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

Explanatory Statement

On July 6, 2020, the Office of Administrative Law (OAL) approved regulations entitled *Employment Regulations Regarding Criminal History, the California Family Rights Act, and the New Parent Leave Act* (OAL Matter Number: 2020-0526-05) submitted by the Fair Employment and Housing Council (Council) of the Department of Fair Employment and Housing (DFEH). These regulations became effective on October 1, 2020.

On September 17, 2020, Governor Newsom signed SB 1383 (Jackson, Chapter 86, Statutes of 2020), which, when effective on January 1, 2021, will expand the California Family Rights Act (CFRA) and eliminate the New Parent Leave Act (NPLA). SB 1383 will render outdated certain portions of the aforementioned rulemaking approved by OAL in July 2020. The Council, therefore, proposes "changes without regulatory effect" to implement SB 1383 and one existing statutory provision (Gov. Code section 12945.2(u)). The proposed regulation would be effective January 1, 2021, thus aligning the Council's regulations with the statutory provisions they implement.

Background

Codified at Government Code section 12945.2, CFRA provides, *inter alia*, that it is unlawful for a covered employer "to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period or who meets [certain other requirements], to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave requested pursuant to this subdivision shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave." Currently, CFRA applies to private employers with 50 or more employees within 75 miles of the employee's workplace and public employers in California. CFRA is enforced by DFEH and through a private right of action.

SB 1383 amends section 12945.2 in the following ways:
• Expands the types of private employers that are covered by changing the definition of "employer" from "any person who directly employs 50 or more persons to perform services for a wage or salary" to "any person who directly employs five or more persons to perform services for a wage or salary";
• Eliminates the requirement that "the employer employ at least 50 employees within 75 miles of the worksite where that employee is employed";
• Expands the types of family members for whom someone can take leave to care for;
• Expands the definition of "child" to include non-dependent adult children and the children of a

domestic partner;
• Provides that leave may be taken because of a “qualifying exigency related to the covered active duty or call to covered active duty of an employee’s spouse, domestic partner, child, or parent in the Armed Forces of the United States, as specified in Section 3302.2 of the Unemployment Insurance Code”;
• Eliminates the current provision at section 12945.2(q) that allows an employer who employs both parents to require them to share 12 weeks of job-protected leave; and
• Eliminates the current provision at section 12945.2(r) that permits an employer to refuse to reinstate its highest-paid employees in certain circumstances.

SB 1383 repeals Government Code section 12945.6, which is the NPLA. That is because when SB 1383 becomes effective, the NPLA will be subsumed by CFRA’s expanded provisions.

In addition, AB 1748 (Bonta, Chapter 718, Statutes of 2019) aligned state and federal family and medical leave laws as they relate to airline flight deck and cabin crewmembers. The bill amended CFRA to establish airline flight deck and cabin crewmember-specific eligibility requirements in conformity with the federal Family and Medical Leave Act (FMLA). *See* Gov. Code section 12945.2(u).

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

The Council’s proposed regulations would update the existing regulations California Code of Regulations, Title 2, sections 11087-11097 to accurately reflect CFRA’s provisions, and the elimination of the NPLA, on January 1, 2021, the desired effective date of the proposed regulations. The Council proposes no substantive changes beyond what is required by SB 1383 and AB 1748. The Council exercised no discretion in putting forth these changes. These changes represent the "only legally tenable interpretation" of the statutory provisions they implement. As detailed below, each proposed regulatory change is dictated by SB 1383 or AB 1748. Therefore, the proposed regulation satisfies Code of Regulations, Title 1, Section 100.

Proposed regulatory change	**Required by**
§§ 11087–11096 amended to eliminate all references to the New Parent Leave Act, NPLA, Gov. Code § 12945.6, or its provisions.***** *****_These amendments are only included in the chart below if they are part of a subdivision that is being amended for an additional purpose._	• SB 1383 eliminated the New Parent Leave Act as of January 1, 2021. See Gov. Code § 12945.6(k) (“This section shall remain in effect only until January 1, 2021, and as of that date is repealed.”) Therefore, it is necessary to remove all references to the NPLA from the regulations.
§11087(a) “Certification” means a written communication from the health care provider of the child, parent, grandparent, grandchild, sibling, ~~or~~ spouse, or domestic partner, or employee with a serious health condition to the employer of the employee requesting a family care leave to care for an aforementioned family member of the employee, ~~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 family member ~~child, parent, or spouse~~, this certification need not identify the serious health	• SB 1383 added “grandparent,” “grandchild,” “sibling,” and “domestic partner” to the California Family Rights Act as family members for whom an employee can take leave. See Gov. Code §§ 12945.2(b)(4)(B), (b)(7), (b)(8), (b)(10), (b)(11),

condition involved, but shall contain the information identified in Government Code section 12945.2.fiv (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 family member ~~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 family member. ~~child, parent or spouse.~~ 1. "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 family member ~~child, parent or spouse~~, as well as directly providing, or participating in, the medical care.	(b)(13) (effective January 1, 2021). Therefore, it is necessary to incorporate these new family members into the regulations.
§11087(c) "Child" means a biological, adopted, or foster child, a stepchild, a legal ward, ~~or~~ a child of an employee or the employee's domestic partner, or a person to whom the employee 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.	• SB 1383 amended the definition of "child" in Gov. Code § 12945.2. Previously, the definition of "child" was limited to children "under the age of 18" or "adult dependent children." See Gov. Code § 12945.2(c)(1)(A)&(B) (effective until December 31, 2020). SB 1383 eliminated the limitations in § 12945.2(c)(1)(A)&(B). See Gov. Code § 12945.2(b)(1) (effective January 1, 2021). Effective January 1, 2021, the definition of "child" is "a biological, adopted, or foster child, a stepchild, a legal ward, a child of a domestic partner, or a person to whom the employee stands in loco parentis." Therefore, it is necessary to take out references in the regulations to the requirement that a child be under the age of 18 or an adult dependent child, so that the regulatory definition comports with the statutory definition.
§11087(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 ~~20 or more persons for purposes of the NPLA, or 50~~ five or more persons ~~for purposes of the CFRA,~~ 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. 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 five ~~20~~ employees ~~(for purposes of the NPLA) or 50 employees (for purposes~~	• SB 1383 amended the definition of a private "employer" from "any person who directly employs 50 or more persons to perform services for a wage or salary" to "any person who directly employs five or more persons to perform services for a wage or salary." Compare Gov. Code §

~~of the CFRA)~~ 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 five~~20 (NPLA) or 50 (CFRA)~~ part or full-time employees to perform services for a wage or salary for any part of the day on which the unlawful conduct occurred or on a "regular basis" as that term is defined in subdivision 11008(d)(1)(A). Employees on paid or unpaid leave, including CFRA ~~or NPLA~~ leave, leave of absence, disciplinary suspension, or other leave, are counted.	12945.2(c)(2)(A) (effective until December 31, 2020) with Gov. Code § 12945.2(b)(3) (effective January 1, 2021). Therefore, it is necessary to replace references to the previous definition with the new definition.
§11087(e) "Domestic partner" means a member of a domestic partnership, as that term is defined in Family Code section 297.	• SB 1383 added this definition of "domestic partner" to Gov. Code § 12945.2(b)(2) (effective January 1, 2021). Therefore, it is necessary to incorporate this definition into the regulations.
§11087 ~~(e)~~(f) "Eligible employee" means either of the following: (1) A full- or part-time employee in California who has been employed for a total of at least 12 months (52 weeks) with the employer at any time prior to the commencement of a CFRA ~~or NPLA~~ leave, and who has actually worked (within the meaning of the 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 ~~or NPLA~~ leave is to commence. ~~(1)~~(A) 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)~~(B) 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 employer from considering employment prior to a continuous break in service of more than seven years so long as the employer does so uniformly, with respect to all employees with similar breaks in service. ~~(3)~~(C) For an employee who takes a pregnancy disability leave, and who then wants to take CFRA ~~or NPLA~~ leave for reason of the birth of the employee's child immediately after the employee's pregnancy disability leave, the 12-month period during which the employee must have worked 1,250 hours is that period immediately preceding the employee's first day of pregnancy disability leave, not the first day of the subsequent CFRA ~~or NPLA~~ leave for reason of the birth of the employee's child. ~~(4) 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, for purposes of the CFRA, at least 50 part- or full-time employees, or for purposes of the NPLA, 20 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.~~	• Prior to SB 1383, Gov. Code § 12945.2 exempted employers with 50 or fewer employees within 75 miles of the worksite from coverage under the law. See Gov. Code § 12945.2(b) (effective until December 31, 2020). SB 1383 eliminated this exemption and also amended the definition of a private "employer" from "any person who directly employs 50 or more persons to perform services for a wage or salary," Gov. Code § 12945.2(c)(2)(A) (effective until December 31, 2020), to "any person who directly employs five or more persons to perform services for a wage or salary," Gov. Code § 12945.2(b)(3) (effective January 1, 2021). Therefore, it is necessary to eliminate any mention of the 75 mile/50 employee requirement, including former subdivision §11087(e)(4), because it no longer has any significance and does not impact any rights or responsibilities. • Additionally, it is necessary to remove former subdivision including former subdivision § 11087(e)(4)(A), regarding "fixed worksites," because this definition was only relevant because of the 75 mile/50 employee exemption, which as explained above was eliminated by SB 1383; therefore, it is necessary to remove this subdivision because it has no

(2) An employee employed by an air carrier as a flight deck or cabin crew member who has been employed for 12 or more months with the employer, has worked or been paid for 60 percent of the applicable monthly guarantee or the equivalent annualized over the preceding 12-month period, and has worked or been paid for at least 504 hours during the preceding 12-month period. For purposes of this subdivision, "applicable monthly guarantee" means the minimum number of hours for which the employer has agreed to schedule such employees for any given month, unless the employee is on reserve status. For those employees on reserve status, the "applicable monthly guarantee" is the number of hours for which the employer has agreed to pay employees who are on reserve status for any given month pursuant to a collective bargaining agreement, or employer policy if no collective bargaining agreement exists.

(3) For purposes of determining an employee's eligibility for CFRA leave under either subdivision (1) or (2), the following terms also apply:

~~(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 20 (NPLA) or 50 (CFRA) employees, if a salesperson works from home in California, but reports to and receives assignments from the salesperson's corporate headquarters in New York, the New York headquarters, not the salesperson's home, would constitute the worksite from which there must be 20 (NPLA) or 50 (CFRA) employees within a 75-mile radius in order for the salesperson to be eligible under the NPLA or 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 or NPLA eligibility for the secondary employer's employees.~~

~~(C)~~(A) Once the employee meets ~~this~~their eligibility ~~criterion~~criteria and gives notice of the need for a leave, 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 five employees for purposes of ~~NPLA, or 50 employees for purposes of~~ CFRA. In such cases, however, the employee would not be eligible for any subsequent leave requested for a different qualifying event.

~~(5)~~(B) If an employee is not eligible for CFRA ~~or NPLA~~ 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 the employee 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 12-month requirement as CFRA ~~or NPLA~~ 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.

independent significance and does not impact on any rights or responsibilities.
Similarly, it is necessary to remove former subdivision § 11087(e)(4)(B), regarding joint employers, which was also tied to the eliminated 75 mile/50 employee exemption, because it has no independent significance and has no impact any rights or responsibilities.

- AB 1748 amended Gov. Code § 12945.2 to add a provision on flight, deck, and cabin crew employed by air carriers: "An employee employed by an air carrier as a flight deck or cabin crew member meets the eligibility requirements specified in subdivision (a) if all of the following requirements are met:

(A) The employee has 12 months or more of service with the employer.
(B) The employee has worked or been paid for 60 percent of the applicable monthly guarantee, or the equivalent annualized over the preceding 12-month period.
(C) The employee has worked or been paid for a minimum of 504 hours during the preceding 12-month period.
(2) As used in this subdivision, the term "applicable monthly guarantee" means both of the following:
(A) For employees described in this subdivision other than employees on reserve status, the minimum number of hours for which an employer has agreed to schedule such employees for any given month.
(B) For employees described in this subdivision who are on reserve status, the number of hours for which an employer has agreed to pay such employees on reserve status for any given month, as established in the collective bargaining agreement or, if none exists, in the employer's policies.
(3) The department may provide, by regulation, a method for

	calculating the leave described in subdivision (a) with respect to employees described in this subdivision. Gov. Code § 12945.2(u). Therefore, it is necessary to add new subdivision § 11087(f)(2) regulation to incorporate this new provision.
§11087 ~~(h)~~(i) "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 an employee's child, parent, ~~or spouse~~, grandparent, grandchild, sibling, spouse, or domestic partner~~of the employee~~ (sometimes referred to as "family members" in these regulations) 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; or (3) Leave of up to a total of 12 workweeks in a 12-month period because of a "qualifying exigency," as that term is defined in Unemployment Code section 3302.2, related to covered active duty or a call to covered active duty of an employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States. (j) "Family member" means an employee's child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or domestic partner.	• SB 1383 added "grandparent," "grandchild," "sibling," and "domestic partner" to the California Family Rights Act as family members for whom an employee can take leave. See Gov. Code §§ 12945.2(b)(4)(B), (b)(7), (b)(8), (b)(10), (b)(11), (b)(13) (effective January 1, 2021). Therefore, it is necessary to incorporate these family members into the regulations. • SB 1383 added § 12945.2(b)(4)(D) (effective January 1, 2021) to the definition of "family care leave" to include "Leave because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, domestic partner, child, or parent in the Armed Forces of the United States, as specified in Section 3302.2 of the Unemployment Insurance Code." Therefore, it is necessary to incorporate this definition into the regulations.
§11087~~(k) "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.~~	• Prior to SB 1383, Gov. Code § 12945.2(r) contained a "key employee" exception that exempted specific employees from some protections under the law. SB 1383 eliminated the "key employee" exception. Compare Gov. Code § 12945.2(r) (effective until December 31, 2020) with Gov. Code § 12945.2 (effective January 1, 2021). Therefore, it is necessary to remove all references to this exception in the regulations as the concept no longer has any significance and does not impact any rights or responsibilities.
§11087 (l) "Grandchild" means the child of an employee's child.	• SB 1383 added this definition of "grandchild" to Gov. Code §

	12945.2(b)(7) (effective January 1, 2021). Therefore, it is necessary to incorporate this definition into the regulations.
§11087 (m) "Grandparent" means a parent of the employee's parent.	• SB 1383 added this definition of "grandparent" to Gov. Code § 12945.2(b)(8) (effective January 1, 2021). Therefore, it is necessary to incorporate this definition into the regulations.
§11087~~(r)~~(u) "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~~ family member of the employee that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse.	• SB 1383 added "grandparent," "grandchild," "sibling," and "domestic partner" to the California Family Rights Act as family members for whom an employee can take leave. See Gov. Code §§ 12945.2(b)(4)(B), (b)(7), (b)(8), (b)(10), (b)(11), (b)(13) (effective January 1, 2021). Therefore, it is necessary to incorporate these new family members into the regulations.
§11087(v) "Sibling" means a person related to the employee by blood, adoption, or by having a common legal or biological parent.	• SB 1383 added this definition of "sibling" to Gov. Code § 12945.2(b)(13) (effective January 1, 2021). Therefore, it is necessary to incorporate this definition into the regulations.
§ 11088. Right to CFRA ~~or NPLA~~ 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 ~~or NPLA~~ 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 ~~or NPLA~~ 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 ~~or NPLA-qualifying~~ purpose, the request was reasonable, and the employer denied the request for CFRA ~~or NPLA~~ leave. (2) Reasonable request. A request to take a CFRA ~~or NPLA~~ 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(a). ~~(c) Limitation on Entitlement.~~	• Prior to SB 1383, Gov. Code § 12945.2 included an exception that if two parents were employed by the same employer they would only be entitled to 12 weeks of leave total. See Gov. Code § 12945.2(q) (effective until December 31, 2020). SB 1383 eliminated this exception. See Gov. Code § 12945.2 (effective January 1, 2021). Therefore, it is necessary to eliminate any references to this exception in the regulations.

~~If both parents are eligible for CFRA or NPLA leave but are employed by the same employer, that 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, but is not required to, grant simultaneous leave to both of the employees. The employer may not limit their entitlement to CFRA leave for any other qualifying purpose. For example, 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.~~	
§ 11089 ~~(2) "Key Employee."~~ ~~An employer may refuse to reinstate a "key employee," as defined in section 11087(k) of these regulations, to the employee's same position or to a comparable position only if the employer establishes, by a preponderance of the evidence, that all of the following conditions exist:~~ ~~(A) The employee requesting the CFRA or NPLA leave is a salaried employee. 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. 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. 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) 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 or NPLA leave (or when CFRA or NPLA leave commences, if earlier) that the employee 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.~~	• Prior to SB 1383, Gov. Code § 12945.2(r) contained a "key employee" exception that exempted specific employees from some protections under the law. SB 1383 eliminated the "key employee" exception. Compare Gov. Code § 12945.2(r) (effective until December 31, 2020) with Gov. Code § 12945.2 (effective January 1, 2021). Therefore, it is necessary to remove all references to this exception in the regulations as the concept no longer has any significance and does not impact any rights or responsibilities.

~~(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 or NPLA leave (or who is on CFRA or NPLA leave), the employer shall notify the employee in writing that it cannot deny CFRA or NPLA 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 or NPLA continue unless and until the employee either gives notice to the employer that the employee 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 the employee 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.~~ ~~§11087(m)(g) "Parent-in-law" means the parent of a spouse or domestic partner.~~	
§ 11090 (e) Minimum duration for CFRA leaves taken intermittently or on a reduced leave schedule for the serious health condition of an employee's ~~parent, child, or spouse~~ family member or for the serious health condition of the employee: Where CFRA leave is taken for a serious health condition of the employee's family member ~~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 the employee does not receive treatment by a health care provider. An employer 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.	• SB 1383 added "grandparent," "grandchild," "sibling," and "domestic partner" to the California Family Rights Act as family members for whom an employee can take leave. See Gov. Code §§ 12945.2(b)(4)(B), (b)(7), (b)(8), (b)(10), (b)(11), (b)(13) (effective January 1, 2021). Therefore, it is necessary to incorporate these new family members into the regulations.
§ 11091(b) Medical Certification. (1) Serious Health Condition of ~~Child, Parent, or Spouse~~an Employee's Family Member As a condition of granting a leave for the serious health condition of the employee's family member ~~child, parent or spouse~~, the employer may require certification of the serious health condition, as defined in section	• SB 1383 added "grandparent," "grandchild," "sibling," and "domestic partner" to the California Family Rights Act as family members for whom an employee can take leave. See Gov. Code §§ 12945.2(b)(4)(B), (b)(7), (b)(8), (b)(10), (b)(11),

11087(a)(1). If the certification satisfies the requirements of section 11087(a)(1), the employer must accept it as sufficient. Upon expiration of the time period the health care provider originally estimated the employee needed to take care of the employee's family member~~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.	(b)(13) (effective January 1, 2021). Therefore, it is necessary to incorporate these new family members into the regulations.
§ 11094(a) ~~(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites below the 20-employee or 50-employee threshold for employee eligibility under eligibility under NPLA or CFRA;~~	• Prior to SB 1383, Gov. Code § 12945.2 exempted employers with 50 or fewer employees within 75 miles of the worksite from coverage under the law. See Gov. Code § 12945.2(b) (effective until December 31, 2020). SB 1383 eliminated this exemption and also amended the definition of a private "employer" from "any person who directly employs 50 or more persons to perform services for a wage or salary" to "any person who directly employs five or more persons to perform services for a wage or salary." Compare Gov. Code § 12945.2(c)(2)(A) (effective until December 31, 2020) with Gov. Code § 12945.2(b)(3) (effective January 1, 2021). Therefore, it is necessary to eliminate this provision as it no longer has any significance and does not impact any rights or responsibilities.
§ 11095. Notice of CFRA ~~and NPLA~~ Rights and Obligations. (d) Text of Notice. The text below contains only the minimum requirements of the California Family Rights Act of 1993~~, New Parent Leave Act~~ and of the employer's obligation to provide pregnancy disability leave. Nothing in this notice requirement prohibits an employer from providing a leave policy that is more generous than that required by CFRA ~~or NPLA~~ 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 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, and if we employ ~~50~~five or more employees ~~at your worksite or within 75 miles of your worksite~~, you may have a right to a family care or medical leave (CFRA leave). This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition or that of your child, parent, parent-in-law, grandparent, sibling, spouse, or domestic partner ~~or~~	• Prior to SB 1383, Gov. Code § 12945.2 exempted employers with 50 or fewer employees within 75 miles of the worksite from coverage under the law. See Gov. Code § 12945.2(b) (effective until December 31, 2020). SB 1383 eliminated this exemption and also amended the definition of a private "employer" from "any person who directly employs 50 or more persons to perform services for a wage or salary" to "any person who directly employs five or more persons to perform services for a wage or salary." Compare Gov. Code § 12945.2(c)(2)(A) (effective until December 31, 2020) with Gov. Code § 12945.2(b)(3) (effective January 1, 2021). Therefore, it is

~~spouse. If we employ less than 50 employees at your worksite or within 75 miles of your worksite, but at least 20 employees at your worksite or within 75 miles of your worksite, you may have a right to a family care leave for the birth, adoption, or foster care placement of your child under the New Parent Leave Act (NPLA). Similar to CFRA leave, the NPLA leave may be up to 12 work weeks in a 12-month period.~~ 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 ~~and employees may choose to use accrued paid leave while taking NPLA leave~~.	necessary to eliminate any reference to the 75 mile/50 employees exception from the regulations as the exception no longer has any significance and does not impact any rights or responsibilities. Additionally, it is also necessary to incorporate the new definition of employer that includes employment of five or more employees.
§ 11097. Certification Form. For leaves involving serious health conditions under CFRA or FMLA, the employer may utilize the following Certification of Health Care Provider form or its equivalent. Employers may also utilize any other certification form so long as the health care provider does not disclose the underlying diagnosis of the serious health condition involved without the consent of the patient. FAIR EMPLOYMENT & HOUSING COUNCIL CERTIFICATION OF HEALTH CARE PROVIDER (California Family Rights Act (CFRA) or Family and Medical Leave Act (FMLA)) IMPORTANT NOTE: The California Genetic Information Nondiscrimination Act of 2011 (CalGINA) prohibits employers and other covered entities from requesting, or requiring, genetic information of an individual or family member of the individual except as specifically allowed by law. To comply with the Act, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic Information,” as defined by CalGINA, includes information about the individual’s or the individual’s family member’s genetic tests, information regarding the manifestation of a disease or disorder in a family member of the individual, and includes information from genetic services or participation in clinical research that includes genetic services by an individual or any family member of the individual. “Genetic Information” does not include information about an individual’s sex or age. 1. Employee’s Name: _____ 2. Patient’s Name (If other than employee): _____ _____ ~~Patient’s relationship to employee:_____~~ ~~If patient is employee’s child, is patient either under 18 or an adult dependent child:~~ Is patient the employee’s family member (i.e., child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or domestic partner? (Note: “child” includes a biological, adopted, foster child, a stepchild, a legal ward, a child of the employee’s domestic partner, and a person to whom the employee stands in loco parentis.) Yes ☐ No ☐ 3. Date medical condition or need for treatment commenced [NOTE: THE HEALTH CARE PROVIDER IS NOT TO DISCLOSE THE UNDERLYING DIAGNOSIS WITHOUT THE CONSENT OF THE PATIENT]:	• SB 1383 added “grandparent,” “grandchild,” “sibling,” and “domestic partner” to the California Family Rights Act as family members for whom an employee can take leave for. See Gov. Code §§ 12945.2(b)(4)(B), (b)(7), (b)(8), (b)(10), (b)(11), (b)(13) (effective January 1, 2021). Therefore, it is necessary to incorporate the family members into the form. Additionally, employers have the discretion whether or not to use the form in section 11097 of the regulations. Accordingly, any changes are not substantive as they will not affect any rights or responsibilities.

_____ _____

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

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

Yes ☐ No ☐

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

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

Yes ☐ No ☐

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

Yes ☐ No ☐

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

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

Yes ☐ No ☐

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

Yes ☐ No ☐

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

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

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

Yes ☐ No ☐

If yes, please indicate the estimated frequency of the employee’s need for intermittent leave due to the serious health condition, and the duration of such leaves (e.g. 1 episode every 3 months lasting 1-2 days):

Frequency: _____ times per _____week(s) _____month(s) Duration:

_____hours or _____day(s) per episode

Yes ☐ No ☐

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

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

Yes ☐ No ☐

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

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

Yes ☐ No ☐

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

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

_____

_____

_____

11. Printed name of health care provider: _____

Signature of health care provider: _____

Date: _____

12. Signature of Employee: _____

Date: _____

***

--- Serious Health Condition ---

"Serious health condition" means an illness, injury (including, but not limited to, on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent, parent-in-law, grandparent, grandchild, sibling, ~~or~~ spouse, or

domestic partner of the employee that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse. A serious health condition may involve one or more of the following:

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

2. Absence Plus Treatment

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

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

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

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

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

4. Chronic Conditions Requiring Treatment A chronic condition which:

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

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

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

5. Permanent/Long-term Conditions Requiring Supervision A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

6. Multiple Treatments (Non-Chronic Conditions) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis

(physical therapy), or kidney disease (dialysis). Note: Authority cited: Section 12935, 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.	