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Employment Law Guidance

SB 1383 Significantly Expands CFRA Family and Medical Leave to Smaller Employers, and Expands Overall Uses of CFRA Leave for All Employers (*Effective January 1, 2021*)

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Governor Gavin Newsom recently signed into law Senate Bill ("SB") 1383, **which becomes effective on January 1, 2021**, and will impact all California employers by significantly expanding the California Family Rights Act ("CFRA") family and medical leave law as follows:

- Applies CFRA to private sector employers with 5 or more employees and all public sector employers – regardless of the number of employees (*previously, CFRA leave was limited to public and private sector employers with 50 or more employees*);

- Eliminates requirement that an eligible employee for CFRA leave be at a worksite with 50 or more employees in a 75-mile radius;

- Adds grandparents, grandchildren, and siblings of the employee as covered family members with a serious health condition who an employee can take CFRA leave to care for; and

- Eliminates the "key employee" defense and other restrictions on the use of CFRA leave.

As a result of SB 1383, CFRA will now deviate further from the federal Family Medical Leave Act ("FMLA") that it otherwise generally ran concurrently with, and could create employee leave entitlements under both laws for up to 24 weeks of protected leave in a 12-month period, under certain circumstances. Below is a summary of SB 1383 and its impact on employers.

Boutin Jones will also be hosting a complimentary webinar on December 10, 2020 from 10-11:30am on the impacts of SB 1383 and an overview of CFRA for smaller employers now covered under CFRA. More information on this webinar is at the end of this Guidance.

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CFRA Leave is Now Applicable to Private Sector Employers with 5 or More Employees and all Public Sector Employers, and Eliminates the Requirement for an Eligible Employee to be at a Worksite with 50 or More Employees in a 75-Mile Radius

SB 1383 will now lower the qualifying threshold for private sector employers to be covered under CFRA from the existing 50 or more employees threshold to a new 5 or more employees threshold. This significantly expands CFRA's coverage to now include most small employers in California. Smaller private sector employers with 5 to 49 employees who were not previously covered under CFRA will now be covered employers.

Impacts on Public Sector Employers

While CFRA also currently defines an "employer" to include all public agencies, a public sector employee could only qualify to take CFRA leave if their worksite had 50 or more employees in a 75-mile radius. Therefore, smaller public agencies with less than 50 or more employees in a 75-mile radius had no employees eligible for CFRA benefits. SB 1383 eliminates the requirement that eligible employees can only qualify for CFRA leave if they are at a worksite with 50 or more employees in a 75-mile radius. Consequently, all public sector employers – regardless of the number of employees – will have to provide CFRA leave to an eligible employee. This change will also impact employees at smaller worksites of a larger private sector employer with 50 or more employees as they will now also be eligible for CFRA leave.

Impacts on Private Sector Employers

Following SB 1383's changes, effective January 1, 2021, any employee who works for a private sector employer with 5 or more employees or any public sector employer can become eligible to take CFRA leave so long as they meet the following criteria:

- Worked for the employer for at least 12 months of service (can be nonconsecutive work for employer over a 7-year period, except that any military leave time while employed counts towards this 12 months of service); and

- Worked at least 1,250 hours in the 12-month period prior to taking CFRA leave.

This will result in private sector employers with 5 or more employees and all public sector employers now having to provide the following CFRA leave of absence entitlements to eligible employees:

- Up to 12 weeks of unpaid family and medical leave for qualifying purposes in a 12-month period;

- Continuation of health insurance benefits at the same level as if the employee had been continuously employed during the CFRA leave; and

- Right to reinstatement to the employee's same or comparable job position to the extent that the employee would have remained in that position if they had been continuously employed during the CFRA leave.

In light of SB 1383's expansion of CFRA leave, the existing New Parent Leave Act ("NPLA") that became law in 2018 and provided CFRA-like bonding leave rights to smaller employers with 20-49 employees is being repealed as it is no longer needed.

While the federal FMLA law remains unchanged and still does not apply to smaller employers with less than 50 employees, CFRA leave will now apply to any private sector employers with 5 or more employees and all public sector employers effective January 1, 2021.

Expanded Uses of CFRA Leave to Care for Additional Family Members with Serious Health Conditions and for Family Military Qualifying Exigency Leave

The other major impact of SB 1383 that is applicable to all CFRA covered employers – including those employers with 50 or more employees that have already been covered under CFRA – is the expansion of the types of leave that can be used under CFRA.

Addition of Grandparent, Grandchild and Sibling of Eligible Employee to Covered Family Members with a Serious Health Condition

Under SB 1383, an employee's ability to take CFRA leave to care for a family member with a serious health condition is now expanded to include more family members. Covered family members now include **grandparent, grandchild, and sibling** – in addition to the existing parent, child, spouse, or registered domestic partner. However, the addition of grandparent, grandchild, and sibling – along with the existing inclusion of registered domestic partner – as covered family members also expands CFRA's deviation from the FMLA's definition of that term which does not include such individuals.

In a unique twist, while SB 1383 adds a definition of "parent-in-law" to CFRA, the revised law does not actually reference the term anywhere else in the statute and therefore does not provide an employee a new right to take CFRA leave to care for the serious health condition of a parent-in-law. It is unclear at this time if future legislation may expand CFRA leave to also cover an employee taking leave to care for a parent-in-law with a serious health condition.

Removal of Restrictions to Take Care to Care for Adult Child with Serious Health Condition

SB 1383 also eliminates the provision under CFRA which precluded an employee from taking leave to care for their adult child over 18 years of age with a serious health condition unless that child was incapable of self-care because of a physical or mental disability. That restriction mirrored the FMLA's definition of "child", but SB 1383's elimination of the restriction will create an additional deviation from that FMLA standard and allow a qualified employee to take CFRA leave to care for **any** adult child who has a serious health condition.

Addition of Qualifying Exigency Family Military Leave

In a move that now brings CFRA more in line with FMLA, SB 1383 adds to CFRA the ability for an eligible employee to take "qualifying exigency" leave related to the covered active duty or call to covered active duty for an employee's spouse, registered domestic partner, child, or parent in the United States Armed Forces. SB 1383's addition here generally mirrors the FMLA's "qualifying exigency" family military leave that was added in 2008, with the only difference being that it also includes an employee's registered domestic partner who is in the United States Armed Forces for purposes of qualifying for the leave.

New Summary of CFRA-Qualifying Leave Reasons Following SB 1383

With SB 1383's revisions to CFRA, an eligible employee can take CFRA leave for one of the following reasons (with the new additions in **bold text**):

- Leave 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;

- Leave to care for a child **(including an adult child over 18 years of age)**, parent, **grandparent, grandchild, sibling**, spouse, or registered domestic partner who has a serious health condition;

- Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions; or

- **Leave because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's spouse, registered domestic partner, child, or parent in the United States Armed Forces.**

The end result here is that CFRA qualified employees will now have the ability to use CFRA leave for more reasons, including some that will not run concurrently with FMLA.

Additional Significant Changes to CFRA

SB 1383 also makes two additional significant changes to the terms and conditions of CFRA leave that deviate from the FMLA:

- For purposes of bonding leave with a newborn child, adopted child or foster care placement under CFRA, SB 1383 eliminates the ability of an employer who employs both ***parents*** of the child to limit their total collective amount of CFRA bonding leave to a total of 12 weeks. As a result, where both parents of the child are employed by the same employer and take CFRA bonding leave, they are now both individually entitled up to 12 weeks of such leave. The FMLA has a similar provision allowing an employer to limit the total amount of bonding leave to a collective 12 weeks where both parents are ***spouses*** – married or registered domestic partners – and are employed by the same

employer. While this collective 12-week bonding leave limitation under FMLA is not impacted by SB 1383, it is important to note that it only applies to the parents of a child who are married or registered domestic partners and both work for the same employer. The CFRA will provide both parents with 12 weeks of bonding leave each, regardless of whether or not the parents are married or registered domestic partners.

- The limited "key employee" exception to an employee's right to reinstatement under CFRA is also eliminated by SB 1383. This "key employee" exemption allows an employer the ability to deny reinstatement to an employee who takes CFRA leave where the employee is among the highest paid 10% of the employer's employees, the denial is necessary to prevent substantial and grievous economic injury to the operations of the employer, and where the employer notifies the employee of its intent to deny reinstatement. FMLA has identical language allowing the "key employee" exemption. SB 1383 now eliminates this limited "key employee" exemption and requires an employer to provide a right to reinstatement to all employees. Following this change, the only other permissible defenses for an employer to deny a right to reinstatement is where the employee's employment would have otherwise ceased or been modified independent of the CFRA leave (*e.g.*, layoff, reduction in hours or disciplinary action unrelated to CFRA leave), or where the employee fraudulently took CFRA leave when they did not otherwise qualify for the leave. The burden is on the employer to establish both such defenses.

Impact of SB 1383's Changes to CFRA on its Interaction with FMLA for Larger Employers with 50 or More Employees

Because SB 1383 makes significant changes to CFRA, a number of these changes also create a more scenarios where an employee's family and medical leave do not run concurrently under both FMLA and CFRA. As a result, larger employers with 50 or more employees who are covered under both FMLA and CFRA may have to provide more protected leave to eligible employees depending on the employee's reasons for using such leave.

Based on SB 1383's revisions, the following family and medical leave reasons do not run concurrently under FMLA and CFRA:

FMLA Only

- Leave due to pregnancy related conditions is considered a "serious health condition" under FMLA. (*It is generally not considered a "serious health condition" under CFRA unless the employee has already exhausted their separate Pregnancy Disability Leave ("PDL") entitlement under California Government Code section 12945*).

- Leave to care for an employee's parent, child, spouse or "next of kin" who is a covered servicemember with a serious injury or illness for up to 26 weeks under FMLA (*although, CFRA leave may run up to 12 weeks to the extent such leave also qualifies as leave to care for a parent, child or spouse with a serious health condition*).

CFRA Only

- Leave to care for a serious health condition of a registered domestic partner, adult child who is not incapable of self-care, grandparent, grandchild, or sibling;

- Leave because of a qualifying exigency related to the covered active duty or call to covered active duty of an employee's registered domestic partner in the United States Armed Forces.

The impact of these expanded leave areas where CFRA leave does not run concurrently with FMLA is that an eligible employee may therefore be able to receive up to 12 weeks of CFRA leave and a separate 12 weeks of FMLA leave – **for a total of 24 weeks of protected leave with a right to reinstatement** – in a 12-month period.

For example, if a qualified employee takes 12 weeks of CFRA leave to care for a grandchild with a serious health condition (something that is not covered under FMLA), that employee would then still have 12 weeks of FMLA leave available in the relevant 12-month period. As a result, SB 1383 will create more scenarios where an employee can be out on a protected unpaid leave of absence with continued health insurance benefits and a guaranteed right to reinstatement for up to 24 weeks in a 12-month period.

How an Employer Should Prepare for SB 1383's Changes to CFRA

Before SB 1383 become effective on January 1, 2021, we recommend that employers take the following actions to prepare for its impact on their CFRA leave obligations:

- For smaller private sector employers with 5-49 employees and all public sector employers with less than 50 employees not previously covered under CFRA until now, it is important to modify existing policies and procedures to incorporate provisions to provide CFRA leaves of absence to eligible employees. CFRA is a very complex law and there are a number of specific issues – such as the application of accrued paid leaves, concurrent use of SDI/PFL benefits, medical certifications, and specific employee notice requirements – that must be properly implemented. Supervisors and Human Resources staff should also be trained on the application of CFRA leaves, and applicable CFRA forms and procedures should be implemented so the employer is prepared to provide CFRA leaves to eligible employees after this new law is implemented.

- For larger employers with 50 or more employees already covered under both FMLA and CFRA, existing FMLA/CFRA leave policies need to be updated to incorporate these revisions to CFRA. In addition, employers should review how they track FMLA and CFRA leaves to properly distinguish when such leaves run concurrently or separately, as referenced above. Supervisors and Human Resources staff should also be trained on the changes to CFRA and the new qualifying uses of the leave.

Overall, it is important for all employers to begin reviewing their existing policies and procedures now in order to make the necessary adjustments in light of SB 1383's changes to CFRA.

Boutin Jones attorneys are available to assist in the preparation or revision of CFRA policies and forms to ensure compliance with SB 1383, to provide legal advice on the impacts of this new law, and to answer any other questions you may have regarding this Guidance. Please contact an attorney in our Employment Law Group by phone at (916) 321-4444 or via email:

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Boutin Jones Employment Law Group Webinar

Impact of SB 1383 on Smaller Employers and Overview of New CFRA Obligations

To assist smaller employers with less than 50 employees who have not been previously covered under the CFRA leave law, Boutin Jones is offering a complimentary Zoom webinar to outline the basics of CFRA leave, provide a general overview of how it will apply in the workplace, and answer questions.

Date/Time: Thursday, December 10, 2020 from 10:00am to 11:30am

Presenter: Gage C. Dungy, Shareholder. (https://boutinjones.com/attorney/gage-c-dungy/)

Registration: Please register for the webinar at:

https://zoom.us/webinar/register/WN_bvDKYp0hQW2mkwLo7PdrDw