

To: All Department of Fish and Wildlife Staff
Subject: Family and Medical/Pregnancy Disability Leave Policy

This Bulletin supersedes the "Family Medical Leave Act" policy as represented by Section 12440 of the California Department of Fish and Wildlife Operations Manual. The revised text follows:

Family and Medical/Pregnancy Disability Leave Policy 12440

It is the policy of the California Department of Fish and Wildlife (CDFW) to provide unpaid job-protected family and medical leave to eligible employees in compliance with the Family and Medical Leave Act (FMLA), including Military Caregiver Leave (MCL) and Qualifying Exigency Leave (QEL), the California Family Rights Act (CFRA), and Pregnancy Disability Leave (PDL).

The following policy provisions do not supersede any Memoranda of Understanding that may provide employees greater family or medical leave benefits.

FMLA/CFRA Leave Entitlement **12440.1**

FMLA/CFRA leave entitles an eligible employee up to 12 workweeks of unpaid job-protected leave in a 12-month period (January 1 through December 31) and the continuation of health benefits for one or more of the following reasons:

- The birth and care of a newborn child of the employee.
- Placement of a child in the employee's family for adoption or foster care.
- To care for a spouse, son, daughter, or parent with a serious health condition.
- To take medical leave when the employee is unable to work because of a serious health condition.
- To take leave for a qualifying exigency (QEL) arising out of the foreign deployment of the employee's spouse, son or daughter of any age, or parent who is a member of the Armed Forces (including the National Guard and Reserves) to manage their affairs while the military member is on covered active duty.
- To take Military Caregiver Leave (MCL) up to 26 workweeks in a 12 month period, to care for a covered military servicemember who is undergoing medical treatment, recuperation, or therapy, who is otherwise on outpatient status, or is on a temporary disability list for a serious injury or illness.

Typically, FMLA/CFRA are concurrent leave except during PDL, when a family member is ineligible for CFRA or taking FMLA Qualifying Exigency Leave (QEL) and Military Caregiver Leave (MCL).

Twelve workweeks of leave entitlement equals twelve (12) of the employee's normally scheduled workweeks. When an employee's schedule varies from week to week, to such an extent that an employer is unable to determine with any certainty how many hours the employee would have worked, the employer uses a weekly average of the hours scheduled over the prior 12 months to calculate the their leave entitlement. CFRA regulations state that for eligible employees who work more or less than five days a week, or who work an alternative work schedule, the number of working days that constitutes 12 workweeks is calculated on a pro rata or proportional basis.

Military Family Leave Entitlement

12440.11

FMLA provides two types of Military Family Leave entitlements. The first is Military Caregiver Leave (MCL) and the second is Qualifying Exigency leave (QEL). Eligible criteria is the same as FMLA with the following exceptions:

An MCL eligible employee must be the servicemember's parent, spouse, or child and next of kin. Confirmation of the employee's relationship to the covered servicemember must be provided to the Human Resources Branch (HRB) Medical Disability Services Unit (MDSU). Where a covered servicemember has a sibling and designates a cousin as their next of kin for FMLA purposes, then only the designated cousin is eligible as the covered servicemember's next of kin.

The 26 workweeks of MCL is not in addition to the 12 workweeks of FMLA leave normally available to eligible employees but is aggregated with all other types of FMLA qualifying leave during the applicable 12 month period. The 12-month period begins on the day the employee begins caregiver leave and ends 12 months after.

Due to MCL being available on a per service member per injury basis, an eligible employee may be entitled to take more than one such leave during the course of his or her employment to care for different servicemembers or for the same servicemember with a subsequent injury or illness. In such circumstances, leave is still limited to no more than 26 weeks during the applicable period. In addition, spouses who are FMLA eligible and work for the State may be limited to a combined total of 26 workweeks' caregiver leave.

Qualifying Exigency Leave (QEL) is for eligible family members needing leave up to 12 workweeks for "a qualifying exigency" arising out of a covered military member's active duty status or call to active duty in support of a contingency operation or deployment to a foreign country. It is available only to the family members of regular Armed Forces, National Guard or Reservists called to federal active duty. QEL does not include military members who are retired members of the regular Armed Forces, a state Reserve or National Guard unit, or those called to active duty by a State rather than the Federal Government.

QEL includes the following eight events:

- Issues arising from short-notice deployment (i.e., deployment to active duty seven or less days prior to the date of deployment)
- Military events, ceremonies, or programs related to active duty or related activities
- Childcare and school activities
- Financial or legal appointments
- counseling

- Rest and recuperation
- Post-deployment activities (e.g., arrival ceremonies and reintegration briefings)
- Additional activities agreed upon by the employer and employee

PDL Entitlement and Duty to Accommodate

12240.12

As outlined in the Department of Fair Employment and Housing (DFEH) regulations, an employee disabled by pregnancy is entitled to take up to four months of unpaid PDL. PDL regulations clarify that disabled by pregnancy includes the following conditions/situations: severe morning sickness, gestational diabetes, pregnancy induced hypertension, preeclampsia, post-partum depression, prenatal or postnatal care, bed rest, childbirth, loss or end of pregnancy, recovery from childbirth or loss/end of pregnancy, and lactation (a medical condition related to pregnancy).

In addition, the employee is entitled to a reasonable accommodation, or a transfer to a less strenuous position, as prescribed by the health care provider. Leave can be taken during any time the employee is physically unable to work because of pregnancy or a pregnancy related condition. Leave can be taken before or after birth, intermittently, or continuously.

FMLA and PDL are concurrent leave. When PDL ends, the eligible employee may request CFRA leave up to 12 workweeks for the birth of the child. There is no requirement that either the employee or child have a serious health condition nor a disability related to pregnancy, childbirth, or medical condition before taking CFRA leave for the birth of the child. For example, if the employee takes 14 weeks of PDL (FMLA equals 12 of the 14 weeks of PDL) the employee may have up to 12 workweeks of CFRA leave to bond with the baby.

If CFRA leave entitlement for baby bonding crosses two calendar years, the employee is entitled to the maximum benefit in each calendar year. For example, if the employee started baby bonding leave on December 15, 2018, they would take two weeks of their 12 workweek entitlement in calendar year 2018. Then on January 1, 2019, the clock would reset and the employee is entitled to another 12 workweeks (total of 14 workweeks). Bonding leave occurs within one year of the child's birth. Bonding leave is not limited to female employees. Eligible male employees may take up to 12 workweeks of bonding leave under CFRA.

Spouses employed by the State are jointly entitled to a combined total of 12 workweeks of bonding leave. CDFW may not limit the employee's entitlement to CFRA leave for any other qualifying purpose. If the parents are unmarried, they may have different rights under FMLA.

Employees may take leave intermittently, which means taking leave in separate periods of time, or by reducing their normal weekly or daily work schedule. If leave is for bonding with a child, the basic minimum leave duration is two weeks. However, the employer must grant a request for leave of less than two weeks on any two occasions.

Definitions

12440.2

Definitions for the following can be found in the Code of Federal Regulations, under Title 29 § 825.102 and § 825.122 (Military). Definitions for CFRA are in the California Code of Regulations, under Title 2 § 11087:

- Spouse
- Son or daughter
- Parent
- Servicemember
- Serious health condition
- Health care provider
- Military definitions: Covered servicemember, active duty, spouse, parent, son, daughter, next of kin of a covered service member, etc.

Eligibility Criteria

12440.3

FMLA/CFRA Eligibility Criteria

12440.31

An employee is eligible for FMLA/CFRA leave when they have worked for the State for a total of 12 months following their date of hire, even with a break in service after the date of hire. In addition, the employee must have physically worked at least a minimum of 1,250 hours in the preceding 12 months.

The statutory requirement is that employee eligibility determinations be made “as of the date leave commences.” If an employee reaches the 12-month eligibility requirement while on leave, the leave period prior to meeting the requirement is non-FMLA leave, and the leave period *after* the requirement is fulfilled would then be considered FMLA leave. With the exception of administrative time off (ATO), periods of leave, including paid leave due to job-related accidents or injuries, do not count towards the 1,250 hours requirement. However, they do count towards the 12 months of employment requirement.

Example: An employee requests and is denied FMLA/CFRA leave because they have only worked 11 months for the State and do not meet the 12 month requirement. The employee is allowed to take a non-FMLA/CFRA leave. During the time taken for the non-FMLA/CFRA leave, the employee meets the 12-month requirement and is now eligible for FMLA/CFRA leave from that point forward. The FMLA/CFRA approved leave counts against the employee’s FMLA/CFRA entitlement.

PDL Eligibility Criteria

12440.32

Unlike FMLA/CFRA, to be eligible for PDL the employee is only required to submit a certification substantiating a medical condition related to pregnancy as noted above. The employee is *not* required to meet FMLA/CFRA’s 12 months or the 1,250 physical hours worked requirements.

During the disabled pregnancy period, the employee is entitled to a reasonable accommodation, or a transfer to a less strenuous position, as prescribed by the healthcare provider. Likewise, the employee may be entitled to additional leave in accordance with CDFW’s Reasonable Accommodation Policy and Procedures.

Notice Requirements

12440.4

Effective January 16, 2009, amended Department of Labor (DOL) regulations created three new employer and/or employee notice responsibilities.

CDFW Notice Requirements

12440.41

1. General Notice (FMLA): DOL has published a new general notice poster entitled "Employee Rights under the FMLA" (WH Publication 1420). Both the FMLA and CFRA's notices are electronically posted on the Human Resources Branch (HRB) Medical Disability Services Unit (MDSU) intranet and included in the new employee hire packet.
2. Notice of Eligibility and Rights and Responsibilities (FMLA/CFRA): HRB MDSU provide employees the notice within five business days after receiving a request for FMLA/CFRA leave or becomes aware that the leave may qualify for FMLA/CFRA. The notice informs the employee whether or not they are eligible and includes important information regarding their rights and responsibilities, certification requirements, and the consequences for not meeting those requirements, as well as information regarding the return-to-work release. In addition, the employee is informed of the consequences if they fail to return to work after FMLA/CFRA leave.

When a represented employee is denied eligibility based solely on a lack of 1,250 hours of service, there may be a union noticing requirement. Eligibility does not mean the leave has been approved for FMLA/CFRA at this point.

3. Designation Notice (FMLA/CFRA): After HRB MDSU receives the certification form (see below) the employee, supervisor and Personnel Specialist is informed within five business days whether the leave is approved, delayed, or denied in writing and if applicable, the consequence for failing to provide a complete certification.

CDFW employees under the California Department of Human Resources' (CalHR) safety sensitive designated classifications requiring a commercial driver license, including non-sworn and sworn peace officers, shall provide a medical release certifying their ability to perform the essential job functions or meet Peace-Officer Standards and Training (POST) requirements with or without the need for a Reasonable Accommodation.

With the exception of amendments and/or extensions, only one Designation Notice is required for each FMLA/CFRA qualifying reason, per leave year, regardless of whether the leave is taken as a continuous block of leave or on an intermittent or reduced leave schedule basis. A retroactive notice is permissible if it does not cause employee harm or injury. CDFW may not retroactively designate leave after the employee has returned to work.

Employee Notice and Certification

12440.42

Employees seeking to use FMLA/CFRA/PDL are required to provide a 30-day advance notice of their need to take a foreseeable leave by submitting the "Family & Medical Leave Request & Fact Sheet" form DFW 1067. This form includes leave for a planned birth, adoption, foster care placement, or medical treatment. If it is not possible to give such advance notice, the employee must provide notice as soon as practicable (on the same or next business day). When intermittent leave is needed for planned medical treatment, the employee must try to schedule treatment so as not to unduly disrupt CDFW operations.

Eligible Military Qualified Exigency Leave (QEL) employees are obligated to provide notice of leave due to a qualifying exigency when they first seek to take the leave.

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Certification of a serious health condition, pregnancy disability, and military deployment, are required and maintained as confidential documents. Employees must submit a certification within 15 calendar days of their Notice of Eligibility.

- CalHR 754 form: "Certification of Health Care Provider for Employee's Serious Health Condition;" or
- CalHR 755 form: "Certification of Health Care Provider for Family Member's Serious Health Condition;" or
- CalHR 756 form: "Certification of Qualifying Exigency for Military Family Leave (FMLA)" As part of the certification process, the employee is required to provide copies of the military member's orders or other military documentation, facts regarding the exigency, and dates of the military member's active duty service and beginning of the exigency; or
- CalHR 757 form: "Certification for Serious Injury or Illness of Covered Service Member for Military Caregiver Leave (FMLA)." The certification form is completed by an authorized health care provider of the covered servicemember, such as the Department of Defense (DOD), Veteran Affairs (VA), DOD Tricare, DOD non-network Tricare, and DOD authorized representative.

If CDFW has a good faith, objective reason, to doubt the validity of a certification for the employee's own medical condition (FMLA), the HRB MSDU may require a second or third medical opinion at the department's expense, in addition to periodic re-certification. CFRA regulations provide the HRB MDSU authority to only contact the health care provider for the limited purpose of authenticating a certification.

Accordingly, if the HRB MDSU receives a deficient or incomplete certification, the employee will be provided a written explanation of the deficiency, given seven calendar days to submit the necessary information, and advised of the consequence of failing to timely provide a completed certification.

Job Restoration

12440.5

Regulation stipulates that, upon return from FMLA/CFRA/PDL leave, an employee must be restored to their original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment. In addition, the employee's use of FMLA/CFRA/PDL cannot result in the loss of any employment benefit that the employee earned or was entitled to before using leave.

If an employee accepts light duty work while recovering from their own serious health condition, the period on light duty assignment will not be counted as FMLA/CFRA/PDL. Employees are not required to work light duty jobs in lieu of taking leave, and those who do so voluntarily are not on FMLA/CFRA/PDL. At the end of the assignment, the employee has the right to be reinstated to the same or equivalent position.

Under specified and limited circumstances, where restoration to employment will cause substantial and grievous economic injury to its operations, an employer may refuse to reinstate certain highly-paid "key" employees after using FMLA/CFRA leave during which health coverage was maintained. In order to do so, the employer must:

- Notify the employee of their status as a key employee in response to the employee's notice of intent to take leave.

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- Notify the employee as soon as the employer decides it will deny job restoration, and explain the reasons for this decision.
- Offer the employee a reasonable opportunity to return to work from leave after giving this notice.
- Make a final determination as to whether reinstatement will be denied at end of the leave period, if the employee then requests restoration.

A "key" employee is a salaried eligible employee who is among the highest paid 10 percent of employees within 75 miles of the work site.

Under CFRA regulations, "an employee who fraudulently obtains or uses CFRA leave from an employer is not protected by CFRA's job restoration or maintenance of health benefits provisions.

Benefit Coverage

12440.6

CDFW is required to maintain group health insurance coverage for an employee on FMLA/CFRA/PDL whenever such insurance was provided before the leave commenced and on the same terms as if the employee had continued to work. If applicable, employees need to arrange payment of their health insurance premiums while on leave. CDFW may recover employee health premiums paid for an employee who fails to return to work from FMLA/CFRA and PDL, and through payroll deductions.

The continuation of health benefits for FMLA are separate from CFRA and PDL regulations. The maximum continuation of health benefits (concurrent FMLA and PDL, and consecutive CFRA) is 29.33 weeks.

Disability Insurance-(Wage Benefit Replacement)

Pursuant to the Employment Development Department (EDD), which administers the State Disability Insurance (SDI), applicable to bargaining units (BU) 1, 4, 11 and 14), and Nonindustrial Disability Insurance (NDI), applicable to excluded employees and rank-and-file employees in BU's 2, 7, 9, 10, and 12, the employer will pay the employer's portion of the health benefits premium for up to 26 weeks.

FlexElect

The reimbursement account and/or cash option (Flex or CoBen) enrollment will stop while the employee is on an unpaid leave of absence. If the employee returns to pay status in the same plan year, the enrollment will resume. Reimbursement account deductions will continue for employees who have sufficient pay issue to cover the deduction during any given pay period. Pay may issue for time worked, leave credits used to cover the FMLA/CFRA/PDL absence, NDI or ENDI payments, or supplementing SDI with the use of leave credits.

If an employee is enrolled in the medical reimbursement account and wishes to continue to submit claims for services provided during the leave of absence, the employee may elect to continue making their contributions through COBRA.

Call-in and Reporting Procedures

12440.7

Employees are required to follow their standard operating call-in procedures when approved for intermittent FMLA/CFRA/PDL leave. When approved for continuous leave, employees are not required to call in daily during the approved leave period. Employees should inform their supervisor how they want to charge leave (e.g. FMLA/CFRA/PDL sick).

Appeals and Complaints

12440.8

Employees may exercise their right to appeal the FMLA/CFRA/PDL determination to the HRB Chief, CDFW's Equal Employment Opportunity (EEO) Office, the U.S. Department of Labor's (DOL) Employment Standards Administration, Wage and Hour Division, and/or the California Department of Fair Employment and Housing (DFEH) without fear of reprisal, interference, or retaliation. DOL administers and enforces FMLA whereas; DFEH administers and enforces CFRA and PDL.

Violations

12440.9

An employee who fraudulently obtains or uses FMLA/CFRA/PDL is not entitled to the provisions' protection, reinstatement, and continuation of group health benefits. Failure to follow any of the provisions of this policy will result in corrective and/or disciplinary action, which may include termination of employment. Violation of this policy does not pertain to an employee who does not wish to request FMLA/CFRA/PDL.

Managers and supervisors shall engage in the interactive process timely and in good faith and may be subject to disciplinary action for any unlawful act or policy violation. It is unlawful to interfere with, restrain, or deny the exercise of any right provided by FMLA/CFRA/PDL. It is also unlawful to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding related to FMLA/CFRA/PDL.

Authorities

12440.10

- Family and Medical Leave Act
- California Family Rights Act
- Pregnancy Disability Leave
- California Department of Human Resources' (CalHR) Manual section 2107-Family Medical Leave Act / California Family Rights Act
- CalHR's Manual section 2120-Pregnancy Disability Leave

Forms

12440.11

- DFW 1067: Family & Medical Leave Request
- CalHR 754: Certification of Health Care Provider for Employee's Serious Health Condition
- CalHR 755: Certification of Health Care Provider for Family Member's Serious Health Condition
- CalHR 756: Certification of Qualifying Exigency for Military Leave (FMLA)
- CalHR 757: Certification for Serious Injury or Illness of Covered Service Member for Military Caregiver Leave (FMLA)
- DFEH-E10P: Certification for Pregnancy Disability Leave

This Policy was previously distributed as CDFW Operations Manual Policy 12440, Family and Medical Leave Policy (issued April 29, 2010).

Contact

For more information regarding this policy and to report any broken links, contact the Human Resources Branch.



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