

Leaves of Absence: An Employer Nightmare!

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January 19, 2023**



**Sagaser, Watkins
& Wieland PC**



Leaves of Absence

- **Administering leaves of absence can be very complicated.**
- **The laws covering leaves of absence are complex on their own but can become a tangled mess if read together, which is required when an employee's leave of absence is governed by more than one of these laws.**

Leaves by Legislation



- 1. The Federal Family Medical Leave Act ("FMLA")**
- 2. The California Family Rights Act ("CFRA")**
- 3. California Pregnancy Disability Leave ("PDL")**
- 4. California Parental Leave**
- 5. The Federal Americans with Disabilities Act ("ADA")**
- 6. The California Fair Employment and Housing Act ("FEHA")**
- 7. California Paid Sick Leave**
- 8. California Paid Family Leave statutes ("PFL")**
- 9. Other California Labor Code Leave Provisions**
- 10. Practical Guidelines**

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Employers Subject to FMLA

- **Employs 50 or more employees for 20 or more workweeks**
 - Current year or previous year
 - Full time &/or part time
- **Public entity (any number)**

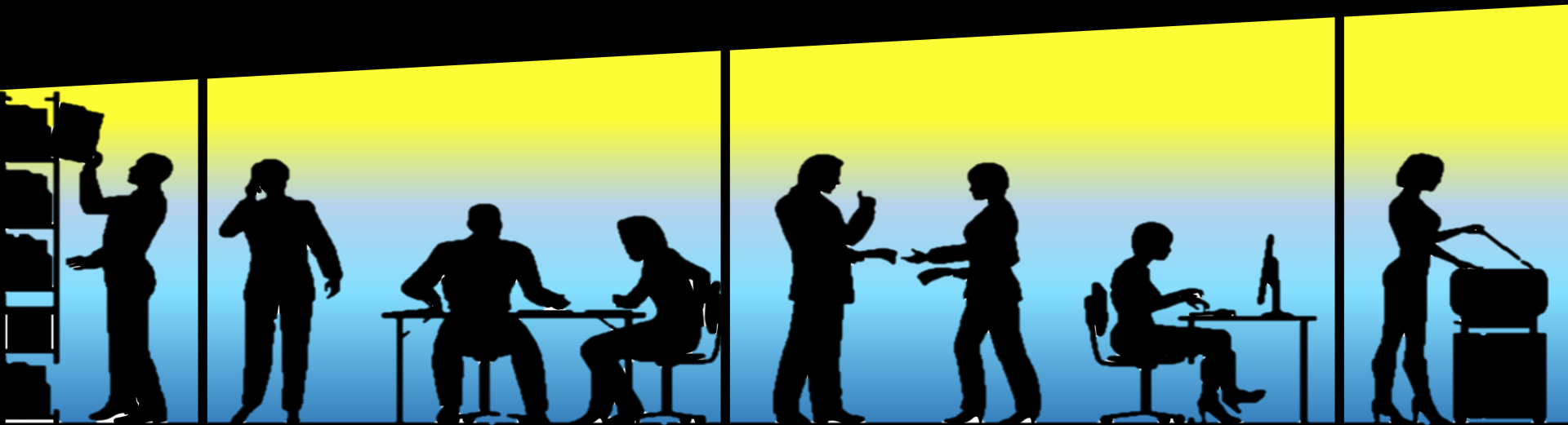


Employees Eligible for FMLA

- **Employed for at least 12 months**
 - **12-month period need not be concurrent**
- **Worked at least 1,250 hours during the 12-month period before taking leave**
- **Work at a facility that employs at least 50 employees within a 75 mile radius**

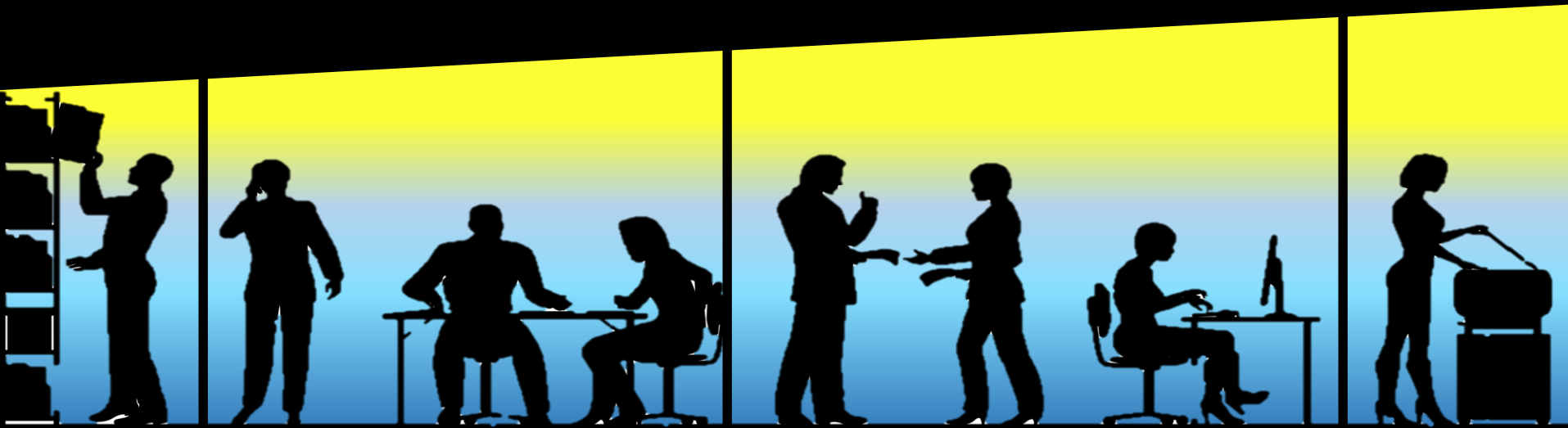


FMLA LEAVE



- Eligible employees are entitled to up to 12 weeks of unpaid leave in a 12-month period
 - Pregnancy disability leave runs concurrent with FMLA but not with CFRA leave. Separate right for pregnancy leave under California law.
- Health insurance is continued during period of leave under same terms as when employed
- Reinstatement to same or equivalent position guaranteed

Qualifying Purposes for FMLA and



- Leave can be taken for the employee's own *serious health condition* or to care for a family member that has a *serious health condition*
 - Family member is spouse, child, parent, or domestic partner
 - Note: Employee pregnancy leave rights under California Pregnancy Disability Leave (separate from CFRA but not FMLA)

Serious Health Condition

- **Serious health condition is something that requires overnight hospitalization or keeps employee (or family member) from work or regular activities for a period of 3 or more calendar days**
 - **Can require medical certification signed by physician**

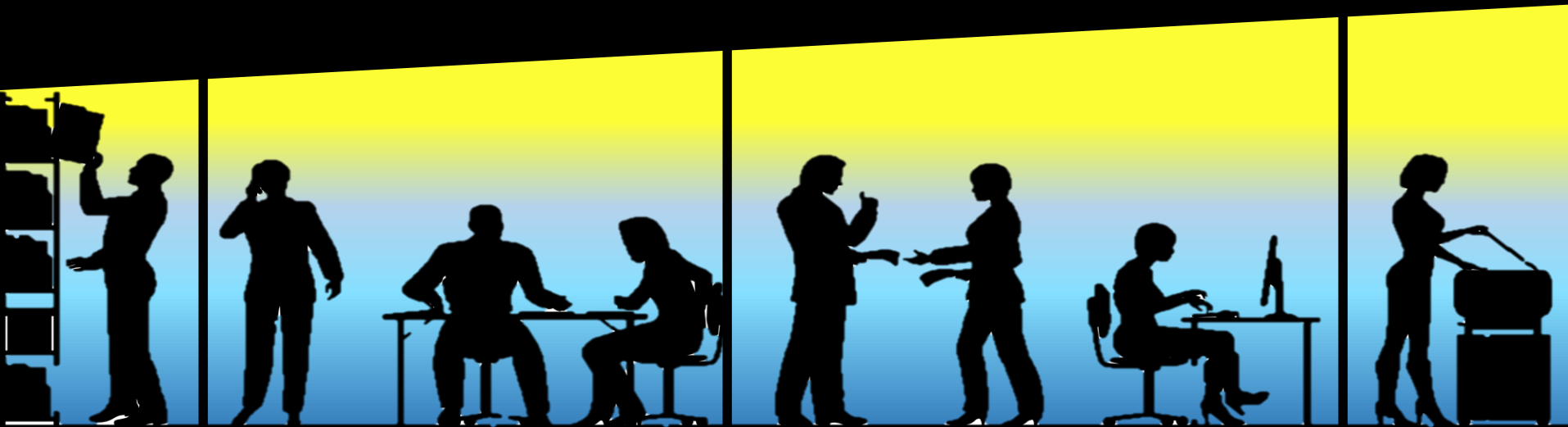


Serious Health Conditions

- Inpatient care
- Incapacity and treatment
- Pregnancy and prenatal care (not under CFRA- because under PDL)
- Chronic conditions
- Permanent or long-term conditions
- Conditions requiring multiple treatments

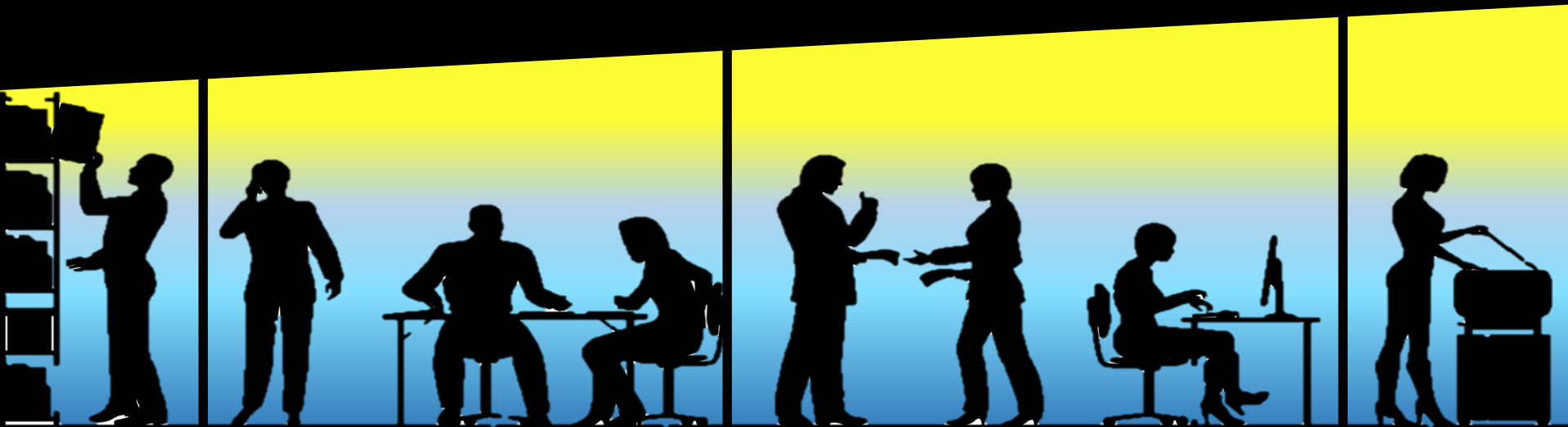


Qualifying Purposes for FMLA



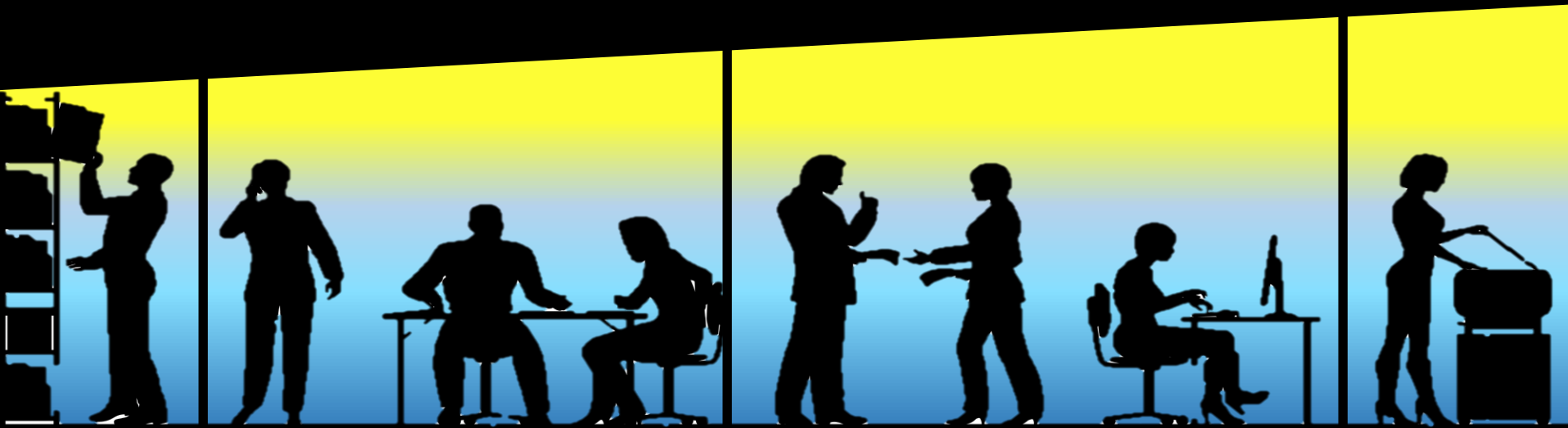
- **Leave can also be taken because of birth or placement of child for adoption or foster care**
 - **Leave must be taken within 12 month of birth or placement**
 - **Leave generally cannot be taken on intermittent basis unless employer agrees. CFRA – Minimum duration of leave is two weeks, but employee can take a shorter increment off on two occasions**
 - **If parents work for same employer, can have policy that the parents share the 12 week leave period**
 - **CFRA now permits BOTH parents to take the 12 week leave.**

Qualifying Purposes for FMLA



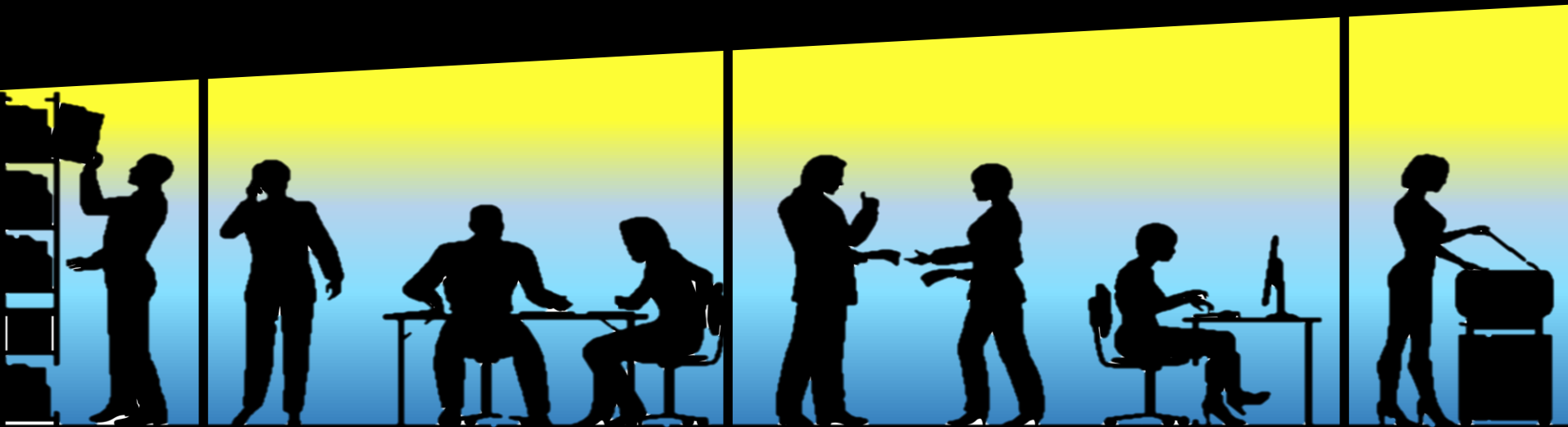
- **Leave may also be taken related to military service or injuries related to military service**
 - **Used to be FMLA only, but there is now a military service leave provision under CFRA.**
 - **Up to 12 weeks of leave for “any qualifying exigency” arising because spouse, child, or parent is on active military duty or has been notified of impending call to active duty**
 - **Up to 26 weeks of leave, less than other FMLA leave already taken, to care for spouse, child, parent, or “next of kin” (nearest blood relative) that is a wounded servicemember during rehabilitation**

California Family Rights Act



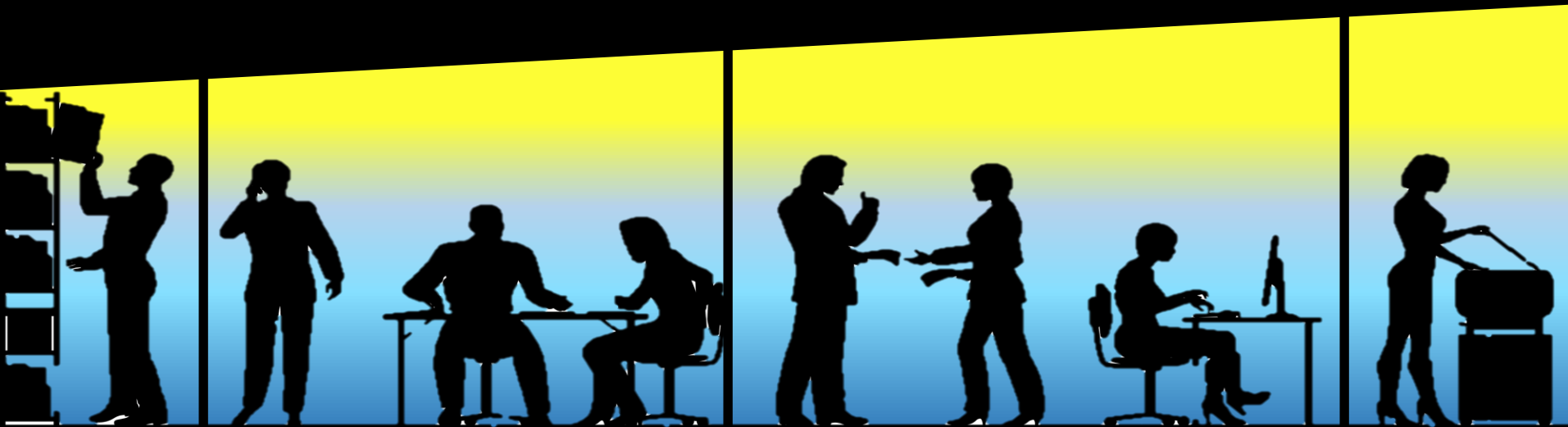
- **SB 1383 (new last year, but still a major change)**
 - **Repeals existing CFRA and New Parent Leave Act**
 - **New CFRA covers any employer with 5 or more employees**
 - **Must grant up to 12 weeks of unpaid protected leave to eligible employee during 12 – month period**
- **AB 1041 (2022 – Effect Jan. 1, 2023)**
 - **Adds “designated person” to CFRA group of qualifying other individuals.**
 - **Defined as any individual related by blood or whose association with the employee is the equivalent of a family relationship.**
 - **Limits employees to one designated person per 12-month period.**

California Family Rights Act



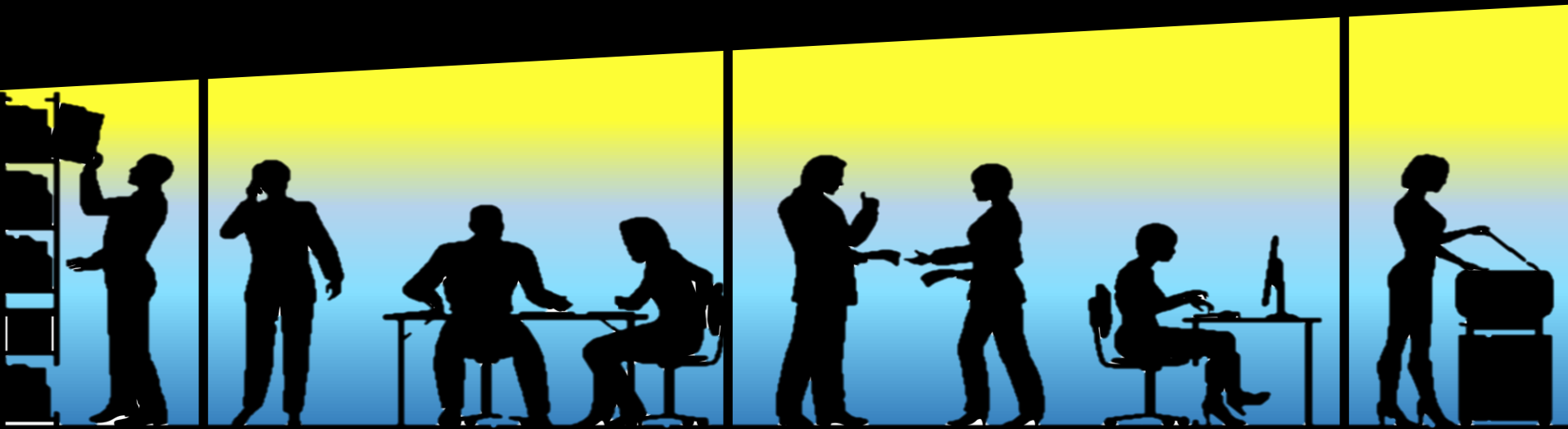
- **Allowable Reasons for Leave**
 - **Employee's own serious medical condition, except for pregnancy disability**
 - **Care of family member who has serious medical condition**
 - **Child spouse, parent, grandparent, grandchild, sibling, domestic partner, child of domestic partner, or designated person.**
 - **Bond with newborn child or child placed for adoption or foster care**
 - **Both parents of child working for same employer are entitled to 12 weeks of leave**
 - **Qualifying exigency related to covered active duty or call to covered active duty of employee's spouse, domestic partner, child or parent in the US Armed Services**

California Family Rights Act



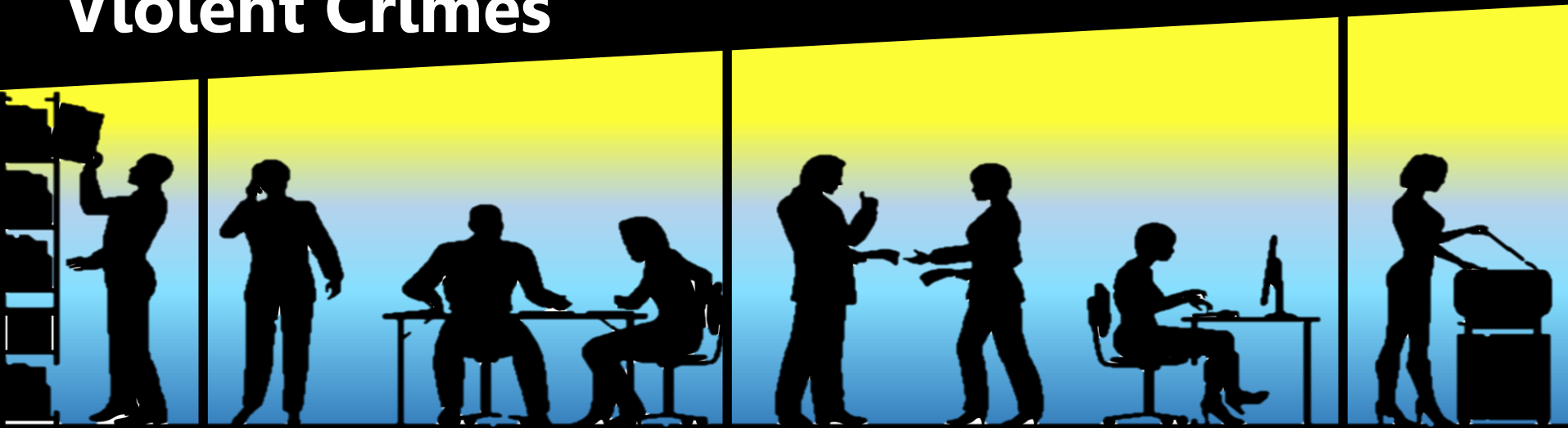
- **Employee eligibility**
 - **Must have worked for employer for 12 months**
 - **Must have worked at least 1250 hours during the 12 months preceding leave request**
 - **No requirement for certain number of employees with 75-mile radius**
 - **Leave runs concurrent with any leave taken under FMLA, except for pregnancy disability**
 - **CAUTION: leave taken under CFRA for purposes not allowed under FMLA does not run concurrent with FMLA and does not reduce FMLA eligibility for employee**

California Family Rights Act



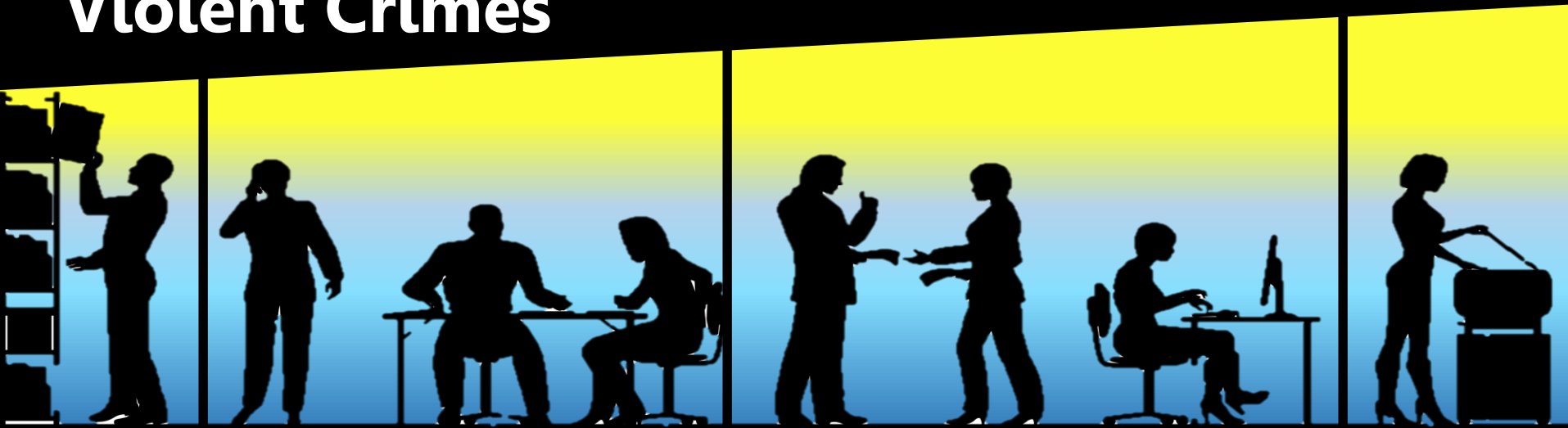
- **AB 1867**
 - **Small employer mediation program (between 5-19 employees)**
 - **Employer or Employee who obtain Right-to-Sue Notice from CRD (formerly the DFEH) may request mediation within 30 days after receipt of notice**
 - **Employee may not pursue litigation in civil court until mediation is complete**
 - **Expires 1/1/2024**

Leaves for Victims of Domestic Violence or Violent Crimes



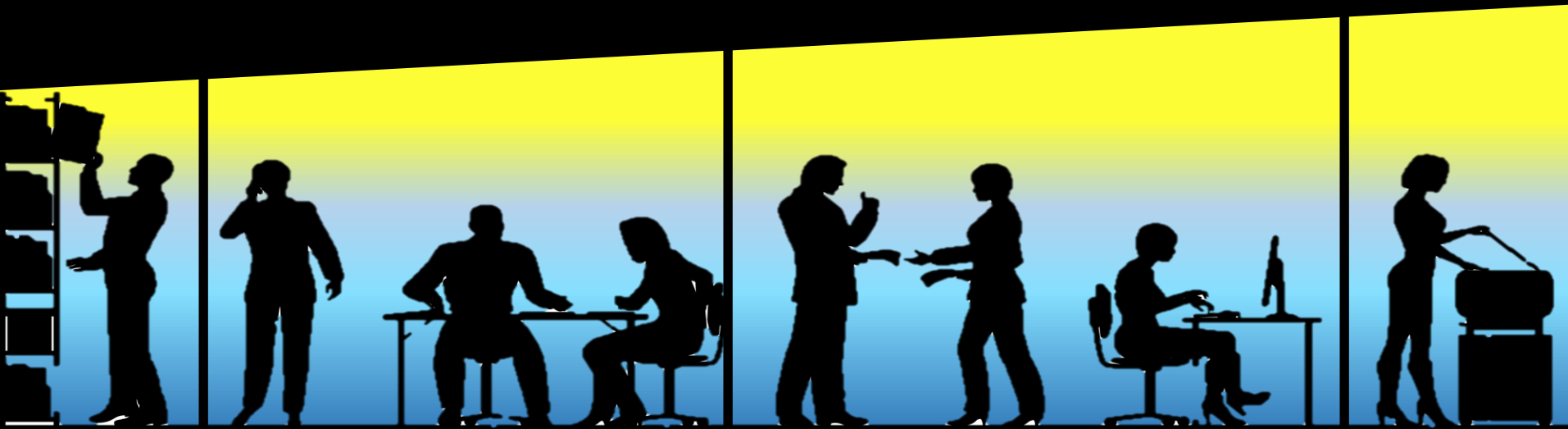
- **AB 2992**
 - **Current law prohibits discrimination or retaliation against victims who take time off to obtain relief**
 - **Expands protections when time taken off to obtain relief, including restraining order or other injunctive relief**
 - **Provides protection if time off is unscheduled if employees provide required documentation**
 - **Victim includes victim of domestic violence, stalking, sexual assault, victim of crime which cause physical or mental injury or threat of same or person whose immediate family member is deceased as direct result of crime**

Leaves for Victims of Domestic Violence or Violent Crimes



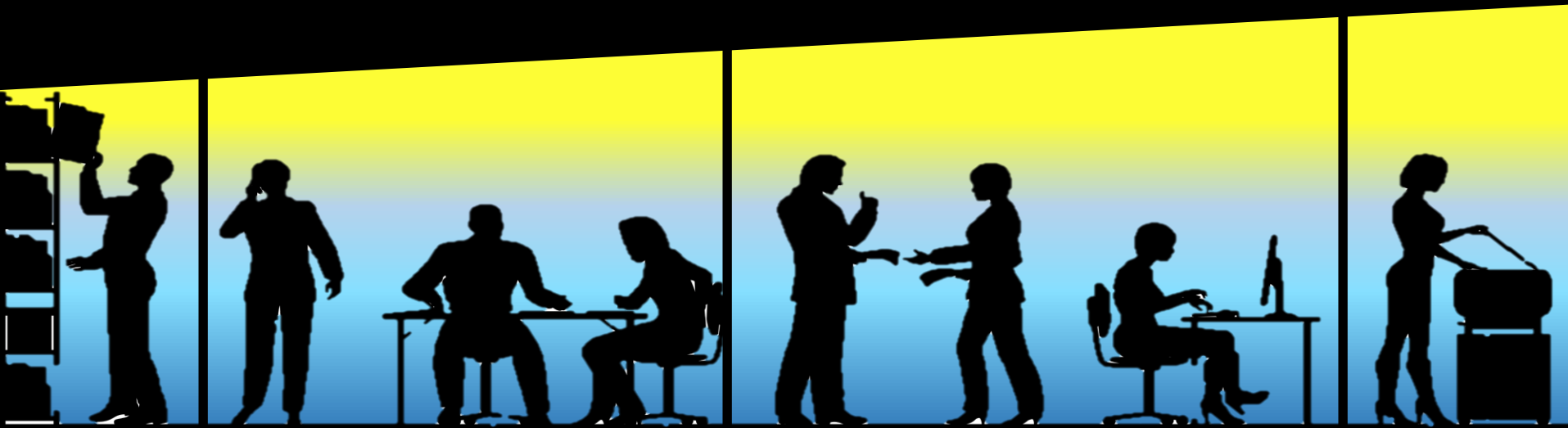
- **Employers of 25 or more**
- **Prohibits discharge, discrimination or retaliation against employees who are victims and take time off to seek medical attention, obtain counseling or participate in safety planning**

Kin Care



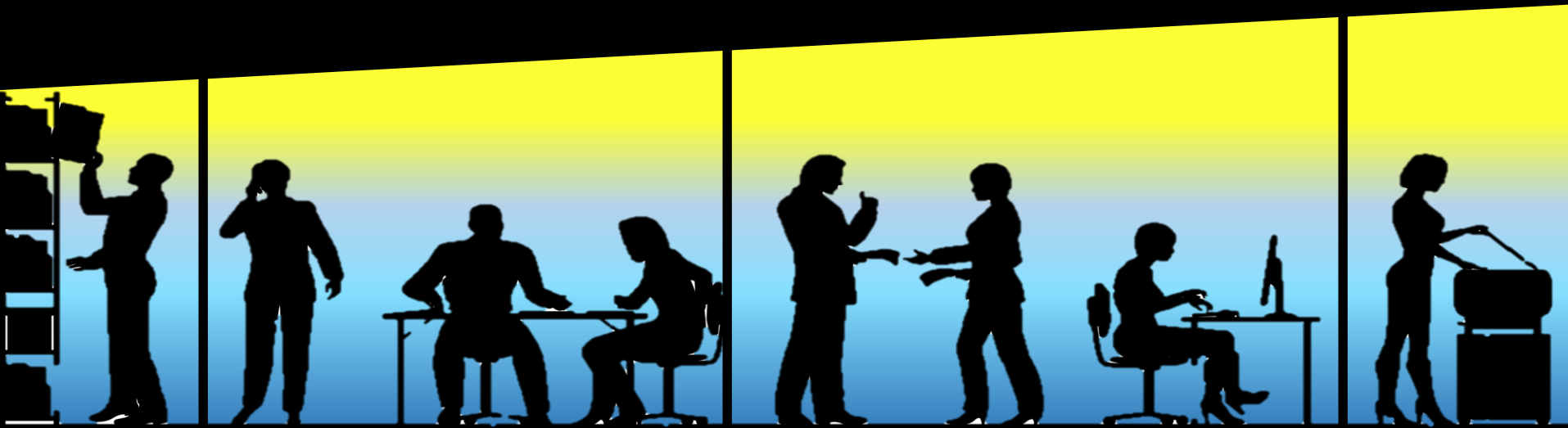
- **AB 2017**
 - **If employee takes time off to care for the illness or injury of family member then designation of use of sick leave is at sole discretion of employee**

Bereavement Leave



- **New for 2023 – AB 1949**
 - Starting January 1, 2023, CA law requires employers to provide bereavement leave on the death of a family member.
 - This is generally unpaid leave of up to five days and need not be taken consecutively.
 - Employees may be required to provide documentation of the death including but not limited to a death certificate, a published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency.
 - Makes it unlawful to refuse to hire, discharge, demote, fine, suspend, expel, or discriminated again and individual's exercise of the right to bereavement leave.

Paid Family Leave



- **Program provided by EDD**
- **Up to 8 weeks of paid time**
- **May be used for baby bonding or to care for family member**
 - **Family member expanded to include grandparent, grandchild, sibling (consistent with CFRA) – also parent-in-law**
- **Also may take time off due to qualifying exigency related to active duty or call to active duty of spouse, domestic partner, child or parent in US Armed Forces**

Employee Notice Requirements to Employer

- 30 days for foreseeable leave
 - If 30 day notice is not possible - as soon as practicable
- * Have a Leave Request Notice Policy or Call-in Procedure. Make sure that someone is available to receive requests and information. Have to respond within 5 days of the request.**

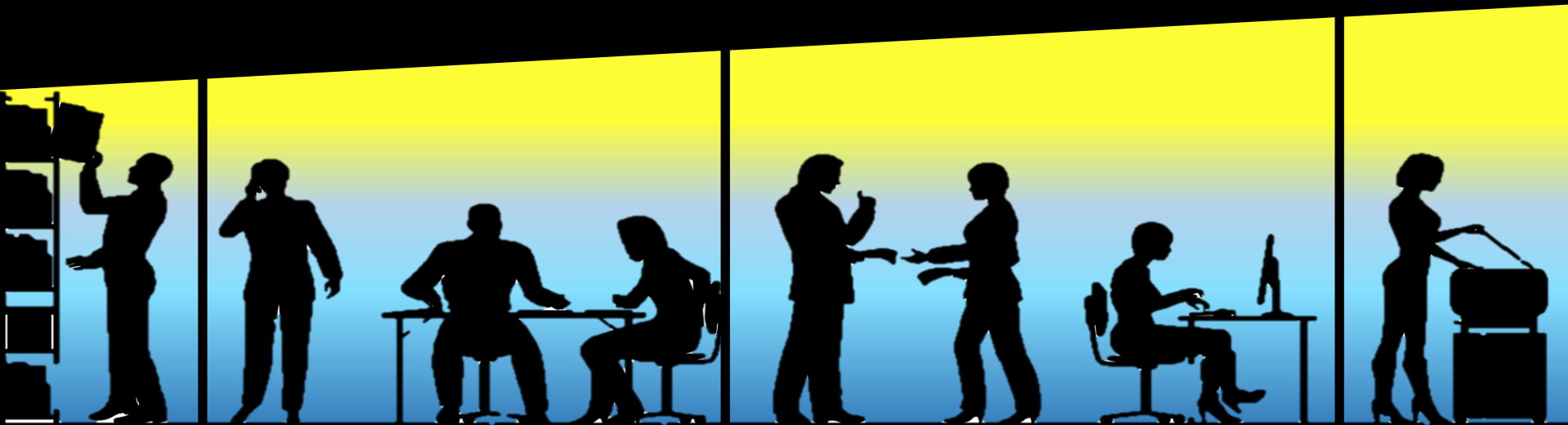


Employer Notice Requirements to Employee

- 1. General Notice**
 - **Posting (FMLA & PDL/CFRA notice)**
 - **Handbook**
- 2. Notice of Eligibility and Rights & Responsibilities Notice**
 - **Within 5 business days of time when employer receives a request for leave or becomes aware of the need for leave.**
- 3. Designation Notice**



Intermittent Leave



- **Under FMLA/CFRA & Pregnancy Leave, employees may take time off in increments determined by physician**
 - **Smallest increment is based on how time is kept by employer**
- **Or employee may work reduced work schedule**
- **Intermittent leave may also be reasonable accommodation under disability laws**

Intermittent Leave



- **Employer may temporarily transfer employee to a different position during intermittent leave if regular position cannot accommodate unplanned or irregular absences**
 - **Must transfer employee back to regular position at end of intermittent leave**
- **Employee must give advance notice for scheduled time off and follow regular call-in procedures for unscheduled time off**

STATE OF IOWA

Certification of Need for Leave

| | | | | |
|--|--|---|--|-----------------------------------|
| DEPARTMENT OF COMMERCE BUREAU OF THE CENSUS | | IOWA STATE DEPARTMENT OF HEALTH DIVISION OF VITAL STATISTICS CERTIFICATE OF BIRTH | | STATE OFFICE NUMBER [REDACTED] |
| 1. PLACE OF BIRTH (a) County <u>Fayette</u> (b) Township <u>Jefferson</u> (c) City or town <u>Bellevue</u> (If outside city or town limits, write RURAL and give town) (d) Name of hospital or institution <u>Morris Hospital</u> (If not in hospital or institution give street number or location) (e) Mother's stay before delivery: In hospital or institution <u>9 days</u> this community <u>Fayette, Iowa</u> (Specify whether years, months, or days) | | 2. USUAL RESIDENCE OF MOTHER (a) State: <u>Iowa</u> (b) County: <u>Fayette</u> (c) City or town: <u>Fayette</u> (If outside city or town limits, write RURAL and give town) (d) Street address: [REDACTED] IF RURAL give LOCATION | | |
| 3. Full name of child <u>Samuel Orrin Sewell</u> 4. Sex <u>Male</u> 5a. Twin or triplet <u>No</u> 5b. If so: born 1st <u>1</u> 2. Number of men <u>1</u> 3. Is mother married <u>Yes</u> 6a. Twin or triplet <u>No</u> 6b. If so: born 1st <u>1</u> 2. Number of men <u>1</u> 3. Is mother married <u>Yes</u> 7. Date of birth <u>1/27/06</u> 8. Hour of birth <u>1:27 P.M.</u> | | 9. Full name <u>Roger Curtis Sewell</u> 10. Color or Race <u>White</u> 11. Age at time of this birth <u>21</u> years 12. Birthplace <u>Traver, Iowa</u> (City, town, or county) (State or foreign country) 13. Usual occupation <u>Trainer, Police Officer</u> 14. Industry or business <u>Farm, Service Station</u> Social Security No. <u>1</u> 15. Full name <u>Marjorie Marie Severa</u> 16. Color or Race <u>White</u> 17. Age at time of this birth <u>18</u> years 18. Birthplace <u>Esque, Iowa</u> (City, town, or county) (State or foreign country) 19. Usual occupation <u>Homemaker</u> 20. Industry or business <u>Own Home</u> Social Security No. <u>1</u> | | |
| 21. Total OTHER children born to this mother (not including this one) <u>0</u> (a) How many OTHER children of this mother now living? <u>0</u> (b) How many OTHER children of this mother were born alive but are now dead? <u>0</u> (c) How many children were born dead? <u>0</u> | | 22. Mother's name and address for mailing register <u>Mrs. Roger Sewell, Fayette, Iowa</u> | | |
| 23. I hereby certify to the birth of this child, who was born alive on the date stated above. The information given above was furnished by <u>Mrs. Roger Sewell</u> related to this child as <u>Mother</u> | | | | |
| 24. Date received by local registrar <u>Feb 1</u> 25. Registrar's own signature <u>C. C. Hall</u> 26. File No. <u>10</u> Given name added <u>10</u> By <u>10</u> | | Actual Signature <u>C. C. Hall</u> (M.D., D.P.H. or other official title) Date Signed <u>1-6-06</u> Address <u>1-6-06</u> | | |



- Certification from Health Care Provider
 - For employee or family member leave
 - Use California certification form
 - Allow 15 days, additional time if incomplete or need additional information
- Baby bonding
 - May require birth certificate if required for all
- Military Leaves
 - Service orders or related documentation

This is to certify that this is a true and correct reproduction of the original record as recorded in this office, issued under authority of Chapter 144, Code of Iowa.
This copy not valid unless prepared on engraved border displaying state seal and signature of the Registrar.

JAN 25 2006

Thomas J. Vilsack

DATE ISSUED

GOVERNOR, STATE OF IOWA

Sally J. Pederson, Lt. Governor

S0778981
FORM #588-0328S (01/2005)

WARNING: IT IS ILLEGAL TO DUPLICATE THIS COPY

DEPUTY STATE REGISTRAR



Required Use of Paid Time Off



- Employer may not require use of available paid time off if employee is receiving compensation for disability during period of leave
 - SDI or short or long-term disability plan
- Employer may not require use of available paid time off if employee is receiving Paid Family Leave compensation during Baby Bonding or Family Care leave

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California Pregnancy Disability Leave

- Covered employers - 5 or more employees
- No eligibility requirements (i.e. length of service, hours)
- Reasons for leave: pregnancy, childbirth, pregnancy related medical conditions (i.e. morning sickness)
- Pregnant employee is entitled to up to 4 months of unpaid leave (as needed – i.e. for each pregnancy)
 - 4 months means time off for the # of days or hours the employee would normally work within 4 months (1/3 of a year or 17 1/3 weeks)
 - Can be intermittent



California Pregnancy Disability Leave

- Administered through EDD
- Physician certifies amount of leave required
- Reinstatement to same position is guaranteed (few exceptions)
- Must consider accommodation for pregnancy-related limitations
- Disability can occur both before and after birth



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California Parental Leave

- **This has been rolled into CFRA as of 2021. There is not really a distinct form of parental leave, apart from Paid Family Leave.**

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Americans With Disabilities Act (ADA) Fair Employment & Housing Act (FEHA)



- Leave of absence may be a reasonable accommodation for physical or mental disability
 - May be required to continue leave at the end of 12-week FMLA/CFRA leave or at the end of a 4-month pregnancy disability leave
 - No statutory limit on duration, not required to accommodate indefinite duration of leave
- ADA covers employers who employ 15 or more employees; FEHA covers employers with 5 or more employees
- No minimum duration of employment required

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Paid Sick Leave

- Minimum of 24 hours or 3 days of paid time off annually
- May use for own illness or family member
 - Spouse, domestic partner, parent, child, grandparent, grandchild, sibling, and designated person.
- Cannot discipline or retaliate for use
- Asking for certification is somewhat gray.



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California Paid Family Leave under EDD



- Provides compensation during period of time off for employee to care for new child or family member or registered domestic partner with serious medical condition
 - Does not provide separate leave rights or job protection; only provides compensation for time off
- Funded by employee contributions
- Applicable to all employers
 - Except for public entity employees who do not contribute to SDI

California Paid Family Leave under EDD



- **No length of service requirement for employee to use benefit**
- **Would run concurrent with FMLA/CFRA, if employee is eligible**
- **Up to eight (8) weeks of benefit payments**

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What Other Leave Statutes Apply to Your Workplace?

- 1. Jury duty or Witness duty**
- 2. Domestic Violence, Sexual Assault and Stalking Victims' Leave**
- 3. Crime Victims' Leave**
- 4. School Appearance/Suspension Leave**
- 5. School and Child Care Activities Leave**
- 6. Military Service Leave (USERRA)**
- 7. Military Spouse Leave**
- 8. Emergency Responder Leave**
- 9. Civil Air Patrol Leave**
- 10. Organ and Bone Marrow Donor Leave**
- 11. Voting Leave**
- 12. Bereavement Leave**



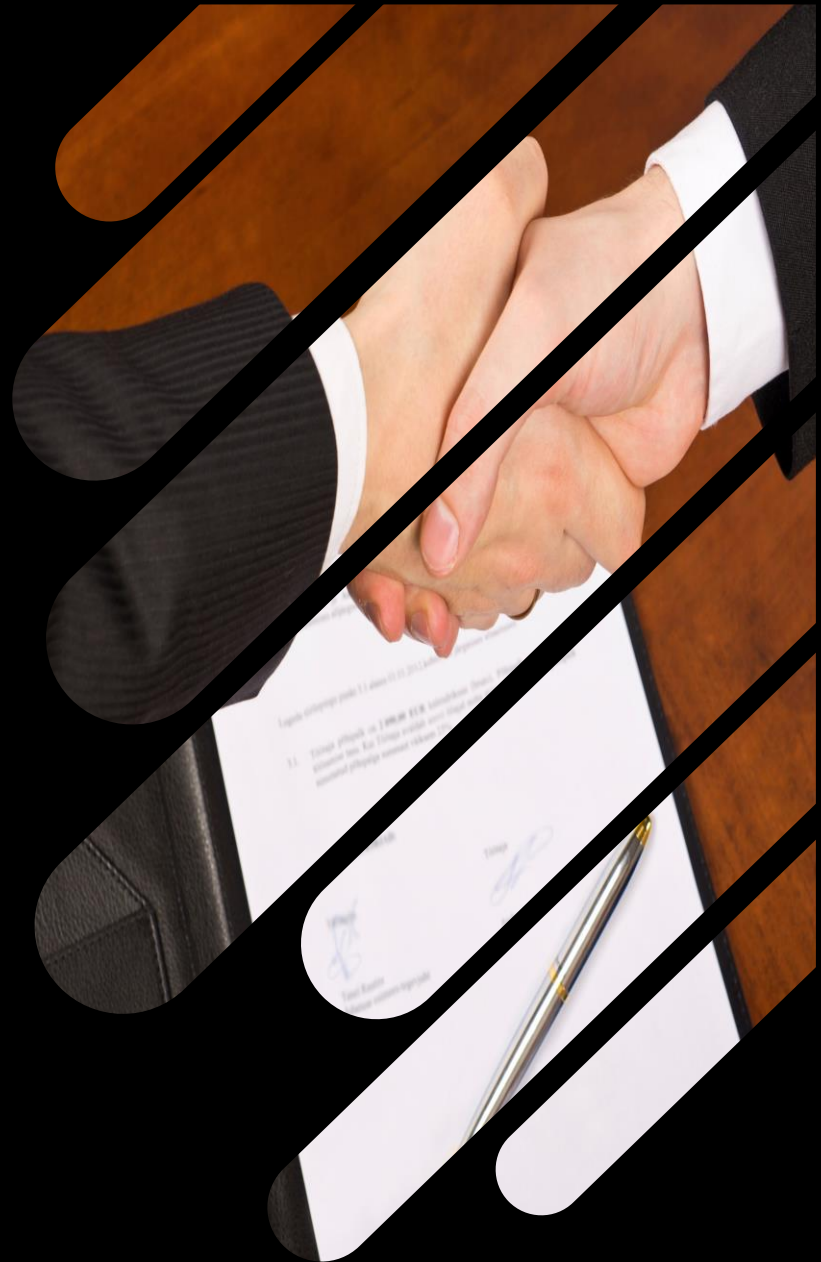
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Practical Guidelines

- 1. Maintain separate confidential medical examination files.**
- 2. Request FMLA/CFRA certification within 2 days of unforeseen leave (or prior to foreseeable leave).**
- 3. Any policy re: fitness for duty must be uniformly applied, job-related, and consistent with business necessity to comply with ADA/FEHA.**
- 4. Remember FMLA/CFRA leave is distinct from ADA/FEHA reasonable accommodation leave. Just because an employee has exhausted CFRA/FMLA does not mean they are ineligible for leave or accommodation under ADA/FEHA.**



Practical Guidelines

5. Create leave policies that address FMLA/CFRA, ADA/FEHA, PDL, Workers' Compensation, PFL, and Parental Leave to include:

- **Notice Requirements**
- **Rights and responsibilities of employees**
- **Sample documentation**
- **Benefits and wages**
- **Terminable events**
- **Any applicable collective bargaining agreement provisions**

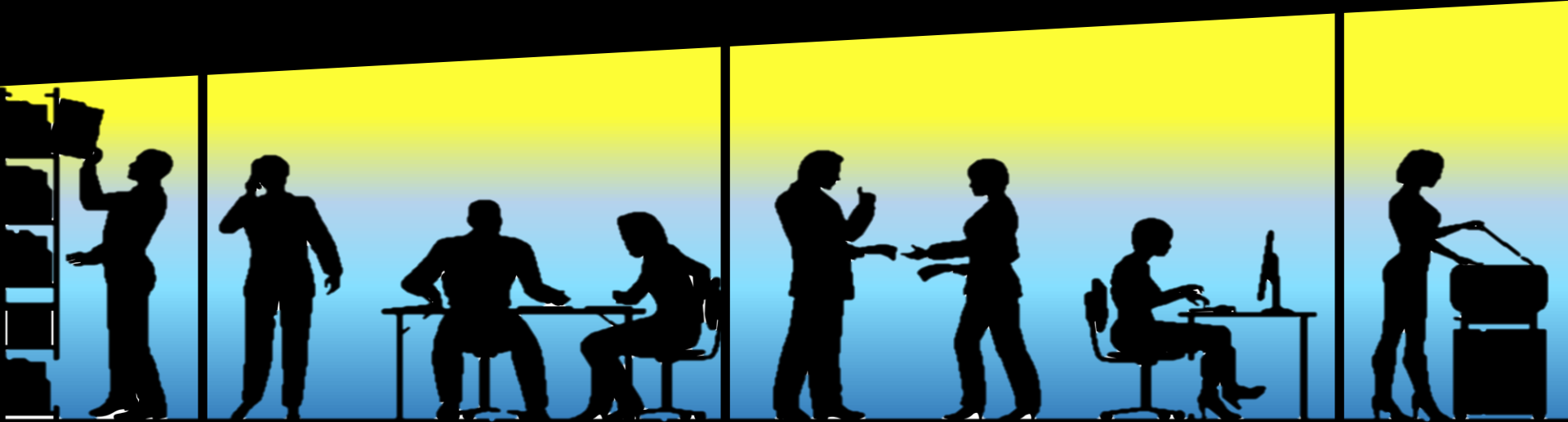


Practical Guidelines

6. When you learn an employee is pregnant, provide them with notices concerning Pregnancy Disability Leave and their rights as a pregnant employee.
7. If an employee is experiencing any CFRA/FMLA qualifying condition or occurrence, provide notices of rights under CFRA/FMLA.
8. Err on the side of caution with respect to requests for accommodation. Failure to engage in the “interactive process” with an employee is itself a basis for a lawsuit.
9. Consider the timing of termination – if someone is proposing terminating an employee who just had a major medical incident or is returning from leave, pump the brakes!



Practical Guidelines



10. Require use of paid time off (vacation/sick leave) as part of statutory leave whenever possible

11. Train managers and supervisors to recognize qualifying absences

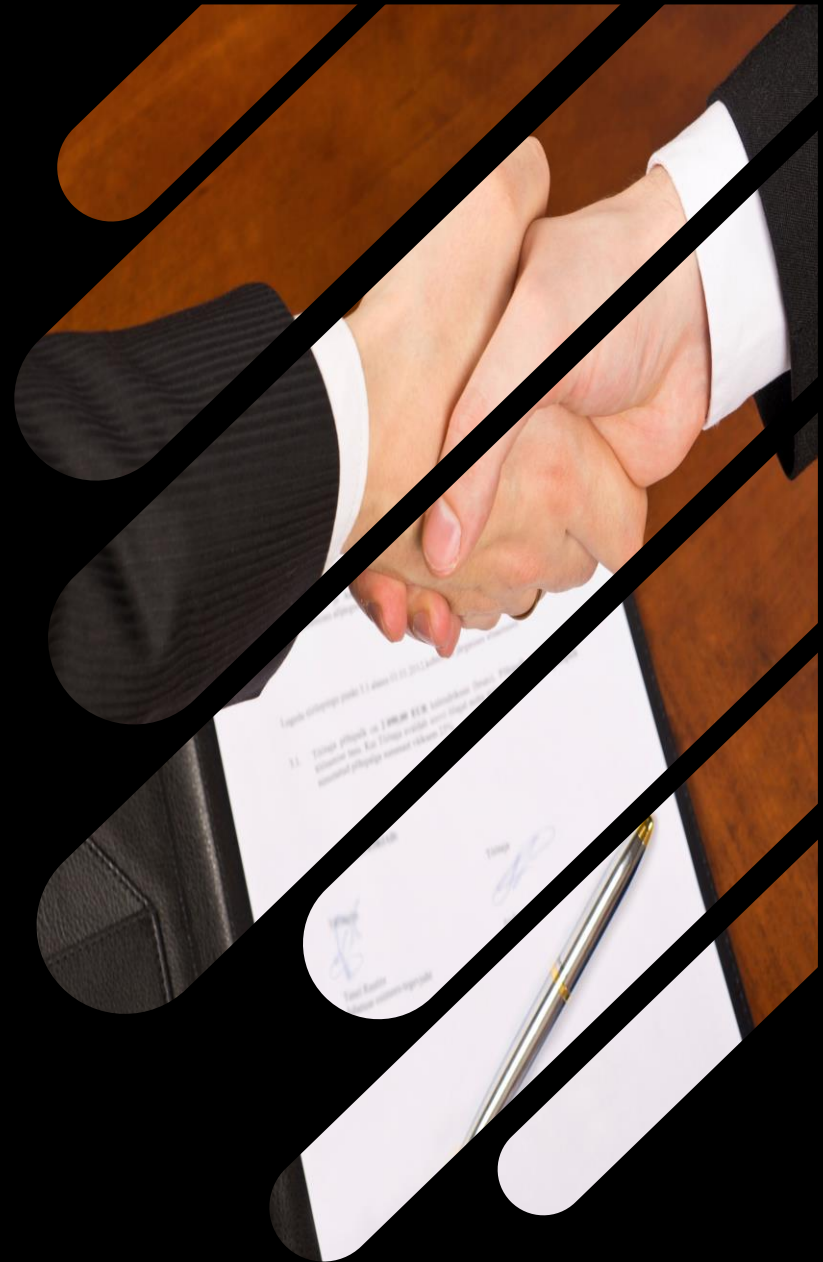
12. Administer leave policies consistently and maintain all appropriate record keeping to demonstrate compliance.

Practical Guidelines

13. Where appropriate, have the employee provide necessary medical certification under FMLA/CFRA. Sometimes, employees will simply fail to do this.

14. Remember, accommodations requests cannot pose an undue burden on the employer, but this is judged in light of all the circumstances and should be relied on sparingly.

15. If you use a third-party administrator to handle requests for leave, be sure to be following-up on the employee's communications with this third-party, especially after a denial of leave or at the end of leave.

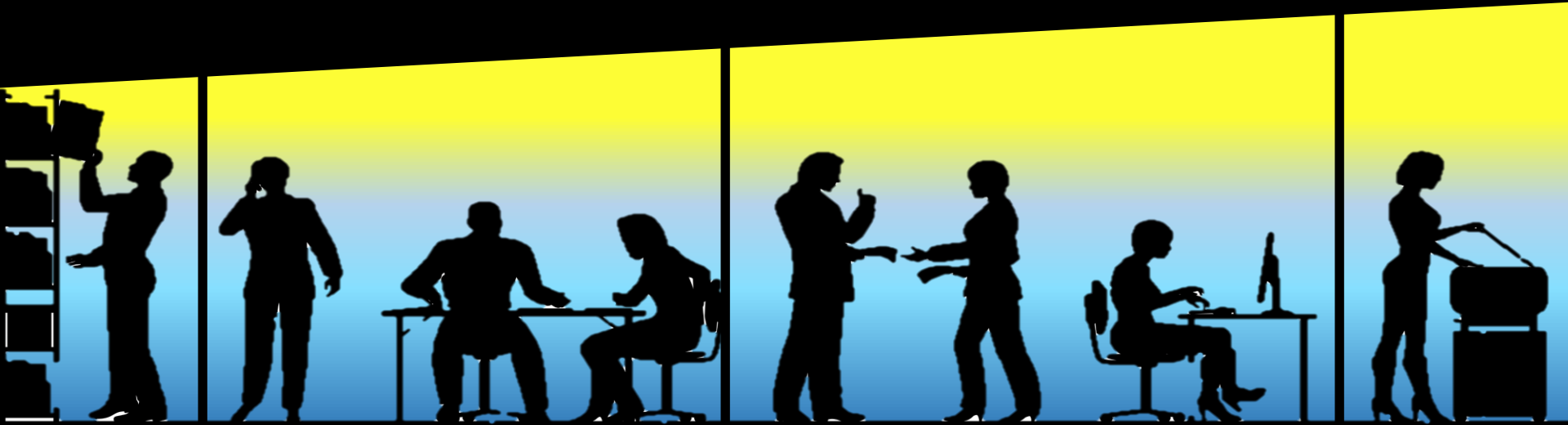


Overview



- **Status of COVID-19 Supplemental Paid Sick Leave?**
 - **Employer Requirements**
 - **Length of Paid Leave**
 - **Compensation**
 - **Retroactivity Application**
 - **Grants for small employers 26-49 employees.**
 - **What to do going forward?**
- **Questions and Answers**

COVID-19 SPSL, Some Cities Still in Effect



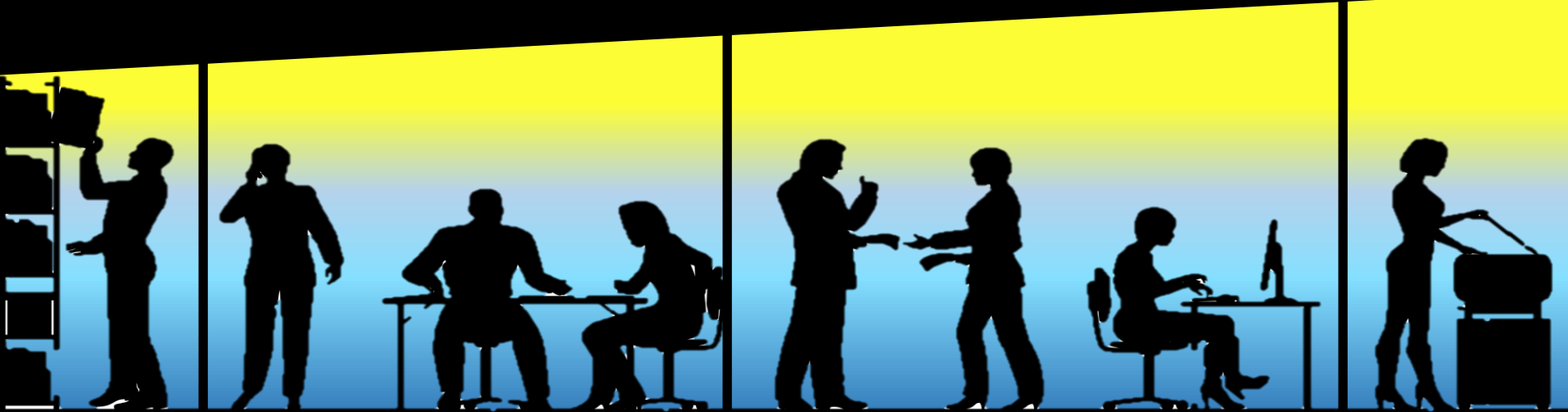
- **Effective until December 31, 2022 and retroactive to January 1, 2022. However, there are still local COVID-19 SPSL ordinances in effect in the cities of Oakland, Long Beach, Los Angeles and the County of Los Angeles.**
 - **All local ordinances still in effect will expire 2 weeks after the “COVID-19 local emergency” expires except for Long Beach .**
- **Provides up to 80 hours (for full-time employees) of COVID-19 Supplemental Paid Sick Leave for covered employees (SPSL)**
 - **If an employee is ‘regarded’ as fulltime, the employee receives the full eligibility.**
- **Applies to employers of more than 25 employees (26 or more)**
- **Prohibits employer from requiring a covered employee to use other paid or unpaid leave, paid time off, or vacation time before employee uses COVID-19 SPSL**

Who qualifies to take COVID-19 SPSL?



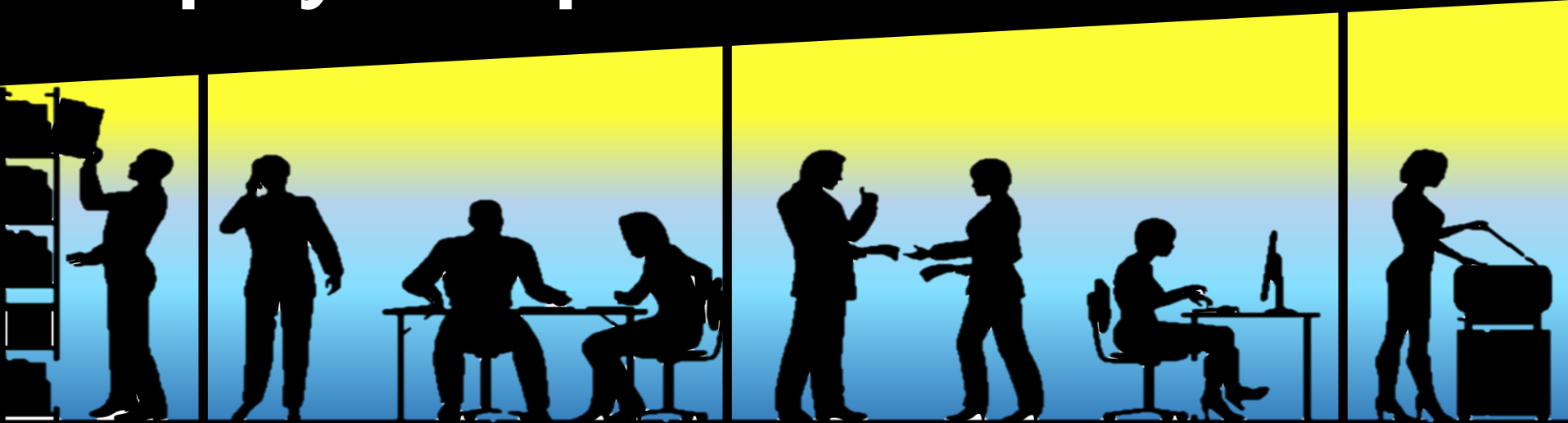
- **Employee is caring for themselves**
- **Employee is caring for a family member**
- **Vaccine related reasons (which continue).**

Who qualifies to take COVID-19 SPSL?



- All employees who are unable to work/telework for a covered employer due to reasons related to COVID-19:
 - a. Employee subject to a quarantine or isolation period related to COVID-19.
 - b. Employee is advised by health care practitioner to quarantine.
 - c. Employee is attending an appointment to receive a vaccine.
 - d. Employee is experiencing symptoms related to a COVID-19 vaccine that prevent the employee from working/teleworking.
 - e. Employee is seeking diagnosis/treatment
 - f. Employee is caring for a family member who is subject to a quarantine or isolation period related to COVID-19 or who has been advised to self-quarantine.
 - g. Employee is caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID-19

Employer Requirements



- **Covered Employer: any business with more than 25 employees.**
- **Covered employer must make COVID-19 SPSL available for immediate use by the covered employee, upon the oral or written request of the covered employee to employer**
- **Covered employer is not required to provide a covered employee more than the total number of hours of COVID-19 SPSL to which the covered employee is entitled under SB 95.**
- **Covered employer may not force covered employees to use any other form of paid or unpaid leave or time off, including company-provided sick leave, vacation, or paid time off, before using COVID-19 SPSL.**
- **Covered employer must post notice of the COVID-19 SPSL requirements in a conspicuous place in the workplace.**

Amount of Paid Leave



COVID-19 SPSL is in addition to any accrued paid sick leave available to employee.

Covered employees entitled up to 80 hours, if either is satisfied:

- **Employer Considers covered employee to work full time; or**
- **Covered employee worked or was scheduled to work, on average, at least 40 hours per week for employer in the two weeks before the date he/she took COVID-19 SPSL.**

Covered employee who regularly works less than full time:

- **Paid leave for the total number of hours covered employee is normally scheduled to work for the employer over two weeks. If the employee has worked a short period of time, the calculation is different.**

Amount of Paid Leave

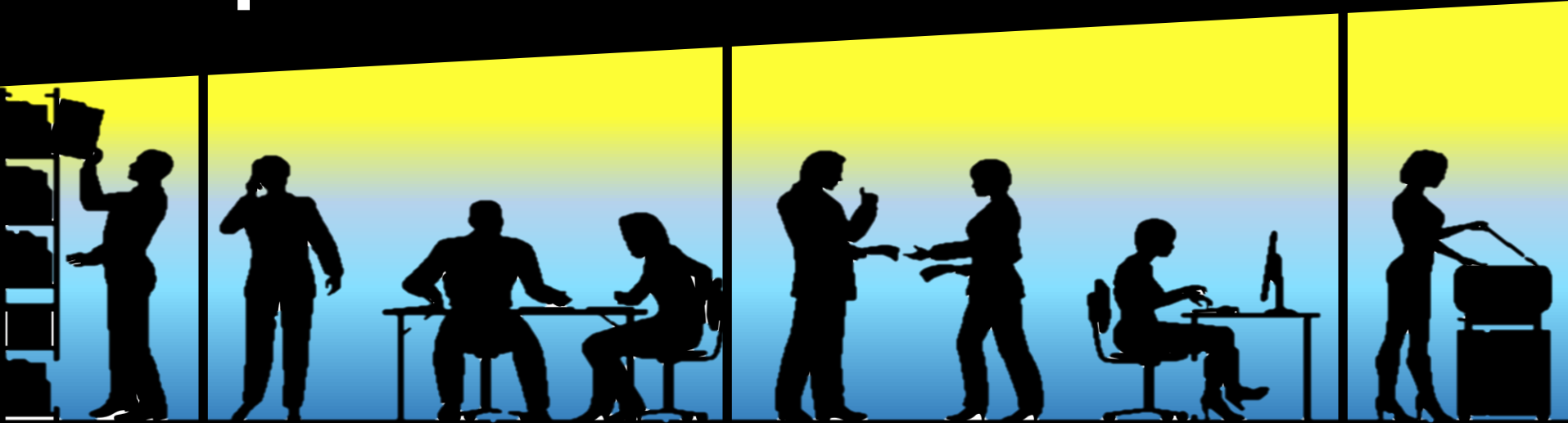


Covered employee who works a variable number of hours:

- Calculation is 14 times the average number of hours the employee worked each day in the preceding six months
- Where employee has worked for the employer over a period of fewer than 6 months but more than 14 days, the calculation shall be 14 times the average number of hours worked over the entire period the employee worked for the employer.

| | |
|---|---|
| Total Number of Hours Worked During 6-Month Period | 520 hours |
| Total Number of Days in 6-Month Period | 182 days |
| Average Number of Hours Worked Each Day in 6-Month Period | $520 \text{ hours} \div 182 \text{ days} = 2.857 \text{ hours}$ |
| 2021 COVID-19 Supplemental Paid Sick Leave Entitlement | $2.857 \times 14 = 40 \text{ hours}$ |

Compensation



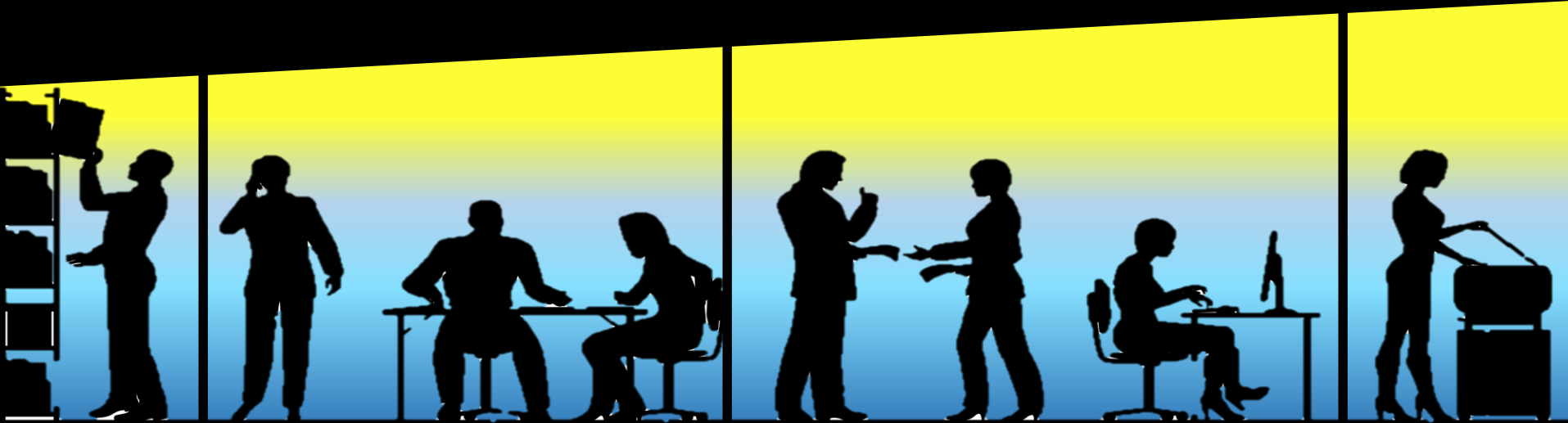
- COVID-19 SPSL caps wages at \$511 per day and \$5,110 in the aggregate for each covered employee
- Employers must calculate COVID-19 SPSL for exempt employees in the same way as the calculate wages for other forms of paid leave time for exempt employees.
 - Maintain exempt employee salary subject to cap.
- Employers must pay each hour of COVID-19 SPSL for nonexempt employees at the higher of:
 - Employee's regular rate of pay for the workweek in which COVID-19 SPSL was taken, regardless of whether the employee worked overtime in that workweek.
 - Dividing employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment
 - The California minimum wage; or
 - The local minimum wage.

Retroactive Application of SPSL



- **Retroactive leave to January 1, 2022 is possible under the law.**
- **A covered employee can use COVID-19 SPSL for any absence since January 1, 2022, that falls within a covered reasons.**
 - **Ex. – if an employee took unpaid leave in January 2022 to care for a quarantined family member, employee can ask for, and employer must pay, COVID-19 SPSL for those unpaid absences**
- **The statute authorizes employer to credit towards COVID-19 SPSL the hours of other paid leave including FFCRA provided to employees on or after January 1, 2022, for absences taken for covered reasons – however, be cautious to restore any leave which the employee otherwise used if you do this.**

Small Business Grants for SPSL



As of the time of this writing, the only offset for the cost of SPSL with which the presenter is aware is in the form of small business loans for employers who employ 26-49 employees. These can be applied for through the California Small Business and Nonprofit COVID-19 Supplemental Paid Sick Leave Relief Grant Program administered by the Governor's Office of Business and Economic Development.

Cal/OSHA Exclusion Pay Expired



- **Cal/OSHA's Non- Emergency COVID-19 Prevention Program is now in place as of January 1, 2023.**
 - **Exclusion pay is not part of the Non-Emergency regulations.**
- **The present standard will remain in effect for two years (January 2025), except for the recordkeeping subsections which will remain in effect for three years (January 2026).**

Question & Answer



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Thank You

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