

Department of Fish and Game
DEPARTMENTAL BULLETIN

Number: 2010-05
Date Issued: 04/29/10
Supersedes: 2010-02)
Expires: Until Superseded

To: All Employees
FGOM Holders

Subject: Family and Medical Leave

This Bulletin sets forth procedures relating to the Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA).¹

The Department of Fish and Game (DFG) is committed to provide family and medical leave to eligible employees in compliance with both the FMLA and CFRA. It is DFG's responsibility to both designate FMLA/ CFRA leave when there is a qualifying event and to give notice of the designation to the employee. It is also DFG's policy to ensure that employees are protected from discrimination and harassment for exercising their rights under FMLA or CFRA.

In addition to family and medical leave, an employee who is disabled due to pregnancy, childbirth, or a related medical condition is entitled to a job-protected Pregnancy Disability Leave (PDL) for any period of actual disability from six (6) weeks up to four (4) months. An employee need not meet the eligibility requirements for FMLA to be eligible for PDL. PDL is not counted against an employee's entitlement to leave under FMLA, but health benefit coverage may be maintained for only 12 weeks in a calendar year under the combined FMLA and PDL leaves. In addition to FMLA/CFRA/PDL, employees are allowed to take up to one year leave without pay for purposes of pregnancy, childbirth, recovery therefrom, care for the newborn child or adoption of a child under the Government Code (for unrepresented employees) and under the various bargaining contracts.

¹ FMLA (Federal law)/CFRA (California Law) are mandated by the following: Americans with Disabilities Act (ADA) – 42USC Section 12101 et seq.; Family Medical Leave Act (FMLA) – 29 USC Section 2601; California Family Rights Act (CFRA) – GC 12945.2; and Fair Employment and Housing Act (FEHA) – GC 12900, et seq.

DEFINITIONS

FMLA/CFRA Leave

FMLA/CFRA leave is defined as an approved leave of absence for up to 12 weeks per calendar year for employees unable to work due to a serious health condition.

FMLA/CFRA gives eligible employees the right to take unpaid leave for one or more of the following reasons:

- To care for the employee's child after birth, adoption or placement in foster care
- To care for the employee's qualifying family member, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform their job functions.

MILITARY FAMILY LEAVE

Effective October 28, 2009, the Fiscal Year 2010 National Defense Authorization Act (NDAA 2010) amended the FMLA's military leave entitlements as described below.²

Qualifying Exigency Leave

With the passage of NDA 2010, the Qualifying Exigency Leave (QEL) is now available to an eligible employee with a spouse, child or parent on active duty or called to active duty in the National Guard or Reserves or serving in the regular Armed Forces. Eligible employees may take up to normal 12 weeks of leave during a calendar year for QEL. The deployment no longer has to be in support of a contingency operation. Also, deployments to a foreign country are now covered.

The purpose of QEL is to help families of members of the National Guard, Reserves or regular Armed Forces to manage their affairs while the military member is on active duty or call to active duty status. QEL is not covered under CFRA. Thus, CFRA leave not exhausted when FMLA used for this purpose. QEL is tracked using the same 12-month period used to track traditional FMLA. Eligible employees are entitled to a total of 12 weeks in a 12-month period regardless of whether the leave is for traditional FMLA leave or for QEL. An employee who has already exhausted 12 weeks of traditional FMLA leave in a 12-month period is not entitled to an additional 12 weeks of QEL leave.

An employee must provide reasonable and practicable notice to the employer when requesting QEL. The DOL interprets reasonable and practicable to mean same day or next business day.

Military Caregiver Leave

An eligible employee whose spouse, child, parent, or "next of kin" is a military service member is injured while on active military duty may take up to a combined total of 26 workweeks of leave in a "single 12-month period" to care for the service member's serious illness or injury. The determination of a serious illness or injury is made by a Department of Defense health care provider. The new law extends the ability of an employee to take MCL to care for a veteran who is undergoing medical treatment,

² Qualifying Exigency Leave – 29 CFR 825.126 and 309 and Military Caregiver Leave – 29 CFR 825.127 and 310

recuperation or therapy for a serious injury or illness. The veteran must have been a member of the Armed Forces (including the National Guard or Reserves) at any time within five (5) years preceding treatment of the serious injury or illness.

The term “next of kin”, used with respect to an individual eligible for MCL, means the nearest blood relative of that individual. If “next of kin” is not within the categories of spouse, child or parent, CFRA leave would not be exhausted when FMLA used for this purpose.

An eligible employee is entitled to take up to 26 workweeks of MCL during a “single 12-month period”. The “single 12-month period” begins on the first day the eligible employee takes MCL and ends 12 months after the date, regardless of the method used by the employer to determine the employee’s 12 workweeks of leave for other FMLA qualifying events. The regulations provide that an eligible employee is entitled to a combined total of 26 workweeks of MCL and leave for any other FMLA qualifying events in this “single 12-month period,” provided that the employee may not take more than 12 workweeks of leave for any other FMLA qualifying events during this period. For example, in the single 12-month period an employee could take 12 weeks of FMLA leave to care for a newborn child and 14 weeks of MCL.

Employees must provide 30 day’s advance notice of the need to take leave to care for a covered service member. If leave is foreseeable, but 30 day’s advance notice is not possible, the employee must provide notice as soon as practicable.

ELIGIBLE EMPLOYEE

An employee who is eligible for FMLA/CFRA leave is one who meets both of the following criteria:

- Has been employed by the State of California for a total of at least 12 months as of the date the FMLA/CFRA leave is to commence, although the 12 months of employment need not be consecutive; and
- Has worked for the State of California at least 1250 hours (time physically worked) during the previous 12-month period, as of the date the FMLA/CFRA leave is to commence, although the 1250 hours need not be consecutive.

An employee who does not meet either of the above threshold requirements is not an “eligible employee” for FMLA/CFRA criteria.

FAMILY MEMBER

For purposes of the FMLA/CFRA, a family member includes a spouse, domestic partner, child or parent of the employee:

- Spouse - One to whom the employee is legally married.
- Child - Includes a biological, adopted or foster child, stepchild, legal ward, or a child for whom the employee stands “in loco parentis” (in place of a parent), regardless of age, who is affected by a serious health condition (as defined by FMLA/CFRA), and who is incapable of self care.

- Parent - A biological parent or someone who stands or has stood “in loco parentis” to the employee, but does not include “parents-in-law”.
- Domestic Partner - One who has been certified with the Secretary of State’s Office in accordance with Family Code Section 297.

SERIOUS HEALTH CONDITION

For purposes of the FMLA/CFRA, a serious health condition is an illness, injury, impairment, or physical or mental condition that involves either of the following:

- Inpatient care (at least an overnight stay) in a hospital, hospice, or residential medical care facility, as well as any period of incapacity or any subsequent treatment in connection with the inpatient care; or
- Continuing treatment by a health care provider acting within the scope of his or her license. These may include a licensed physician, osteopath, podiatrist, dentist, clinical psychologist, licensed clinical social worker, optometrist, chiropractor (within limited purposes), nurse practitioner, nurse-midwife, or Christian Science practitioner) and one or more of the following:
 - a. Any period of incapacity requiring absence from work for more than three consecutive calendar days for a condition that involves continuing treatment by, or under the supervision of, a health care provider;
 - b. Any period of incapacity due to pregnancy or for prenatal care;
 - c. Any period of incapacity or continuing treatment by, or under the supervision of, a health care provider for a chronic serious health condition;
 - d. A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective;
 - e. Any period of absence to receive multiple treatments (including any period of recovery after) either for restorative surgery, after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment (i.e., chemotherapy for cancer, physical therapy for arthritis, dialysis for kidney disease, etc.).

A serious health condition does not include such things as voluntary or cosmetic treatments that are not medically necessary, routine physical examinations, medical or dental appointments, or minor or transitory illnesses, such as colds and flu.

PROCEDURE FOR REQUESTING FMLA/CFRA LEAVE

When the need for FMLA/CFRA leave is reasonably foreseeable, employees must submit their request to their supervisor at least 30 calendar days prior to the start of the leave. If the need for leave is not reasonably foreseeable, employees must give notice as soon as the need for leave becomes known. The supervisor will forward all requests to the appropriate Personnel Analyst for approval.

Within five business days after a supervisor receives a request for FMLA/CFRA leave, the Personnel Analyst will complete and provide Form DPA 752 “Notice of Eligibility and

Rights and Responsibilities” to the employees informing them whether or not they are eligible for FMLA/CFRA leave (i.e., worked at least 12 months with the employer and worked at least 1,250 hours in the previous 12 months). Eligibility does not mean the leave has been approved for FMLA/CFRA at this point. If employees are eligible for FMLA/CFRA leave, the Personnel Analyst will also provide them with Form DPA 754 “Certification of Health Care Provider for Employee’s Serious Health Condition”, Form DPA 755 “Certification of Health Care Provider for Family Member’s Serious Health Condition”, Form DPA 756 “Certification of Qualifying Exigency for Military Family Leave” or Form DPA 757 “Certification for Serious Injury or Illness of Covered Service member for Military Caregiver Leave” as appropriate.

The medical certification must provide sufficient information for the Personnel Analyst to determine if the leave may qualify for FMLA/CFRA protection and to anticipate the timing and duration of the leave. An employer can ask for a second opinion for the employee’s own health condition. Also, a Physician Assistant is now an approved health care provider.

Employees also must inform the Personnel Analyst if the requested leave is for a reason for which FMLA/CFRA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave during a new calendar year.

Upon the Personnel Analyst’s written request for medical certification, an employee must provide the information within 15 calendar days, prior to the leave, if the need for the leave was reasonably foreseeable to the employee; or, if the need for leave was unforeseeable, within a reasonable time of no less than 15 calendar days after the first day of leave. Authorization for the leave may be withheld until the medical certification is provided. If no medical certification is provided, the leave may be denied.

After the medical certification is received, the Personnel Analyst will complete and provide Form DPA 753 “Designation Notice” to the employees informing them whether the leave is approved. If the leave is not designated as FMLA/CFRA, employees must be informed as to the reason why the leave is denied.

USE OF LEAVE CREDITS

Employees are not required to use leave credits when taking FMLA/CFRA leave. However, when employees elect to use leave credits, they will be notified by their supervisor of the amount of leave credits that will be counted against the 12-week entitlement, except when compensatory time off (CTO) and holiday credits are used. The use of CTO and holiday credit will not be counted against the employee’s 12-week FMLA/CFRA entitlement. If a holiday occurs during a week in which an employee is on FMLA/CFRA leave, the week is counted as a full week of FMLA/CFRA leave.

Eligible employees taking FMLA/CFRA leave are entitled to use appropriate leave credits which may include sick leave, vacation, annual leave, personal leave, catastrophic leave, holiday credit, excess hours, and unpaid leave. Sick leave and catastrophic leave must be taken in accordance with Bargaining Agreements and/or civil service rules.

FMLA/CFRA FORMS

Forms may be accessed on DFG's Intranet under Human Resources >> Personnel >> HRB Forms.

APPEALS

If benefits are denied, an employee may file an internal discrimination complaint with the DFG Equal Opportunity Office. The employee may also file an external discrimination complaint with the California Department of Fair Employment and Housing and/or an appeal with the U.S. Department of Labor.

For information on filing an internal or external discrimination complaint, please contact the Equal Opportunity Office. For information on filing an appeal with the U.S. Department of Labor or if you have any other FMLA/CFRA related questions, please contact your assigned Personnel Analyst or Administrative Officer.

Helen Carriker
Deputy Director, Administration