to employers who employ 5 or more employees
 - Part-time employees are counted
- Applies to government employers, regardless of size
- Applies to employees who have been employed for at least 12 months and have at least 1,250 hours of service during the previous 12-month period

➤ **What if Alpha and Carol are both located in California?**

➤ **Does CFRA apply to Alpha?**

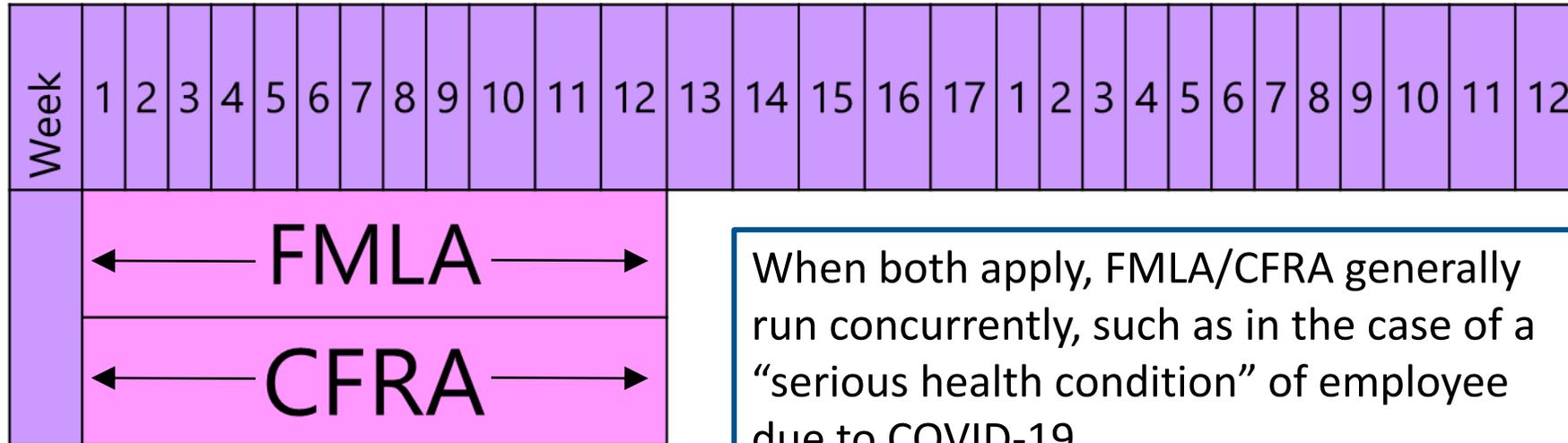
➤ **Is Carol eligible for CFRA leave?**

CFRA – Qualifying Leaves

- Under CFRA, eligible employees may take up to **12 weeks** of **unpaid** leave in a 12-month period due to:
 - The “**serious health condition**” of the **employee**, spouse, registered domestic partner, child, parent, sibling, grandparent, or grandchild;
 - The birth of a child, and to care for the newborn;
 - The placement of a child for adoption or foster care;
 - A “qualifying exigency” (as defined under PFL) related to covered active duty or a call to covered active duty of employee's spouse, domestic partner, child, or parent in the Armed Forces of US
- CFRA does not include service member leave
- Often, if both apply, FMLA & CFRA run concurrently, but **not** in the case of pregnancy (more later), **or** another exception or difference applies

➤ **Scenario 1: Carol has COVID-19—a “serious health condition”—and requests 12 weeks of leave. All other facts the same.**

Carol's Serious Health Condition (COVID-19)



When both apply, FMLA/CFRA generally run concurrently, such as in the case of a “serious health condition” of employee due to COVID-19

Health benefits must be maintained through FMLA/CFRA leave, as required by those laws

New Facts: What if Alpha has only 10 employees?

CA Pregnancy Disability Leave (PDL)

- Applies to employers with 5 or more full or part-time employees
- Applies to state and local government employers of any size
- Applies to employees who become disabled by pregnancy, childbirth, or related medical conditions
- There is no length-of-service requirement before an employee is eligible for PDL
- Provides for an **unpaid** leave of up to 4 months (**17 1/3 weeks**)
 - May be eligible for SDI (more later)

➤ *Scenario 2: What about Carol?*

PDL - Benefits

- **Health:** Employer must maintain coverage under a group health plan on the same terms and conditions as coverage would have been provided if the employee was continuously employed
 - Employee can be required to pay her own share of premium
- **Other Benefits:** The employee may participate in other non-health employee benefit plans to the same extent and under the same conditions as would apply to any other unpaid disability leave granted by the employer for any reason other than a pregnancy disability

➤ **What about Carol?**

PDL - Premiums

➤ What if Carol does not return to work at the end of PDL?

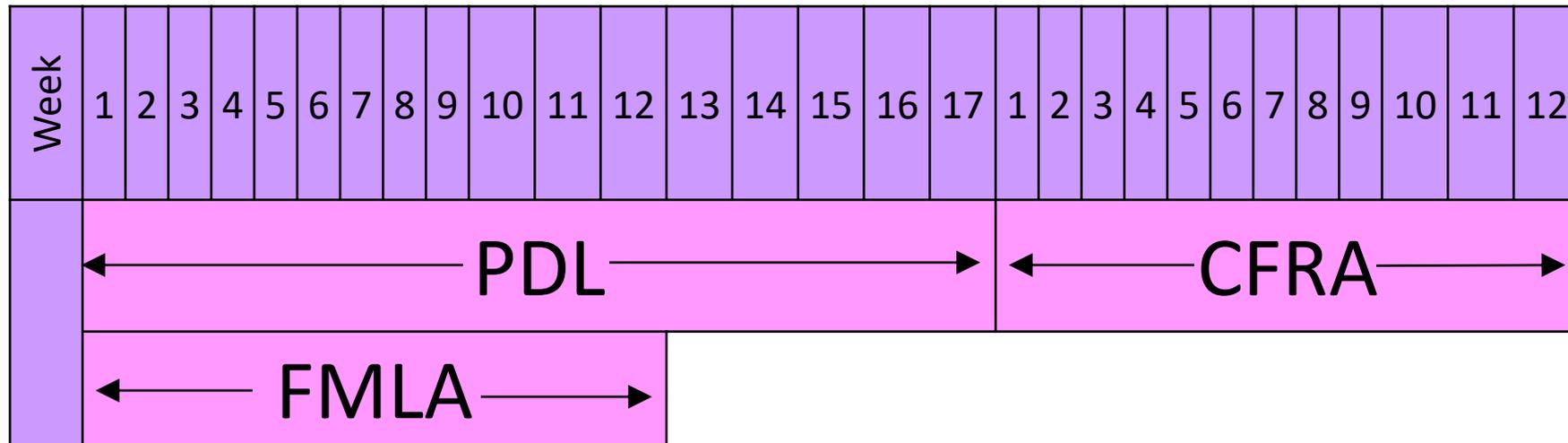
- An employer may recover from the employee the premium that the employer paid for maintaining coverage under the group health plan if both of the following conditions occur:
 - The employee fails to return from leave after the leave has expired
 - The employee's failure to return from leave is for a reason other than one of the following:
 - The employee taking leave under CFRA;
 - The continuation, recurrence, or onset of a health condition that entitles the employee to PDL or non-pregnancy related medical condition requiring further leave; or
 - Other circumstance beyond the control of the employee.

FMLA/CFRA/PDL

➤ **Scenario 2: Carol requests 4 months leave because she is disabled by pregnancy, & 12 weeks of baby bonding leave. All other facts the same.**

- How do FMLA/CFRA/PDL interrelate? Typically, for a serious health condition, FMLA/CFRA run concurrently (Carol's COVID-19). However, CFRA rules are different if the employee is eligible for PDL:
- FMLA: If the pregnant employee's disabling condition is also a "serious health condition," PDL and FMLA run concurrently
 - So, the employee is exhausting FMLA while on PDL
- CFRA: However, PDL and CFRA do not run concurrently
 - So, the employee is not exhausting CFRA while on PDL
 - So, at the end of PDL, the employee will still be entitled to up to 12 weeks of leave under CFRA for baby bonding (for a maximum of 4 months plus 12 weeks)

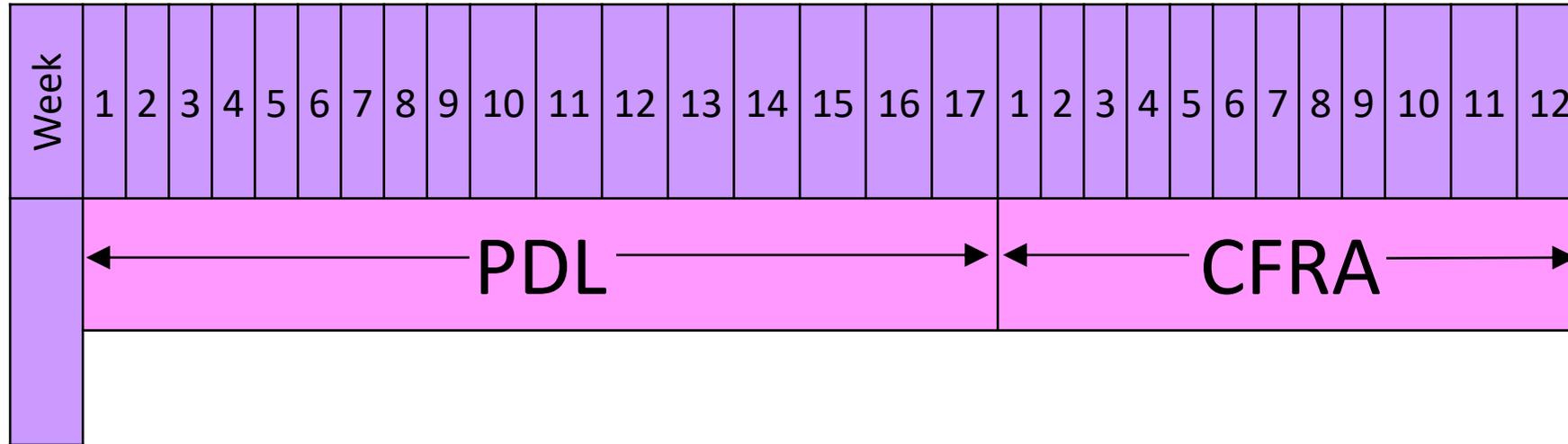
Carol's Serious Health Condition (Pregnancy)



Health benefits must be maintained through FMLA, PDL, & CFRA leave, as required by those laws

New Facts: At the end of 12 weeks of CFRA leave, Carol is still disabled. Can she be terminated? Don't forget about ADA/FEHA . . .

Carol's Serious Health Condition (Pregnancy)



New Facts: What if Alpha has only 10 employees, all in Marina del Rey?

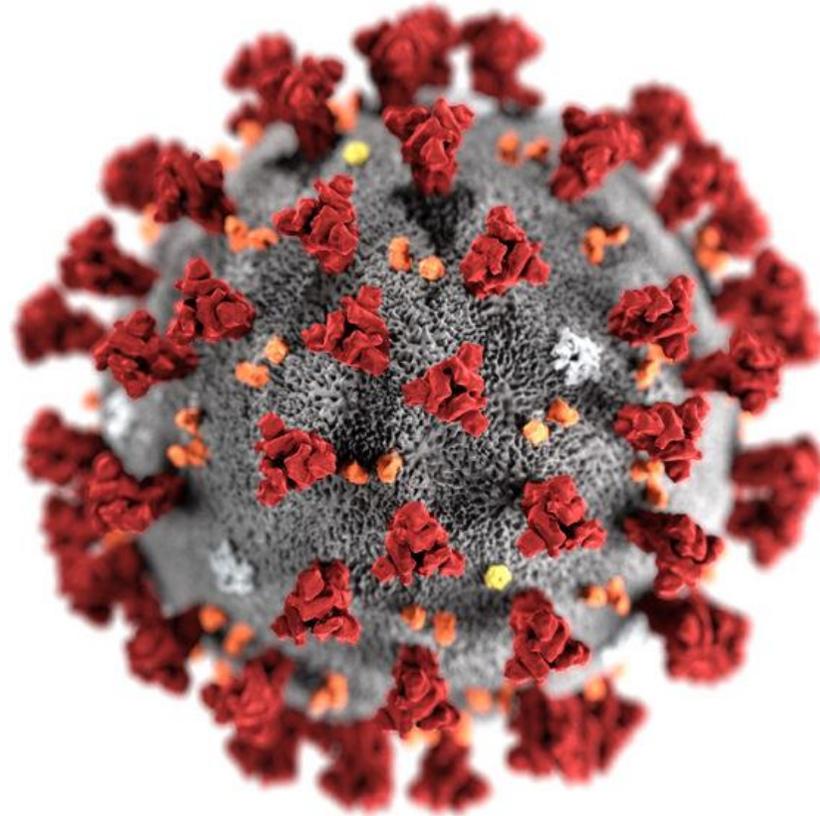
Note: Health benefits must be maintained through applicable PDL & CFRA leave, as required by those laws.

CA Paid Sick Leave: Healthy Workplace/Healthy Family Act

- An employee who works in California for 30 or more days within a year from the beginning of employment is entitled to paid sick leave
- Leave accrues, beginning on 1st day of employment, at the rate of one hour per every 30 hours worked; accrued leave carries over to the following year, but may be capped at 48 hours or 6 days (with some conditions)
- Leave is paid at the employee's regular wage rate
- Employee may use accrued paid sick days beginning on the 90th day of employment
- An employee can take paid leave for employee's own or a family member for the diagnosis, care, or treatment of an existing health condition or preventive care or for specified purposes for an employee who is a victim of domestic violence, sexual assault, or stalking

➤ **Scenario 1: Carol is sick with COVID-19. Is Carol entitled to paid sick leave under this law?**

COVID-19, Leaves, & Benefits



FFCRA & ARPA: Federal Voluntary Paid Leave

- **Covered Employers:** Government employers and private employers w/ fewer than 500 employees
- **Paid Leave:** Families First Coronavirus Response Act (FFCRA) contained two mandatory paid leave provisions (the Emergency Paid Sick Leave Act (EPSLA) and the Emergency FMLA Expansion Act (EFMLEA))—both started April 1, 2020, & ended December 31, 2020
 - **CAA:** Under the Consolidated Appropriations Act, 2021 (the CAA), employers had the option to provide paid leave under the terms/conditions set forth in FFCRA and receive a tax credit through **March 31, 2021**
 - **ARPA:** Under ARPA, employers have the option to provide paid leave under the terms/conditions set forth in FFCRA—as expanded by ARPA—and receive a tax credit through **September 30, 2021**
 - **Health Coverage:** Must maintain while on paid leave
- **End of story?** Check leave and wage replacement rights under employer leave policies (including under **CA's Healthy Workplace/Healthy Family Act**), federal and state leave laws (such as **FMLA/CFRA**), state and private disability coverage, municipal ordinances, etc.

California: S.B. 95: 2021 COVID-19 Supplemental Paid Sick Leave

- **Covered Employers:** Public/private employers w/ 26 or more employees
- **Covered Employees:** Those who cannot work or telework due to a specified reason are entitled to up to 80 hours of paid sick leave
- **Time Period—Expired:** January 1, 2021 – **September 30, 2021**
- **Is that the end of the story?** No. Employees may be entitled to time off and wage replacement under existing laws and programs, including FMLA, CFRA, Healthy Workplace/Healthy Family Act, PFL, SDI, LTD, and STD



Options

- **Potential Bases for Leave:**

- S.B. 95 2021 COVID-19 Supplemental Paid Sick Leave—Expired
- Mandatory and voluntary paid leave under FFCRA/CAA/ARPA—Expired
- Paid leave under Healthy Workplace/Healthy Family Act (CA Paid Sick Leave)
- Unpaid leave under FMLA or CFRA (serious health condition, their own or family member)
- Mandates under municipal ordinances—generally & related to COVID

- **Potential Bases for Wage Replacement (other than paid leave):**

- SDI (their own health condition)
- STD or LTD policy (their own health condition)
- PFL (family member)
- WC

- **PFL/S.B. 95/CA Paid Sick Leave Chart:** <https://www.dir.ca.gov/dlse/Comparison-COVID-19-Paid-Leave.html>

Wage Replacement



- Disability Benefits
- Paid Family Leave

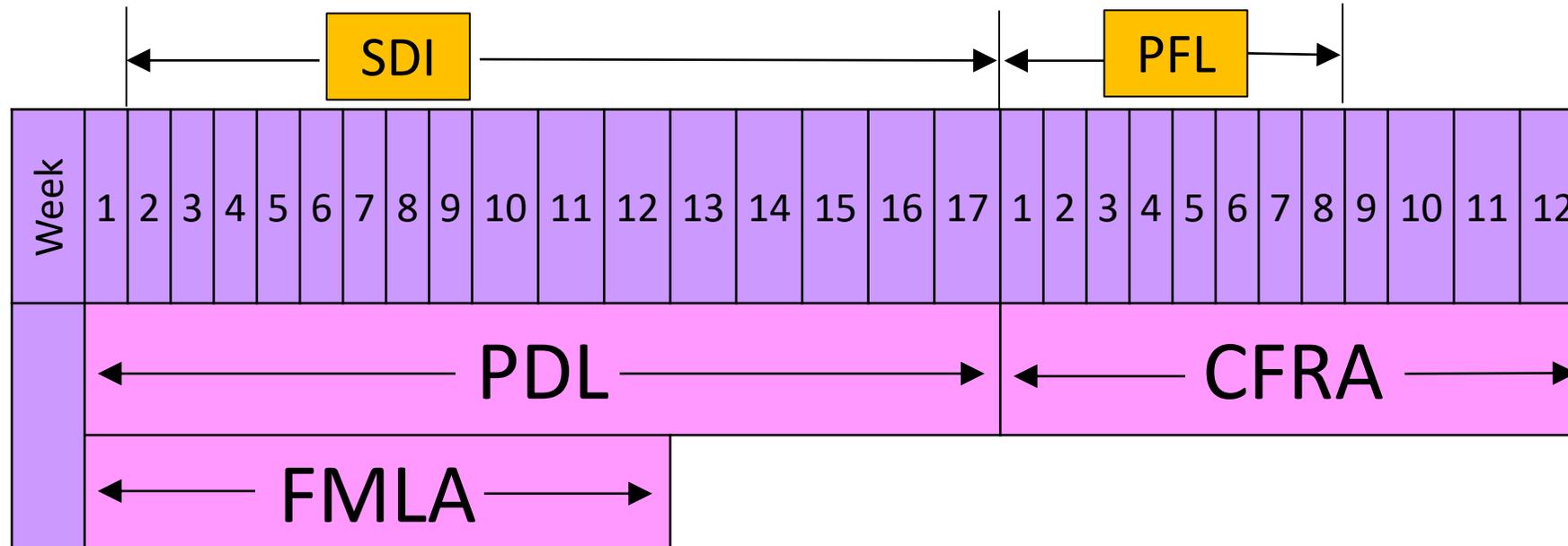
Disability Benefits

- **Disability Benefits:** If the employee is on leave due to his or her own serious health condition, the employee may qualify for disability benefits (STD, LTD, or state program (SDI))
 - In CA, SDI provides partial wage replacement benefits to eligible California workers who are unable to work due to a non-work-related illness or injury, whether physical or mental, including any illness or injury resulting from pregnancy, childbirth, or related medical condition
 - SDI benefits—after 1 week waiting period—are for up to 52 weeks
 - SDI provides benefits but not job protection; however, other laws (such as FMLA, CFRA, or PDL), when applicable, may provide job protection
 - SDI is administered by the Employment Development Department (EDD)
- **Note:** State disability insurance available in CA, HI, NJ, NY, & RI

Paid Family Leave

- **PFL:** In CA, may be entitled to Paid Family Leave (PFL)
 - PFL provides up to 8 weeks (formerly 6) of wage replacement benefits (in 12 months)—no waiting period—to workers taking time off to:
 - Care for a seriously ill child, spouse, parent, parent-in-law, grandparent, grandchild, sibling, or registered domestic partner;
 - Bond with a minor child within one year of birth, placement of the child in foster care, or adoption; or
 - **New:** Participate in a qualifying event because of a family member's (spouse, registered domestic partner, parent, or child) military deployment to a foreign country (effective **January 1, 2021**)
 - **New:** Effective **January 1, 2022**, A.B. 123 increases formula for determining PFL benefits
 - PFL is taken concurrently with FMLA and CFRA
 - PFL provides benefits but not job protection (other laws might provide job protection); administered by EDD
- **Action Items:** Update posters and brochures

FMLA/CFRA/PDL: Example



Wage Replacement in CA for Carol:

- During PDL: STD or SDI (7 day waiting period for SDI)
- During CFRA: 8 weeks of PFL (no waiting period)

➤ What about Carol?

Wage Replacement in CA for COVID-19:

- Both SDI & PFL could be available in some instances

Workers' Compensation

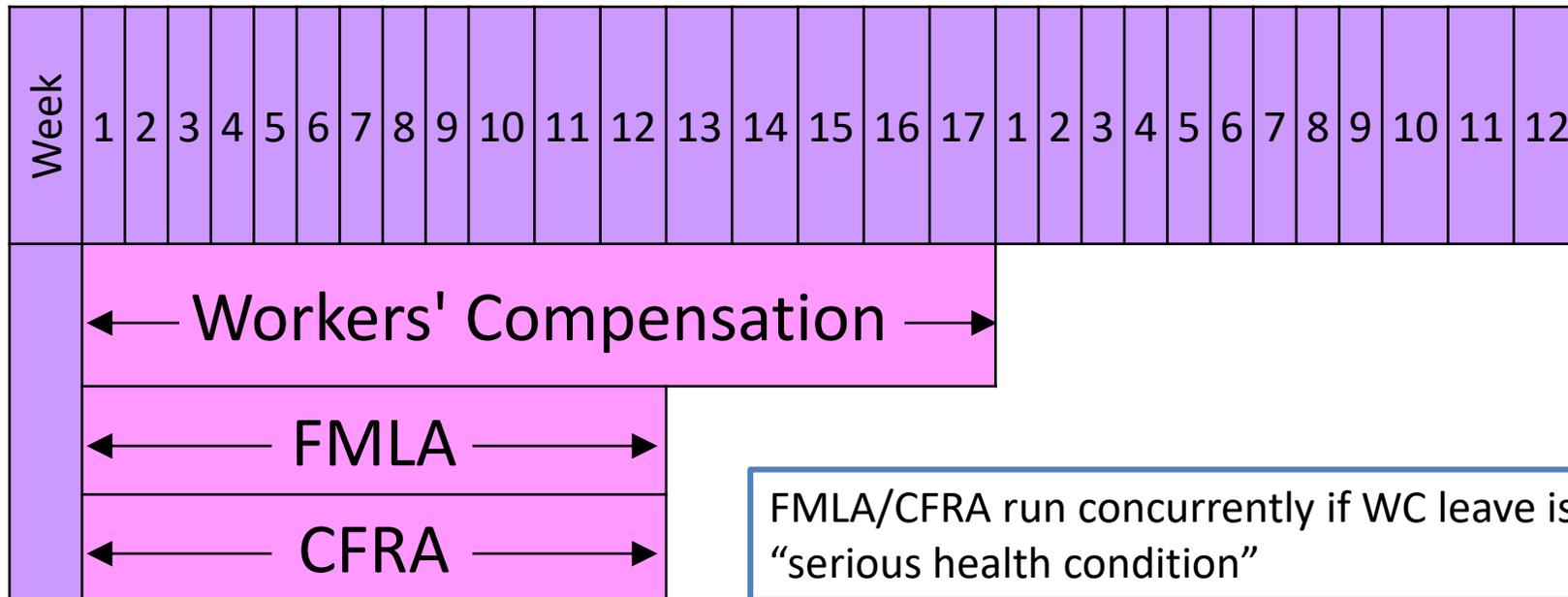


Workers' Compensation

➤ *New Facts:* Carol injures herself at work. She qualifies for 4 months of workers' compensation (WC) leave. Other facts remain the same (hours worked in last 12 months, etc.).

- If the WC leave also qualifies as a “serious health condition” under FMLA/CFRA, designate the leave as an FMLA/CFRA leave
 - Carol will exhaust FMLA/CFRA while on WC
 - What about benefits?
 - Must remain on health coverage during FMLA/CFRA leave; after that, in CA, depends on ERISA health plan terms
 - If coverage ends, send COBRA election notice (qualifying event = loss of coverage due to reduction in hours)
- **Note:** S.B. 1159 not detailed here

Workers' Compensation



FMLA/CFRA run concurrently if WC leave is a "serious health condition"

Health benefits must be maintained through FMLA/CFRA leave, as required by those laws

Leaves of Absence & Cafeteria Plans



Leaves of Absence & Cafeteria Plan Elections

- **General Rule:** Employees cannot change cafeteria plan elections mid-year unless the employee experiences a permitted election change event
- **Unpaid Leave:** Under cafeteria plan rules, a commencement of or return from an unpaid leave of absence may be the basis for a mid-year election change:
 - Check cafeteria plan language; remember consistency rule; includes POP and health FSA elections
 - Upon return to work, may resume participation in cafeteria plan
- **Paid leave:** If leave is paid, handle in the usual manner
- **FMLA:** A separate set of IRS rules was issued stating that an employee taking leave under FMLA may revoke an existing election of accident or health plan coverage (or health FSA contributions) during FMLA leave (next slide); these regulations include more details and examples

Cafeteria Plan: FMLA

➤ **Carol goes out on FMLA leave. How do you handle her cafeteria plan elections?**

Alpha has a calendar year plan.

- **Paid Leave:** Handle in usual manner
- **Unpaid Leave:**
 - Employee may revoke coverage; or, employee may continue coverage, but discontinue payment of premium & health FSA contributions under cafeteria plan
 - If employer pays, do not have to allow discontinuance of coverage
 - Right to reinstatement upon return to work
- **Payment Terms for Unpaid Leave:**
 - Offer 1 or more: Pre-pay (can't require), pay-as-you-go, & catch up (more over)
 - Terms must be at least as favorable as for other leaves

Cafeteria Plan: FMLA

Pre-Pay

- Cannot require and cannot be only option
- Employee may pay pre-tax (pre-tax pre-payments cannot span two plan years) or pay post-tax

Pay-As-You-Go

- Same payment schedule as if not on leave or on COBRA, or voluntarily agreed to by employer and employee
- Usually paid post-tax
- If employee fails to pay, employer may cancel or recoup premium

Catch Up

- Agree in advance
- Employee may pay pre-tax or post-tax

More Administrative Considerations . . .



COBRA

➤ What about Carol's COBRA rights?

- Not all leaves will result in a COBRA qualifying event (QE), so you must ask: Does the leave (such as a reduction in hours) result in a loss of coverage? (Non-payment of premium is not a COBRA QE.)
- Review plan terms to determine length of coverage in the event of a leave
- Provide COBRA notice if employee fails to return from FMLA/CFRA leave
- Calculate COBRA maximum coverage period from end of FMLA/CFRA leave
- **Resources:** FMLA and COBRA: 26 C.F.R. § 54.4980B-10

Don't Forget about Open Enrollment

- Employees on leave are entitled to same rights during open enrollment as active employees
- Don't forget to distribute open enrollment materials to employees on leave—it is required by ERISA, etc.—and follow up
 - If your usual distribution method is either through electronic distribution or in-person meetings, may have to choose another option for those on leave (such as 1st class mail)
- **Note:** Document the process and election choices



Action Plan/Best Practices

- Best practices:** Be prepared before leave is requested
- Post required—and updated—notices (translate when required)
- Review benefit plan terms to determine how long coverage extends in the event of leaves (amend plan terms/wrap as appropriate)
- Update employee handbooks, and coordinate language with plan terms
- Provide necessary notices to employees (translate when required)
- Prepare and update sample forms—in advance
- Adopt procedures—in advance—for payment of premium while on leave, consistent with leave laws and cafeteria plan rules
- Communicate payment and re-payment options prior to commencement of leave; agree to payment terms prior to start of leave
- Watch for:** New developments

Resources

- **PDL/CFRA/FMLA: Quick Reference Guides:**
 - FMLA/CFRA: <https://www.dfeh.ca.gov/employment/family-care-medical-leave-guide/>
 - PDL/CFRA/FMLA: <https://www.dfeh.ca.gov/employment/pdl-bonding-guide/>
- **PDL/CFRA: Fact Sheets, Posters, Certification Forms:**
 - <https://www.dfeh.ca.gov/family-medical-pregnancy-leave/>
- **PFL: FAQs, Forms, Publications:**
 - <https://edd.ca.gov/disability/paid-family-leave/>
- **SDI: FAQs:**
 - <https://www.edd.ca.gov/Disability/FAQs.htm#er>
- **Healthy Workplace Healthy Family Act:**
 - <https://www.dir.ca.gov/dlse/ab1522.html>
- **COVID-19: Benefits Chart:**
 - <https://www.labor.ca.gov/coronavirus2019/#chart>

Questions?

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The information provided during this program does not constitute legal advice. In addition, this program only provides a summary of certain complex and always evolving laws and regulations. Attendees should consult their legal counsel for guidance on the application and implementation of the many federal and state laws that impact employee benefit plans and the workplace, including the topics discussed during this program.

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