



Department of Fair Employment & Housing Fair Employment and Housing Council

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CHANGES WITHOUT REGULATORY EFFECT UNDER CALIFORNIA CODE OF REGULATIONS, TITLE 1, SECTION 100

Explanatory Statement

On September 17, 2020, Governor Newsom signed SB 1383 (Jackson, Chapter 86, Statutes of 2020), which, as of January 1, 2021, expanded the California Family Rights Act (CFRA) and eliminated the New Parent Leave Act (NPLA). SB 1383 also defined “parent-in-law” for purposes of the CFRA.

On December 30, 2020, the Office of Administrative Law (OAL) approved regulations entitled *Changes without Regulatory Effect to California Family Rights Act Regulations (2 CCR 11087 et seq.)* (OAL Matter Number: 2020-1109-02) submitted by the Fair Employment and Housing Council (Council) of the Department of Fair Employment and Housing (DFEH). These regulations implemented SB 1383 and became effective on January 1, 2021.

On September 30, 2021, Governor Newsom signed AB 1578 (Judiciary Omnibus, Chapter 401, Statutes of 2021). When effective on January 1, 2022, AB 1578 will, in pertinent part, clarify that an employee can take leave under the California Family Rights Act (CFRA) to care for a parent-in-law with a serious health condition. See Section 17 of AB 1578.

The Council, therefore, proposes “changes without regulatory effect” to implement AB 1578 and to further implement SB 1383 through technical corrections. The proposed regulations would be effective January 1, 2022, thus aligning the Council’s regulations with the statutory provisions established by AB 1578 that they implement.

Background

Codified at Government Code section 12945.2, CFRA provides, *inter alia*, that it is unlawful for a covered employer “to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period or who meets [certain other requirements], to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave requested pursuant to this subdivision shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave.” Currently, CFRA applies to private employers with 5 or more employees nationwide and public employers in California. CFRA is enforced by DFEH and through a private right of action.

SB 1383 repealed Government Code section 12945.6, which is the NPLA. When SB 1383 became effective on January 1, 2021, the NPLA was subsumed by CFRA’s expanded provisions. In addition

to the other amendments to Section 12945.2, set forth in the Explanatory Statement for the 2020 regulatory amendments, SB 1383 amended section 12945.2 to include the definition of “parent-in-law.”

AB 1578 amends section 12945.2 by clarifying the definition of “parent” to include “parent-in-law.”

The Proposed Regulations Satisfy Code of Regulations, Title 1, Section 100

The Council’s proposed regulations would update the existing regulations California Code of Regulations, Title 2, section 11087 et seq. to accurately reflect CFRA’s provisions on January 1, 2022, the desired effective date of the proposed regulations. The Council proposes no substantive changes beyond what is required by AB 1578 and SB 1383. The Council exercised no discretion in putting forth these changes. These changes represent the "only legally tenable interpretation" of the statutory provisions they implement. As detailed below, each proposed regulatory change is dictated by AB 1578 or SB 1383. Therefore, like the 2020 regulatory amendments, the proposed regulation satisfies Code of Regulations, Title 1, Section 100.

Proposed regulatory change	Required by
<p>§ 11087(p) “Parent” means a biological, foster, or adoptive parent, <u>a parent-in-law</u>, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child. A biological or legal relationship is not necessary for a person to have stood in loco parentis to the employee as a child. Parent does not include a parent-in-law.</p>	<ul style="list-style-type: none"> Section 17 of AB 1578 (amending Gov. Code § 12945.2(b)(10)’s definition of “parent” to include “parent-in-law”) (effective January 1, 2022)
<p>(q) Reserved. <u>“Parent-in-law” means the parent of a spouse or domestic partner.</u></p>	<ul style="list-style-type: none"> Gov. Code § 12945.2(b)(11) (existing definition of “parent-in-law”) (effective January 1, 2021) in conjunction with Section 17 of AB 1578 (amending Gov. Code § 12945.2(b)(10)’s definition of “parent” to include “parent-in-law”) (effective January 1, 2022)
<p>§ 11094(b) CFRA's prohibition against “interference” prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise CFRA rights or giving information or testimony regarding the employee's CFRA leave, or another person's CFRA or NPLA leave, in any inquiry or proceeding related to any right guaranteed under this article. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid CFRA leave. By the same token, employers cannot use the taking of CFRA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can CFRA leave be counted against an employee under an employer's attendance policies.</p>	<ul style="list-style-type: none"> Section 3 of SB 1383 (repealing the NPLA as of January 1, 2021: “[The NPLA] shall remain in effect only until January 1, 2021, and as of that date is repealed,” Gov. Code § 12945.6(k))
<p>§ 11094(d) All individuals, and not merely employees who are CFRA-qualified, are protected from retaliation for opposing (e.g., filing a complaint about) any practice that is unlawful under CFRA or NPLA. They are similarly protected if they oppose any practice that they reasonably believe to be a violation of CFRA or</p>	<ul style="list-style-type: none"> Section 3 of SB 1383 (repealing the NPLA as of January 1, 2021: “[The NPLA] shall remain in effect only until January 1, 2021, and as

<p>these implementing regulations.</p>	<p>of that date is repealed," Gov. Code § 12945.6(k))</p>
<p>§ 11095(d) Text of Notice.</p> <p>The text below contains only the minimum requirements of the California Family Rights Act of 1993 and of the employer's obligation to provide pregnancy disability leave. Nothing in this notice requirement prohibits an employer from providing a leave policy that is more generous than that required by CFRA and providing its own notice of its own policy. Covered employers may develop their own notice or they may choose to use the text provided below, unless it does not accurately reflect their own policy.</p> <p>FAMILY CARE AND MEDICAL LEAVE AND PREGNANCY DISABILITY LEAVE</p> <p>Under the California Family Rights Act of 1993 (CFRA), if you have more than 12 months of service with us and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave, and if we employ five or more employees, you may have a right to a family care or medical leave (CFRA leave). This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition or that of your child, parent, <u>parent-in-law</u>, grandparent, <u>grandchild</u>, sibling, spouse, or domestic partner. While the law provides only unpaid leave, employees may choose or employers may require use of accrued paid leave while taking CFRA leave under certain circumstances.</p> <p>Even if you are not eligible for CFRA leave, if you are disabled by pregnancy, childbirth or a related medical condition, you are entitled to take a pregnancy disability leave of up to four months, depending on your period(s) of actual disability. If you are CFRA eligible, you have certain rights to take BOTH a pregnancy disability leave and a CFRA leave for reason of the birth of your child. Both leaves contain a guarantee of reinstatement - for pregnancy disability it is to the same position and for CFRA it is to the same or a comparable position - at the end of the leave, subject to any defense allowed under the law.</p> <p>If possible, you must provide at least 30 days' advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself or of a family member). For events that are unforeseeable, we need you to notify us, at least verbally, as soon as you learn of the need for the leave. Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with this notice policy.</p> <p>We may require certification from your health care provider before allowing you a leave for pregnancy disability or for your own serious health condition. We also may require certification from the health care provider of your <u>family member child, parent, or spouse</u>, who has a serious health condition, before allowing you a leave to take care of that family member. When medically necessary, leave may be taken on an intermittent or reduced work schedule.</p> <p>If you are taking a leave for the birth, adoption, or foster care placement of a child, the basic minimum duration of the leave is two weeks, and you must conclude the leave within one year of the birth or placement for adoption or foster care.</p>	<ul style="list-style-type: none"> • Section 17 of AB 1578 (amending Gov. Code § 12945.2(b)(10)'s definition of "parent" to include "parent-in-law") (effective January 1, 2022) in conjunction with Gov. Code § 12945.2(b)(11) (existing definition of "parent-in-law") (effective January 1, 2021) • Section 2 of SB 1383 added "grandparent," "grandchild," "sibling," and "domestic partner" to the California Family Rights Act as family members for whom an employee can take leave. See Gov. Code §§ 12945.2(b)(4)(B), (b)(7), (b)(8), (b)(10), (b)(11), (b)(13) (effective January 1, 2021).

Taking a family care or pregnancy disability leave may impact certain of your benefits and your seniority date. If you want more information regarding your eligibility for a leave and/or the impact of the leave on your seniority and benefits, please contact _____.

§ 11097. Certification Form.

For leaves involving serious health conditions under CFRA or FMLA, the employer may utilize the following Certification of Health Care Provider form or its equivalent. Employers may also utilize any other certification form so long as the health care provider does not disclose the underlying diagnosis of the serious health condition involved without the consent of the patient.

FAIR EMPLOYMENT & HOUSING COUNCIL

CERTIFICATION OF HEALTH CARE PROVIDER

(California Family Rights Act (CFRA) or Family and Medical Leave Act (FMLA))

IMPORTANT NOTE: The California Genetic Information Nondiscrimination Act of 2011 (CalGINA) prohibits employers and other covered entities from requesting, or requiring, genetic information of an individual or family member of the individual except as specifically allowed by law. To comply with the Act, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic Information," as defined by CalGINA, includes information about the individual's or the individual's family member's genetic tests, information regarding the manifestation of a disease or disorder in a family member of the individual, and includes information from genetic services or participation in clinical research that includes genetic services by an individual or any family member of the individual. "Genetic Information" does not include information about an individual's sex or age.

1. Employee's Name: _____

2. Patient's Name (If other than employee): _____

Is patient the employee's family member (i.e., child, parent, grandparent, grandchild, sibling, spouse, or domestic partner)?

(Note: "child" includes a biological, adopted, foster child, a stepchild, a legal ward, a child of the employee's domestic partner, and a person to whom the employee stands in loco parentis. "Parent" includes a biological, foster, or adoptive parent, a parent-in-law, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child. A biological or legal relationship is not necessary for a person to have stood in loco parentis to the employee as a child.)

3. Date medical condition or need for treatment commenced [NOTE: THE HEALTH CARE PROVIDER IS NOT TO DISCLOSE THE UNDERLYING DIAGNOSIS WITHOUT THE CONSENT OF THE PATIENT]:

- Section 17 of AB 1578 (amending Gov. Code § 12945.2(b)(10)'s definition of "parent" to include "parent-in-law") (effective January 1, 2022)

4. Probable duration of medical condition or need for treatment:

5. Below is a description of what constitutes a "serious health condition" under both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). Does the patient's condition qualify as a serious health condition?

Yes No

6. If the certification is for the serious health condition of the employee, please answer the following:

Is employee able to perform work of any kind? (If "No," skip next question.)

Yes No

Is employee unable to perform any one or more of the essential functions of employee's position? (Answer after reviewing statement from employer of essential functions of employee's position, or, if none provided, after discussing with employee.)

Yes No

7. If the certification is for the care of the employee's family member, please answer the following:

Does (or will) the patient require assistance for basic medical, hygiene, nutritional needs, safety, or transportation?

Yes No

After review of the employee's signed statement (See Item 10 below), does the condition warrant the participation of the employee? (This participation may include psychological comfort and/or arranging for third-party care for the family member.)

Yes No

8. Estimate the period of time care is needed or during which the employee's presence would be beneficial: _____

9. Please answer the following questions only if the employee is asking for intermittent leave or a reduced work schedule.

Intermittent Leave: Is it medically necessary for the employee to be off work on an intermittent basis due to the serious health condition of the employee or family member?

Yes No

If yes, please indicate the estimated frequency of the employee's need for

intermittent leave due to the serious health condition, and the duration of such leaves (e.g. 1 episode every 3 months lasting 1-2 days):

Frequency: _____ times per _____ week(s) _____ month(s) Duration: _____ hours or _____ day(s) per episode

Yes No

Reduced Schedule Leave: Is it medically necessary for the employee to work less than the employee's normal work schedule due to the serious health condition of the employee or family member?

If yes, please indicate the part-time or reduced work schedule the employee needs: _____ hour(s) per day; _____ days per week, from _____ through _____

Yes No

Time Off for Medical Appointments or Treatment: Is it medically necessary for the employee to take time off work for doctor's visits or medical treatment, either by the health care practitioner or another provider of health services?

If yes, please indicate the estimated frequency of the employee's need for leave for doctor's visits or medical treatment, and the time required for each appointment, including any recovery period: Frequency: _____ times per _____ week(s) _____ month(s) Duration: _____ hours or _____ day(s) per appointment/treatment

Yes No

ITEM 10 IS TO BE COMPLETED BY THE EMPLOYEE NEEDING FAMILY LEAVE. ****TO BE PROVIDED TO THE HEALTH CARE PROVIDER UNDER SEPARATE COVER.

10. When family care leave is needed to care for a seriously-ill family member, the employee shall state the care the employee will provide and an estimate of the time period during which this care will be provided, including a schedule if leave is to be taken intermittently or on a reduced work schedule:

11. Printed name of health care provider: _____

Signature of health care provider: _____

Date: _____

12. Signature of Employee: _____

Date: _____

--- Serious Health Condition ---

“Serious health condition” means an illness, injury (including, but not limited to, on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or domestic partner of the employee that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse. A serious health condition may involve one or more of the following:

1. Hospital Care Inpatient care in a hospital, hospice, or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or consequent to such inpatient care. A person is considered an “inpatient” when a health care facility formally admits the person to the facility with the expectation that the person will remain at least overnight and occupy a bed, even if it later develops that such person can be discharged or transferred to another facility and does not actually remain overnight.

2. Absence Plus Treatment

(a) A period of incapacity of more than three consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition), that also involves:

(1) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

3. Pregnancy [NOTE: An employee's own incapacity due to pregnancy is covered as a serious health condition under FMLA but not under CFRA]

Any period of incapacity due to pregnancy or for prenatal care.

4. Chronic Conditions Requiring Treatment A chronic condition which:

(1) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

5. Permanent/Long-term Conditions Requiring Supervision A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing

supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, 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, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis).