

# TAKING TIME OFF WORK

## **INTRODUCTION:**

Employees with cancer may often face employment discrimination when they need to take time off for treatment or to recuperate. Caregivers may also face similar discrimination. Both federal and state laws allow eligible cancer survivors and family members to take paid and unpaid leaves of absence from their work. This section provides an overview of these laws.

## **I. THE FAMILY AND MEDICAL LEAVE ACT OF 1993**

A. **Statute:** 29 U.S.C. § 2601 – The Family Medical Leave Act (FMLA) was designed to balance the demands of the workplace with the needs of families, to promote the stability and economic security of the family, and to promote national interests in preserving family integrity by permitting leaves of absence or time off from work while still retaining employment security and benefits if the employee and the employer are covered by the law.

1) **Covered Employers:**

- (i) Private employers with 50 or more employees, within a 75 mile radius of the employer's worksite; and
- (ii) Public employers, regardless of size, including federal, state and local governments.

2) **Covered Employees:** Covered employees must meet eligibility criteria set forth below.

B. **Protection under the FMLA:**

1) **Covered Leave:** A covered employer must grant an eligible employee up to 12 weeks of unpaid, job and benefit-protected leave, in a 12-month period to:

- (i) Care for a spouse, son, daughter, or parent with a serious health condition;
- (ii) To take medical leave when the employee is unable to work because of a serious medical condition;
- (iii) To care for a newborn child following the birth; or
- (iv) For the placement of a son or daughter in adoption or foster care with the employee.

2) **How is the 12-Month Period Determined:** An employer must elect one of four options to determine the 12-month period:

- (i) A calendar year;
- (ii) Any fixed 12-month "leave year such as a fiscal year, a year required by state law, or a year starting on the anniversary of the employee's hiring date";
- (iii) A 12-month period measured from the date when an employee's first FMLA leave begins; or
- (iv) A "rolling" 12-month period measured backward from the date an employee uses FMLA leave.

3) **Intermittent Leave:** Employees may take their 12-week leave in blocks of time or by reducing their normal weekly or daily work schedule. However,

each extension or new block of FMLA leave time is subject to the same notification and certification requirements as the initial leave period.

- (i) If the requested FMLA leave is for the birth and care of a newborn child or the placement for adoption or foster care, use of the intermittent leave is subject to the employer's approval.
- 4) **“Serious Health Condition”**: A serious health condition is any physical or mental "illness, injury, medical condition or impairment" that requires:
- (i) Inpatient care and treatment in a hospital, hospice or residential care facility; or
  - (ii) Continuing outpatient treatment by a health care provider, which includes:
    - A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that involves:
      - ⇒ Two or more treatments by a health care provider (e.g., physical therapy) under the orders of, or on referral by, the health care provider; or
      - ⇒ At least one treatment by a health care provider, which results in a regimen of continuing treatment under the supervision of the health care provider.
    - Any period of incapacity due to pregnancy or prenatal care.
    - Any period of incapacity or treatment for such incapacity, which is due to a chronic, serious health condition that:
      - ⇒ Requires periodic visits for treatment to a health care provider;
      - ⇒ Continues over a period of time; or
      - ⇒ May cause episodic rather than a continuing period of incapacity.
    - A period of incapacity, which is permanent or long-term due to a condition for which treatment may not be effective.
    - Any period of absence for the purpose of receiving multiple treatments 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.
- 5) **Health Care Provider**: Under the FMLA, the definition of “health care provider” includes the following:
- (i) Doctors of medicine or osteopathy licensed in the state in which they practice;
  - (ii) Podiatrists, dentists, clinical psychologists, optometrists and chiropractors (limited to correction of subluxations of the spine as demonstrated by x-rays), practicing within the scope of their practice and under state license;
  - (iii) Nurse practitioners, nurse-midwives and clinical social workers, practicing within the scope of their practice and under state license;
  - (iv) Christian Scientist practitioners listed with the First Church of Christ Scientist in Boston, Massachusetts; or
  - (v) Any health care provider recognized by the employer or the employer's health plan benefits manager.
- 6) **Medical Certification of a Serious Health Condition**:
- (i) **What an employer can do**:

- An employer may require that the employee provide certification of the need to take FMLA leave from the employee's health care provider;
- An employer may ask the employee to see the employer's physician for a second medical opinion at the employer's expense to determine whether the FMLA request is warranted; and
- The employer may also ask that the certification include the date when the serious health condition began, the probable duration of the condition, or the estimated time required to care for a family member. If the requested leave is for the employee, the certification must contain a statement that the employee is unable to perform one or more of his or her essential job functions.

(ii) **What an employer can not do:** An employer may not:

- Seek additional information to identify the serious health condition of the employee or of the family member (The doctor need only state that the employee needs time off due to a serious health condition);
- Request a copy of the employee's or family member's medical records; and
- Contact the employee's health care provider to clarify information on the medical certification or to confirm the certification without the employee's permission.

7) **Confidentiality of Medical Documents:** Any FMLA-related inquiries and all related documentation are confidential and must be kept in separate medical files, apart from an employee's personnel file.

8) **Taking Care of Family Members:** An employee can obtain leave under the FMLA to care for family members including:

(i) **Care of children:** The care of children includes minors other than the employee's offspring, such as grandchildren and foster children. It also includes adult dependent children who are unable to care for themselves because of a mental or physical disability.

(ii) **Care of parents:** The care of parents extends to individuals who are not biologically related but who acted as parents to the employee.

(iii) **Care of spouses:** The care of spouses does not extend to domestic partners. Spouses who work for the same employer are jointly entitled to a combined total of 12 weeks of family leave for the birth and care of newborn child, for placement of a child for adoption or foster care, and to care for a parent who has a serious health condition. Leave for birth and care, or placement for adoption or foster care of a child must conclude within 12 months of the birth or placement.

C. **Employee Eligibility Requirements:** To be eligible for FMLA leave, an employee must meet the all three of the following requirements:

1) **Work for the employer for at least 12 months:** The 12 months do not have to be continuous or consecutive. All time worked during the 12 months prior to the commencement of the FMLA leave is counted.

- 2) **Work at least 1250 hours in the 12 months immediately preceding the commencement of leave:** To determine if any employee has satisfied the 1250 hour requirement, an employer will look at the total hours worked during the 12 months preceding the FMLA leave. An employee meets the 1250 hour requirement if he/she she has worked:
  - (i) 24 hours in each of the 52 weeks of the year; or
  - (ii) Over 104 hours in each of the 12 months of the year; or
  - (iii) 40 hours per week for more than 31 weeks (over seven months) of the year.
- 3) **Work at a site that has at least 50 or more employees within a 75 mile radius of that site:** The 75 mile radius is determined by the distance it would take to drive 75 miles on the surface road from the site in any given direction.

**D. Employee Responsibilities:**

- 1) **Notice Requirement:** An employee must give the employer reasonable advance notice that the employee wishes to take FMLA leave. "Reasonable advance notice" means at least 30 days in advance if the leave is foreseeable (e.g., for a surgical procedure), or as soon as practicable if the leave is not foreseeable. "As soon as practicable" means that the employee must give the employer at least a verbal notification within one or two days from the date the employee learns of the need to take leave.
- 2) **Asking for Leave:** A request for FMLA leave may be in plain language and does not have to specifically mention the FMLA. However, the request must include sufficient information for the employer to understand that the reasons for the leave fall under the FMLA definition of a serious health condition. To ensure adequate protection, it is advisable to give such notice in writing and to refer to the FMLA, although it is not required.

**E. Employer Responsibilities:**

- 1) **Notice Requirement:** An employer must notify the employee, in writing, that the requested leave is designated as FMLA leave. If an employer was not aware that the employee's leave should have been designated as FMLA, the leave can be retroactively defined as FMLA leave, but only if the leave is still in progress or within two business days of the employee's return to work.
- 2) **Unpaid Leave:** The FMLA only requires unpaid leave. An employee, however, may elect, or the employer may require the employee, to use accrued sick or vacation leave for some or all of the FMLA period.
  - (i) When paid leave such as sick or vacation leave is substituted for unpaid leave, it may be counted as FMLA leave only if the employee is properly notified of the FMLA designation when the leave begins.
- 3) **Job-Protected Leave:** Upon return from FMLA leave, an employee must be restored to his or her original position or to an equivalent position with equivalent pay, benefits and other terms and conditions of the employment.

- (i) **Exceptions:** There are several circumstances in which an employer does not need to reinstate an employee:
- If an employee gives unequivocal notice that he or she does not intend to return to work;
  - If an employee is unable to return to work when he or she has exhausted all 12 weeks of FMLA leave in the designated 12-months period;
  - If an employee's position was eliminated (e.g., in a general lay-off);
  - If the employee was terminated for a legitimate reason unrelated to the leave (e.g., for theft or misconduct); or
  - If the individual is a highly paid "key employee" (e.g., in the top 10% of the pay scale whose absence would cause substantial grievous economic injury to the operations of the business). Employers must notify employees that are considered "key" and are likely to be denied reinstatement when they apply for leave, but the employer may not deny the employee the leave.
- (ii) **Additional Leave May Be Available Under the Americans with Disabilities Act (ADA):** Under the ADA, an employee may be entitled to leave beyond the 12-weeks designated by the FMLA, but only if:
- The employee's serious health condition also qualifies as a disability under the ADA;
  - The extension is requested as a reasonable accommodation;
  - The requested extension has a definite ending date; and
  - The additional leave does not pose an undue hardship on the employer.
- (iii) **How do FMLA Protections Differ From the ADA?:** Leave time under the FMLA may be used to care for the employee or a seriously ill family member. Under the ADA, the employee can only use the leave to accommodate his or her own limitations. Additionally, under the FMLA, an employee is entitled to return to his or her original or an equivalent position. If the employee is unable to return to work when the 12-week period is complete, the employer is not required to hold the employee's position. Under the ADA, an employee is entitled to return to the same position, unless it would be an undue hardship on the employer to hold the position open.
- 4) **Benefit Protected Leave:** Under the FMLA, an employee is entitled to receive full continued health insurance from the employer, but the employer is not required to maintain any other benefit plans unless it is the employer's established policy to do so for all employees. If other benefits are discontinued during the leave, coverage must be restored upon return to work and may not be subjected to any eligibility requirements or pre-existing condition exclusions.
- 5) **Discrimination or Retaliation Under the FMLA:** An employer may not take any adverse action against an employee who is asserting his or her FMLA

rights, and an employer may not discharge or otherwise discriminate or retaliate against an employee for alleging a violation of the FMLA.

- F. **Complaint Process for FMLA Violations:** The administrative agency responsible for handling FMLA-related complaints is the Employee Standards Administration (ESA) Wage and Hour Division of the U.S. Department of Labor (DOL). The DOL will investigate claims, but filing an administrative complaint is not a pre-requisite to filing a lawsuit in federal court. The complaint must be in writing and should include a full statement of the acts and/or omissions believed to constitute a violation of the FMLA, including all pertinent dates.
- 1) **Deadline for Filing:** Administrative complaints or court actions for violations under the FMLA must be filed within two years of the date of the last alleged violation. However, complaints about willful violations may be made within three years.

## II. CALIFORNIA FAMILY RIGHTS ACT (CFRA)

- A. **Statute:** Cal. Gov't Code §12945.2 – The California Family Rights Act (CFRA) mirrors the provisions of the FMLA and provides the same protections, but under state jurisdiction. Under CFRA, a covered employee is permitted up to 12 weeks of unpaid leave in a given 12-month period to care for the employee himself/herself or for a seriously ill family member. The leave may be taken consecutively, intermittently, or on a reduced work schedule.
- 1) **Covered Employer:**
    - (i) Private employers with 50 or more employees, including non-profit religious organizations; and
    - (ii) Public employers, regardless of size, including state and local governments, and local schools.
- B. **Protection under CFRA:** Once the 12 weeks of unpaid leave have been exhausted, the employer is not obligated to provide additional leave time under CFRA. An employer, however, may be required to provide additional time as a reasonable accommodation under the Fair Employment and Housing Act (FEHA) if the employee meets the FEHA qualifications for a covered, qualified individual with a disability and the leave will not pose an undue hardship on the employer. Under the FEHA, the employee can only use any additional leave to accommodate his or her own limitations.
- 1) **Job Protected Leave:** Under CFRA, an employee is entitled to return to his or her original or an equivalent position. If the employee is unable to return to work when the 12-week period is complete, the employer is not required to hold the employee's position. Under the FEHA, an employee is entitled to return to the same position, unless the employer was unable to hold the position open due to undue hardship.
- C. **Complaint Process under CFRA:** Complaints for violations of CFRA must be filed with the California Department of Fair Employment and Housing (DFEH). In contrast to the FMLA, an employee must first exhaust the DFEH's administrative remedies by filing a complaint. The employee may request an investigation by the DFEH that does not require an attorney or the employee may obtain a "right-to-sue notice" from the DFEH before he or she may file a lawsuit in state court.

- 1) **“Right-to-sue Notice”:** The DFEH will accept requests for an immediate DFEH "right-to-sue notice" from persons who have decided to proceed in court. The decision to request such an authorization is a critical one. If a complainant chooses to request a "right-to-sue notice" immediately, the DFEH will not investigate the complaint. Obtaining a “right-to-sue notice” and waiving the Department’s investigation should not be done without consulting with an attorney.
- 2) **Deadlines for Submitting a Complaint:** A complaint must be filed with the DFEH within 365 days of the alleged violation. The DFEH will close a case if they find no merit in the charge or the employee asks for an “immediate right-to-sue notice.”
- 3) **Deadlines for Filing a Claim in Court:** If an employee chooses to request an immediate “right-to-sue notice,” the DFEH will close the case. An employee has 365 days from the date of the “right-to-sue notice” to file a lawsuit in state court.

### III. CONTACT INFORMATION

<p><b>For questions about the Family &amp; Medical Leave Act (FMLA):</b>  U.S. Department of Labor  Employment Standards Administration  Wage and Hour Division  Frances Perkins Building  200 Constitution Ave, NW  Washington, D.C. 20210  (866) 487-9243 or (887) 889-5827 (TTY)  <a href="http://www.dol.gov/esa/whd/fmla">www.dol.gov/esa/whd/fmla</a></p>	<p>U.S. Department of Labor  2800 Cottage Way, Room W-1836  Sacramento, CA 95825-1886  (866) 487-9243</p>
<p>U.S. Department of Labor  300 S. Glendale Ave., Suite 400  Glendale, CA 91205-5274  (213) 894-6375 or (866) 487-9243</p>	<p>U.S. Department of Labor  5675 Ruffin Road, Suite 320  San Diego, CA 92123-1362  (619) 557-5606 or (866) 487-9243</p>
<p>U.S. Department of Labor  100 N. Barranca Street, Suite #850  West Covina, CA 91791  (626) 966-0478 or (866) 487-9243</p>	<p>U.S. Department of Labor  455 Market Street, Suite 800  San Francisco, CA 94105  (415) 744 –5590 or (866) 487-9243</p>
<p><b>For questions about CFRA:</b>  CA Dept. of Fair Employment &amp; Housing  611 West 6<sup>th</sup> Street, Suite 1500  Los Angeles, CA 90012  (800) 884-1684 or (213) 439-6799  <a href="http://www.dfeh.ca.gov">www.dfeh.ca.gov</a>  <i>(Los Angeles County)</i></p>	<p>CA Dept. of Fair Employment &amp; Housing  2101 East 4<sup>th</sup> Street, Suite 255-B  Santa Ana, CA 92705-3855  (800) 884-1684 or (714) 558-4266  <a href="http://www.dfeh.ca.gov">www.dfeh.ca.gov</a>  <i>(Orange County)</i></p>
<p>CA Dept. of Fair Employment &amp; Housing</p>	<p>CA Dept. of Fair Employment &amp; Housing</p>

<p>111 North Market Street, Suite 810  San Jose, CA 95113-1102  (800) 884-1684 or (408) 385-0344  <a href="http://www.dfeh.ca.gov">www.dfeh.ca.gov</a>  <i>(Monterrey, San Benito, Santa Cruz, Santa Clara Counties)</i></p>	<p>1515 Clay Street, Suite 701  Oakland, CA 94612-2512  (800) 884-1684 or (510) 622-2941  <a href="http://www.dfeh.ca.gov">www.dfeh.ca.gov</a>  <i>(San Francisco, San Mateo, Sonoma, Marin, Lake, Mendocino, Del Norte Counties)</i></p>
<p>CA Dept. of Fair Employment &amp; Housing  1001 Tower Way, Suite 250  Bakersfield, CA 93309-1596  (800) 884-1664 or (661) 395-2729  <a href="http://www.dfeh.ca.gov">www.dfeh.ca.gov</a>  <i>(Kern, Tulare, Inyo, &amp; Mono Counties)</i></p>	<p>CA Dept. of Fair Employment &amp; Housing  1350 Front Street, Suite 005  San Diego, CA 92101  (800) 884-1684 or (619) 645-2681  <a href="http://www.dfeh.ca.gov">www.dfeh.ca.gov</a>  <i>(San Diego &amp; Imperial Counties)</i></p>

<p>CA Dept. of Fair Employment &amp; Housing  1320 East Shaw Ave., Suite 150  Fresno, CA 93710  (800) 884-1684 or (559) 244-4760  <a href="http://www.dfeh.ca.gov">www.dfeh.ca.gov</a>  <i>(Fresno, Kings, Madera, Merced, Stanislaus, Mariposa Counties)</i></p>	<p>CA Dept. of Fair Employment &amp; Housing  2000 O Street, Suite 120  Sacramento, CA 95814-5212  (800) 884-1684 or (916) 445-5523  <a href="http://www.dfeh.ca.gov">www.dfeh.ca.gov</a>  <i>(Sacramento, Yolo, Glenn, Tehama, Trinity, Shasta, Modoc, Lassen, Plumas, Sierra, Nevada, Placer, El Dorado, Yuba, Sutter, Amador, Calaveras, Alpine, Toulumne Counties)</i></p>
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