NEGOTIATING THE BERMUDA TRIANGLE:

The Integration of State and Federal Leave Laws

Presented by:

Patrick S. Moody
Barsamian & Moody
A Professional Corporation
Attorneys at Law
1141 W. Shaw Ave., Ste. 104
Fresno, CA 93711-3704
Tel: (559) 248-2360
Fax: (559) 248-2370
Office E-Mail: laborlaw@theemployerslawfirm.com
Personal E-mail: pmoody@theemployerslawfirm.com
www.theemployerslawfirm.com

We wish to express confidence in the information contained herein. Used with discretion, by qualified individuals, it should serve as a valuable management tool in assisting employers to understand the issues involved and to adopt measures to prevent situations which commonly give rise to legal liability. However, this text should not be considered a substitute for experienced labor counsel, as it is designed to provide information in a highly summarized manner.

The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.

Introduction

The key to understanding the confusing overlap of the various leave laws is determining the obligations you have under each of them, separately. For example, the Family and Medical Leave Act and the California Family Rights Act each require covered employers to allow up to 12 weeks of leave during a 12-month period for various reasons, while the ADA requires that an employer reasonably accommodate an employee's disability. Those are obviously two very different things, but the "reasonable accommodation" of a disability may actually include the granting of leave. California's Pregnancy Disability Leave allows all employees disabled by pregnancy to take up to four months of leave, and while workers' compensation is primarily a system for compensating employees for workplace injuries and illnesses, it also impacts an employee's leave. California's Paid Family Leave allows employees to receive State Disability Insurance payments while taking leave to assist certain family members. And, effective January 1, 2024, California employers were required to grant 40 hours or 5 days (whichever is more) of paid sick leave to all employees.

Perhaps the most difficult aspect of this analysis is that these statutory schemes tend to utilize the same words and phrases, while defining them differently. Also, some of the employer's obligations under the different statutes can actually lead to a potential violation of conflicting portions of one of the other statutes.

The most likely scenario, however, is trying to comply with laws that require simultaneous application. Overlapping issues are often confusing, not only because of the overlap, but also because of the complexity of each of the laws that must be applied. Breaking down the overlapping issues into employer obligations under each statute will get you headed in the right direction. If you understand your obligations under each of the laws, you will be able to set a proper course of action to follow.

This presentation will cover:

- Family and Medical Leave Act
- California Family Rights Act
- Americans with Disabilities Act
- California's Fair Employment & Housing Act (disability provisions)
- California's Pregnancy Disability Leave
- California's Paid Family Leave;
- California Paid Sick Leave, and
- California's Workers' Compensation system.

A. An Overview of the Family and Medical Leave Act of 1993

The following is an overview of the basic requirements, entitlements, and definitions necessary to understand the FMLA. ***In general, it is important to keep in mind that the purpose of the FMLA is to provide guaranteed leave, continued health insurance coverage, and reinstatement to eligible employees working for companies that are covered by the FMLA***.

1. Basic Obligations

The FMLA requires employers with fifty or more employees within a seventy-five (75) mile radius to provide eligible employees up to twelve (12) weeks of unpaid leave in a twelve (12) month period. This leave can be taken in increments and need not be used at one time. Leave must be granted for certain situations including: birth, adoption, or foster care placements; care for a spouse, parent, or child with a serious health condition; and a personal serious health condition of the individual employee (including pregnancy related leave – the overlap of which is discussed below).

During the leave of absence, the employer must maintain the employee's group health insurance coverage under any existing plan. The employer's obligation in this regard is no greater than if the employee had not taken a leave. Therefore, if employee contributions to health plans are normally required, the employee is responsible for the same costs while on leave.

Finally, any eligible employee who takes FMLA leave must be returned to the position he or she held before the leave, absent very limited circumstances. If this is not possible, the employee must be given an equivalent position if one exists.

2. Who is a Covered Employer under the FMLA

Any person or business that has employed fifty (50) or more employees for at least twenty (20) or more calendar workweeks in the current year, or in the preceding year and are engaged in any industry or activity affecting commerce, is a covered employer under the FMLA.

Further, a covered employer remains covered until it has less than fifty (50) employees on the payroll for twenty (20) (nonconsecutive) workweeks in the current or preceding year. For instance, if an employer met the 50 employees/20 workweeks test from January 1, 2024 through December 31, 2024, but then reduces its work force to thirty-five (35) employees on January 1, 2025, it is still covered by the FMLA until January 1, 2026 because it met the coverage criteria for 20 workweeks of the preceding year.

“Joint” employers can also be covered if their combined number of employees exceeds 50. For example, if an employer has 25 direct hire employees, but supplements

its workforce with 35 employees from an outside labor source, those employees can be combined to meet the minimum employee threshold. This only applies in terms of "joint" employers, however, which in short, means that each employer exercises control over the employees. The federal Department of Labor starts from a presumption of joint employment. It is up to the employers to prove otherwise.

3. Who is a Covered Employee?

An employee is eligible for FMLA leave if he or she works for a covered employer, has been employed for at least twelve (12) months, has worked 1,250 hours within the previous twelve (12) months, and works at a site where there the employer has fifty (50) or more employees within seventy-five (75) road miles. The twelve (12) months of overall employment need not be consecutive, but the 1,250 hours must be within the most recent twelve (12) months.

The 1,250 hours worked are calculated according to the principles of the Fair Labor Standards Act ("FLSA"). Thus, hours worked for this purpose includes all hours actually worked, such as overtime, but does not include holiday, vacation or other paid time off, or unpaid time off. Employees who are exempt from recording their work hours, such as executive, administrative, and professional employees, are presumed to have worked 1,250 hours if they have worked for the employer for the last twelve (12) months.

4. Reasons for Leave

The FMLA entitles a covered employee to take time off for:

a. The birth of a son or daughter;

b. The adoption or foster care placement of a child with the employee;

c. Care for a spouse, child, or parent with a serious health condition (note that "spouse" is defined in accordance with the marriage laws of the state where the spouses got married);

d. An employee's own serious health condition which makes the employee unable to perform the essential functions of their position; and/or

e. A "qualifying exigency," or to care of an injured service member, under the National Defense Authorization Act of Fiscal Year 2008.

National Defense Authorization Act of Fiscal Year 2008

On January 28, 2008, former President Bush signed the National Defense Authorization Act for Fiscal Year 2008, which primarily deals with the budget for national

defense matters. This Act, however, also included the first expansion of the Family and Medical Leave Act ("FMLA") since that law was originally enacted in 1993. Specifically, the law expands the FMLA in two ways, by granting:

1. Leave for a "Qualifying Exigency;" and
2. Leave to Care for Injured Service Member.

All covered employers are required to display and keep displayed a poster prepared by the U.S. Department of Labor summarizing the major provisions of the Family and Medical Leave Act (FMLA) and telling employees how to file a complaint. The poster must be displayed in a conspicuous place where employees and applicants for employment can see it. A poster must be displayed at all locations even if there are no eligible employees. The Notice is available for downloading at the DOL's website: www.dol.gov/FMLA/posters.

The Department of Labor has additional information on this topic on its website, located at: https://www.dol.gov/agencies/whd/fact-sheets/28mc-fmla-exigency-leave and https://www.dol.gov/agencies/whd/fact-sheets/28ma-fmla-servicemember-caregiver.

5. "Serious Health Condition"

A "serious health condition" is defined as an illness, impairment, or physical or mental condition that involves either:

a. Inpatient care in a hospital, hospice, or residential medical facility, including any period of incapacity related thereto or any subsequent treatment in connection with such inpatient care; or

b. Continuing treatment by or under the supervision of a health care provider, which can include any one or more of the following:

- A period of incapacity of **more than** three (3) consecutive full calendar days, plus any subsequent treatment;
- A period of incapacity of **more than** three (3) consecutive calendar days, plus a subsequent period of incapacity for the same condition involving treatment two (2) or more times by a health care provider, within 30 days of the first day of incapacity, unless extenuating circumstances exist;
- A period of incapacity of **more than** three (3) consecutive calendar days, plus a subsequent period of incapacity for the same condition that results in a continuing course of treatment,

such as prescription medications, therapy, etc., but not including things like over-the-counter medications, general exercise, etc.;

- Pregnancy (as will be discussed later, this is an area of difference between the state law and the federal law) or parental care,

- Incapacity due to a chronic serious health condition (asthma, diabetes, epilepsy, etc.);

- Incapacity due to a permanent or long-term condition for which treatment may not be effective (Alzheimer's, terminal cancer, etc.); and/or

- Absences to receive multiple treatments by a health care provider, and to recover from such treatment (chemotherapy, kidney dialysis, radiation treatments, etc.).

An employee is unable to perform the functions of his or her position when a health care provider finds that the employee cannot work at all, or is unable to perform any one of the essential functions of the employee's position, including when an employee must be absent from work to receive medical treatment for a serious health condition. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, and routine dental or orthodontic problems are not serious health conditions. While substance abuse may be a serious health condition, only substance abuse treatment is covered under FMLA leave, not absences due to the use of the substance.

6. Duration of Leave

The FMLA provides for leave of up to twelve (12) workweeks in a twelve (12) month period. The regulations interpreting the Act explain that the 12-month period can be calculated in a number of fashions, so long as the method chosen is uniformly and consistently applied to all employes: a calendar year; an anniversary year; a 12-month period measured forward from the first date an employee takes FMLA leave; or a rolling 12-month period which looks either backward from the current request for leave. Failure to select one of these methods will result in the use of the method which provides the most beneficial outcome for the employee.

Only the rolling year prevents an employee from "stacking" leave from one period to a subsequent period.

With the "looking back" rolling year method, when an employee requests FMLA leave, the employer looks back over the twelve (12) month period prior to the commencement of leave. Any leave that the employee utilized during the previous twelve

(12) month period counts as leave already taken.

7. Benefit Continuation During Leave

The FMLA does not require an employer to pay an employee's salary or wages during leave. It does, however, require that the employer maintain the employee's insurance coverage under any group health plan for the duration of the leave, as if the employee were still working. If the employee has a co-payment for the insurance coverage, the employee must continue to make that co-payment while on leave in order to keep the benefits in place. Failure to do so can result in the coverage lapsing. If the employee's co-payment is ordinarily deducted from the employee's paycheck, but the employee is not receiving a paycheck during the leave, the employee will have to arrange to make the appropriate payment, or the employer can make the payment for the employee, and try to recoup the payment when the employee returns to work.

While an employee is entitled to no greater benefits during leave than while at work, the coverage cannot be reduced. Insurance cannot be altered or removed simply because the employee chooses to take family leave. Any changes that would have been had the employee not taken the leave, however, can be made while the employee is on leave.

Notwithstanding the fact that FMLA leave is unpaid, either the employee or the employer may insist that paid vacation, sick leave, or personal leave be substituted for FMLA leave in appropriate circumstances, unless the employee is receiving payments under a disability plan, in which case it is up to the employee.

8. Reinstatement After Leave

The FMLA provides that upon returning from leave, an employee is entitled to be reinstated to the position he or she held when the leave commenced, or if that is not possible, to an equivalent comparable position with equivalent employment benefits, pay and other terms and conditions of employment. When the employee goes out on leave, he or she can request, and the employer is obligated to provide, a written guarantee of reinstatement.

If an employer wants to reinstate an employee to a "comparable" position, that position must have virtually identical duties, requiring the same skills, effort, responsibility and authority. Further, the position must provide virtually identical pay, benefits, working conditions, privileges, perquisites, and status.

As with benefits, any changes to the employee's position or assignment that would have taken place if the employee had not taken leave, can take place while the employee is on leave, and can affect the employee's reinstatement rights. For example, if, while an employee is on leave, the employer goes through a reduction in force and the employee's

position is eliminated and the employee would have been laid off, then the employer need not reinstate the employee. However, if the employee had been reassigned, rather than laid off, then the employer must reinstate the employee to the position he or she would have been reassigned to.

The only major exception to the reinstatement requirement is that the employer can refuse to reinstate a "key" employee, if the employee is one of the highest paid 10% of the salaried employees within 75 miles of his or her worksite, and the employer notifies the employee that reinstating him or her would cause "substantial and grievous economic injury" to the employer. Note that the requirement is not that granting the leave would cause the injury to the employer, but rather, that the reinstatement would cause the injury. For example, assume that the person requesting leave is the company's Chief Financial Officer who is requesting 12 weeks of leave right as the company is responding to an IRS audit, and the company has to have a CFO in order to respond to the audit. If the company determines that the only way to get a replacement CFO is to offer that person a long-term contract, it can notify the employee that it will not be able to reinstate her. If the employee has already begun the leave, the employer must give her a reasonable opportunity to return from the leave before replacing her.

Finally, an employer can refuse to reinstate an employee who engages in misconduct while on leave. For example, if the employer has a "no moonlighting" policy, and it discovers that the employee was employed with another company while on leave, the employer can refuse to reinstate that person. The same applies if the employee obtains the leave via fraud or other dishonest means.

Other than these examples, the right to reinstatement is fairly absolute.

B. California Family Rights Act (CFRA) - Overview and Comparison with FMLA

Even though the FMLA and the CFRA are both designed to provide leave for "serious health conditions" of the employee or covered family members, there are several significant differences between the two Acts and their regulations. Covered employers must understand both Acts and effectively administer their employees' requests that qualify for leave under either or both of the Acts. Knowledge of the different requirements of each Act is also important because the Act that grants greater family or medical leave rights with respect to the particular leave request must be applied.

1. Distinction – "Covered Employee"

The definition of "eligible employee" under the CFRA is identical to the definition under the FMLA, except that the employee must have been employed for "more than" twelve (12) months, as opposed to "at least" twelve (12) months. Thus, the CFRA technically requires one additional day of employment for the employee to be eligible for leave.

An employee is entitled to leave under both Acts because of: the birth of a child of the employee; the placement of a child with an employee in connection with the adoption or foster care of a child by the employee; leave to care for a child, parent, spouse, grandparent, grandchild, or sibling who has a serious health condition; leave because of a serious health condition that makes the employee unable to perform the essential functions of his/her position; or leave because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, child, or parent in the Armed Forces of the United States. Under most circumstances, with the exceptions discussed below relating to pregnancy and leave to care for a "domestic partner," FMLA and CFRA leave run concurrently.

2. Distinction – Pregnancy and Related Conditions

One of the most significant differences between the CFRA and the FMLA is that a woman may utilize FMLA leave for a period of incapacity due to pregnancy or prenatal care, while the CFRA regulations expressly exclude pregnancy or related medical conditions from the definition of "serious health condition." The reason for this exclusion is that a provision of the Fair Employment & Housing Act ("FEHA") entitles a female employee affected by pregnancy, childbirth, or related medical conditions to take Pregnancy Disability Leave ("PDL") for a reasonable period of time, not to exceed four (4) months per pregnancy.

If a woman's pregnancy precludes her from performing the essential functions of her job, she is entitled to PDL. Because she is suffering from a serious health condition as defined under the FMLA, her employer may also exhaust her FMLA leave concurrently with the PDL, provided it notifies the woman that it is doing so. Once the baby is born and the disability period expires, the woman is entitled to an additional twelve (12) weeks of leave to care for her baby under the CFRA. If the disability period (both before and after the birth) lasted less than twelve (12) weeks, and the employer chose to concurrently exhaust her FMLA leave with the PDL, the leave to care for the baby will include both the remainder of the 12-week entitlement to FMLA leave and the full allotment of CFRA leave. If the disability period lasted more than twelve (12) weeks, the employee will only have CFRA leave to care for or bond with the baby.

Unlike FMLA leave or CFRA leave, an employee is eligible to take PDL as long as the employer she works for has five (5) or more employees. Also, unlike FMLA and CFRA leave, there is no minimum length of employment or minimum number of hours worked for entitlement to PDL. Thus, an employer must be careful not to run FMLA leave concurrently with PDL leave in those situations where the employee is not yet entitled to FMLA leave. In such a situation, the time spent on PDL would count as time employed toward the twelve (12) month requirement for FMLA purposes, but not toward the 1,250 hours worked requirement.

Finally, the four (4) months of PDL is tied to each pregnancy, and not a specific twelve (12) month period, like FMLA and CFRA leave. Thus, assume that a woman

utilized PDL for a pregnancy from January 1 to April 1, and then had a miscarriage. If she became pregnant again, and disabled due to the pregnancy in September, she would be entitled to an additional four (4) months of PDL in regard to the second pregnancy as well.

It is unlawful employment practice for an employer to refuse to maintain and pay for coverage for an eligible female employee who takes pregnancy disability leave under a group health plan, for the duration of the leave, not to exceed four months over the course of a 12-month period, commencing on the date the leave begins, at the level and under the conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the leave.

Further, a California court has ruled that if a woman has utilized all of her four months of PDL, she may still be entitled to additional leave as an accommodation of related disabilities, or as protection against pregnancy discrimination.

3. Distinction – Registered Domestic Partner

Another significant distinction between the FMLA and the CFRA is that as of January 1, 2005, California's CFRA was amended to provide that an employee is entitled to take CFRA leave for purposes of the serious health condition of a "registered domestic partner." The FMLA does not provide any leave for domestic partners. To be eligible, the domestic partners must be registered with the State of California, not merely living together.

Because an employee taking leave to care for a domestic partner is not using FMLA leave, it can lead to situations where the employee may end up with the ability to take up to twenty-four (24) weeks of leave in a twelve (12) month period. For example, assume that an employee takes twelve (12) weeks of CFRA leave to care for a registered domestic partner. At the end of that time, the employee would still have his or her allotment of twelve (12) weeks of FMLA leave that he or she could utilize for his or her own serious health condition, or for any of the other eligible reasons under the FMLA.

Keep in mind, however, that the FMLA regulations have expanded the definition of "spouse" to include anybody defined as a spouse by the relevant state where the spouses were married. California allows same sex marriage, so same sex spouses are entitled to take leave to care for their spouse.

4. Distinction – Minimum Amount of "Baby-Bonding" Leave

The FMLA and the CFRA differ in regard to the minimum amount of leave that may be taken for the purpose of caring for a newborn, adopted, or foster child; the so-called "baby-bonding" leave. The FMLA provides that where leave is taken because of the birth or placement of a child for adoption or foster care, all leave must be taken at one time unless the employer agrees otherwise. Under the CFRA, the basic minimum duration of leave is two (2) weeks. However, an employer must grant a request for CFRA leave that

is less than two weeks' duration at least twice during the 12-week period. California employers should follow the CFRA provision as this provides the most benefit to employees.

5. Distinction – Employer Designation of Leave

Both the FMLA and the CFRA place the burden of determining whether the employee is qualified for leave on the employer. Both also require the employer to notify the employee that he or she is utilizing protected leave. The two Acts differ, however, in defining the employer's obligations with regard to the notice.

The FMLA provides that the employer must notify the employee, in writing, that he or she is using FMLA leave within five (5) business days. This is a change from the past, where employers had to provide oral notice within two (2) business days and were allowed up to ten (10) days to provide written notice. If the employer determines that the employee is not eligible for leave, the notice must set forth at least one (1) reason who not; i.e., the employee has not worked enough hours, etc.

The CFRA provides that the employer must notify the employee in writing that he or she is using CFRA leave within five (5) business days. California employers should follow the FMLA notice requirements as it is deemed to be more beneficial to the employee.

The FMLA notice requirements, however, were subject to a significant U.S. Supreme Court interpretation that employers should be aware of. The EEOC had implemented a regulation providing that if the employer failed to provide the notice to the employee within the allotted time, then the employer could not count any leave taken against the employee's twelve (12) weeks of leave, until the employer gave proper notice. The Supreme Court reviewed a challenge to that regulation in *Ragsdale v. Wolverine Worldwide, Inc.* Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint, or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered.

In that case, the employer had a policy of allowing employees to take up to thirty (30) weeks of leave. Ragsdale took all thirty (30) weeks, and then requested more time off under the FMLA, but the employer refused any additional leave, and fired her when she did not return to work. Ragsdale sued, claiming that the employer had never told her that the thirty (30) weeks of leave under the company policy was counting against her FMLA leave. The U.S. Supreme Court ruled that the EEOC's regulation impermissibly granted more leave than the statute required, and therefore, as long as the employee was not harmed by the employer's failure to give the notice, the employer may still count the leave taken against the FMLA allotment.

California employers should be aware, however, that this case dealt only with the FMLA, and did not address the virtually identical regulation under the CFRA. California's courts are not shy about disagreeing with the Supreme Court, and therefore, the safe course of action is to always provide the notice.

Please note that the FMLA certification form issued by the federal Department of Labor is not to be used as is for state CRFA leave certification. The FMLA form asks specific medical information that is prohibited by California law. An employee who refuses to provide sufficient information to allow the employer to reasonably determine if the employee is entitled to protected leave, however, is deemed to have waived their right to such leave. Be very careful about thoroughly documenting the justification behind denying leave.

6. Spouses/Parents Working for Same Employer

Under FMLA, spouses employed by the same employer are limited to a combined total of twelve weeks of leave during the any 12-month period (1) for the birth of a son or daughter or to care for the child after birth; (2) for placement of a son or daughter with the employees in connection with adoption or foster care or for care after such placement; or (3) to care for an employee's parent with a serious health condition. The CFRA no longer places a combined total for 12 workweeks for parents who work for the same employer. As of January 1, 2021, CFRA requires an employer who employs both parents of a child to grant leave to each employee. Under FMLA, in addition to limiting leave for birth, adoption or foster care placement, employers may limit spouses employed by the same company to 12 workweeks of leave to care for a parent with a serious health condition.

7. Distinction – Military Spouse Leave

In 2020, the Legislature amended the CFRA to expand the meaning of "family care and medical leave" to include "[l]eave because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States. Under both CFRA and FMLA, an eligible employee is entitled to a total of twenty-six (26) weeks' of leave to care for a recovering service member injured in the line of duty in a 12-month period. Additionally, California law (Military and Veterans Code § 395.10) requires employers with twenty-five (25) or more employees to allow spouses of military personnel to take up to ten (10) days of unpaid leave when their spouse is on leave from deployment to a designated combat zone, or deployment during a period of military conflict. To be eligible, the employee must be regularly scheduled to work at least twenty (20) hours per week.

The employee must provide the employer with notice that he or she wishes to take leave within two (2) business days of receiving official notice that the employee's spouse will be on leave from deployment. The employee also must provide the employer with

written documentation certifying the spouse will be on leave from deployment.

8. Distinction "Inpatient" Care

For purposes of the CFRA, the care is "inpatient" as long as the employee or covered family member is admitted to the hospital with the expectation that the person will stay at least overnight, even if that ends up not being the case.

C. Paid Leave – California's Paid Family Leave and "Kin" Care and Paid Sick Leave

Generally speaking, family and medical care leave under both the FMLA and the CFRA is unpaid. While there have been efforts to make employers pay for leave under those statutes, as currently worded, the statutes provide that the leave is unpaid. However, both statutes do provide that an employee may elect, or an employer may require an employee to use paid accrued leave concurrently with leave under both Acts in certain circumstances. There are also two other California laws that come into play in this situation as well for California employers.

1. California's Paid Family Leave

All employees in California who contribute to the State Disability Insurance ("SDI") fund are eligible receive SDI payments for up to eight (8) weeks of Paid Family Leave ("PFL"), within the employer's designated twelve (12) month family leave period, "to bond with a minor child within the first year of the child's birth or placement in connection with foster care or adoption," or "to care for a child, parent, spouse, or domestic partner who has a serious health condition."

Many of the key definitions in the PFL law are borrowed from the CFRA, in particular, the definition of "serious health condition." For the employee to be eligible to take such leave, other than for child bonding leave, it is necessary that the family member is suffering from a serious health condition.

All employees are covered under the PFL, not just those who work for an employer with fifty (50) or more employees, and there is no one (1) year initial work requirement and no minimum hours worked requirement, as there is under the protected leaves. Thus, even employees who would not be entitled to FMLA/CFRA leave, are entitled to claim SDI benefits for a PFL covered leave.

There is no waiting period before the employee is entitled to receive paid leave benefits. As of January 1, 2025, the employer cannot require the employee to use sick leave or any other paid time off before receiving PFL benefits.

Finally, the PFL law does not create any reinstatement rights or benefit continuation rights for employees who would not otherwise have such rights under some

other law, such as the CFRA, FMLA, or California's PDL statute. Actually, the name Paid Family Leave is a bit of a misnomer, in that the statute does not really mandate leave, but rather, allows covered employees to receive payment while taking leave. The original title, Family Temporary Disability Insurance, was more accurate.

To obtain the PFL benefits, employees must submit claim forms to the SDI fund, which will need to include information from their doctor verifying the serious health condition of the relevant family member. The employee is not eligible to receive PFL benefits if he or she is receiving, or is entitled to receive, unemployment insurance benefits or SDI benefits, or if another family member is ready, willing and able to provide care for the ill family member.

An employee taking PFL, who is also entitled to leave under either the CFRA or the FMLA, must run the leaves concurrently.

2. California's "Kin" Care Law

California Labor Code Section 233 provides that when an employer offers its employees a sick leave benefit, an employee is entitled to utilize his or her sick leave, "in an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement," to take care of an ill child, spouse, parent, or domestic partner. Such leave must be "accrued and available."

Unlike CFRA or FMLA leave, kin care is calculated on a calendar year basis, by statute. For example, if an employee can accrue up to six (6) days of sick leave per year, he or she would have three (3) days accrued by July 1. If he or she needed to utilize kin care as of that date, the employee would be able to take all three (3) days as kin care, because that is the amount he or she can accrue in six (6) months, and it is accrued and available. If the employee had some additional sick leave accrued and carried over from a prior year for example, say ten (10) days, he or she would still only be able to take up to three (3) days of kin care, or the amount of sick leave that the employee could accrue in six (6) months.

Also, unlike CFRA and FMLA leave, there are no prerequisites to an employee taking kin care leave, other than any conditions that the employer requires employees to meet prior to utilizing his or her sick leave. For example, if the employer requires employee to have worked for at least six months prior to being eligible to take sick leave, that requirement must also be met before the employee can utilize kin care leave.

If an employer provides paid sick leave, the employee can utilize kin care as a way to make a portion of his or her CFRA or FMLA leave paid. Likewise, the employee could utilize kin care to cover some of the waiting period prior to PFL benefits kicking in.

3. California Paid Sick Leave

Effective July 1, 2015, all California employers were required to allow employees to accrue and use paid sick leave. There is no minimum number of employees requirement, such as with the FMLA or CFRA, but the law does have some exceptions for employees covered by a collective bargaining agreements, unionized certain construction workers and certain in-home service providers.

Effective January 1, 2024, employers must provide up to five (5) days or forty (40) hours of paid sick leave. Paid sick leave can provided upfront in a "lump sum" or it be accrued at the rate of one (1) hour for each 30 hours worked, up to a maximum of 80 hours or 10 days per year. Accrual can also be at some other designated rate, so long as the rate allows for accrual of at least 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment and 40 hours by the 200th calendar day of employment.

Hours may be carried over to the following year for a maximum of 80 hours or 10 days, unless the employer grants the full 40 hours up front, without using an accrual method. Employers who provide an upfront grant of five (5) days or forty (40) hours at the beginning of each year do not need to provide any accrual, nor do they need to allow any carryover.

Exempt employees are presumed to work 40-hour weeks, unless their schedule is less than that number of hours.

Effective January 1, 2023, a "designated person" has been added to the definition of a "family member" for whom an employee can take protected leave. We previously discussed that the CFRA defines a "designated person" as "any individual related by blood or whose association with the employee is the equivalent of a family relationship." However, under California Paid Sick Leave law, a "designated person" is defined as "a person identified by the employee at the time the employee requests paid sick days." The employer may choose to limit an employee to one designated person per twelve-month period.

Employees can begin to use the leave after 90 days.

This law does not require the employer to grant additional paid sick leave if it already provides leave that complies with the law.

Accrued paid sick leave need not be paid out upon termination of employment, but if the employee is rehired within one year, the accrued leave must be reinstated.

How you deal with leave accrual / granting of leave must be described in your Labor Code section 2810.5 notice to employees upon hire. The Labor Commissioner

has provided an updated notice for this purpose. Further, the employees' accrued sick leave must be set forth on their wage statements, or on a separate writing provided to the employees on pay day. Lastly, the employer must display a poster in a conspicuous place containing all the required information.

D. An Overview of the Americans with Disabilities Act ("ADA")

Like the situation with the FMLA and the CFRA, California saw it necessary to have its own version of the ADA. Therefore, there are provisions of the Fair Employment & Housing Act ("FEHA") which address disability issues. The FEHA provisions on disabilities are virtually identical to the ADA, with one major exception; namely, in that the FEHA defines disability much more broadly than the ADA does, though that has changed now with the enactment of the American with Disabilities Act Amendments Act of 2008 ("ADAAA), which will be discussed shortly. The employer's basic obligations under the two statutes are identical, however, and are set forth below in regard to the ADA.

Americans with Disabilities Act Amendments Act of 2008

The ADAAA went into effect on January 1, 2009.

The overall goal was to increase the number of disabled people who are going to be afforded the rights and benefits of the ADA.

The ADAAA makes several significant changes, including:

1. The "substantially limits" definition will be construed less strictly;
2. The "major life activities" definition is expanded to include "major bodily functions;"
3. "Mitigating measures" are not to be considered; and
4. The definition of being "regarded as" disabled is expanded.

Even with these changes, however, it is important to keep in mind that the main purpose of the disability statutes is to require an employer to engage in an interactive process with a disabled employee to determine whether there are any reasonable accommodations that will enable the employee to perform the essential functions of his or her job.

1. Basic Obligations

Like other civil rights statutes, the ADA prohibits discrimination by an employer, employment agency, labor organization, and joint labor-management committee. The statute protects a "qualified individual with a disability." What distinguishes the ADA from

other statutes protecting individuals from discrimination is that the other protected classes encompass an identifiable class, such as all persons age 40 or over. In contrast, the ADA protects persons with mental and physical disabilities - a class that embraces many people with different disabilities, each with a varying degree of severity - and it also protects persons "perceived" as having disabilities. Thus, each case may present a different disability or the same disability but different degrees of severity. Furthermore, the requirement of reasonable accommodation, basic to the ADA, must be examined on a case-by-case basis. The result is that cases under the ADA are very fact specific, turning on the nature and extent of the disability and the possible kinds of accommodations.

2. Covered Employers

The employment provisions of the ADA apply to employers with 15 or more employees. The FEHA applies to employers with 5 or more employees. Thus, as long as the employer has at least 5 employees, it must be prepared to deal with the requirements of the disability statutes.

3. Definition of "Disability"

Under the ADA, an individual with a "disability" is a person who has a physical or mental impairment that "substantially limits" one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

a. "Substantially limits" is defined as:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

b. "Major life activities" is defined as:

The ADAAA provides the first statutory definition of "major life activities:"

"Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking,

breathing, learning, reading, concentrating, thinking, communicating, and working."

It also adds "major bodily functions," as "including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

The condition need only substantially limit one major life activity or one major bodily function to qualify as a disability.

Under the ADAAA, it will be much easier to establish the substantial limitation of a major bodily function.

c. "Has a record of such an impairment," is defined as: "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."

d. "Is regarded as having such an impairment" is defined as:

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated as constituting such limitation;

(ii) Has a physical or mental impairment only as a result of the attitudes of others toward the impairments; or

(iii) Has no impairment as defined, but is treated as having a substantially limiting impairment.

The ADAAA makes changes in this area as well.

In *Sutton v. United Airlines (U.S. Sup. Crt. 1999)*, the U.S. Supreme Court narrowly interpreted the "regarded as" prong of the disability definition by limiting it to considerations of the person's ability to work only.

The ADAAA greatly expands the "regarded as" prong by stating: "an individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*."

Thus, there is now no "substantial" requirement, and even no "limits"

requirement.

This excludes “transitory and minor” impairments. Transitory is defined as lasting less than six months. This is different than “episodic.”

e. “**Physical or mental impairment” is defined as:**

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic skin, and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Mitigating Measures - The ADAAA specifically overrules *Sutton v. United Airlines* (U.S. Sup. Crt. 1999) which held that in evaluating whether is given condition is a disability, courts must consider mitigating measures such as medication, devices, or learned behavioral modification. Thus, a person is considered to have substantial limitations and is entitled to protection under the law even if the substantial limitations may be overcome by available means (e.g., insulin for a diabetic or a prosthesis for an individual without a limb). There are exceptions for ordinary eyeglasses and contact lenses. Also, although the law protects alcoholics, it also allows employers to proscribe the use of alcohol on the premises and intoxication at work, and employers may hold alcoholics to the same standards as non-alcoholics.

Case by Case Analysis - A determination as to whether an impairment is a disability under the statute must be made on a case-by-case basis. Examples of conditions that have been held to fall within the statutory definition under certain circumstances include: diabetes, severe coronary artery disease, and severe migraine headaches. Conditions that have been held not to meet the statutory definition include: infertility, short term ailments such as broken bones or sprains (even if the individual requires absolute bed rest, hospitalization, or surgery), and carpal tunnel syndrome. Because cases under the ADA are extremely fact specific, a condition that does not meet the statutory definition in one instance may be held to meet the definition in another situation.

FEHA and ADA Distinction – “Limits” vs. “Substantially Limits”

In the past, the most significant distinction between the ADA and the FEHA was that the FEHA defines a disability as an impairment or condition that merely “limits” a

major life activity. In other words, the FEHA does not require a "substantial limitation." For purposes of disability litigation, the impact of this difference in definition was that under the ADA, the major question was whether the person even has a disability, while under the FEHA it was virtually presumed that most conditions are a disability. For disability questions under the FEHA, the major question was whether the employer properly engaged in the "interactive process" with the employee to determine whether there was a reasonable accommodation the employer can make for the employee's disability, and whether the employer properly followed up on any such accommodations.

One of the main purposes of the ADAAA, however, was to expand the list of conditions that qualify as a disability under the ADA, and shift the main question to whether the employer properly engaged in the interactive process.

In *Toyota v. Williams* (U.S. Sup. Crt. 2002) the U.S. Supreme Court held that "the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled.'"

The ADAAA, however, states that one of its purposes is:

1. "To convey congressional intent that the standard created by the Supreme Court in …*Toyota*…for 'substantially limits' … has created an inappropriately high level of limitation necessary to obtain coverage under the ADA;"

2. "To convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations;" and

3. "To convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

The ADAAA does not provide a new definition of "substantially limits," and does not eliminate the term "substantially," but merely says that it should be construed differently, with the purpose being to expand the number of conditions that qualify as a disability, and to refocus the question on whether the employer properly engaged in the interactive process. Thus, the operative question in ADA cases will be much more in line with the operative question under the FEHA.

4. Pre-employment Inquiries

An employer may not conduct a pre-employment medical examination or inquire as to whether an applicant has a disability or the nature or severity of the disability. However, an employer can inquire about an applicant's ability to perform job-related functions, and can ask an applicant to demonstrate his or her ability to perform the essential functions of the job. Pre-employment tests to determine the illegal use of drugs, consistent with applicable state law, are not considered medical examinations.

An employer can make a job offer and condition that job offer on the applicant successfully completing a medical examination, provided that all entering employees are subject to an examination. Employers must ensure that information obtained in the exam is collected and maintained separately and is treated as confidential medical information.

5. Ability to Perform the "Essential Functions" of the Job

A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that the individual holds or desires." In determining which job functions are "essential functions," consideration will be given to the employer's judgment of what is essential, and to written job descriptions prepared before advertising or interviewing for the job.

Case law has established, however, that if an employer has not included a job function on its description of a particular job, it will not be deemed “essential.” Therefore, it is imperative that employers have accurate and up to date job description for all jobs. Additionally, the essential functions are those functions that the individual who holds the position must be able to perform unaided or with assistance of a reasonable accommodation. The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential.

6. Duty to Make "Reasonable Accommodation"

The ADA requires that employers make a "reasonable accommodation" of an individual's disability, unless the accommodation would impose an undue hardship on the employer. Reasonable accommodations include:

a. Making existing facilities used by employees readily accessible to and usable by individuals with disabilities;
b. Job restructuring, part-time or modified work-schedules, reassignment to a vacant position, modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities; and, as is particularly relevant here,
c. Potentially granting leave to an employee.

Whether a particular accommodation is “reasonable” requires a specific analysis of the job and the individual's ability. Mere reliance upon the job description is insufficient, as is relying on stereotypes about particular disabilities. Rather, the employer must engage in an interactive process with the employee during which they discuss the employee’s abilities and possible accommodations which would allow the employee to

perform the essential functions of the job. The employer must also consider relevant and specific medical information as to the employee's abilities.

7. Employer Need Not Incur "Undue Hardship"

The obligation to provide a reasonable accommodation is not without limits. An employer does not have to provide an accommodation that would cause an "undue hardship" to the operation of the employer's business. "Undue hardship" is defined as "an action requiring significant difficulty or expense." The statute clearly delineates the factors to consider in determining whether an accommodation would impose an undue hardship on a covered entity. These include:

a. Cost;
b. Financial resources of the employer;
c. Size of the business;
d. Type of business; and
e. The impact of the accommodation.

Thus, what might be an undue hardship to one employer will not necessarily be a hardship to another employer. It is a fact specific inquiry that the employer must conduct with regard to each individual situation.

8. Unlawful Discrimination

Employers and other covered entities may not discriminate against an individual because of a disability in regard to job application procedures, hiring, advancement or discharge, compensation, job training, and other terms, conditions, and privileges of employment. Refusing to make reasonable accommodation for an individual with a disability or denying an opportunity to an individual because a reasonable accommodation would be required, unless such accommodation would impose an undue hardship, is an unlawful discriminatory act.

An employer may not conduct or require a medical examination or inquire of an employee as to the existence of a disability or the nature or severity of the disability, unless the examination is shown to be job-related and consistent with business necessity. However, the ADA does not prevent an employer from offering voluntary medical examinations and taking voluntary medical histories as part of an employee health program for all employees.

The ADA does not preclude an employer from requiring that employees not be under the influence of alcohol and illegal use of drugs in the workplace, nor does it prohibit the finding of unsatisfactory performance or behavior related to drug use or alcoholism. Thus, an alcoholic employee may have a disability, but that disability does not protect the employee from discipline for conduct in violation of the employer's policies which are caused by the disability.

E. Workers' Compensation

The purpose of the workers' compensation system is to deliver relatively quick compensation to employees who suffer injury or death arising out of and in the course of their employment. For its part of this "compensation bargain," the employer is immunized from a civil action in which the employee might obtain a much larger recovery. It is a mandatory, generally no-fault, and self-executing system that provides medical care, temporary and permanent disability indemnity, vocational retraining and death benefits. Additionally, the employer is penalized for discriminating against injured workers, for serious and willful misconduct, and for unreasonably delaying the provisions of benefits. The law is to be liberally interpreted to protect employees who are injured in the course of their employment, and is administered statewide by judges assigned by the Workers' Compensation Appeals Board ("WCAB)".

1. Insurance Requirement

Workers' Compensation Insurance is mandatory. The insurance may be obtained from an insurance company or by obtaining a certificate of self-insurance. All policies are required to provide all the benefits mandated by law.

Being willfully uninsured is a crime that carries significant penalties, including an order that the business cease operations until insurance is acquired. Failure to obey such a "stop order" also is a misdemeanor. Other penalties include an increase of 10% of the compensation awarded to an injured employee, an award of attorneys' fee to the employee, and a penalty of $1,000 per employee employed at the time of the stop order.

Thus, employers should make a diligent effort to obtain and keep their workers' compensation insurance in force. Failure to do so can be, and probably will be, more expensive than the insurance costs.

2. Covered Employees

Generally speaking, all "employees" are entitled to workers' compensation coverage. However, not every worker is an employee. Generally, anyone in the service of another is presumed to be an employee, even aliens, minors and prisoners. Independent contractors are excluded, as are a number of volunteers. An independent contractor who does not have the required contractor's license is, as a matter of law, an employee of the person who hired him, as are any employees of the unlicensed contractor.

The WCAB resolves doubts in favor of covered employment.

3. Covered Injuries

An injury for workers' compensation purposes is any specific or cumulative trauma resulting in disability or death, or need for medical treatment. The injury may be physical or mental, and may include the aggravation of a preexisting and previously dormant or asymptomatic non-industrial disease or condition.

The criteria for proving a psychiatric injury are more stringent and complex than for a physical injury, and defenses include an insufficient level of industrial causation, that the injury was a result of a lawful, nondiscriminatory, good faith personnel action, as well as employment for less than 6 months. Both the criteria and defenses vary depending on the date of the psychiatric injury.

4. Injuries “Arising Out Of” and “In the Course Of” Employment

Only "industrial" injuries are covered by workers' compensation insurance. Industrial injuries are those "arising out of and occurring in the course of employment (AOE/COE)." This dual requirement is the cornerstone of workers' compensation, and is more specifically stated in Labor Code sections 3600 and 3601. Those two sections together provide that when the conditions of compensation occur, workers' compensation is the exclusive remedy for an injured employee. The “conditions of compensation” are:

(a) Both the employer and employee are subject to the compensation law;

(b) At the time of the injury, the employee is performing service growing out of an incident to the employment, and is acting within the course of the employment;

(c) The injury is proximately caused by the employment;

(d) The injury is not caused by the intoxication of the employee;

(e) The injury is not intentionally self-inflicted;

(f) The employee has not willfully and deliberately caused his or her own death;

(g) The injured employee was not the initial physical aggressor in an altercation;

(h) The injury was not caused by the commission of a felony of which the employee has been convicted; and

(i) The injury did not arise from participation in any off-duty recreational, social or athletic activity, except where the activity is a reasonably expected part of the employment.

Generally, any injury on the employer's premises during working hours is compensable, while an injury off the employer's premises or outside working hours may or may not be compensable. An injury while going to or coming from work during an ordinary commute is not compensable, but there are many exceptions to that the rule.

An injury while performing authorized duties in an unauthorized, even criminal fashion is also compensable, but an injury while performing unauthorized duties may not be.

5. Benefits

When an industrial injury is found or admitted to have occurred, the injured worker, or his or her dependents, is entitled to receive five distinct types of benefits.

a. Temporary Disability

Temporary disability indemnity is designed as a wage replacement when the employee is unable to work while he or she is recovering from an industrial injury. Temporary disability may be total or partial. If it is total (i.e.; the employee cannot work at all), the entire prescribed benefit is paid to the employee. If it is partial (i.e.; the employee can work part time at some kind of job), payment is made on a wage-loss basis.

b. Permanent Disability

Temporary disability benefits end when an employee is declared medically "permanent and stationary (P&S)." When an injured employee is P&S, he or she has reached the maximum medical improvement, though continuing medical care may still be necessary. At this point, the employee may be entitled to permanent disability indemnity. Permanent disability indemnity is designed to compensate an employee for a reduced ability to compete in the open labor market, stemming from the industrial injury.

c. Medical Treatment

An injured employee is entitled to all medical treatment that is reasonably required to cure or relieve the effects of the industrial injury. This entitlement may extend to what is essentially a lifetime award of medical care related to the injury. The employer is liable for all medical care needed, even if a non-industrial condition must be treated in order to treat the industrial injury.

d. Vocational Rehabilitation

There have been a number of changes made to vocational rehabilitation benefits in recent years. Currently, for injuries occurring after January 1, 2004, vocational rehabilitation benefits are a graduated scale of benefits, in the form of schooling vouchers. To be eligible, the employee must have an industrial injury that causes permanent partial disability, after which the employee does not return to work for the employer within sixty (60) days of the termination of temporary disability payments. The vouchers range in value from up to $4000 if the permanent partial disability is less than 15%, to up to $10,000 if the permanent partial disability is between 50% and 99%.

The employer can avoid the vocational rehabilitation benefits if, within thirty (30) days after the end of temporary disability payments, it offers and the employee rejects or fails to accept:

1. A “modified” position, which is the employee’s former job modified so that the employee can perform it, if the position will last at least twelve (12) months; and

2. An “alternative” position, which is a different regular position that the employee can perform, as long as the position lasts at least twelve (12) months and pays within 15% of the wages and benefits as the former position, and the position is located within a reasonable commute of the employee’s residence at the time of the injury.

e. Death Benefits

If an employee dies in, or as a result of, an industrial injury or disease, the employee's dependents (not necessarily heirs) at the time of the injury (not death, unless injury and death are virtually simultaneous), are entitled to a death benefit. An industrial accident, specific or cumulative trauma, or exposure need only have hastened an

employee's death, and need not be the principal cause of the death, to entitle the dependents to a death benefit. The amount of the benefit varies with the number of dependents and the extent of their dependency, as well as with the date of injury, but is generally capped at $160,000.

6. Labor Code Section 132a Discrimination

Employers and insurers are prohibited from taking any action because of an industrial injury which works toward the detriment of the injured worker. These actions may range from outright termination, to a reduction in grade, even where the employee cannot perform the duties of the higher grade, or the discontinuance of severance pay. When the employee proves that the detriment occurred, the burden shifts to the employer to prove that the detriment was not related to the industrial injury and was necessitated by the realities of doing business.

An employee's remedy for illegal discrimination is a 50% increase in benefits, up to $10,000, and costs up to $250, plus reinstatement, lost wages and work benefits. In calculating the exposure of a discrimination claim, employers and insurers sometimes overlook the value of the lost wages and work benefits, which often may be more than the 50% increase in compensation benefits. There is no specific bar against insuring against this risk, but this insurance is almost never offered, while insurers may sometimes provide the cost of defense against such a claim.

Any action taken with regard to an industrially-injured employee should be well considered and founded on verifiable reasons that truly reflect the necessity of the action as compelled by the realities of doing business, not just business expediency. Even the seemingly most well-grounded action may spur a claim and a potential penalty for unlawful discrimination.

Recently, some courts have considered the question of whether an industrially injured employee may bring a claim under state or federal civil rights laws as well as under Labor Code section 132a. An employee is allowed to pursue both workers' compensation claims and claims under the Americans with Disabilities Act.

California's Supreme Court definitively answered this question in *City of Moorpark v. Superior Court*, where it specifically ruled that an employee who suffered discrimination on the basis of a work-related disability could sue civil damages under the FEHA, and was not limited to pursuing a 132a claim.

This issue most frequently arises when an employer must make a decision with regard to an employee who has been on an extended leave of absence due to an industrial injury. For example, assume an employee has been on temporary total disability leave for a year or more, and then is declared P&S and eligible to return to work.

Frequently, the employer has had to replace the employee in the interim, or the employee is no longer able to perform all of the functions of his or her job, but rather, has various restrictions. In those cases, the employer's failure to properly deal with the return to work issues can lead to a 132a claim, and can also implicate the FMLA, CFRA, ADA, etc.

F. Negotiating the Bermuda Triangle: Trying to Make Sense of This

This section of the presentation addresses some of the most common issues that arise in trying to reconcile these various laws. As you will see, the only way to effectively deal with these issues is to keep the purpose behind each different statutory scheme in mind, and to then run each given scenario through each scheme.

1. Problems with the Definition of "Disability"

As set forth above, the ADA, the disability provisions of the FEHA, and the workers' compensation statutes, all utilize the word "disability." The problem, of course, is that the different statutes do not define the word the same way, which requires anybody who deals with these issues to take extra care.

a. Does everyone with an occupational injury that results in temporary or permanent disability payments also have a disability within the meaning of the ADA and FEHA?

No. Even if an employee with an occupational injury has a "disability" as defined by a workers' compensation statute, he or she may not have a "disability" for ADA or FEHA purposes.

The workers' compensation system defines a "disability" as any industrial injury that limits an employee's ability to perform his or her job, regardless of the level or the length of the limitation.
The ADA defines "disability" as a physical or mental impairment that substantially limits major life activity (though this is now going to be interpreted much more broadly), having a record of such an impairment, or being regarded as having such an impairment.

The FEHA defines "disability" the same as the ADA, but does not require a "substantial" limitation in a major life activity, but rather, requires only a limitation of any degree. Further, both the ADA and the FEHA require some level of permanency for an impairment to rise to the level of a disability.

Thus, disabilities resulting from occupational injury may not be severe enough to substantially limit a major life activity, and therefore, would not be a disability under the ADA. While a workers'

compensation disability that prevents an employee from working at his or her job may be substantial enough to qualify as a disability under the FEHA, temporary disabilities generally do not. In sum, not all workers' compensation disabilities qualify as a disability under the ADA or the FEHA. Likewise, not all FEHA disabilities will qualify as ADA disabilities. Employers must be cognizant of this fact.

b. Does every person who has filed a workers' compensation claim have a disability under the "record of" portion of the ADA/FEHA definition?

No. A person has a disability under the "record of" portion of the ADA definition only if he or she has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits, or for the FEHA simply limits, one or more major life activities. Keep in mind that a workers' compensation disability is not necessarily an ADA or FEHA disability.

c. When does a person with an occupational injury have a disability under the "regarded as" portion of the ADA/FEHA definition?

A person with an occupational injury has a disability under the "regarded as" definition if he or she:

i. has an impairment that does not substantially limit a major life activity, but is treated by an employer as if it were substantially limiting;

ii. has an impairment that substantially limits a major life activity only because of the attitude of others towards the impairment; or

iii. has no impairment but is treated as having a substantially limiting impairment.

Example: An employee has an occupational injury that has resulted in a temporary back impairment that does not substantially limit a major life activity. However, the employer views her as not being able to lift more than a few pounds and refuses to return her to her position. The employer therefore regards her as having an impairment that substantially limits the major life activity of working, and the employee therefore has a disability as defined by the

ADA/FEHA.

Employer Alert: "Regarded as Having a Disability"

In one case, a supervisor asked a disruptive employee if he was having any "problems" that the company could help him with. The employee was referred to an "employer assistance program." The employee later sued after being fired, allegedly because he took too much leave. The Ninth Circuit held that the employee could sue under the ADA, reversing a summary judgment in favor of the employer. The reason? The evidence showed that the company "regarded" the plaintiff as having a mental disability. Whether or not the plaintiff actually had the disability was not important, because the employer believed that he had a disability. (Holihan v. Lucky Stores, Inc. (9th Cir. 1996).

2. Issues Concerning Disability Related Questions and Examinations of Applicants/Employees

The section pertains particularly to disability-related questions and medical examinations related to workers' compensation and occupational injuries.

a. When may an employer ask questions about an applicant's prior workers' compensation claims or occupational injuries?

An employer may ask questions about an applicant's prior workers' compensation claims or occupational injuries only after it has made a conditional offer of employment, but before employment has begun, and only as long as it asks the same questions of all entering employees in the same job category. If the employer asks about such injuries prior to offering employment, it is seen as a violation of the ADA and FEHA, in that such questions are likely to reveal information about a disability. If the employer waits to conduct the pre-employment testing until after the employee actually begins working, as often happens when the employer needs somebody to begin working immediately, the regulations provide that the test is no longer necessary as the employer is able to physically observe whether the employee is capable of performing the work.

b. When may an employer require a medical examination of an applicant to obtain information about the existence or nature of prior occupational injuries?

An employer may require a medical examination to obtain

information about the existence or nature of an applicant's prior occupational injuries, after it has made a conditional offer of employment, but before employment has begun, as long as it requires all entering employees in the same job category to have a medical examination. Where an employer has already obtained basic medical information from all entering employees in a job category, it may require specific individuals to have follow-up medical examinations only if they are medically related to the previously obtained medical information, and specifically related to the job in question.

c. Before making a conditional offer of employment, may an employer obtain information about an applicant's prior workers' compensation claims or occupational injuries from third parties, such as former employers, state workers' compensation offices, or a service that provides workers' compensation information?

No. An employer may not obtain any information from third parties that it could not lawfully obtain directly from the applicant, either at the pre-offer stage, or at any other time.

d. May an employer ask disability-related questions of an employee either at the time he or she experiences an occupational injury or when he or she seeks to return to work?

Yes. The employer may ask disability-related questions that are job-related and consistent with business necessity. This requirement is met where an employer reasonably believes that the occupational injury will impair the employee's ability to perform essential job functions or raises legitimate concerns about whether the employee can work without posing a direct threat to his or her, or others', safety. However, the questions must not exceed the scope of the specific occupational injury and its effect on the employee's ability, with or without reasonable accommodation, to perform essential job functions or to work without posing a direct threat.

e. May an employer ask disability-related questions or require a medical examination of an employee with an occupational injury in order to ascertain the extent of its workers' compensation liability?

Yes. Neither the ADA, nor the FEHA prohibit an employer from asking disability-related questions or requiring medical examinations

that are necessary to ascertain the extent of its workers' compensation liability.

However, excessive questioning or imposition of medical examinations may constitute disability-based harassment, which is prohibited by the ADA and FEHA.

f. If an employee with a disabling occupational injury requests a reasonable accommodation, may the employer ask for documentation of his or her disability?

Yes. If an employee requests reasonable accommodation and the need for accommodation is not obvious, the employer may require reasonable documentation of the employee's entitlement to an accommodation. While the employer may require documentation showing that the employee has a covered disability and stating his or her functional limitations, it is not entitled to medical records that are unnecessary to the request for reasonable accommodation.

3. Issues Related to Hiring Decisions

This section focuses on employer problems encountered in hiring persons with disabilities.

a. May an employer refuse to hire a person with a disability because it assumes, correctly or incorrectly, that he or she poses some increased risk of occupational injury and increased workers' compensation costs?

No. The employer can only refuse to hire such a person if the employer can show that employment of the person in the position poses a "direct threat" to that person's safety or to the safety of co-workers. In enacting the ADA, Congress sought to address the negative impact of stereotypes regarding disability, including assumptions about workers' compensation costs. Where an employer refuses to hire a person because it assumes, correctly or incorrectly, that because of a disability he or she poses some increased risk of occupational injury (and, therefore, increased workers' compensation costs), the employer discriminates against that person on the basis of disability. The employer can refuse to hire the person only if it can show that his or her employment in the position poses a "direct threat" to either the employee or to others. This means that an employer may not "err on the side of safety" simply because of a potential health or safety risk. Rather, the

employer must demonstrate that the risk rises to the level of a direct threat.

"Direct threat" means significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation. The determination that a direct threat exists must be the result of a fact-based, individualized inquiry that takes into account the specific circumstances of the individual with a disability.

In determining whether employment of a person in a particular position poses a direct threat, the factors to be considered are:

i. The duration of the risk;

ii. The nature and severity of the potential harm;

iii. The likelihood that the potential harm will occur; and

iv. The imminence of the potential harm.

b. May an employer refuse to hire a person with a disability simply because he or she sustained a prior occupational injury?

No. The mere fact that a person with a disability experienced an occupational injury in the past does not, by itself, establish that his or her current employment in the position in question poses a direct threat; i.e., a significant risk of substantial harm that cannot be lowered or eliminated by a reasonable accommodation. However, evidence about a person's prior occupational injury, in some circumstances, may be relevant to the direct threat analysis, discussed above.

5. Issues Arising Where an Employee Returns to Work After Disability and/or Occupational Injury

a. May an employer require that an employee be able to return to "full duty" before allowing him or her to return to work?

No. The term "full duty" may include marginal as well as essential job functions, or may mean performing job functions without any accommodation. An employer may only require that an employee be able to perform the essential functions of the job, either with or without a reasonable accommodation, and without causing the

employer an undue hardship.

b. May an employer refuse to return an employee with a disabling occupational injury to work simply because it assumes, correctly or incorrectly, that he or she poses some increased risk of re-injury and increased workers' compensation costs?

No. The fact that an employee has had a disabling occupational injury does not, by itself, indicate that he or she is unable to perform the essential functions of the job or that returning him or her to work poses a direct threat. In some circumstances, evidence about an employee's disability may be relevant to whether he or she can perform the essential functions of the job, with or without a reasonable accommodation, or it may be relevant to the direct threat analysis. An employer should consider the pertinent factors listed above, in applying the direct threat analysis in this context.

c. May an employer refuse to return an employee with a disabling occupational injury to work simply because of a workers' compensation determination that he or she has a "permanent disability" or is "totally disabled?"

No. Workers' compensation laws are different in purpose from the ADA and FEHA and utilize different standards for evaluating whether an individual has a "disability" or whether he or she is capable of working. For example, under the workers' compensation definition of “disability,” a person who loses vision in both eyes or has lost the use of both arms or legs may have a "permanent total disability," although he or she may still be able to work with a reasonable accommodation. Therefore, he or she would be able to work, and the employer would have to engage in the interactive process regarding potential reasonable accommodations. Such a determination under the workers’ compensation system is never conclusive regarding an individual's ability to return to work, although it may provide evidence regarding an employee's ability to perform the essential functions of the position in question or to return to work without posing a direct threat.

d. Under the ADA/FEHA, is a rehabilitation counselor, physician, or other specialist responsible for deciding whether an employee with a disabling occupational injury is ready to return to work?

No. The employer bears the ultimate responsibility for deciding

whether an employee is ready to return to work. Therefore, the employer, rather than a rehabilitation counselor, physician, or other specialist, must determine whether the employee can perform the essential functions of the job, with or without reasonable accommodation, or can work without posing a direct threat.

On the other hand, the employer must base its decision upon up to date medical information, and therefore may find it helpful to seek information from the rehabilitation counselor, physician, or other specialist regarding the employee's specific functional limitations, abilities, and possible reasonable accommodations.

6. Issues Pertaining to Reasonable Accommodation

The ADA and FEHA require that an employer make reasonable accommodations for the known physical or mental limitations of an otherwise qualified individual with a disability, unless the employer can demonstrate that the accommodation would impose an undue hardship. This section provides specific guidance regarding reasonable accommodation in the context of an accompanying workers' compensation injury.

a. Does the ADA or FEHA require an employer to provide reasonable accommodation for an employee with an occupational injury which provides the employee with either temporary or permanent disability payments?

No. Neither the ADA, nor the FEHA requires an employer to provide a reasonable accommodation for an employee with an occupational injury, unless the person has a disability as specifically defined by those statutes. All three statutes define “disability” differently. Keep in mind, however, that the FEHA defines “disability” very broadly.

b. May an employer discharge an employee who is temporarily unable to work because of an occupational injury resulting in total disability payments?

No. An employer may not automatically discharge an employee who is temporarily unable to work where it would not impose an undue hardship to provide leave as a reasonable accommodation. Even assuming that the occupational injury amounted to a disability under the ADA or FEHA, an employer is obligated to consider whether granting leave is a reasonable accommodation.

c. What are the reinstatement rights of an employee with a disabling occupational injury?

An employee with a disabling occupational injury is entitled to return to his or her same position unless the employer demonstrates that holding open the position would impose an undue hardship.

In some instances, an employee may request more leave even after the employer has communicated that would impose an undue hardship to hold open the employee's position any longer. In this situation, the employer must consider whether it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship. For example, suppose that an employee needs six months to recover from a disabling occupational injury, but holding his or her original position open for more than the employee's allotted FMLA leave will impose an undue hardship. The employer must consider whether it has a vacant equivalent position to which the employee can be reassigned for the remaining leave. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued leave is not required as a reasonable accommodation if a vacant position at a lower level is also unavailable.

d. May an employer unilaterally reassign an employee with a disabling occupational injury to a different position instead of first trying to accommodate the employee in the position he or she held at the time the injury occurred?

No. If the injury amounts to a disability under the ADA or FMLA, the employer must first assess whether the employee can perform the essential functions of his or her original position, with or without a reasonable accommodation. Examples of reasonable accommodation include job restructuring, modification of equipment, or a part-time work schedule. Reassignment should be considered only when accommodation is not possible or would impose an undue hardship.

e. Must an employer reassign an employee that is no longer able to perform the essential functions of his or her original position, with or without a reasonable accommodation, because of a disabling occupational injury?

Yes. Where an employee can no longer perform the essential functions of his or her original position, with or without a reasonable accommodation, because of a disabling occupational injury, the ADA

and FEHA require an employer to reassign him or her to an equivalent vacant position for which he or she is qualified, absent undue hardship. If no equivalent vacant position (in terms of pay, status, etc.) exists, then the employee must be reassigned to a lower graded position for which he or she is qualified, absent undue hardship.

f. If there is no vacancy for an employee who can no longer perform his or her original position because of a disabling occupational injury, must an employer create a new position or "bump" another employee from his or her position?

No. Neither the ADA, nor the FEHA require an employer to create a new position or to bump another employee from his or her position in order to reassign an employee who can no longer perform the essential functions of his or her original position, with or without a reasonable accommodation. Cases have held that the disabled employee's accommodation rights do not supersede the other employees' rights in their jobs, and do not require the employer to create a new job.

g. When an employee requests leave as a reasonable accommodation under the ADA or FEHA because of a disabling occupational injury, may an employer provide an accommodation that requires him or her to remain on the job instead?

Yes. An employer need not provide an employee's preferred accommodation as long as the employer provides an effective accommodation; i.e., one that is sufficient to meet the employee's job related needs.

Accordingly, an employer may provide a reasonable accommodation that requires an employee to remain on the job, in lieu of providing leave (e.g., reallocating marginal functions, or providing temporary reassignment). The employer is obligated to restore the employee's duties or to return the employee to his or her original position once he or she has recovered sufficiently to perform its essential functions, with or without reasonable accommodation.

However, if an employee with a disabling occupational injury does not request a reasonable accommodation, but simply requests leave that is routinely granted to other employees (e.g., accrued paid leave or leave without pay), an employer may not require him or her to

remain on the job with some type of adjustment unless it requires employees without disabilities who request such leave to remain on the job with some type of adjustment.

h. When an employee requests leave under the FMLA/CFRA, may an employer provide an accommodation that requires him or her to remain on the job instead?

No. If an employee qualifies for leave under the FMLA/CFRA, an employer may not require him or her to remain on the job with an adjustment in lieu of taking a leave of absence.

i. May an employer satisfy its ADA/FEHA obligation to provide reasonable accommodation for an employee with a disabling occupational injury by placing him or her in a workers' compensation vocational rehabilitation program?

No. An employer cannot substitute vocational rehabilitation services in place of a reasonable accommodation required by the ADA or FEHA. An employee's rights under the ADA and FEHA are separate from his or her entitlement under workers' compensation law. The ADA and FEHA require employers to accommodate an employee in his or her current position through job restructuring or some other modification, absent undue hardship. If it would impose an undue hardship to accommodate an employee in his or her current position, then the ADA and FEHA require that an employer reassign the employee to a vacant position he or she can perform, absent undue hardship.

j. May an employer make a workplace modification that is not a required form of reasonable accommodation under the ADA or FEHA in order to offset workers' compensation costs?

Yes. Nothing in the ADA or FEHA prohibits an employer from making a workplace modification that is not a required form of reasonable accommodation for an employee with an occupational injury in order to offset workers' compensation costs. For example, neither the ADA, nor FMLA require employers to lower production standards to accommodate individuals with disabilities. However, an employer is clearly permitted to voluntarily lower production standards for an occupationally injured employee as a way of returning him or her to work more quickly.

k. If an employer provides a long term "light duty" position to an employee recovering from an industrially caused disability, does the employer have to allow the employee to remain in the light duty position when employee is declared "permanent and stationary?"

An employer has no duty to convert a "temporary" light duty position into a permanent position, as that would, in effect, be creating a new position. Rather, the employer must then engage in the interactive process to see if a reasonable accommodation will allow the employee to perform the essential functions of his or her regular job.

7. Exclusive Remedy Provisions of Workers' Compensation Laws

This section deals with an employee's ability to pursue multiple avenues of relief.

a. Do the exclusive remedy provisions in workers' compensation laws prevent employees from pursuing claims under the ADA, FEHA and/or FMLA?

No. The purpose of workers' compensation's exclusivity clauses is to protect employers from being sued under common law theories for personal injury. Courts have generally held that the exclusive remedy provisions of state workers' compensation laws cannot prevent claims arising under the other state or federal civil rights laws.

California's Supreme Court definitively answered this question in *City of Moorpark v. Superior Court*, where it specifically ruled that an employee who suffered discrimination on the basis of a work-related disability could also sue for civil damages under the FEHA, and was not limited to pursuing a 132a claim.

8. "Serious Health Condition" and "Disability"

This section deals with the differences between a "serious health condition" and a "disability."

a. Are all serious health conditions also disabilities?

No. A "serious health condition" is not necessarily an ADA/FEHA "disability." An ADA "disability" is a physical or mental impairment that substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an

impairment. A FEHA “disability” is the same as an ADA disability, but the impairment need simply “limit” a major life activity. A workers’ compensation “disability” is any industrial injury that limits an employee’s ability to perform his or her job, regardless of the level or the length of the limitation.

Some "serious health conditions" may well be ADA or FEHA disabilities, such as most cancers and serious strokes. Other "serious health conditions" may not be ADA or FEHA disabilities, for example, pregnancy or a routine broken leg or hernia.

b. Are all disabilities also serious health conditions?

No. A serious health condition, in part, involves in patient care or an inability to perform the essential functions of the job for more than 3 days, and an ongoing course of treatment by a medical care provider. A person who must utilize a wheelchair has a “disability” under the ADA and FEHA, but assuming that he or she has no related medical problems, simply being in a wheelchair would not be a serious health condition.

c. Does an employee with an ongoing chronic serious health condition have a “record of” a disability?

Not necessarily. The fact that an individual has a record of a "serious health condition" does not necessarily mean that he or she has a record of a disability. Again, “serious health condition” and “disability” are defined differently, and while some serious health conditions are disabilities, and vice versa, not all are.

d. Is an employee with a serious health condition perceived as having a disability?

Just because someone has a "serious health condition" does not necessarily mean that the employer regards him or her as having a disability. If the employer treats the individual as having an impairment that substantially limits, or limits in terms of the FEHA, one or more major life activities, then the employer perceives him or her as having a disability. Employers must be careful to avoid this situation.

9. Medical Certifications

This section deals with the FMLA provision allowing employers to ask for

certification that an employee has a serious health condition and the ADA/FEHA restrictions on disability related inquiries.

a. Does an employer violate the ADA or FEHA by requesting an employee to complete the FMLA/CFRA certification form?

No. When an employee requests leave for a serious health condition of a family member or the employee's own health condition, employers do not violate the ADA or FEHA by asking for the information specified in the FMLA certification form put out by the EEOC. The FMLA form only requests information relating to the particular serious health condition, as defined in the FMLA or CFRA, for which the employee is seeking leave. An employer is entitled to know why an employee, who otherwise should be at work, is requesting time off. If the inquiries are strictly limited in this fashion, they are "job related and consistent with business necessity" under the ADA and FEHA.

10. Leave as an Undue Hardship

This section deals with the burden that granting leave places upon employers.

a. May an employer refuse to grant leave for a serious health condition because it would be an undue hardship?

No. If an eligible employee who works for a covered employer has a serious health condition, the right to leave is absolute, other than for a key employee. The fact that it would be a hardship on the employer to grant the leave is irrelevant.

b. May an employer refuse to grant leave to an employee disabled by pregnancy because it would be an undue hardship?

No. Again, the right to leave under California's PDL is absolute. Likewise, as long as the employee is an eligible employee working for a covered employer, she would be entitled to leave under the FMLA for her pregnancy related disability.

c. Is leave of more than 12 weeks automatically an undue hardship?

No. Just because the FMLA and CFRA limit leave to twelve (12) workweeks in a 12-month period, does not mean that employees are automatically limited to twelve (12) weeks of leave per year. For

example, PDL leave extends to four (4) months for each pregnancy, regardless of how often the pregnancies occur. Likewise, an employee on leave to recover from a workers' compensation covered injury is entitled to stay on leave until it would be an undue hardship for the employer to continue the leave. Further, if leave is a reasonable accommodation of an ADA/FEHA disability, the amount of leave that needs to be granted is a fact specific question, which will vary for different employers and employees.

11. Conflicts between the Laws and Multiple Application

This section deals with those situations with the laws are in conflict, or when more than one of them apply.

a. If an individual with a disability takes 10 weeks of leave as a reasonable accommodation, can the employer count that leave as FMLA/CFRA leave also?

Yes. Designating leave as FMLA/CFRA leave does not lessen its status as a reasonable accommodation. Of course, because the person is on leave as an ADA/FEHA accommodation, he or she is entitled to be reinstated to the prior position, and not merely reinstatement to an "equivalent" position as is allowed under the FMLA/CFRA. Likewise, the employee would be entitled to have his or her health benefits continued under the FMLA/CFRA.

b. If at the end of the 10 weeks leave, the employee can only work part-time, after returning to his or her original job, but the employer does not provide health benefits to part-time employees, what happens to the employee's benefits?

The benefits would continue until the entire twelve (12) weeks of FMLA/CFRA leave has expired. In this case, it would be on a reduced schedule basis, based upon the amount of time that the employee is working. If he or she is working half time, he or she would be utilizing one-half of a week of leave for each week worked.

c. If an employee is provided with an alternative job as an accommodation of a disability, but then needs and takes FMLA/CFRA leave while assigned to that job, to which job does the employee return when coming back from the leave?

An employee's right to be reinstated to the same or an equivalent job upon the end of FMLA/CFRA leave applies to the job that the

employee held at the time he or she requested the leave. Here, he or she would be reinstated to the job given as an accommodation. Of course, if the need for the accommodation has ceased, the employer can look to put the employee back into his or her regular job.

d. When evaluating a potential undue hardship of granting leave as a reasonable accommodation under the ADA/FEHA, may employers consider the cost and disruption of FMLA/CFRA leave that the employee has already taken?

Yes. The EEOC has issued a statement that because the burden of evaluating a reasonable accommodation ultimately rests upon the employer, it can consider the impact of prior FMLA/CFRA leave already taken. Of course, leave in excess of 12 weeks is not automatically an undue hardship, and the employer must do a complete analysis of the situation on a case-by-case basis.

e. When one statute provides greater benefits to the employee than another, which one should the employer follow.

Always follow the statute that provides the greatest benefit to the employee.

G. Review – Fact Patterns

1. Scenario 1

John and Claire, a husband and wife both work for Acme Company. John has worked at Acme for years, while Claire started working there on June 1, 2011. The company employs more than 100 employees. Acme Company uses the calendar year as its FMLA/CFRA leave entitlement period. On January 1, 2011, Claire informs her supervisor that she needs leave because she is planning to undergo fertility treatments. Because the fertility clinic is 500 miles away and the treatments will take place over a period of a week, she needs to be absent from February 7, 2012, through February 13, 2012, which includes 5 workdays. John informs his supervisor that he needs leave for the same period of time, both to contribute his DNA to the project, and to support Claire, who is very anxious and upset.

Question: Are Claire and John entitled to leave for the fertility treatments?

John and Claire were successful in conceiving a child. Claire's expected due date is November 6, 2011. Shortly after returning to work in February, John trips over a box at work and tears some tendons in his left knee. He is out of work for 2 weeks. Due to

some minor complications with her pregnancy, Claire needs to take 4 weeks off from work prior to delivery, and both John and Claire have announced their intent to take 8 weeks off from work after the baby is born to care for their newborn. They intend to return to work on January 2, 2013.

Question: What are their leave entitlements?

Question: Can their leave be paid?

2. Scenario 2

You are the HR Manager for a large corporation, responsible for administering personnel policies for several divisions. Susan, a full-time outside salesperson, runs a red light and has a serious accident while returning from dinner with a customer at which alcohol was served on a Tuesday. She suffers a fractured arm, broken ankle and serious facial lacerations. She also fails a police-administered sobriety test and is charged with driving under the influence. She spends Tuesday night in the hospital and the next day at home before returning to work on Thursday. When she comes to your office on Thursday to discuss the accident and the criminal charges, she asks for information about chemical dependency treatment. She also states that her doctor has advised future surgery to repair her arm, with a continuing course of rehabilitation therapy.

Company policy prohibits employees from being under the influence of alcohol or illegal drugs while working; however, it is also common practice for the salespeople to serve and consume alcohol while entertaining customers, a practice specifically endorsed by the CEO. Susan has worked with the company for 7 years and is known to be a "party person." She has been warned in the past for her "inappropriate behavior" at company sponsored social gatherings, at which she routinely drinks to excess.

Is Susan eligible for workers' compensation benefits?

Is Susan eligible for FMLA/CFRA leave?

Is Susan protected under the ADA/FEHA? If so, what type of accommodation might be required to enable her to perform essential job functions?

What should be done about Susan's violation of company policy?

Answers

Scenario 1

1. Are Claire and John entitled to leave for the fertility treatments?

Claire has not worked at Acme Company long enough to be eligible for FMLA/CFRA leave. It sounds as though Claire may be infertile, which is probably a disability under the ADA/FEHA. Both the EEOC and the CRD would probably determine that Claire is entitled to the leave as a reasonable accommodation, unless Acme can prove that it would be an undue hardship to provide the leave. Also, Claire would probably be eligible for PDL.

John may be entitled to FMLA/CFRA leave. While he does not appear to have a serious health condition, Claire's infertility is going to require a period of incapacity of more than 3 consecutive calendar days and continuing treatment by a health care provider, which meets the definition of a serious health condition. Both the FMLA and the CFRA also allow for leave to provide psychological comfort and reassurance.

2. What are their leave entitlements?

Claire has taken no FMLA/CFRA leave prior to her pregnancy leave, so she is entitled to a total of 12 weeks of leave after she met her 12-month eligibility requirement on June 1, 2011. Therefore, Claire is entitled to take up to twelve weeks of FMLA/CFRA leave for baby bonding, etc. Keep in mind that the 4 weeks due to complications would not qualify as CFRA leave, but rather, would constitute PDL. Those 4 weeks would also qualify as FMLA leave, however. Thus, Claire would be able to take 4 weeks of FMLA/PDL leave for the complications, and 8 weeks of FMLA/CFRA leave for the baby bonding after the birth.

John has taken 1 week of FMLA/CFRA leave for the fertility treatments, plus 2 weeks after his workers' compensation injury for his knee. (You ran them concurrently didn't you?) Therefore, he has 9 weeks of leave available. While he has sufficient leave to take 8 weeks of leave to care for his newborn child.

In reality, John might be able to stretch his leave somewhat, if he can show that a week or two of the leave he takes after the birth of their child is to care for Claire, who may experience some period of disability due to childbirth. If the doctor certifies that Claire will be incapacitated for 2 weeks, John may take 2 weeks to care for Claire. Because Claire will be taking those 2 weeks after birth as leave for her own serious health condition, it will count as FMLA/PDL leave, and she will only be taking 6 weeks of FMLA/CFRA leave to care for their newborn, if she returns on January 2. John will then be taking 8 weeks of leave (2 to care for Claire and 6 for baby bonding), and will return on January 2.

3. Can the leave be paid?

Claire would be able to apply for up to 6 weeks' of PFL during her baby bonding leave, after the birth of the baby. Because PFL is not paid for the employee's own serious condition, she would not be eligible for such benefits while she was disabled by the pregnancy. Also, keep in mind that an employee is not eligible for PFL benefits when he or she is eligible to obtain SDI benefits, which are available for employees disabled by pregnancy.

John would be able to obtain PFL benefits for that amount of time he takes off for baby bonding. Keep in mind that while he was caring for Claire, she did not have a "serious health condition" as defined by PFL. PFL adopts the definition of serious health condition from the CFRA, which specifically excludes pregnancy from that definition. He also would not be eligible for PFL benefits for that amount of time when he was off with his workers' compensation injury.

Paid sick leave as of July 1, 2015.

Scenario 2

Susan's eligibility for workers' compensation benefits, FMLA/CFRA leave and ADA/FEHA protections must be analyzed separately under each law.

1. Is Susan eligible for workers' compensation benefits?

Here, Susan sustained work-related injuries because the accident occurred following a business meeting (entertaining a client) that is directly related to Susan's sales position. The fact that the meeting was over and Susan was injured on her way home does not change that fact, in light of the fact that her job requires such travel.

Because Susan was apparently intoxicated, however, as shown by the police sobriety test, her injuries may not be covered by the workers' compensation policy. Generally speaking, an injury that happens while the employee is intoxicated is not covered. However, the employer, or its carrier, would have to show that the injury was "caused by" the intoxication, and further, would have to establish that Susan was in fact intoxicated. Further, when an employer condones alcohol use, it loses its ability to challenge workers' compensation coverage on the grounds of intoxication. Here, Susan is a known "party person," and has been warned for inappropriate behavior resulting from excessive drinking in the past. Therefore, her injuries are probably entitled to coverage.

2. Is Susan eligible for FMLA/CFRA leave?

First, determine whether Susan meets the eligibility criteria. Has she been an employee for the requisite 12 months? Yes, she's worked for this company for seven years. In the prior 12 months has she worked 1,250 hours or more? The facts given do not make this clear. However, as a full-time outside salesperson, she is an exempt employee who does not keep track of her hours, and therefore, you must assume she meets the 1,250-hour requirement. Thus, as long as Susan works within 75 miles of at least 49 other employees, she would be covered. For sake of this example, we will assume that she is covered.

Second, determine whether Susan's two-day absence was for an FMLA/CFRA reason. Susan's overnight stay in the hospital and the day of incapacity afterward (Wednesday) meet the definition of a serious health condition. Plus, any subsequent treatment in connection with the overnight stay will be covered—which would probably include surgery on her arm, and any follow-up to the surgery.

Further, when Susan has surgery on her arm, in addition to qualifying for FMLA/CFRA leave as subsequent treatment in connection with her inpatient care, she will most likely qualify for FMLA/CFRA leave for inpatient care for the surgery itself and the continuing course of rehabilitation therapy, assuming she still meets the eligibility criteria at that point.

If Susan is absent to attend chemical dependency treatment, you should obtain medical certification to determine if her absences are related to a serious health condition. Depending on the type of treatment, the amount of time she needs and how her drinking problem affects her, this time could be under the continuing treatment, multiple treatment or inpatient care definitions.

3. <u>Is Susan protected by the ADA and/or the FEHA, and if so, what type of accommodation might be required</u>?

Susan's two-day absence and any time she needs related to surgery and rehabilitation for her arm do not qualify for ADA/FEHA protections because the conditions causing these absences are not disabilities. Susan has a broken arm, broken ankle and facial lacerations. Based on the information provided, none of these conditions are long-lasting or permanent in duration and therefore are not disabilities.

Susan's request for information about chemical dependency treatment puts the company on notice that she may have a disability that may require accommodation. You are entitled to some specific information from her physician or a chemical dependency counselor to determine:

a. Is Susan addicted to alcohol?

b. If yes, how does this condition affect her ability to perform essential job functions?

c. What treatment, limitations or restrictions has her health care provider prescribed?

With this information, you can then determine if the ADA/FEHA applies and whether Susan requires time off to attend a chemical dependency treatment program as an accommodation.

4. <u>What should be done about Susan's violation of company policy</u>?

Even if Susan has a disability (alcoholism) the ADA and FEHA allow the company to discipline her for violating company policy by drinking on the job. However, because the written policy differs from accepted and condoned practice (remember, the CEO condones alcohol consumption for the sales department) you must be careful to treat Susan the same as other sales employees who drink too much while entertaining clients. Disciplining Susan for violating a policy for which other sales employees are not disciplined looks like you are discriminating against Susan because she is an alcoholic. You should, however, also look to the fact of how the company treats other employees who cause serious injuries such as this.

The most important thing, however, is to immediately change the company's policy with regard to condoning an employee's repeated drinking to excess at company functions, so as to avoid this situation in the future.