

ATTACHMENT F

Fair Employment & Housing Council Further Modifications to Text of Proposed Amendments to the California Family Rights Act Regulations

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 2. Discrimination in Employment
Article 11. Family Care and Medical Leave Act

TEXT

Text proposed to be added for the 45-day comment period is displayed in underline type.
Text proposed to be deleted for the 45-day comment period is displayed in ~~striketrough~~ type.
Text proposed to be added for the first 15-day comment period is displayed in double underline type.
Text proposed to be deleted for the first 15-day comment period is displayed in ~~double striketrough~~ type.
Text proposed to be added for the second 15-day comment period is displayed in **bold** type.
Text proposed to be deleted for the second 15-day comment period is displayed in *italics* type.

In some instances, the text currently under consideration will be both single stricken and double underlined, which means it is text that was previously proposed to be deleted from an existing regulation, which the Council has restored and is no longer proposing to delete. Similarly, text that is both single underlined and double stricken means that the text was previously proposed to be added, but the Council subsequently decided to remove it. The same logic applies for text that is bolded or italicized as it is the most recent revisions proposed by the Council.

Article 11. ~~Family Care and Medical Leave~~ California Family Rights Act

§ 11087. Definitions.

The following definitions apply only to this article. The definitions in the federal ~~regulations~~ issued that became effective ~~January~~ ~~March 6 8, 1995 2013~~ (29 C.F.R. Part 825), interpreting the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. § 2601 et seq.) and its implementing regulations shall also apply to this article, to the extent that they are not inconsistent with the

following definitions:

~~(a) “Adult dependent child” means an individual who is 18 years of age or older and who is incapable of self care because of a mental or physical disability within the meaning of Government Code section 12926.~~

(~~ab~~a) “Certification” means a written communication from the health care provider of the child, parent, spouse, or employee with a serious health condition to the employer of the employee requesting a family care leave to care for the employee's child, parent or spouse, or a medical leave for the employee's own serious health condition.

(1) For family care leave for the employee's child, parent, or spouse, this certification need not identify the serious health condition involved, but shall contain the information identified in Government Code section 12945.2.

~~(A) the date, if known, on which the serious health condition commenced,~~

~~(B) the probable duration of the condition,~~

~~(C) an estimate of the amount of time which the health care provider believes the employee needs to care for the child, parent or spouse, and~~

~~(D) a statement that the serious health condition warrants the participation of the employee to provide care during a period of treatment or supervision of the child, parent or spouse.~~

~~1. (A)~~ “Warrants the participation of the employee,” within the meaning of Government Code section 12945.2, includes, but is not limited to, providing psychological comfort; and arranging third party care for the child, parent or spouse, as well as directly providing, or participating in, the medical care.

(2) For medical leave for the employee's own serious health condition, this certification need not, but may, at the employee's option, identify the serious health condition involved. Any certification shall contain the information identified in Government Code section 12945.2, as is demonstrated in section 11097 of these regulations. For purposes of the certification “unable to perform the function of his or her position” means that an employee is unable to perform any one or more of the essential functions of his or her position. ~~It~~ The certification shall contain:

~~(A) The date, if known, on which the serious health condition commenced,~~

(B) The probable duration of the condition, and

(C) A statement that, due to the serious health condition, the employee is unable to work at all or is unable to perform any one or more of the essential functions of his or her position.

(be) “CFRA” means the Moore-Brown-Roberti California Family Rights Act of 1993. (California Family Rights Act, Gov. Code, §§ 12945.1_ and 12945.2.) “CFRA leave” means family care or medical leave taken pursuant to CFRA.

(e) “Child” means a biological, adopted, or foster son or daughter, a stepson or stepdaughter, a legal ward, or a child of an employee who stands in loco parentis to that child, who is either under 18 years of age or an adult dependent child. An adult dependent child is an individual who is 18 years of age or older and who is incapable of self-care because of a mental or physical disability within the meaning of Government Code section 12926(j) and (l).

(1) “In loco parentis” means in the place of a parent; instead of a parent; charged with a parent's rights, duties, and responsibilities. It does not require a biological or legal relationship.

(d) “Covered employer” means any person or individual, including successors in interest of a covered employer, engaged in any business or enterprise in California who directly employs 50 or more persons within any state of the United States, the District of Columbia or any territory or possession of the United States to perform services for a wage or salary within 75 miles of the worksite where the employee requesting the leave is employed. It also includes the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. There is no requirement that the 50 employees work at the same location or work full-time. “Employer” as used in these regulations means “covered employer.”

(1) “Directly employs” means that the employer maintains an aggregate of at least 50 part or full-time employees on its payroll(s) for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The workweeks do not have to be consecutive. The phrase “current or preceding calendar year” refers to the calendar year in which the employee requests the leave or the calendar year preceding this request. Employees on paid or unpaid leave, including CFRA leave, leave of absence, disciplinary suspension, or other leave, are counted so long as the employer has a reasonable expectation that the employee will later return to active employment.

(2) “Perform services for a wage or salary” excludes independent contractors as defined in the Labor Code, section 3353 but includes persons who are compensated in whole or in part

by commission.

~~(3) Normally the legal entity that employs the employee is the employer under CFRA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions. Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the “joint employment” test or the “integrated employer” test, as described in FMLA regulations. Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under CFRA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality based on the economic realities of the situation. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:~~

(A) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(B) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or

(C) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(e) “Eligible employee” means a full- or part-time employee working in California ~~with~~ who has been employed for a total of at least more than 12 months (52 weeks) of service with the employer at any time prior to the commencement of a CFRA leave, and who has actually worked (within the meaning of the Fair Labor Standards Act, 29 C.F.R. Part 785 California Labor Code and Industrial Welfare Commission Wage Orders) for the employer at least 1,250 hours during the 12-month period immediately prior to the date the CFRA leave or FMLA leave is to commence.

(1) Once the employee meets these two eligibility criteria and takes a leave for a qualifying event, the employee does not have to requalify, in terms of the numbers of hours worked, in order to take additional leave for the same qualifying event during the employee's 12-month leave period.

(2) Employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months, except for a break in service caused by a military service obligation or written agreement to the contrary. Nothing in this section prevents an employers from considering

employment prior to a continuous break in service of more than seven years so long as they do the employer does so uniformly, with respect to all employees with similar breaks in service.

(23) For an employee who takes a pregnancy disability leave ~~that is also an FMLA leave~~, and who then wants to take CFRA leave for reason of the birth of her child immediately after her pregnancy disability leave, the 12-month period during which she must have worked 1,250 hours is that period immediately preceding her first day of ~~FMLA leave based on her pregnancy disability leave~~, not the first day of the subsequent CFRA leave for reason of the birth of her child.

(34) In order to be eligible, the employee must also work for an employer who maintains on the payroll, as of the date the employee gives notice of the need for leave, at least 50 part- or full-time employees within 75 miles, measured in surface miles, using surface transportation, of the worksite where the employee requesting the leave is employed. A worksite can refer to either a single location or a group of contiguous locations, ~~or for employees with no fixed worksite, the site to which they are assigned as their home base, from which their work is assigned, or to which they report.~~

(A) For employees with no fixed worksite, the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, **for the purpose of counting 50 employees**, if a salesperson works from home in California, but reports to and receives assignments from her corporate headquarters in New York, the New York headquarters, not her home, would constitute the worksite from which there must be 50 employees within a 75-mile radius in order for the salesperson to be eligible under the CFRA.

(B) When an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that of the secondary employer. The employee is also counted by the secondary employer to determine CFRA eligibility for the secondary employer's employees.

(~~A~~C) Once the employee meets this eligibility criterion and gives notice of the need for a leave, ~~takes a leave for a qualifying event~~, the employer may not deny the leave, cut short the leave, or deny any subsequent leave taken for the same qualifying event during the employee's 12-month leave period, even if the number of employees within the relevant 75-mile radius falls below 50. In such cases, however, the employee would not be eligible for

any subsequent leave requested for a different qualifying event.

(5) If an employee is not eligible for CFRA leave at the start of a leave because the employee has not met the 12-month length of service requirement, the employee may nonetheless meet this requirement while on leave, because leave to which they/he/she are/is otherwise entitled counts toward length of service (although not for the 1,250 hour requirement). The employer should designate the portion of the leave in which the employee has met the ~~one-year~~ 12-month requirement as CFRA leave. For example, if an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g. workers' compensation, group health plan benefits, etc.), the week counts as a week of employment.

(f) “Employment in the same position” means employment in, or reinstatement to, the original position the employee held prior to taking a CFRA leave.

(g) “Employment in a comparable position” means employment in a position that is virtually identical to the employee's original position in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from where the employee was previously employed. It ordinarily means the same shift or the same or an equivalent work schedule. It has the same meaning as the term “equivalent position” in FMLA and its implementing regulations.

(h) “Family care leave” means either:

(1) Leave of up to a total of 12 workweeks in a 12-month period for reason of the birth of a child of the employee; or the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, and a guarantee of employment, made at the time the leave is granted, in the same or a comparable position upon termination of the leave; or

(2) Leave of up to a total of 12 workweeks in a 12-month period to care for a child, parent, or spouse of the employee who has a serious health condition, and a guarantee of employment, made at the time the leave is granted, in the same or a comparable position upon termination of the leave.

(i) “FMLA” means the federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq., and its implementing regulations, 29 C.F.R. Part 825, ~~issued that became effective January 6, 1995~~ ~~March 8, 2013~~. “FMLA leave” means family care or medical leave taken pursuant to

FMLA.

(j) “Health care provider” means either:

(1) an individual holding either a physician's ~~and or~~ surgeon's certificate ~~issued pursuant to Article 4 (commencing with section 2080) of Chapter 5 of Division 2 of the Business and Professions Code or an osteopathic physician's and surgeon's certificate issued pursuant to Article 4.5 (commencing with section 2099.5) of Chapter 5 of Division 2 of the Business and Professions Code, or any other individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, including another country, who directly treats or supervises the treatment of the serious health condition, or within the meaning of Government Code section 12945.2, or~~

(2) any other person who meets the definition of others “capable of providing health care services,” as set forth in FMLA and its implementing regulations.

~~(k) “In loco parentis” means in the place of a parent; instead of a parent; charged with a parent's rights, duties, and responsibilities. It does not require a biological or legal relationship.~~

~~(k) “Key employee,” as used in Government Code section 12945.2, means an employee who is paid on a salary basis and is amongst the highest paid 10 percent of the employer's employees working within 75 miles of the employee's worksite at the time of the leave request. “Key employee” means an employee who is paid on a salary basis and is amongst the highest paid 10 percent of the employer's employees who are employed within 75 miles of the employee's worksite at the time of the leave request, as described in Government Code section 12945.2.~~

~~(kml)~~ “Medical leave” means leave of up to a total of 12 workweeks in a 12-month period because of an employee's own serious health condition that makes the employee unable to work at all or unable to perform any one or more of the essential functions of the position of that employee. The term “essential functions” is defined in Government Code section 12926(f). “Medical leave” does not include leave taken for an employee's pregnancy disability, as defined in ~~(men)~~ below, except as specified below in section 11093(c)(1).

~~(lmm)~~ “Parent,” ~~means a biological, foster, or adoptive parent, 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 within the meaning of Government Code section 12945.2,~~ does not include a parent-in-law.

~~(men)~~ “Pregnancy disability leave” means a leave taken for disability on account of pregnancy,

childbirth, or a related medical conditions, pursuant to Government Code section 12945 and defined in section 11035(r) of the regulations.

~~(p)~~ “(Reason of the birth of a child,” within the meaning of Government Code section 12945.2 and these regulations includes, but is not limited to, bonding with a child after birth.

~~(n)~~ “Reinstatement” means the return of an employee to his or her original or comparable the position that the employee held prior to after taking a CFRA leave, or a comparable position, and is synonymous with “restoration” within the meaning of FMLA and its implementing regulations.

~~(o)~~ “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, or spouse of the employee which that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse.;

(1) “Inpatient care” means (i.e., an overnight a stay) in a hospital, hospice, or residential health care facility, any subsequent treatment in connection with such inpatient care, or any period of incapacity. A person is considered an “inpatient” when a health care facility formally admits him or her to the facility with the expectation that he or she 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) “Incapacity” means the inability to work, attend school, or perform other regular daily activities due to a serious health condition, its treatment, or the recovery that it requires.

~~(2)~~ “Continuing treatment” meansing or continuing ongoing medical treatment or supervision by a health care provider, as detailed in section 11097 of these FMLA and its implementing regulations.

~~(p)~~ “Spouse” means a partner in marriage as defined in Family Code section 300 and or a registered domestic partner, within the meaning of Family Code sections 297 through 297.5. As used in this article and the Family Code, “spouse” includes also means a same-sex partners in marriage.

~~(q)~~ “Twelve workweeks” means the equivalent of 12 of the employee's normally scheduled workweeks. (See also section 11090(d).)

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2,

Government Code; ~~and~~ *J.E. Robinson v. FEHC* (1992) 2 Cal.4th 226 [5 Cal.Rptr.2d 782]; Cal. Code Regs., tit. 8, § 11010; Cal. Code Regs., tit. 22, §§ 51108, 97212(o); Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825, issued January 6, 1995 ~~effective March 8, 2013; Fair Labor Standards Act, 29 U.S.C. section 201 et seq.; and 29 C.F.R. § 785.~~

§ 11088. Right to CFRA Leave: Denial of Leave; Reasonable Request; Permissible Limitation.

(a) It is an unlawful employment practice for a covered employer to refuse to grant, upon reasonable request, a CFRA leave to an eligible employee, unless such refusal is justified by the permissible limitation specified below in subdivision (c).

(b) Denial of leave.

(1) Burden of proof.

Denial of a request for CFRA leave is established if the Department or the employee shows, by a preponderance of the evidence, that the employer was a covered employer, the employee making the request was an eligible employee, the request was for a CFRA-qualifying purpose, the request was reasonable, and the employer denied the request for CFRA leave.

(2) Reasonable request.

A request to take a CFRA leave is reasonable if it complies with any applicable notice requirements, as specified in section 11091, and if it is accompanied, where required, by a certification, as that term is defined in section 11087(~~aba~~).

(c) Limitation on Entitlement.

~~If spouses employed by the same employer are entitled to CFRA leave, both parents are eligible for CFRA leave but are employed by the same employer, that their~~ employer may limit leave for the birth, adoption or foster care placement of their child to a combined total of 12 workweeks in a 12-month period ~~between the two parents~~. The employer may not limit their entitlement to CFRA leave for any other qualifying purpose. For example, spouses parents employed by the same employer each may take 12 weeks of CFRA leave if needed to care for a child with a serious health condition. If the parents are unmarried, they may have different family care leave rights under FMLA.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2,

Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11089. Right to Reinstatement: Guarantee of Reinstatement; Rights upon Return; Refusal to Reinstatement; Permissible Defenses.

(a) Guarantee of Reinstatement.

(1) Upon granting the CFRA leave, the employer shall inform the employee of its guarantee to reinstate the employee to the same or a comparable position, subject to the defenses permitted by section 11089(~~ed~~)(1) and (~~e~~)(2), and shall provide the guarantee in writing upon request of the employee.

(2) It is an unlawful employment practice for an employer, after granting a requested CFRA leave, to refuse to ~~honor its guarantee of reinstatement~~ the employee to the same or a comparable position at the end of the leave, unless the refusal is justified by the defenses stated in section 11089(~~ed~~)(1) and (~~e~~)(2).

(~~A~~) An employee is entitled to reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

(~~B~~) If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, or other non-qualifying reason, as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon returning to work.

(b) Rights upon Return.

The employee is entitled to the same position or to a comparable position that is equivalent (i.e., virtually identical) to the employee's former position in terms of pay, benefits, shift, schedule, geographic location, and working conditions, including privileges, perquisites, and status. The position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(1) Equivalent benefits includes benefits resumed in the same manner and at the same levels as provided when the leave began, subject to any changes in benefit levels that may have taken place during the period of CFRA leave affecting the entire workforce, unless otherwise elected by the employee.

(2) CFRA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, ~~or~~ position, or geographic location that better suits the employee's personal needs on return from leave, from offering a promotion to a better position, or from complying with an employer's obligation to provide reasonable accommodation under the disability provisions of the Fair Employment and Housing Act

(FEHA).

(bc) Refusal to ~~reinstate~~ Reinstatement.

(1) Definite Date of Reinstatement.

Where a definite date of reinstatement has been agreed upon at the beginning of the leave, a refusal to reinstate is established if the Department or employee proves, by a preponderance of the evidence, that the leave was granted by the employer and that the employer failed to reinstate the employee to the same or a comparable position by the date agreed upon.

(2) Change in Date of Reinstatement.

If the reinstatement date differs from the employer's and employee's original agreement, a refusal to reinstate is established if the Department or employee proves, by a preponderance of the evidence, that the employer failed to reinstate the employee to the same or a comparable position within two business days, where feasible, after the employee notifies the employer of his or her readiness to return, ~~as required by the FMLA regulations.~~

(ed) Permissible ~~defenses~~ Defenses.

(1) Employment Would Have Ceased or Hours Would Have Been Reduced.

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the CFRA leave period. An employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed at the time on the requested reinstatement date is requested in order to deny reinstatement. As per (a)(1) of this section, this burden shall not be satisfied if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.

(A) If an employee is laid off during the course of taking CFRA leave and employment is terminated, the employer's responsibility to continue CFRA leave, maintain group health plan benefits and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise.

(B) If a shift has been eliminated or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon reinstatement.

(2) “Key Employee.”

~~A refusal~~ An employer may refuse to reinstate a “key employee,” as defined in section 11087(k) of these regulations, to his or her same position or to a comparable position is justified only if the employer shows ~~establishes~~, by a preponderance of the evidence, that all of the following conditions exist:

(A) ~~The employee requesting the CFRA leave is a salaried employee,~~ and As used in Government Code section 12945.2 (r), “salaried employee” means an employee paid on a salary basis.

(B) ~~The employee requesting the leave is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed at the time of the leave request,~~ and Whether an employee is “among the highest paid 10 percent,” pursuant to Government Code section 12945.2, is determined by comparing the year-to-date wages, within the meaning of the California Labor Code and Industrial Welfare Commission Wage Orders, of the employer’s employees within 75 miles of the worksite where the requesting employee is employed at the time of the leave request, divided by the number of weeks worked (including weeks in which paid leave was taken).

~~(C) The refusal to reinstate the employee is necessary because the employee's reinstatement will cause substantial and grievous economic injury to the operations of the employer,~~ and As used in Government Code section 12945.2, “substantial and grievous economic injury” means reinstatement that would cause substantial, long-term economic injury or threaten the economic viability of the employer. A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.

~~(D) The employer notifies the employee of the intent to refuse reinstatement at the time the employer determines that the refusal is necessary under (C) above, and~~

~~(E) In any case in which the leave has already commenced, the employer shall give the employee a reasonable opportunity to return to work following the notice prescribed in (D) above.~~

(D) An employer who believes it may deny reinstatement to a key employee must inform the employee in writing at the time the employee gives notice of the need for CFRA leave (or when CFRA leave commences, if earlier) that he or she is a key employee. At the same time, the employer must also inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that reinstatement will result in substantial and grievous economic injury to its operations. If the employer cannot give such notice immediately because of the need to determine whether the employee is a key employee, it shall give the notice as soon as practicable after the employee notifies the employer of a need for leave (or the commencement of leave, if earlier). An employer who fails to provide notice in compliance with this provision will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(E) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if it reinstates a key employee who has given notice of the need for CFRA leave (or who is on CFRA leave), the employer shall notify the employee in writing that it cannot deny CFRA leave, but that it intends to deny reinstatement on completion of the leave. An employer should ordinarily be able to give such notice prior to the employee starting leave. The employer must serve the notice either in person or by certified mail. The notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the duration of the leave and the urgency of the need for the employee to return.

(F) If an employee on leave does not return to work in response to the employer's notification of intent to deny reinstatement, the employee continues to be entitled to maintenance of health benefits coverage as provided by section 11092(c) and the employer may not recover its cost of health benefit premiums. A key employee's rights under CFRA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave.

(G) After an employer notifies an employee that substantial and grievous economic injury will result if the employer reinstates the employee, the employee still is entitled to request reinstatement at the end of the leave period even if he or she did not return to work in response to the employer's notice. The employer must then again determine whether reinstatement will result in substantial and grievous economic injury, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of reinstatement.

(3) Fraudulently-obtained CFRA Leave.

~~An employee who fraudulently obtains CFRA leave from an employer is not entitled to any of the job protections afforded by CFRA.~~ 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. An employer has the burden of proving that the employee fraudulently obtained or used CFRA leave.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11090. Computation of Time Periods: Twelve Workweeks; Minimum Duration.

(a) CFRA leave does not need to be taken in one continuous period of time. It cannot exceed more than 12 workweeks total for any purpose in a 12-month period.

(b) If the leave is common to both CFRA and FMLA, this 12-month period will run concurrently with the 12-month period under FMLA. An employer may choose any of the methods (the calendar year, any fixed 12-month “leave year,” the 12-month period measured forward from the date any employee's first CFRA leave begins, or a “rolling” 12-month period measured backward from the date an employee uses any CFRA leave) allowed in the FMLA regulations, issued ~~effective January 6, 1995~~ ~~March 8, 2013~~, 29 C.F.R. Part 825, section 825.200, subdivision (b), for determining the 12-month period in which the 12 weeks of CFRA leave entitlement occurs. The employer must, however, apply the chosen method consistently and uniformly to all employees in California and notify employees requesting CFRA leave of its chosen method. **If an employer fails to select one of the above methods for measuring the 12-month period, the method that provides the most beneficial outcome for the employee will be used. An employer wishing to change to another method is required to give at least 60 days’ notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstance may a new method be implemented in order to avoid the Act's leave requirements.**

(c) “Twelve workweeks” as that term is defined in section 11087(~~qts~~), means the equivalent of 12 of the employee's normally scheduled workweeks. For eligible employees who work more or less than five days a week, or who work on alternative work schedules, the number of working days that constitutes 12 workweeks is calculated on a pro rata or proportional basis. If 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 otherwise have worked (but for the taking of CFRA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) wouldshall be used for calculating the employee's leave entitlement.

(1) For example, for a full-time employee who works five eight-hour days per week, 12 workweeks means 60 working and/or paid eight-hour days of leave entitlement. For an employee who works half time, 12 workweeks may mean 30 eight-hour days or 60 four-hour days, or 12 workweeks of whatever is the employee's normal half-time work schedule. For an employee who normally works six eight-hour days, 12 workweeks means 72 working and/or paid eight-hour days of leave entitlement.

(2) If an employee takes leave on an intermittent or reduced work schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which the employee is entitled. For example, if an employee needs physical therapy that requires an absence from work of two hours a week, only those two hours ~~can~~may be charged against the employee's CFRA leave entitlement. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

(3) If a holiday falls within a week taken as CFRA leave, the week is nevertheless counted as a week of CFRA leave. If, however, the employer's business activity has temporarily ceased for some reason and employees generally are not expected to report for work for one or more weeks, (e.g., a school closing for two weeks for the Christmas/New Year holiday or summer vacation or an employer closing the plant for retooling), the days the employer's activities have ceased do not count against the employee's CFRA entitlement. Similarly, if an employee uses CFRA leave in increments of less than one week, the fact that a holiday may occur within a week in which an employee partially takes leave does not count against the employee's CFRA entitlement unless the employee was otherwise scheduled and expected to work during the holiday.

(4) If an employee normally would normally be required to work overtime, but is unable to do so because of a CFRA-qualifying reason that limits the employee's ability to work overtime, the hours that the employee would have been required to work may be counted against the employee's CFRA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee normally would normally be required to work 48 hours in a particular week, but due to a serious health condition the employee works 40 hours that week, the employee would utilize eight hours of CFRA-protected leave out of the 48-hour workweek. Voluntary overtime hours that an employee does not work due to a serious health condition shall not be counted against the employee's CFRA leave entitlement.

(5) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than CFRA, and prior to the employee notice of need for CFRA leave), the hours worked under the new schedule are to be used for making this calculation.

(d) Minimum duration for CFRA leaves taken intermittently or on a reduced leave schedule for the birth, adoption, or foster care placement of a child-; CFRA leave taken for reason of the birth, adoption, or foster care placement of a child of the employee does not have to be taken in one continuous period of time. Any leave(s) taken shall be concluded within one year of the birth or placement of the child with the employee in connection with the adoption or foster care of the child by the employee. The basic minimum duration of the leave shall be two weeks. However, an employer shall grant a request for a CFRA leave of less than two weeks' duration on any two occasions and may grant additional requests for additional occasions of such leave lasting less than two weeks.

(e) Minimum duration for CFRA leaves taken intermittently or on a reduced leave schedule for the serious health condition of a parent, child, or spouse or for the serious health condition of the employee-; Where CFRA leave is taken for a serious health condition of the employee's child, parent, or spouse or of the employee, leave may be taken intermittently or on a reduced work schedule when medically necessary, as determined by the health care provider of the person with the serious health condition. However, intermittent or reduced work schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition, even if he or she does not receive treatment by a health care provider. An employer ~~may~~must limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave provided it is not greater than one hour.

(1) If an employee needs intermittent leave or leave on a reduced work schedule that is foreseeable based on planned medical treatment for the employee or a family member, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily to an available alternative position. This alternative position must have the ~~equivalent same~~ rate of pay and benefits, the employee must be qualified for the position, and it must better accommodate recurring periods of leave than the employee's regular job. ~~It does not need to have~~ to have equivalent duties, although an employer may not transfer the employee to an alternative position to discourage the employee from taking leave or to otherwise work a hardship on the employee. Transfer to an alternative position may include altering an existing job to accommodate better the employee's need for intermittent leave or a reduced work schedule and must comply with any applicable collective bargaining agreement or employer leave policy, the FEHA, and any other applicable state or federal law.

(2) CFRA leave, including intermittent leave and/or reduced work schedules, is available to instructional employees of educational establishments and institutions under the same

conditions as apply to all other eligible employees.

(3) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, the entire period that the employee is forced to be absent is designated as CFRA leave and counts against the employee's CFRA entitlement. However, an employee ~~may~~ shall be permitted to return to work if he or she is able to perform other aspects of the work that are not physically impossible, such as administrative duties, and thereby shorten the time designated as CFRA leave.

(4) Employers may reduce exempt employees' pay for CFRA intermittent leave or a reduced work schedule, ~~only as permitted by the California Labor Code and Industrial Welfare Commission Wage Orders and must comply with~~ as long as **provided** the reduction is not inconsistent with any applicable collective bargaining agreement or employer leave policy, the FEHA, and any other applicable state or federal law.

Note: Authority cited: Section 12935(a), Government Code; ~~and Stats. 1993, ch. 827, (AB 1460), Section 2.~~ Reference: Section 12945.2, Government Code; DLSE Opinion Letter 03.12.2002; DLSE Opinion Letter 04.08.2002; ~~and~~ Stats. 1993, ch. 827 (AB 1460), § 2; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11091. Requests for CFRA Leave: Advance Notice; Certification; Employer Response.

(a) Advance Notice.

(1) Verbal Notice.

Unless an employer waives its employees' notice obligations described herein, ~~A~~ an employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA, to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. The mere mention of "vacation," other paid time off, or resignation does not render the notice insufficient, so long as **provided** the underlying reason for the request is CFRA-qualifying, and the employee communicates that reason to the employer. The employer should inquire further of the employee if ~~it is necessary to~~ determine whether the employee is requesting ~~have more information about whether~~ CFRA leave is being sought by

~~the employee and to obtain the necessary information concerning the leave (i.e., commencement date, expected duration, and other pertinent permissible information) details of the leave to be taken. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially CFRA-qualifying. Failure to respond to permissible employer inquiries regarding the leave request may result in denial of CFRA protection if the employer is unable to determine whether the leave is CFRA-qualifying.~~

(A) Under all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as CFRA or CFRA/FMLA qualifying, based on information provided by the employee or the employee's spokesperson, and to give notice of the designation to the employee.

~~(B) Employers may not retroactively designate leave as CFRA leave after the employee has returned to work without the employee's consent, except under those same circumstances provided for in FMLA and its implementing regulations for retroactively counting leave as FMLA leave. Employers may not retroactively designate leave as CFRA leave after the employee has returned to work, except with appropriate notice to the employee and where the employer's failure to timely designate does not cause harm or injury to the employee.~~

(2) 30 Days' Advance Notice.

An employer may require that employees provide at least 30 days' advance notice before CFRA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member. The employee shall consult with the employer and make a reasonable effort to schedule any planned medical treatment or supervision so as to minimize disruption to the operations of the employer. Any such scheduling, however, shall be subject to the approval of the health care provider of the employee or the employee's child, parent or spouse.

(3) When 30 Days Not Practicable.

If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable.

(4) Prohibition ~~Against~~ Denial of Leave in Emergency or Unforeseeable Circumstances.

An employer shall not deny a CFRA leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide advance notice of the need for the leave, so long as that the employee provided notice to the employer as soon as practicable.

(5) Employer Obligation to Inform Employees of Notice Requirement.

An employer shall give its employees reasonable advance notice of any notice requirements that it adopts. The employer may incorporate its notice requirements in the general notice requirements in section 11095 and such incorporation shall constitute reasonable advance notice. Failure of the employer to give or post such notice shall preclude the employer from taking any adverse action against the employee, including denying CFRA leave, for failing to furnish the employer with advance notice of a need to take CFRA leave.

(6) Employer Response to Leave Request.

The employer shall respond to the leave request as soon as practicable and in any event no later than ~~10 calendar~~ five business days after receiving the employee's request. The employer shall attempt to respond to the leave request before the date the leave is due to begin. Once given, approval shall be deemed retroactive to the date of the first day of the leave.

(b) Medical Certification.

(1) Serious Health Condition of Child, Parent, or Spouse.

As a condition of granting a leave for the serious health condition of the employee's child, parent or spouse, the employer may require certification of the serious health condition, as defined in section 11087(~~aba~~)(1). If the certification satisfies the requirements of section 11087(~~aba~~)(1), the employer must accept it as sufficient. Upon expiration of the time period the health care provider originally estimated ~~that~~ the employee needed to take care of the employee's child, parent or spouse, the employer may require the employee to obtain recertification, but only if additional leave is requested. The employer may not contact a health care provider for any reason other than to authenticate a medical certification.

(2) Serious Health Condition of Employee.

As a condition of granting a leave for the serious health condition of the employee, the

employer may require certification of the serious health condition, as defined in section 11087~~(a)~~(2). Upon expiration of the time period the health care provider originally estimated ~~that~~ the employee needed for his/her own serious health condition, the employer may require the employee to obtain recertification, but only if additional leave is requested. The employer may not contact a health care provider for any reason other than to authenticate a medical certification.

(A) If the employer ~~has established~~ a good faith, objective reason to doubt the validity of the certification ~~provided by the employee~~ provides for his/her own serious health condition, the employer may require, at the employer's own expense, ~~that the employee to obtain the opinion of a second health care provider, designated or approved by the employer, concerning any information in the certification. The health care provider designated or approved by the employer shall not be employed on a regular basis by the employer under the conditions identified in Government Code section 12945.2.~~

1. The employer may not ask the employee to provide additional information (e.g., symptoms, diagnosis, etc.) in the medical certification beyond that allowed by these regulations.
2. The employer is responsible for complying with all applicable law regarding the confidentiality of any medical information received.

(B) In any case in which the second opinion described in (b)(2)(A) differs from the opinion in the original certification, the employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider, designated or approved jointly by both the employer and the employee, concerning any information in the certification.

(C) The opinion of the third health care provider concerning the information in the certification shall be considered to be final and shall be binding on the employer and the employee.

(D) The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, without cost, upon the request of the employee.

(E) As a condition of an employee's return from medical leave, the employer may require ~~that~~ the employee to obtain a release to return-to-work from his/her health care provider stating that he/she is able to resume work, but only if the employer has a uniformly applied practice or policy of requiring such releases from other employees returning to work after illness, injury or disability and there is no collective bargaining or other policy agreement forbidding

the practice. An employer is not entitled to a release to return-to-work for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a release to return-to-work for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave.

(F) An employer may not require an employee to undergo a fitness-for-duty examination as a condition of an employee's return. After an employee returns from CFRA leave, any fitness-for-duty examination must be job-related and consistent with business necessity, in accordance with section 11071 of these regulations.

(3) Providing Certification.

The employer may require that the employee provide any certification within no less than 15 calendar days of the employer's request for such certification, unless it is not practicable for the employee to do so despite the employee's good faith efforts. This means that, in some cases, the leave may begin before the employer receives the certification. Absent extenuating circumstances (e.g., unavailability of healthcare provider), if the employee fails to timely return the certification, the employer may deny CFRA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. The same rules apply to recertification. If the employee never produces the certification or recertification, the leave is not CFRA leave. At the time the employer requests certification, the employer also must advise the employee of the anticipated consequences of his or her failure to provide adequate certification.

Note: Authority cited: Section 12935, Government Code. Reference: Section s **11071**, 12945.2, Government Code; *White v. County of Los Angeles* (2014) 225 Cal.App.4th 690; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11092. Terms of CFRA Leave.

(a) The following rules apply to the permissible terms of a CFRA leave, to the extent that they are consistent with the requirements of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq. Nothing in these regulations infringes on the employer's obligations, if any, under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) (~~29 U.S.C. § 1161 et seq.~~) or prohibits an employer from granting CFRA leave on terms more favorable to the employee than those listed below.

(b) Paid Leave.

An employer is not required to pay an employee during a CFRA leave except:

(1) An employee may elect to use or an employer may require an employee to use any accrued vacation time or other paid accrued time off (including undifferentiated paid time off (PTO)), ~~other than accrued sick leave,~~ that the employee is ~~otherwise~~ eligible to take during the otherwise unpaid portion of the CFRA leave. An employee may also elect to use, or an employer may require an employee to use, any accrued sick leave that the employee is eligible to take during the otherwise unpaid portion of a CFRA leave if the CFRA leave is for the employee's own serious health condition or any other reason if mutually agreed between the employer and the employee. If an employee is receiving a partial wage replacement benefit during the CFRA leave, the employer and employee may agree to have employer-provided paid leave, such as vacation, paid time off, or sick time supplement the partial wage replacement benefit, unless otherwise prohibited by law.

(2) For leave for an employee's own serious health condition, the employee may also substitute leave taken pursuant to a short- or long-term disability leave plan, as determined by the terms and conditions of the employer's leave policy, during the otherwise unpaid portion of the CFRA leave. This paid disability leave runs concurrently with CFRA leave, and may continue longer than the CFRA leave if permitted by the disability leave plan. An employee receiving any form of disability payments is not on "unpaid leave" and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation.

(3) An employee receiving Paid Family Leave to care for the serious health condition of a family member or to bond with a new child is not on "unpaid leave," and, therefore, an employer may not require that employee to use paid time off, sick leave, or accrued vacation.

~~(234)~~ Only if the employee ~~asks for~~ requests leave for what would be a CFRA-qualifying event may an employer require the employee to use any accrued vacation time or other paid accrued time off (including ~~PTO time~~), ~~other than accrued sick leave,~~ that the employee is ~~otherwise~~ eligible to take during the otherwise unpaid portion of the CFRA leave. If an employee uses paid leave under circumstances that do not qualify as CFRA leave, the leave will not count against the employee's CFRA leave entitlement.

(A) If an employee requests to utilize accrued vacation time or other paid accrued time off without reference to a CFRA-qualifying purpose, an employer may not ask whether the employee is taking the time off for a CFRA-qualifying purpose.

1. If the employer denies the employee's request and the employee then provides

information that the requested time off is or may be for a CFRA-qualifying purpose, the employer may inquire further into the reasons for the absence. If the absence is CFRA-qualifying, then the rules in section 11092(b)(1) and (2), above, apply.

~~(3) An employer may require the employee to use, or an employee may elect to use, any accrued sick leave that the employee is otherwise eligible to take during the otherwise unpaid portion of a CFRA leave for:~~

~~(A) the employee's own serious health condition, or~~

~~(B) any other reason if mutually agreed to between the employer and the employee.~~

~~(45) An employer and employee may negotiate for the employee's use of any additional paid or unpaid time off instead of using to substitute for the CFRA leave provided by this section.~~

(c) Provision of Health Benefits.

If the employer provides health benefits under any group health plan, the employer has an obligation to continue providing such benefits during an employee's CFRA leave, FMLA leave, or both. The following rules apply:

(1) The employer shall maintain and pay for ~~the an~~ employee's health coverage at the same level and under the same conditions as coverage would have been provided if the employee had not taken CFRA leave ~~been continuously employed during the entire leave period.~~

(2) ~~The is~~ employer's obligation commences on the date leave first begins under FMLA (i.e., for pregnancy disability leaves) or under FMLA/CFRA (i.e., for all other family care and medical leaves). ~~The obligation continues CFRA~~ for the duration of the leave(s), up to a maximum of 12 workweeks in a 12-month period. As section 11044 (c) of the Council's pregnancy disability leave regulations state, "The time that an employer maintains and pays for group health coverage during pregnancy disability leave shall not be used to meet an employer's obligation to pay for 12 weeks of group health coverage during leave taken under CFRA. This shall be true even where an employer designates pregnancy disability leave as family and medical leave under FMLA. The entitlements to employer-paid group health coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements."

(3) ~~A "group health plan" is as defined in section 5000(b)(1) of the Internal Revenue Code of 1986.~~ If the employer's group health plan includes dental care, eye care, mental health

counseling, ~~et cetera~~, or other types of coverage, or if it includes coverage for ~~the~~ an employee's dependents as well as for the employee, the employer shall also continue this coverage.

(4) Although the employer's obligation to continue group health benefits under either FMLA or CFRA, or both, does not exceed 12 workweeks in a 12-month period, nothing shall preclude the employer from maintaining and paying for health care coverage for longer than 12 workweeks.

(5) An employer may recover the premium that the employer paid for maintaining group health care coverage during any unpaid part of the CFRA leave if both of the following conditions occur:

(A) The employee fails to return from leave after the period of leave to which the employee is entitled has expired. An employee is deemed to have failed to return from leave if he/she works less than 30 days after returning from CFRA leave. An employee who retires during CFRA leave or during the first 30 days after returning is deemed to have returned from leave.

(B) The employee's failure to return from leave is for a reason other than the continuation, recurrence, or onset of a serious health condition that entitles the employee to CFRA leave, or other circumstances beyond the control of the employee.

(6) Group health plan coverage must be maintained for an employee on CFRA leave until:

(A) The employee's CFRA leave entitlement is exhausted;

(B) The employer can show that the employee would have been laid off and the employment relationship terminated for lawful reasons during the period of the CFRA leave; or,

(C) The employee provides unequivocal notice of intent not to return to work.

(d) Employee Payment of Group Health Benefit Premiums.

If employees are required to pay premiums for any part of their group health coverage, the employer must provide the employee with advance written notice of the terms and conditions under which premium payments must be made.

(1) If CFRA leave is paid, the employee's share of premiums must be paid by the method normally used during any paid leave, typically as a payroll deduction, unless a voluntary agreement between the employer and the employee dictates otherwise.

(2) If CFRA leave is unpaid, the employer may require that payment be made to the

employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(A) Payment due at the same time as if made by payroll deduction;

(B) Payment due on the same schedule as payments are made under COBRA;

(C) Payment prepaid pursuant to a cafeteria plan at the employee's option;

(D) The employer's existing rules for payment by employees on leave without pay would apply, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid CFRA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or

(E) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the CFRA leave is foreseeable).

(3) Unless an employer policy provides a longer grace period, an employer's obligation to maintain health insurance benefits coverage ceases under CFRA if an employee's premium payment is more than 30 days late. In order to drop coverage, an employer must provide written notice at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the written notice unless payment has been received by that date.

(A) The employer may recover the employee's share of any premium payments missed by the employee for any CFRA leave period during which the employer maintains health coverage by paying the employee's share.

(B) Regardless of whether an employee pays premiums while on CFRA leave, all other obligations of an employer under CFRA would continue, such as reinstatement upon return and complete restoration of coverage/benefits equivalent to those that the employee would have had if leave had not been taken, including family or dependent coverage.

(C) If an employer terminates an employee's insurance health benefits coverage in accordance with this section because of the employee's non-payment of premiums and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

(d) Other Benefits and Seniority-Accrual

During the period of CFRA leave, the employee is entitled to accrual of seniority and to

participate in health plans ~~for any additional period of leave~~ not covered by (c) above; ~~and also~~ in any employee benefit plans, including life, short-term or long-term disability or accident insurance; pension and retirement plans; and supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to any other leave granted by the employer for any reason other than CFRA leave.

(1) Unpaid CFRA leave for the serious health condition of the employee shall be compared to other unpaid disability leaves whereas unpaid CFRA leaves for all other purposes shall be compared to other unpaid personal leaves offered by the employer. CFRA leave shall not constitute a break in service or cause the employee to lose seniority, even if other paid or unpaid leave constitutes a break in service for purposes of establishing longevity or seniority, or for layoff, recall, promotion, job assignment, or seniority-related benefits.

~~(2) If the employer's policy allows seniority to accrue when employees are out on paid leave, such as paid sick or vacation leave, then seniority will accrue during any part of a paid CFRA leave.~~

~~(3) The employee returning from CFRA leave shall return with no less seniority than the employee had when the leave commenced for purposes of layoff, recall, promotion, job assignment, and seniority-related benefits such as vacation. If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on CFRA leave, the employer must give written notice to the employee that he or she is subject to the new or changed plan/benefits to the same extent as if the employee were not on leave.~~

(ef) Continuation of Other Benefits.

If the employer has no policy, practice or collective bargaining agreement that requires or authorizes any other type of unpaid personal or disability leave or if the employer's other unpaid personal or disability leaves do not allow for the continuation of benefits during these leaves, an employee taking a CFRA leave shall be entitled to continue to participate in the employer's health plans, pension and retirement plans, supplemental unemployment benefit plans or any other health and welfare employee benefit plan, in accordance with the terms of those plans, during the period of the CFRA leave.

(1) As a condition of continued coverage of group medical benefits (beyond the employer's obligation during the 12-week period described above in (c)), life insurance, short- or long-term disability plans or insurance, accident insurance, or other similar health and welfare employee benefit plans during any unpaid portion of the leave, the employer may require the employee to pay premiums at the group rate.

~~(A) If the employee elects not to pay premiums to continue these benefits, this nonpayment of premiums shall not constitute a break in service for purposes of longevity, seniority under any collective bargaining agreement or any employee benefit plan requiring the payment of premiums.~~

~~(2) An employer is not required to make plan payments to any pension and/or retirement plan or to count the leave period for purposes of time accrued under any such plan during any unpaid portion of the CFRA leave. The employer shall allow an employee covered by a pension and/or retirement plan to continue to make contributions, in accordance with the terms of these plans, during the unpaid portion of the leave period.~~

~~(fg) Employee Status:~~

~~The employee shall retain employee status during the period of the CFRA leave. The leave shall not constitute a break in service for purposes of longevity and/or seniority under any collective bargaining agreement or under any employee benefit plan. Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualification period, physical exam, et cetera.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; ERISA, 29 U.S.C. § 1001 et seq.; and COBRA, 29 U.S.C. § 1161 et seq.

§ 11093. Relationship ~~Between~~ between CFRA Leave and Pregnancy Disability Leave; Relationship between CFRA Leave and Non-Pregnancy Related Disability Leave.

(a) Separate and Distinct Entitlements.

The right to take a CFRA leave under Government Code section 12945.2 is separate and distinct from the right to take a pregnancy disability leave under Government Code section 12945 and section 11035 et seq. of the regulations.

(b) Serious Health Condition - Pregnancy.

An employee's own disability due to pregnancy, childbirth or a related medical conditions is not included as a serious health condition under CFRA. Any period of incapacity or treatment due to

pregnancy, including prenatal care, is included as a serious health condition under FMLA.

(c) CFRA Leave after Pregnancy Disability Leave.

At the end of the employee's period(s) of pregnancy disability, or at the end of four months of pregnancy disability leave, whichever occurs first, a CFRA-eligible employee may request to take CFRA leave of up to 12 workweeks for reason of the birth of her child, if the child has been born by this date. There is no requirement that either the employee or child have a serious health condition in order for the employee to take CFRA leave. There is also no requirement that the employee no longer be disabled by her pregnancy, childbirth or a related medical conditions before taking CFRA leave for reason of the birth of her child.

(1) Where an employee has utilized four months of pregnancy disability leave prior to the birth of her child, and her health care provider determines that a continuation of the leave is medically necessary, an employer may, but is not required to, allow an eligible employee to utilize CFRA leave prior to the birth of her child. No employer shall, however, be required to provide more CFRA leave than the amount to which the employee is otherwise entitled, but this does not excuse the employer's other obligations under the FEHA, such as the obligation to provide reasonable accommodation under the disability provisions, where applicable.

(d) Maximum Entitlement.

The maximum possible combined leave entitlement for both pregnancy disability leave (under FMLA and Government Code section 12945) and CFRA leave for reason of the birth of the child (under this article) is four months and 12 workweeks. This assumes that the employee is disabled by pregnancy, childbirth or a related medical conditions for four months and then requests, and is eligible for, a 12-week CFRA leave for reason of the birth of her child. This maximum entitlement does not include leave provided as a reasonable accommodation for a physical or mental disability under the FEHA.

(e) Disability Leave

The right to take a CFRA leave under Government Code section 12945.2 is separate and distinct from the right to take a disability leave under Government Code section 12945 and section 11064 et seq. of the regulations. If an employee has a serious health condition that also constitutes a disability as defined by Government Code section 12926 and cannot return to work at the conclusion of her CFRA leave, the employer has an obligation to engage that employee in an interactive process to determine whether an extension of that leave would constitute a reasonable accommodation under the FEHA.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12945 and 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ 11094. Retaliation and Protection from Interference with CFRA Rights.

~~In addition to the retaliation prohibited by Government Code section 12940 and section 11021 of the regulations, it shall be an unlawful employment practice for any person to discharge, fine, suspend, expel, punish, refuse to hire, or otherwise discriminate against any individual, except as otherwise permitted in this article, because that individual has:~~

~~(a) exercised his or her right to CFRA leave, and/or~~

~~(b) given information or testimony regarding his or her CFRA leave, or another person's CFRA leave, in any inquiry or proceeding related to any right guaranteed under this article.~~

(a) Any violation of CFRA or its implementing regulations constitutes interfering with, restraining, or denying the exercise of rights provided by CFRA. "Interfering with" the exercise of an employee's rights includes, for example, refusing to authorize CFRA leave and discouraging an employee from using such leave. It would also include an action by a covered employer to avoid responsibilities under CFRA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites below the 50-employee threshold for employee eligibility under CFRA;

(2) Changing the essential functions of the job in order to preclude the taking of leave; ~~and~~

(3) Reducing an employee's hours available to work in order to avoid employee eligibility; ~~and~~

(4) Terminating an employee when it anticipates an otherwise eligible employee will be asking for a CFRA-qualifying leave in the future.

(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 his or her CFRA leave, or another person's CFRA 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 "no fault" an employer's

attendance policies.

(c) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under CFRA. For example, employees (or their collective bargaining representatives) cannot “trade off” the right to take CFRA leave against some other benefit offered by the employer. This does not prevent the settlement or release of CFRA claims by employees based on past employer conduct without the approval of a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be reinstated to the same position the employee held at the time the employee's CFRA leave commenced or to a comparable position.

(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. They are similarly protected if they oppose any practice that they reasonably believe to be a violation of CFRA or its implementing regulations.

(e) In addition to retaliation prohibited by CFRA, retaliation is also prohibited by Government Code 12940 and section 11021 of the regulations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940 and 12945.2, Government Code.

§ 11095. Remedies. (Reserved.)

~~Upon determining that an employer has violated Government Code section 12945.2, the Commission may order any remedy available under Government Code section 12970, and section 7286.9 of the regulations. The remedy, however, for a violation of section 7297.9 (failure to provide notice) shall be an order that the employer provide such notice.~~

§ 11096 11095. Notice of CFRA Rights and Obligations ~~Right to Request~~ CFRA Leave.

(a) Employers to Post Notice.

~~Covered employers shall provide notice to their employees of the right to request CFRA leave under the California Family Rights Act. Employers shall post the notice in a conspicuous place or places where employees tend to congregate. Electronic posting is sufficient to meet this posting requirement as long as it is posted electronically in a conspicuous place or places where employees would tend to view it in the workplace.~~ Every employer covered by the CFRA is required to post and keep posted on its premises, in conspicuous places where employees are

employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Department of Fair Employment and Housing. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this section. If the employer publishes an employee handbook that describes other kinds of personal or disability leaves available to its employees, ~~that the employer shall include a description of CFRA leave in the next edition of its handbook it publishes following adoption of these regulations.~~ The employer may include both pregnancy disability leave and CFRA leave requirements in a single notice.

(b) Employers to Give Notice.

Employers are also encouraged to give a copy of the notice to each current and new employee, ensure that copies are otherwise available to each current and new employee, and disseminate the notice in any other way.

(c) Non-English Speaking Workforce.

Any employer whose workforce at any facility or establishment contains 10 percent or more of persons who speak a language other than English as their primary spoken language shall translate the notice into ~~the language or languages spoken by this group or these groups of employees~~ every language that is spoken by at least 10 percent of the workforce.

(d) Text of Notice.

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 ~~this act~~ 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.

FAMILY CARE AND MEDICAL LEAVE (CFRA LEAVE) AND PREGNANCY DISABILITY LEAVE

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, you may have a right to ~~an unpaid~~ 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 or spouse. 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.

Even if you are not eligible for CFRA leave, if you are disabled by pregnancy, childbirth or a related medical conditions, 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 ~~or~~ 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.

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.

We may require certification from your health care provider before allowing you a leave for pregnancy disability or for your own serious health condition, ~~or~~ We also may require certification from the health care provider of your child, parent or spouse, 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.

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.

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

_____ .

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940, 12945 and 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825

§ 11097 11096. Relationship with FMLA Regulations.

To the extent that they are within the scope of Government Code section 12945.2 and not inconsistent with this article, other state law, or the California Constitution, the Council incorporates by reference the federal regulations interpreting FMLA issued ~~that became effective January 6, 1995~~ March 8, 2013 (29 C.F.R. Part 825), which govern any FMLA leave that is also a leave under this article.

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825.

§ ~~11098~~ 11097. Certification Form.

For leaves involving serious health conditions, the employer may utilize the following Certification of Health Care Provider form or its equivalent. Employers may also utilize any other certification form, ~~such as the United States Department of Labor Form WH-380, revised December 1994 (Certification of Health Care Provider/Family and Medical Leave Act of 1993), provided that 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 ~~COMMISSION~~COUNCIL
CERTIFICATION OF HEALTH CARE PROVIDER
(California Family Rights Act of 1993 (CFRA))

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): _____

Patient’s relationship to employee: _____

If patient is employee’s child, is patient either under 18 or an adult dependent child:

Yes No

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

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

5. *The attached sheet describes what is meant by a* **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 under any of the categories described? If so, please check the appropriate category.**

~~(1) (2) (3) (4) (5) (6)~~

Yes No

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

Yes No

- Is the employee able to perform work of any kind?
(If “No,” skip next question.)
- 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.)

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

Yes No

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

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.

Yes No

- Intermittent Leave:** Is it medically necessary for the employee to be off work on an intermittent basis *or to work less than the employee’s normal work schedule in order to deal with* **due to** the serious health condition of the employee or family member?
- If the answer to 9 is yes, please indicate the estimated number of doctor’s visits, and/or estimated duration of medical treatment, either by the health care practitioner or another provider of health services, upon referral from the health care provider.* _____

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

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 he or she 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, or spouse 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:
~~A “Serious Health Condition” means an illness, injury, impairment, or physical or mental condition that involves one of the following:~~

1. Hospital Care

Inpatient care (i.e., an overnight stay) 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 him or her to the facility with the expectation that he or she 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 of 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).

Note: Authority cited: Section 12935(a), Government Code. Reference: Section 12945.2, Government Code; California Genetic Information Nondiscrimination Act, Stats. 2011, ch. 261; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.; and 29 C.F.R. § 825. ~~Appendix B, Form WH 380, as revised December 1994.~~