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The advocate's guide to beating employers at their CFRA games

THE 2021 AMENDMENTS TO THE CALIFORNIA FAMILY RIGHTS ACT SUBSTANTIALLY EXPAND THE NUMBER OF WORKERS ENTITLED TO PROTECTED LEAVE

Most people are generally familiar with the federal Family Medical Leave Act (FMLA) and often assume that the California Family Rights Act (CFRA) provides the same protection. While the FMLA and the CFRA are both forms of protected unpaid leave, like many California employment laws, employees will receive broader protection under the CFRA.

On January 1, 2021, significant amendments to the CFRA became effective. The amended CFRA substantially expands the number of workers who are entitled to protected leave. In this chaotic pandemic world, these critical changes may have gone unnoticed. Employers may still be operating under the old rules and workers may not know the full extent of their new rights. To help clients successfully take their protected leave, advocates must know these important new rules and how to beat employers who may try to play games with their clients' rights. Advocates need to know: (1) what are the new rules; (2) how employers try to circumvent those rules; (3) how to push back against an employer attempting to interfere with a client's protected leave; and (4) the potential claims against an employer for doing so.

FMLA overview

The FMLA provides eligible employees up to 12 weeks of unpaid protected leave to care for oneself, a spouse, child, or a parent. (29 C.F.R. § 825.200.) To be eligible, the employee must have worked for at least 1,250 hours in the past 12 months and the employer must have 50 or more employees within a 75-mile radius. (29 U.S.C. § 2611; 29 C.F.R. § 825.110.) The leave can be continuous or intermittent. (29 C.F.R. § 825.202.) An employee who takes protected leave has the right to reinstatement to the same or equivalent position. (29 C.F.R. § 825.214.)

In narrow circumstances, an employer can deny reinstatement if the employee is designated a key employee. (29 C.F.R. § 825.217.) To be designated as a key employee, the person taking leave must be salaried and among the top 10 highest paid employees within a 75-mile radius. (29 U.S.C., § 2614(b)(1); 29 C.F.R. § 825.217.) The employer must provide written notice making the key employee designation at the time the employee requests leave. (29 CFR § 825.219(b).) The employer must then provide a second written notice once it determines that "substantial and grievous" harm will occur by *reinstatement* (but not by the leave). (*Ibid.*)

CFRA overview and key 2021 amendments

Until last year, CFRA largely mirrored the FMLA in terms of eligibility. However, the recent amendments have added greater coverage under California law. At a minimum, advocates must be aware of four key changes to the CFRA.

Broader coverage

Employers with five or more employees must provide CFRA leave. (Gov. Code, § 12945.2, subd. (c)(2).) This expands coverage to approximately six million additional Californians. (*Governor Newsom Signs Bill Extending Job-Protected Family Leave to Nearly 6 Million Californians* (Sep. 17, 2020) at <https://www.gov.ca.gov/2020/09/17/governor-newsom-signs-bill-extending-job-protected-family-leave-to-nearly-6-million-californians/> [as of Mar. 14, 2021].)

Grandparent/grandchildren care

Employees can take protected leave to care for their grandparents or grandchildren. This is distinct from the FMLA in recognizing that family support structures can be multigenerational. Leave under CFRA is now permissible for care related to the employee's child, parent, spouse, grandparents, grandchildren, domestic partner, sibling or for care related to the employee. (Gov. Code, § 12945.2, subd. (b)(4)(B).)

No key employee designation

CFRA eliminated an employer's ability to deny reinstatement to a worker designated as a key employee.

Mandatory ADR for disputes with small employers

Eligible employees who have been denied CFRA leave, denied reinstatement, or who have been subjected to discrimination, harassment or retaliation against them for taking protected leave may seek legal action in court after obtaining a right-to-sue notice from the Department of Fair Employment and Housing (DFEH). (Cal. Code Regs., tit. 2, § 10005.) However, the 2021 amendment allows smaller employers with between five and 19 employees 30 days from obtaining the right-to-sue notice to request that all parties participate in the DFEH's new pilot mediation program. (Gov. Code, § 12945.21.) If the employer timely requests mediation, litigation on the matter is placed on hold until the mediation is complete. The DFEH mediation program will be in place until January 1, 2024. (*Ibid.*)

A potential downside of this change is that employers may invoke it as a stalling tactic. While the amendment states that the DFEH "shall initiate the mediation promptly following the request," it still delays the case by up to 30 days and it is unclear what the department's capacity will be to meet

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this new obligation. A potential upside of this amendment is that it may give some employees an early opportunity to reach a settlement on all of their related FEHA causes of action (discussed in greater detail below). The reality of this change is that advocates must prepare their clients for a potentially lengthy battle.

Ways employers discourage CFRA leave

Many employers are ill-prepared for their employees to take extended leave. While an employee taking CFRA leave can expose existing stresses on a business, all too often, the employer will make the employee's already stressful situation worse by lashing out.

When evaluating potential cases, advocates should look for these common fact patterns. In these circumstances, employers discourage the employee from taking protected leave or punish them afterwards for taking the leave. These situations may give rise to a CFRA interference or retaliation claim or other causes of action under the FEHA, discussed in greater detail later in this article.

Escalation of minor performance issues

Escalation of minor performance issues is a red flag. Has the employee been consistently performing a task a certain way? Is that standard practice suddenly under scrutiny? Is the employee being peppered with petty, nitpicking emails clearly creating a paper trail of purported performance problems? Do other employees who have not sought CFRA leave escape criticism despite engaging in the same or similar work?

Piling on work and unrealistic expectations

A sudden increased workload and/or shortened deadlines should be viewed with suspicion. Is the employer piling on work without a rational business explanation? Are expectations so unrealistic that it appears the employee is being set up to fail? Is your client being held accountable for work projects and deadlines that were discussed and due while the client was on leave? Either immediately before the leave begins or upon return from CFRA leave, is the employee suddenly being buried with unrealistic assignments and deadlines?

The unfair PIP

Escalation of minor performance issues and piling on of work with unrealistic deadlines can create support for imposing a contrived Performance Improvement Plan (PIP). Does the PIP memorialize red-flag issues? Is it selective in its criticism? Does it ignore significant accomplishments? Does it ignore context that may explain performance challenges? Are the criticisms vague (e.g., com- munication and style)? Does it contain SMART goals (specific, measurable, achievable, realistic, and timely) or will improvement be gauged by subjective and ambiguous standards?

Suspicious and selective layoffs

The worst-case scenario is being laid off while on CFRA leave or shortly after returning from leave. An employee may legally be laid off while on protected leave if the reason for termination is unrelated to the leave taken. In these situations, the focus becomes whether the business justification for termination is legitimate. Advocates must ask several key questions in order to address a suspicious layoff. What is the financial health of the company? Was the employee's position restructured or was the employee replaced? How many people were laid off: (a) at the company; (b) in the same division; and (c) in the same department? Who made the decision regarding the employee's layoff? What will become of the employee's job duties? Are there suspicious commonalities among those who were laid off (e.g., new mothers, employees who took protected leave, employees who requested an accommodation)? Are there documents that predate the employee's protected leave to support when and how the layoff decision was made?

In addition to interfering with your client's CFRA rights, all of the above scenarios can have a chilling effect and discourage other employees at the worksite from taking the leave to which they are entitled. Standing up for your client will not only help your client, but hopefully, also have a positive ripple effect for other workers at the company who may seek to assert their CFRA rights down the road.

Beating employers at their game

In some instances, the goal is simply to help secure the protected leave and the reinstatement to a same or similar position to which your client is entitled. Because many small businesses may not be aware of their new obligations, such cases can be handled in a straightforward manner by advising the employer of the changes in the law. However, when an employer makes collateral attacks on an employee's right to take protected leave (as discussed above), things can get more complicated.

The CFRA and its regulations provide strong and protective language for employees seeking to take protected leave. Under the CFRA, employers that grant CFRA leave must provide the employee with a guarantee of reinstatement *to the same or a comparable position at the conclusion of the leave.* (Gov. Code, § 12945.2, subd. (a); 2 C.C.R. § 11089(a), (d).) After the 12 weeks of CFRA leave expires, an employee is entitled to be returned to the same position the employee held when the leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. (*Neisendorf v. Levi Strauss & Co.* (2006), 143 Cal.App.4th 509, 517.)

In order to deny reinstatement, employers have the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed on the requested reinstatement date. Significantly, that burden is not satisfied if the employee was replaced or if her position was restructured to accommodate the employee's absence. (2 CCR § 11089 (d)(1).) Most employers are unaware of this language in the regulations, making it a powerful weapon in the plaintiff advocate's arsenal of tools.

The employer's onus to prove that it is more likely than not that the employee would have been terminated regardless of

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leave is not trivial. Therefore, the more holes a plaintiff advocate can poke into the employer's purported reasons for termination, the stronger the case becomes for the employee.

CFRA-related causes of action

There are at least eight causes of action every advocate should consider when evaluating a CFRA case. Typical claims include: (1) CFRA interference; (2) CFRA retaliation; (3) harassment; (4) discrimination; (5) related FEHA discrimination claims; (6) retaliation; (7) failure to prevent discrimination/harassment/retaliation; and (8) wrongful termination in violation of public policy.

CFRA interference

There are two main broad categories of claims under CFRA: (1) interference and (2) retaliation. Interference and retaliation claims are often used interchangeably. While they do go hand-in-hand when it comes to CFRA violations, they are also distinct claims with unique requirements which should be pled as separate causes of action.

In an interference claim, an employee asserts that the employer has denied or otherwise interfered with her substantive statutory rights (e.g., leave denial). In a retaliation claim, an employee asserts that the employer has taken an adverse action against an employee for engaging in one or more protected activities (e.g., discriminating against an employee for past use of leave). (29 C.F.R. § 825.220; *Xin Liu v. Amway Corp.* (9th Cir. 2003) 347 F.3d 1125, 1136; *Dudley v. Department of Transp.* (2001) 90 Cal.App.4th 255, 264.).

To prevail on an interference claim, the employee plaintiff must establish that: (1) plaintiff is eligible for CFRA protections; (2) the employer is covered by CFRA; (3) plaintiff is entitled to leave under the CFRA; (4) plaintiff provided sufficient notice of intent to take leave; and (5) the employer denied the CFRA benefits to which the plaintiff was entitled. (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 250; *Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 601).

CFRA retaliation

In a CFRA retaliation claim, an employee asserts that the employer has retaliated against an employee for engaging in protected activity (e.g., retaliating against an employee for requesting leave or past use of leave). (29 C.F.R. § 825.220; *Xin Liu*, *supra*, 347 F.3d at 1136; *Dudley*, *supra*, 90 Cal.App.4th at 264.)

To prevail on a CFRA retaliation claim, the employee must establish that: (1) the employer is covered by the CFRA; (2) plaintiff is an employee eligible to take CFRA leave; (3) plaintiff exercised right to take leave for a qualifying CFRA purpose; and (4) plaintiff suffered an adverse employment action (e.g., demotion or termination) because of exercise of that right. (*Moore*, *supra*, 248 Cal.App.4th at 248; *Soria*, *supra*, 5 Cal.App.5th at 604.)

In such cases, the burden of production and persuasion for a retaliation claim is in accordance with the three-step procedure used for discrimination claims under Title VII. (See *McDonnell Douglas Corp. v. Green* (1973) 411 US 792, 802-805, 93 S.Ct. 1817, 1824-1826.) As such, where there is no direct evidence of retaliation, the plaintiff must establish a prima facie case of retaliation; the employer must respond with a legitimate, nondiscriminatory reason for its actions, and plaintiff, in order to prevail, must establish that the employer's articulated reason was a "pretext" or cover-up for unlawful retaliation. (See Family and Medical Leave Act (FMLA)/California Family Rights Act (CFRA); Cal. Prac. Guide Employment Litigation Ch. 12-B.)

Pretext can be shown by the timing of the adverse decisions in relation to the protected activity. (*Flait v. North American Watch Corp.*, (1992) 3 Cal.App.4th 467, 479.) Pretext may "be inferred from the timing of the company's termination decision, by the ability of the person making the decision, and by the terminated employee's job performance before termination." (*Sada v. Robert F. Kennedy Medical Center*, (1997) 56 Cal.App.4th 138, 156.) "In the classic situation where temporal proximity is a factor, an employee has worked for the same employer for several years, has a good or excellent performance record, and then, after engaging in some type of protected activity – is suddenly accused of serious performance problems, subjected to derogatory comments about the protected activity, and terminated. In those circumstances, temporal proximity, together with the other evidence, may be sufficient to establish pretext." (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353-354.)

Harassment

Under the CFRA, an employee shall have a cause of action for harassment when the employee has suffered harassment for formally asserting a right to CFRA leave. (See 2 C.C.R., § 11094.) Harassment claims against the employer, and often the individual supervisor, are prevalent in CFRA cases. As discussed above, the escalation of performance issues, unfair deadlines, sudden micromanagement of work, etc., are potentially good facts for a harassment cause of action against the employer and even the individual supervisor engaging in the harassing conduct. (See *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686 [in which the California Supreme Court broadly defines harassment as not just offensive verbal, visual or physical communications, but *any* conduct which sends "abusive messages that create a hostile working environment"].)

Discrimination

Discriminating against an employee for exercising his or her rights to leave under the CFRA is unlawful. (Gov. Code, § 12945.2, subd. (k); See also *Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 6-7; *Neisendorf v. Levi Strauss & Co.* (2006) 143 Cal.App.4th 509, 517.) California courts have held that "by prohibiting employment discrimination based on family and medical leave, the CFRA strengthens the FEHA's general goal of preventing the deleterious effects of employment discrimination, and also

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furthers the CFRA's specific goal of promoting stability and economic security in California families." (*Faust v. California Portland Cement Company*, (2007) 150 Cal.App.4th 864, 878, quoting *Nelson v. United Technologies* (1999) 74 Cal.App.4th 597, 610.)

To succeed on a disparate treatment-based CFRA discrimination claim, the employee must establish that: (1) the employer is a covered entity under FEHA; (2) plaintiff was an employee of employer; (3) the employer subjected plaintiff to an adverse employment action (e.g., termination); (4) plaintiff's protected status (e.g., taking CFRA leave) was a substantial motivating reason for employer's decision to terminate plaintiff; (5) plaintiff was harmed; and (6) the employer's conduct was a substantial factor in causing plaintiff's harm. (*Judicial Council of California Civil Jury Instructions* No. 2500 (2020).) The same *McDonnell Douglas* burden shifting test discussed above then applies.

Related FEHA discrimination claims

Other common FEHA discrimination claims in CFRA cases include: (1) discrimination based on an employee's disability (Gov. Code, § 12940 subds. (a), (m)-(n)); or (2) medical condition (Gov. Code § 12940 subd. (a)). Often, the employee's disability or medical condition is the underlying reason the employee needs to take CFRA leave in the first place. In addition, an employee may suffer being perceived as having a disability by the employer as a result of taking the protected leave. Accordingly, the plaintiff's advocate should also consider a discrimination claim based on perceived disability. (Gov. Code, § 12926 subd. (o).)

Retaliation

FEHA prohibits retaliating against individuals who have "filed a complaint, testified, or assisted in any proceeding" with regard to harassment or discrimination. (See Gov. Code, § 12940, subds. (a), (h).) "To establish a prima facie case of retaliation, a plaintiff must show that: (1) plaintiff engaged in protected activity; (2) the employer subjected the plaintiff to an adverse employment action; and (3) the protected activity and the employer's action were causally connected." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th1028, 1042.)

An employee's formal or informal complaints to a supervisor regarding unlawful harassment or discrimination is a 'protected activity' and actions taken against the employee after such complaints may constitute retaliation. (*Passantino v. Johnson & Johnson Consumer Products, Inc.* (9th Cir. 2000) 212 F.3d 493, 506-507.) Therefore, if an employee has reported the CFRA interference, harassment and/or any of the discrimination discussed above to the employer, the employee has another strong claim for retaliation under FEHA. The same burden-shifting analysis discussed above applies.

Failure to prevent discrimination/ harassment/retaliation

Failure to prevent discrimination, harassment or retaliation is a claim based on the legal principle that it should be illegal for an employer to fail to take all reasonable steps necessary to prevent unlawful conduct from occurring. (Gov. Code, § 12940, subd. (k).) In order to prove a claim of failure to prevent discrimination or harassment, the plaintiff must establish that: (1) plaintiff was an employee of the employer; (2) the employee was subjected to harassment, discrimination, or retaliation in the course of employment; (3) the employer failed to take all reasonable steps to prevent the harassment, discrimination, or retaliation; (4) the employee was harmed, and (5) that the employer's failure to take all reasonable steps to prevent the harassment, discrimination, or retaliation was a substantial factor in causing the employee's harm. (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035.)

The failure to prevent a claim is an important tool in holding the employer accountable not only for the harm caused to your client individually in bringing a lawsuit, but to also effect systemic change in the workplace. This cause of action is also a useful tool in broadening the scope of discovery to gather broad information regarding the number of other similar complaints and lawsuits the employer received before failing to take appropriate action in your client's case. Gathering this important evidence is helpful in establishing liability and punishing the employer for failing to stop the unlawful conduct earlier in your client's case.

Wrongful termination

Wrongful termination in violation of public policy is a tort claim. It provides the employee legal recourse when the employee's termination violates clear public policy delineated in a constitutional, statutory or regulatory provision. (See *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 75.) Violations of CFRA can form the basis of a common law wrongful discharge claim. (*Nelson v. United Technologies* (1999) 74 Cal.App.4th 597.)

While a wrongful-termination claim does not include statutory attorney's fees and may be a redundant cause of action after pleading FEHA claims, it may be useful to the plaintiff advocate for strategic reasons such as in expanding discovery requests or as a fallback claim if the underlying FEHA claims are not as strong.

The above causes of action, though not exhaustive, are a starting point and can provide clients with significant leverage when attempting to resolve a contentious CFRA case. Whether these potential claims are summarized in a demand letter or pled in a complaint, it sends a powerful message to the employer that the client is prepared to fight to trial.

Conclusion

The amended CFRA expands protected leave for millions of Californians. Many well-meaning employers may not be aware of their new and ongoing obligations to provide their employees with leave and the effective advocate may have to educate those

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employers on the amended law. Less well-meaning employers may be keenly aware of the new protections the amendments provide but may nonetheless actively try to interfere with their employees' CFRA rights. Plaintiff advocates must be able to identify subtle and not so subtle ways that employers interfere with CFRA rights and be prepared to beat them at their game.

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