

MODULE 3:

FAMILY AND MEDICAL LEAVES

FMLA AND CFRA

Department of Human Resources
Medical Leave Program
City and County of San Francisco
Equal Employment Opportunity Division



OUTLINE OF PRESENTATION

- 1. History**
- 2. Eligibility for FMLA and CFRA**
- 3. Designating Leaves**
- 4. Exemptions and Exceptions to FMLA and CFRA**
- 5. Notice Requirements**
- 6. Using Accrued Leave**
- 7. Medical Certification**
- 8. Second and Third Opinions**
- 9. Investigating Potential FMLA/CFRA Misuse**
- 10. What is “Caring” For a Family Member**
- 11. Military Leaves**
- 12. Return to Work**
- 13. Retaliation**

HISTORY

HISTORY OF FMLA AND CFRA

Family Medical Leave Act

The FMLA passed with bipartisan support in January of 1993, and was signed by President Clinton as the first accomplishment of his new administration.

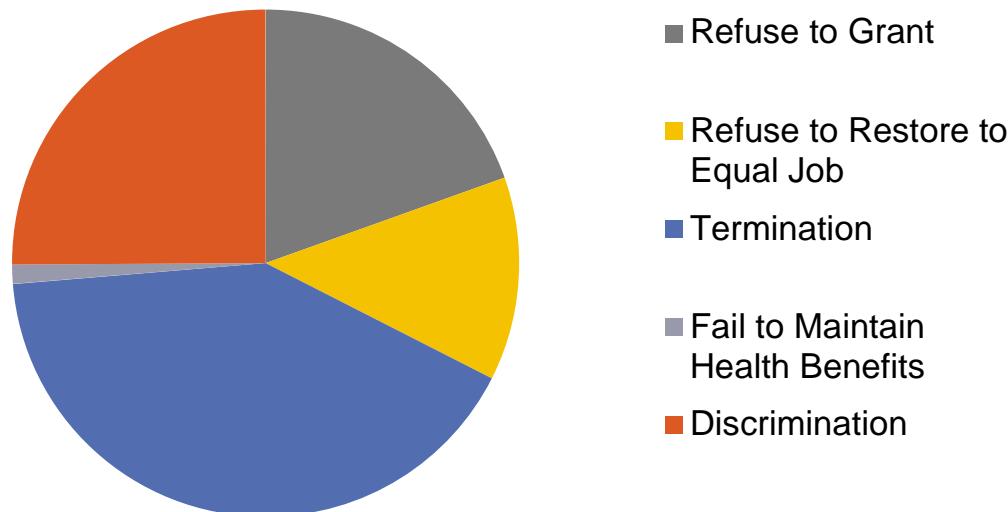
California Family Rights Act

Before the FMLA, California already had a family leave statute when the State passed CFRA in 1991. California amended its CFRA in 1993 to make the statute closely resemble the federal FMLA, with a few distinctions, among those the treatment of pregnancy leave.

FMLA COMPLAINT STATS

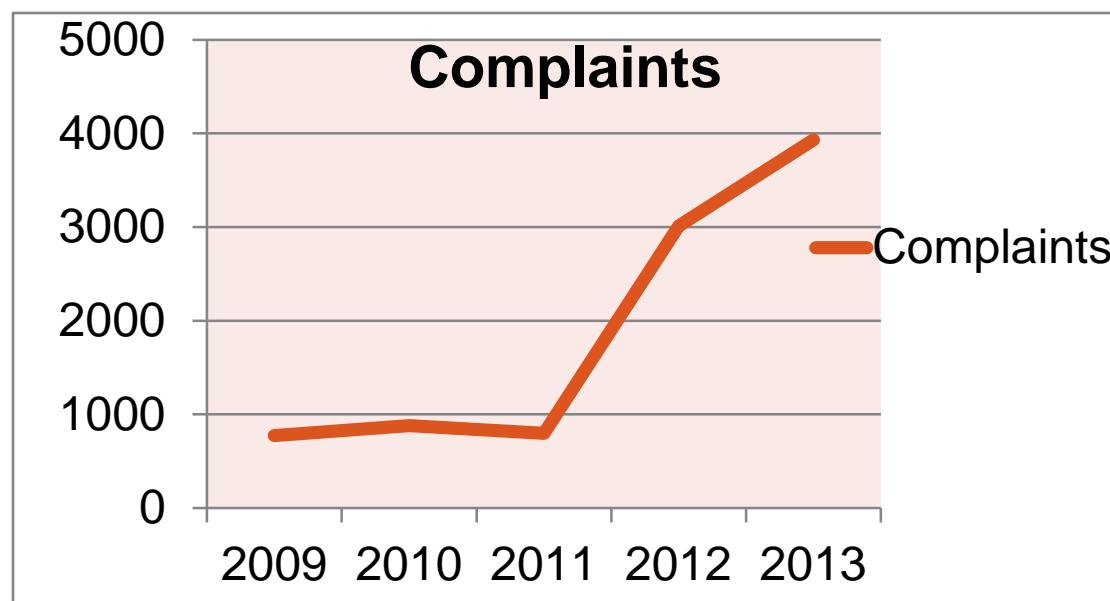
| FMLA Enforcement Statistics | FY 2013 | FY 2012 | FY 2011 | FY 2010 | FY 2009 |
|-------------------------------|---------|---------|---------|---------|---------|
| Number of Complaint Cases | 1,634 | 1,723 | 2,132 | 2,094 | 1,841 |
| Percent of No-Violation Cases | 54% | 55% | 58% | 58% | 49% |

Types of Complaints 2013



CFRA COMPLAINT STATISTICS

| DFEH Family Care or Medical Leave Complaints | CY 2013 | CY 2012 | CY 2011 | CY 2010 | CY 2009 |
|--|---------|---------|---------|---------|---------|
| Number of Complaints Filed | 3931 | 3011 | 798 | 881 | 774 |



DFEH v. VERIZON

\$6 MILLION CFRA CLASS ACTION SETTLEMENT
APPROVED JANUARY 19, 2012

- ▶ **Employees required to provide more information to support their requests for CFRA leave than is necessary under the law.**
- ▶ **CFRA leave requests denied as untimely, when they were timely made.**
- ▶ **Employees disciplined and/or terminated for CFRA qualifying absences.**

ELIGIBILITY

TERM AND TIME REQUIREMENTS

- 1. Employee has worked for the City at least 12 months.**
 - A. Time in any department counts toward the 12-months service requirement.**
 - B. Nonconsecutive service may be aggregated to meet the 12 month term requirement. (FMLA: Exclude breaks in service more than 7 years, UNLESS related to military obligations or covered by a CBA. CFRA: Aggregate regardless of breaks in service.)**
- 2. Employee has worked 1,250 hours within 12 months preceding start of leave**
 - A. Only count hours worked, UNLESS time off is related to military service.**
- 3. Employee works at a location with at least 50 employees within 75 miles**

COVERED RELATIONSHIPS

- **Child** (biological, adopted, foster, stepchild, legal ward, child of a person standing *in loco parentis*) **who is either under 18 or 18+ and incapable of self-care because of a mental or physical disability.**
- **Parent** (biological, adoptive, step, foster, *in loco parentis* when employee was a child)
- **Spouse** (FMLA excludes domestic partners)



COVERED REASONS

MEDICAL LEAVE: (Employee or Family Member)

1. Inpatient care
2. Absence of more than 3 consecutive days plus treatment 2 or more times OR one treatment plus medication
3. Incapacity due to pregnancy or prenatal care (NOT under CFRA)
4. Chronic conditions which require periodic visits, continue over an extended period of time, and may cause episodic rather than continuing periods of incapacity (e.g., asthma, diabetes, epilepsy, etc.)
5. Permanent or long term conditions (Alzheimer's, severe stroke, terminal stages of a disease)
6. Multiple treatments for a condition that would likely result in a period of incapacity of more than 3 days in the absence of treatment (cancer, severe arthritis, kidney disease)

CHILD BONDING:

Birth or adoption of a child, or foster care placement of child

WHAT IS NOT A SERIOUS HEALTH CONDITION?

- **Common Cold**
- **Common Flu**
- **Earache**
- **Upset Stomach**
- **Headaches (other than migraines)**
- **Routine Dental Care**
- **Cosmetic Treatments/Surgery**
- **Minor Ulcers**

TIMING AND CONTENT OF REQUEST

**30 days in advance, if
practicable**

**Does not have to use the
words “FMLA” or
“CFRA”**

**If request is for
intermittent leave, ask
for estimated frequency,
and duration.**

**If request is to care for a
family member, ask for
relationship, type of care
to be provided,
proposed schedule,
frequency, and duration.**



DESIGNATING LEAVES

DESIGNATING THE LEAVE

- It is the **employer's responsibility** to designate leave as FMLA-CFRA qualifying (whether unpaid or paid through substitution of paid leave), and to give notice of this designation to the employee.
- If you need **more information**, ask the employee in writing or ask the employee's spouse, family member or designated representative.
- When you have enough information to determine whether the leave is being taken for an FMLA-CFRA qualifying reason, you must notify the employee whether the leave has or has not been designated as FMLA-CFRA leave **within five business days** absent extenuating circumstances.
- Can only **retroactively designate** if employee and employer agree.

29 C.F.R. 825.301

CCR § 11091(a)(1)(B)

WORKERS' COMP LEAVES

- **Should be designated as FMLA/CFRA if:**
 - Employee is absent for three days or more
AND
 - Employee is treated by a Workers' Compensation provider for an injury at least two times, or one time and required to follow a regimen of therapy (i.e., prescription drugs, physical therapy); OR
 - Employee requires multiple treatments or the supervision of a health care provider to avoid incapacity of three days or more.

EXEMPTIONS AND EXCEPTIONS TO FMLA/CFRA

WHO IS A KEY EMPLOYEE AND WHY DOES IT MATTER?

1. A key employee is a salaried employee who is among the highest paid 10% of all employees employed by the employer within 75 miles of employee's worksite; and
2. The refusal to reinstate must be necessary to prevent substantial and grievous economic injury to the operations of the employer; and
3. The employer must give notice that the employee is a key employee at the time of leave or leave request, and must inform of potential consequences of taking the leave.

CAN THE EMPLOYEE REFUSE FMLA/CFRA PROTECTIONS?

An employee can affirmatively decline to use FMLA/CFRA leave when the leave is taken to care for the serious health condition of a qualifying family member. Escriba v. Foster Poultry Farms (9th Cir. 2014) 743 F.3d 1236

There is no case law on whether an employee can decline to use FMLA/CFRA leave for their own serious health condition. Under CFRA, if an employee requests paid time off and does not indicate a CFRA purpose, the employer cannot inquire further as to whether the time off is CFRA-qualifying. But under FMLA and CFRA the employer has an affirmative duty to designate leave as FMLA/CFRA upon receiving sufficient notice. ALWAYS DESIGNATE for the employee's own serious health condition.



NOTICE REQUIREMENTS

NOTICE ! NOTICE ! NOTICE! NOTICE !

-  **Post notices explaining employee rights and responsibilities under FMLA and CFRA in the workplace.**
-  **Include information about FMLA/CFRA in personnel policies/employee handbooks and provide information to new employees.**
-  **When employee requests FMLA/CFRA leave or employer acquires knowledge that leave may be for FMLA/CFRA qualifying reason, provide employee with notice concerning his/her eligibility for FMLA/CFRA leave AND rights and responsibilities.**
-  **Notify employees whether leave is designated as FMLA/CFRA leave and the amount of leave that will be deducted from employee's FMLA/CFRA leave entitlement.**

CFRA NOTICE REQUIREMENTS

- CFRA regulations require a “**response**” to the request for leave within 10 calendar days—not an approval or denial. FMLA requires a response within 5 days that establishes whether the employee is eligible for the leave and notifies the employee of his/her rights and responsibilities under FMLA. **FOLLOW THE 5-DAY RULE.** The 5-day FMLA notice rule is more favorable to the employee, so respond to the leave request within that shorter timeframe.
- Employees are not required to provide all necessary information for the employer to make an informed decision when requesting leave. Use the 5-day response window to request medical certification or other verifying documents.
- The response can be as simple as “We have received your FMLA/CFRA leave request and we have determined that you meet the 12 month/1250 hour requirement. In order to make a determination on whether your leave qualifies as FMLA/CFRA, you must provide medical certification of a serious health condition within 15 calendar days.” **TRACK THE 15-DAY MEDICAL CERTIFICATION DEADLINE.**

USING ACCRUED LEAVE

CAN EMPLOYEE USE SICK LEAVE DURING FMLA/CFRA?

| Type of Leave Accrual | FMLA | CFRA | City Policy |
|--------------------------|---|---|--|
| Sick | Follow employer's leave policy if unpaid leave. | Employer may require for employee's own serious health condition, if unpaid leave | City policy requires employees to use sick leave during an unpaid FMLA/CFRA leave. |
| Vacation | Follow employer's leave policy if unpaid leave. | Employer may require, if unpaid leave | Some City employees may be required to use vacation during an unpaid FMLA/CFRA leave, but check the MOU. |
| Other (i.e. FH, CTO, FF) | Follow employer's leave policy if unpaid leave. | Employer may require, if unpaid leave | Same as above. |

If an employee receives SDI, PFL or other disability benefits during an FMLA/CFRA leave, the leave is considered "paid," and the chart above does not apply.

MEDICAL CERTIFICATION

WHO IS A HEALTH CARE PROVIDER?

“(1) an individual holding either a physician’s and surgeon’s certificate...or an osteopathic physician’s and surgeon’s certificate...or any other individual duly licensed as a physician, surgeon, or osteopathic physician or surgeon in another state or jurisdiction, including another country, who directly treats or supervises the treatment of the serious health condition”, or (2) any other person who meets the definition in the FMLA statute and regulations. C.C.R 7297.0(j)

- *“Health care provider means: ...Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist)...Nurse practitioners, nurse-midwives, clinical social workers and physician assistants...Christian Science Practitioners... 29 C.F.R 825.102*

A WORD ABOUT CHIROPRACTORS

A chiropractor is a health care provider “limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist.” Cal.Gov.Code § 12945.2(c)(6)(B); 29 C.F.R. § 825.118(b)(1) (2007).

When an employee presents you with a certification from a chiropractor, review it carefully. Consider a 2nd Opinion to address 3 questions:

- 1) Has the chiropractor taken x-rays?**
- 2) Do the x-rays show a subluxation (dislocation/misalignment)?**
- 3) Did the chiropractor perform a manual manipulation of the spine to correct a subluxation?**

MEDICAL CERTIFICATION

“Due within 15 calendar days of the employer’s request, unless it is not practicable for the employee to do so despite the employee’s good faith efforts.” Cal. Code Regs., tit.2 § 7297.4 (b)(3).

When an employee requests leave for their own serious health condition, CFRA limits the employer’s inquiries to:

- 1) the date on which the condition commenced;**
- 2) the probable duration of the condition; and**
- 3) a statement that, due to the serious health condition, the employee is unable to perform the functions of his or her position.**

If the leave is to care for a family member, the City is also entitled to an estimate of the time that the employee needs to provide care and a statement that the condition warrants the employee’s participation.

RECERTIFICATION

- If additional leave is required, the employer may require that the employee obtain subsequent recertification regarding the **employee's own** serious health condition on a reasonable basis in accordance with the procedure for new requests.
Cal.Gov.Code § 12945.2 (k)(C)(2).
- If additional leave is requested when the leave is to care for a **family member**, the employer's only recourse is to request recertification. **No second opinions are allowed.**

BEST PRACTICES FOR EMPLOYEE'S OWN CONDITION:

- If you have reason to doubt the validity of the certification, document your reasons and request a second opinion through DHR. The requesting Department bears the expense.
- You don't have to wait until the employee requests additional leave to ask for a second opinion!

SECOND AND THIRD OPINIONS

SECOND OPINION

How do I request a second opinion?

- **Review the medical certificate. Is there anything to cast doubt on its validity? Write it down.**
- **Review the employee's leave pattern. Does it match the certification? Create a leave calendar.**
- **Is there anything that raises reasonable suspicion about the employee's leave? Document it.**

Contact DHR/EEO Leave Management Program



"You've got to be kidding me!"

THIRD OPINION

When, why and how?

In any case where the second opinion differs from the opinion in the original certification, the employer may require, at the employer's expense, that the employee obtain the opinion of a third health care provider, designated or approved jointly by the employer and the employee, concerning any information in the certification.

Cal. Code Regs., tit.2 § 11091(b)(2)(B).

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

Cal. Code Regs., tit.2 § 110911(b)(2)(C).

MANAGING INTERMITTENT LEAVE

Best practices to manage intermittent leave— and abuse?

- Scrutinize initial certification—seek clarification as necessary for estimated frequency and duration.
- Ensure all absences related to the condition are counted against the FMLA/CFRA leave entitlement – COMMUNICATE TO EMPLOYEE THAT HE/SHE MUST SAY THE LEAVE IS RELATED TO FMLA/CFRA CONDITION, or the leave may not be designated.
- Require recertification at permitted time periods.
- Work with employee to schedule planned medical treatment to minimize disruption to operations and CONSIDER TEMPORARY REASSIGNMENT OR PART TIME WORK SCHEDULE.
- Carefully assess whether intermittent leave is a reasonable accommodation.

CAN YOU TRANSFER AN EMPLOYEE TO A DIFFERENT POSITION DURING INTERMITTENT LEAVE?*

An employer may temporarily transfer an employee who needs intermittent leave to an available alternative position:

- 1) for which the employee is qualified and
- 2) that better accommodates recurring periods of leave than does the employee's regular position, so long as
- 3) the alternate position has equivalent pay and benefits, and
- 4) such transfer is appropriate even if the position does not have equivalent duties.

* This only applies to intermittent leave or reduced schedule leave for planned medical treatment for employee, qualified family member or service member, or for birth or bonding.

WHAT TO DO WITH BETTY THE BRICKLAYER?

Betty is taking 8 weeks of leave to recover from knee surgery, followed by intermittent leave on Mondays and Tuesdays for 8 consecutive weeks for physical therapy and recovery.

It is not feasible to have a bricklayer in the field just 3 days a week.

There is an open position in the office that has equivalent pay and benefits.

Can you transfer
Betty?



INVESTIGATING AND ADDRESSING POTENTIAL FMLA/CFRA MISUSE

WHAT CAN YOU DO WHEN YOU SUSPECT MISUSE OR ABUSE OF INTERMITTENT LEAVE?

INVESTIGATE!

- Follow up on credible reports of employees engaging in conduct that is inconsistent with their medical leave.
- Interview witnesses
- Gather documents, i.e. social media, websites, newspapers
- Interview the employee and present the investigative findings.
 - Ask if the activities are consistent with his/her medical restrictions.
 - Ask if he/she is ready to return to work.



SUSPICIOUS PATTERNS

Andrea Anderson, an Accountant in your department, has been approved for intermittent FMLA/CFRA leave due to a back injury she sustained during a helicopter accident. She is certified for flare-ups 1 to 2 times per week with each episode lasting from 1 to 2 days. This condition is expected to continue indefinitely. Her use of leave has been slightly above the approved frequency and duration, which is consistent with the health care provider's certification. Andrea has been out for two weeks, and her supervisor has come to you wondering if there is anything that can be done.

What do you suggest?

WHAT CAN YOU DO ABOUT ANDREA?

Andrea's supervisor says that she suspects Andrea may be using her FMLA/CFRA leave to spend time with her kids and there seems to be a correlation between daytime Giants games, school closures, and Andrea's flare-ups.

San Francisco Giants 2013 Schedule

| MARCH/APRIL | | | | | | | WANT |
|-------------|-----------|----------|----------|---------|---------|----------|---|
| SUN | MON | TUE | WED | THU | FRI | SAT | |
| 23 | 24 | 25 | 26 | 7:15 | 27:15 | 28 | 10:05 29 |
| 30:05 4:30 | 31:05 4:0 | 1:15 4:0 | 2:12:40 | 3:11:10 | 4:11:10 | 5 | OAK ◇ OAK ◇ OAK ◇ |
| 5:05 6 | 7:1:35 | 8:1:15 | 9:1:15 | 10:1:15 | 11:1:05 | 12 | ARI ◇ ARI ◇ ARI ◇ ARI ◇ LAD ◇ LAD ◇ LAD ◇ |
| LAD ◇ | ARI ◇ | ARI ◇ | ARI ◇ | COL ◇ | COL ◇ | COL ◇ | |
| 11:05 13 | 14:1:15 | 15:1:15 | 16:12:45 | 17:1:10 | 18:5:40 | 19 | |
| COL ◇ | LAD ◇ | LAD ◇ | LAD ◇ | LAD ◇ | CLE ◇ | CLE ◇ | |
| 1:10 | 20:5:40 | 21:5:40 | 22:12:10 | 23 | 24:7:15 | 25:11:05 | 26 |
| SD ◇ | COL ◇ | COL ◇ | COL ◇ | COL ◇ | CLE ◇ | CLE ◇ | |
| 11:05 | 27:1:15 | 28:7:15 | 29:7:15 | 30 | | | |
| CLE ◇ | SD ◇ | SD ◇ | SD ◇ | | | | |

| AUGUST | | | | | | |
|----------|---------|---------|----------|----------|----------|---------|
| SUN | MON | TUE | WED | THU | FRI | SAT |
| | | | | | 4:10 | 14:10 |
| 10:10-3 | 9:10-10 | 4:15-10 | 5:15-10 | 6 | 11:10-10 | 7:50-10 |
| NYM◇ | NYM◇ | MIL ◇ | MIL ◇ | KC ◇ | KC ◇ | KC ◇ |
| 11:10-10 | | 11:7:15 | 12:12:45 | 13 | 14 | 15:15 |
| KC ◇ | | CWS ◇ | CWS ◇ | | PHI ◇ | PHI ◇ |
| 10:15-17 | 18:6:05 | 19:5:05 | 20:5:05 | 21:4:05 | 22:10:05 | 2 |
| PHI ◇ | | CHC ◇ | CHC ◇ | CHC ◇ | WSH ◇ | WSH ◇ |
| 10:35-24 | 7:15-25 | 7:15-25 | 26:7:15 | 27:12:45 | 28:7:15 | 29:6:05 |
| WSH ◇ | COL ◇ | COL ◇ | COL ◇ | COL ◇ | MIL ◇ | MIL ◇ |
| 10:35-31 | MIL ◇ | | | | | |

| JULY | | | | | | |
|-----------------|-----------------------|-------------|-------------|---|-----------|------|
| SUN | MON | TUE | WED | THU | FRI | SAT |
| | | 1/15 | 1/15 | 2/145 | 3/40 | 4/15 |
| | | STL ◇ STL | STL ◇ STL | SD ◇ SD | | |
| 1:10 | 6/7 105 | 7/7 105 | 8/17 95 | 10/15 105 | 11/15 105 | |
| SD ◇ OAK | OAK □ | OAK ◇ OAK | OAK ◇ OAK | ARI □ ARI | ARI □ ARI | |
| 195 13 | 14 | 15 | 16 | 17 1:10 | 18 4:10 | 11 |
| ARI ◇ | All-Star Break | | | MIA ◇ MIA | MIA ◇ MIA | |
| 20/10 205 | 21/4:05 | 22/4:05 | 23/10:24 25 | 205 25/5 205 | 26/5 205 | |
| MIA ◇ PHI | PHI ◇ PHI | PHI ◇ PHI | PHI ◇ PHI | LAJ ◇ LAD | LAD ◇ LAD | |
| 195 27 7:15 | 28/7:15 | 29/12:45 30 | | 31 | | |
| LAD ◇ PIT | PIT ◇ PIT | PIT ◇ PIT | | | | |
| HOME EXHIBITION | | | HOME | Dates, time and opponents subject to change. | | |
| ROAD EXHIBITION | | | AWAY | | | |

| SEPTEMBER | | | | | | | WANT |
|------------------|-----------------|-----------------|------------------|------------------|------------------|-----------------|-----------------|
| SUN | MON | TUE | WED | THU | FRI | SAT | |
| 1:10 1 COL ◇ | 1:540 COL ◇ | 2:1210 COL ◇ | 3 COL ◇ | 4 DET ◇ | 4:1008m DET ◇ | 5 DET ◇ | 10:08m DET ◇ |
| 10:08m DET ◇ | 8 DET ◇ | 8:175 ARI ◇ | 9:175 ARI ◇ | 10:1245 ARI ◇ | 11:175 LAD ◇ | 12:655 LAD ◇ | |
| 10:5 14 LAD ◇ | 14:640 ARI ◇ | 15:640 ARI ◇ | 16:1240 ARI ◇ | 17 SD ◇ | 18:10 SD ◇ | 19:540 SD ◇ | |
| 1:10 21 SD ◇ | 7:10 LAD ◇ | 7:22 LAD ◇ | 7:23 LAD ◇ | 7:24 LAD ◇ | 7:15 SD ◇ | 25:17 SD ◇ | 1:05 SD ◇ |
| 10:5 28 SD ◇ | | 29 SD ◇ | 30 SD ◇ | | | | 2/4/14 |

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FOLLOW THE GIANTS ON RADIO: KNBR 680
EN ESPAÑOL: 860 AM ESPN Deportes

WATCH THE GIANTS ON

WATCH THE GIANTS ON:
NBC Bay Area □ Fox Saturd
CSN-Bay Area ◇ ESPN ◆

For Season 7

For Season 1

For Season
415.972.22

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415.972.2298 or visit our website at www.sfgiants.com**

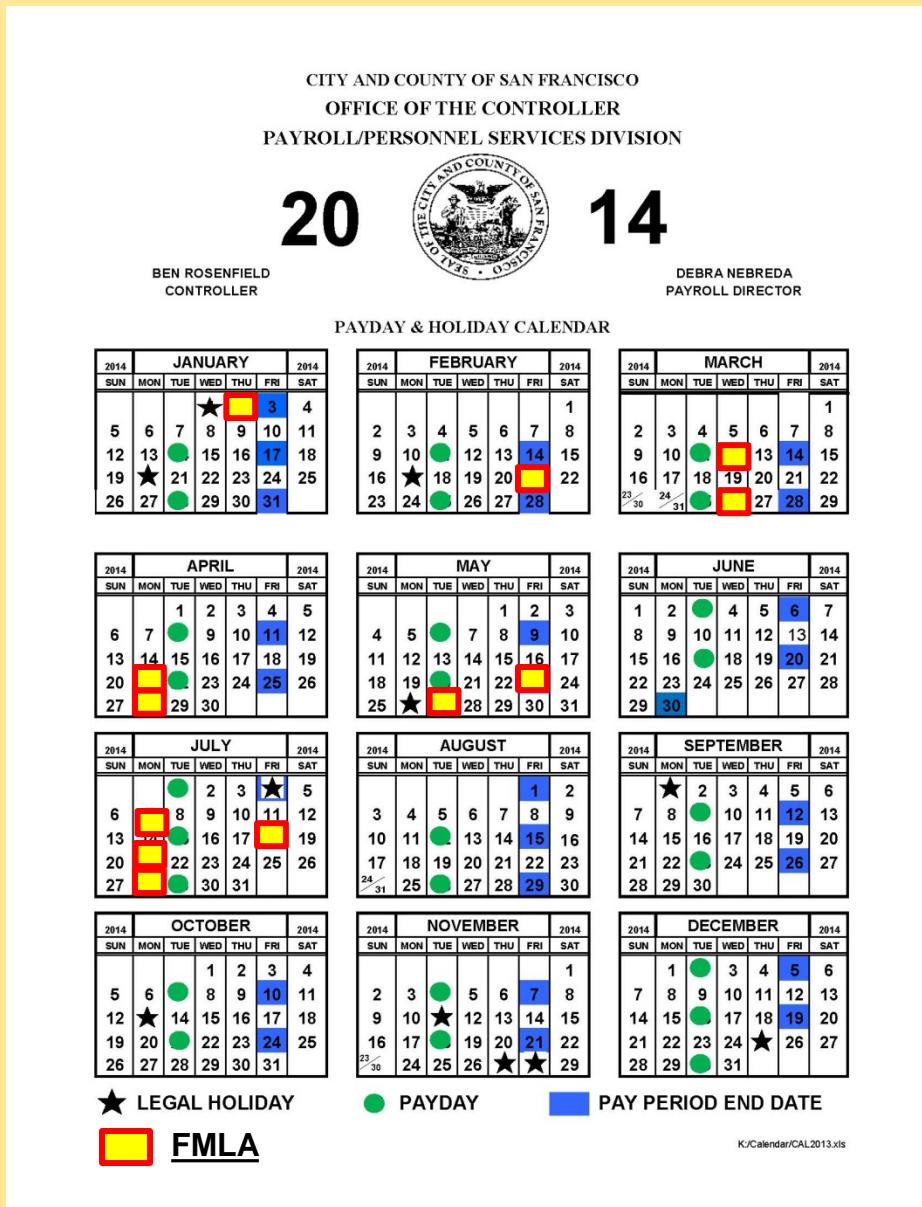
| 2013-2014 INSTRUCTIONAL CALENDAR | | | | | | |
|-------------------------------------|----|----|----|----|--------------------|-----------------------|
| | | | | | Instructional Days | Dates of Significance |
| July 2013 | M | T | W | T | F | |
| | 1 | 2 | 3 | 4 | 5 | |
| | 6 | 7 | 8 | 9 | 10 | 11 |
| | 12 | 13 | 14 | 15 | 16 | 17 |
| | 18 | 19 | 20 | 21 | 22 | 23 |
| | 24 | 25 | 26 | 27 | 28 | 29 |
| | 30 | 31 | | | | |
| August 2013 | | | 1 | 2 | | 10 |
| | 3 | 4 | 5 | 6 | | |
| | 7 | 8 | 9 | 10 | | |
| | 11 | 12 | 13 | 14 | 15 | 16 |
| | 18 | 19 | 20 | 21 | 22 | 23 |
| | 24 | 25 | 26 | 27 | 28 | 29 |
| | 30 | 31 | | | | |
| September 2013 | | | | 1 | 2 | 20 |
| | 3 | 4 | 5 | 6 | 7 | |
| | 9 | 10 | 11 | 12 | 13 | |
| | 16 | 17 | 18 | 19 | 20 | |
| | 23 | 24 | 25 | 26 | 27 | |
| | 30 | 31 | | | | |
| October 2013 | | 1 | 2 | 3 | 4 | 22 |
| | 5 | 6 | 7 | 8 | 9 | |
| | 12 | 13 | 14 | 15 | 16 | |
| | 19 | 20 | 21 | 22 | 23 | |
| | 26 | 27 | 28 | 29 | 30 | |
| | 30 | 31 | | | | |
| November 2013 | | | | | 1 | 17 |
| | 4 | 5 | 6 | 7 | 8 | |
| | 11 | 12 | 13 | 14 | 15 | |
| | 18 | 19 | 20 | 21 | 22 | |
| | 25 | 26 | 27 | 28 | 29 | |
| | 30 | 31 | | | | |
| December 2013 | | | | | 1 | 15 |
| | 4 | 5 | 6 | 7 | 8 | |
| | 9 | 10 | 11 | 12 | 13 | |
| | 16 | 17 | 18 | 19 | 20 | |
| | 23 | 24 | 25 | 26 | 27 | |
| | 30 | 31 | | | | |
| January 2014 | | | | 1 | 2 | 18 |
| | 4 | 5 | 6 | 7 | 8 | |
| | 11 | 12 | 13 | 14 | 15 | |
| | 18 | 19 | 20 | 21 | 22 | |
| | 25 | 26 | 27 | 28 | 29 | |
| | 30 | 31 | | | | |
| February 2014 | | | | | 1 | 19 |
| | 4 | 5 | 6 | 7 | 8 | |
| | 11 | 12 | 13 | 14 | 15 | |
| | 18 | 19 | 20 | 21 | 22 | |
| | 25 | 26 | 27 | 28 | 29 | |
| | 30 | 31 | | | | |
| March 2014 | | | | | 1 | 20 |
| | 4 | 5 | 6 | 7 | 8 | |
| | 10 | 11 | 12 | 13 | 14 | |
| | 17 | 18 | 19 | 20 | 21 | |
| | 24 | 25 | 26 | 27 | 28 | |
| | 30 | 31 | | | | |
| April 2014 | | | 1 | 2 | 3 | 18 |
| | 4 | 5 | 6 | 7 | 8 | |
| | 11 | 12 | 13 | 14 | 15 | |
| | 18 | 19 | 20 | 21 | 22 | |
| | 25 | 26 | 27 | 28 | 29 | |
| | 30 | 31 | | | | |
| May 2014 | | | | 1 | 2 | 21 |
| | 4 | 5 | 6 | 7 | 8 | |
| | 11 | 12 | 13 | 14 | 15 | |
| | 18 | 19 | 20 | 21 | 22 | |
| | 25 | 26 | 27 | 28 | 29 | |
| | 30 | 31 | | | | |
| June 2014 | | 1 | 2 | 3 | 4 | 0 |
| | 9 | 10 | 11 | 12 | 13 | |
| | 16 | 17 | 18 | 19 | 20 | |
| | 23 | 24 | 25 | 26 | 27 | |
| | 30 | 31 | | | | |

Fall Semester – 84 days
Spring Semester – 96 days
Total Instructional Days – 180 days
Total Work Day – 1 day
Professional Development – 1 day
Total Service Days – 1 day

| | | | |
|-----------|----|----------|----|
| July | 0 | January | 18 |
| August | 15 | February | 15 |
| September | 20 | March | 20 |
| October | 22 | April | 18 |
| November | 17 | May | 21 |
| December | 15 | June | 0 |

DOCUMENT SUSPICIOUS PATTERNS

Create a color coded leave calendar for Andrea.



Do her actual leave dates exceed her HCP's estimated duration and frequency?

WHAT DO YOU DO?

- **Gather information and get complete facts.**
- **Meet with Andrea when she returns to work and during the meeting:**
 - Confirm that she requested leave for her FMLA/CFRA condition on the calendared dates.
 - Confirm that she understands how seriously you take FMLA/CFRA and sick leave abuse.
 - Show her the pattern absence evidence you've gathered.

WHEN YOU COUNSEL ME, IT STRESSES ME OUT!

Andrea becomes hysterical after being confronted with her pattern absences and apparent dishonesty. She goes home. After 2 days of no call/no show, she faxes you a note from her doctor that says she is suffering from extreme anxiety due to job related stress and is incapacitated. She calls her supervisor to request 1 month of FMLA/CFRA leave.

Is this sufficient medical certification?

MARTIN R. ROBERTS, M.D.
INTERNAL MEDICINE
24 IMPERIAL DRIVE

DEA # B0000000000
BATCH # DRS041103199 LICH MA00000

IF PRESCRIPTION IS WRITTEN AT ALTERNATE PRACTICE SITE, CHECK HERE AND PRINT ALTERNATE ADDRESS AND TELEPHONE NUMBER ON REVERSE SIDE

PATIENT Andrea Arithmetic DOB
ADDRESS DATE 12/20/14

Rx *Extend disability to Jan. 31, 2015. Acute anxiety. Unable to return to work. Insomnia and PTSD symptoms due to hostile work environment. In therapy and on medication. No estimated return to work date.*

SUBSTITUTION PERMISSIBLE DO NOT SUBSTITUTE

DO NOT REFILL _____
REFILL _____ TIMES

SIGNATURE OF PRESCRIBER
Martin Roberts, MD

This form is for controlled substance prescriptions only. It is illegal to possess or use this form without a valid prescription. Unauthorized possession and/or use of this form including alterations or forgery, are crimes punishable by law.

IF ANDREA IS SO STRESSED OUT, WHY ISN'T SHE AT HOME?

Andrea's coworkers are at their wit's end having to work overtime to cover for Andrea.

Two of them are talking about it at lunchtime when they see Andrea in the food court.

They follow her to an office building and see her doing what looks like the exact same job she said she is too sick to do.

Is there anything you can do?



MOONLIGHTING AND OUTSIDE EMPLOYMENT

Employees who are on leave for **job-related stress** have been allowed to work elsewhere in positions that are virtually identical in duties, environment and schedule.

Courts ask: can the employee perform the essential functions of her job in her current environment?

Hospital technician who was on leave for job-related stress was allowed to work at another hospital in a nearly identical position.

Lonicki v. Sutter Health Center, 43 Cal.4th 201 (2008)

Psychiatric nurse who was on leave for job-related stress was allowed to work part-time for a home care agency.

Stekloff v. St. John's Mercy Health Systems, 218 F.3d 858 (2000)

CCSF EMPLOYEE HANDBOOK

Outside or Additional Employment

- Additional or outside employment of any kind requires the written approval of the Human Resources Director or designee. Requests for approval of outside or additional employment must be resubmitted to the Human Resources Director or designee. Any such outside employment must not interfere with an employee's City job, and must adhere to the requirements specified in the Civil Service Rules.
- Your department's "Statement of Incompatible Activities" may impose additional restrictions on employees' activities.
- The Request for Approval for Additional Employment Form is available on the Department of Human Resources website at www.sfgov.org/DHR. For more information regarding restrictions on outside or additional employment, please see the Civil Service Rules at www.sfgov.org/civil_service or contact your departmental personnel officer.

CCSF Employee Handbook p. 50

WHAT ACTIVITIES ARE INCOMPATIBLE WITH THE EMPLOYEE'S ILLNESS OR INJURY?



Cal.
Supreme
Court to
decide



Don't
have to
stay
home



Looks
like fraud
– honest
belief
okay



Looks
like fraud
– honest
belief
okay

Employee on leave from car dealership for back injury was working at his own restaurant sweeping, bending over, and using a hammer. Richey v. Autonation, 149 Cal.Rptr.3d 280 (2012).

Employee on leave because her hand was too swollen to operate a computer mouse was seen shopping at Toys-R-Us on her way home. Jennings v. Mid-American Energy Co., 282 F.Supp.2d 954 (2003).

Employee on leave because of herniated disc was seen standing and walking at a beer festival. Seeger v. Cincinnati Bell Telephone Co., 681 F.3d 274 (2012).

Employee on leave for knee surgery seen bending and lifting while shopping. Kariotis v. Navistar, 131 F.3d 672 (1997).

*Many California courts have rejected the honest belief defense in FMLA/CFRA cases.

WHAT IS
"CARING" FOR
A FAMILY
MEMBER?

LEAVE TO CARE FOR FAMILY MEMBER: WHAT IS CARE?

The Department of Labor explains that the phrase “to care for” a family member:

“encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.”

WHAT IS PARTICIPATION?

9th Circuit Court of Appeals:

**Caring for a family member with a serious health condition
“involves some level of participation in ongoing treatment of
that condition.” Marchisheck v. San Mateo County, 199 F.3d 1068 (1999).**

IS THIS REALLY CARING FOR A FAMILY MEMBER?



Employee took a 4-day trip to retrieve the family automobile from another state in order to comfort his pregnant wife. Tellis v. Alaska Airlines, 414 F.3d 1045 (2005).



Employee talked to his father daily, performed household chores, and drove his father to the counselor while father was suffering from depression. Scamihorn v. General Truck Drivers, 282 F.3d 1078 (2002).



Employee helped mother move to a one-level apartment to minimize the need for at-home assistance. Pang v. Beverly Hospital, Inc., 79 Cal.App. 4th 986 (2000).



Employee on leave to help father after surgery was seen playing golf, working on sprinklers, and spending a night away from his father.

McDaneld v. Eastern Municipal Water, 109 Cal.App.4th 702 (2003).



Employee on leave to care for grandmother left work early, went for a walk in the park and drove to a hardware store. Boecken v. Gallo Glass Co., 2008 WL 4470759.

MILITARY LEAVES

MILITARY CAREGIVER LEAVE

How is this different from regular caregiver leave?

Benefit: FMLA covers **up to 26 weeks** within a single 12-month period

(this includes any time taken for another FMLA-qualifying purpose)



Use: to care for **seriously ill or injured servicemember or veteran** (different definition than serious health condition)

Covered FMLA relationships are expanded to include “next of kin”
(blood relative who has been granted legal custody of the servicemember, siblings, grandparents, aunts and uncles, first cousins) and include **children of any age**. Excludes domestic partners.

Certification Form—Current Servicemember
Certification Form—Veteran

<http://www.dol.gov/whd/forms/WH-385.pdf>
<http://www.dol.gov/whd/forms/wh385V.pdf>

RULES FOR MILITARY CAREGIVER LEAVE

Covered conditions: Serious illness or injury

(this is different than a serious health condition)

Definition:

Incurred in line of active duty or existed before duty and was aggravated by service and may render member medically unfit to perform duties.

For **veterans**, the condition can also be*:

A physical or mental condition that substantially impairs the ability to secure or follow a substantially gainful occupation by reason of a disability related to military service, or would do so absent treatment.

Servicemember's status: Current service member receiving outpatient treatment or any veteran who was discharged within the last 5 years (excludes dishonorably discharged)

* Other covered conditions for veterans can be found in 29 CFR 825.127

INTERACTION WITH CFRA

CFRA does **not have a separate provision for Military Caregiver leave.**

Employees who wish to take leave to care for a servicemember under CFRA still must certify:

- 1. Qualifying CFRA relationship** (spouse, registered domestic partner, parent, minor child or adult dependent child)
- 2. Serious Health Condition**

CFRA will run concurrently with FMLA Military Caregiver leave for up to 12 weeks if servicemember is a parent, spouse, registered domestic partner, or child, AND if the illness qualifies as a serious health condition.

MILITARY EXIGENCY LEAVE

Covered under FMLA, but not CFRA (Up to 12 weeks)

Relationships: Spouse, parent, or **child of any age** (includes biological, adopted, foster, step, in loco parentis) who is a member of the Armed Forces (including the National Guard and Reserves) and who is on covered active duty or has been notified of an impending call or order to covered active duty.

Uses and timeframes:

- **Short notice deployment** (less than 7 days)
- **Military events** (ceremonies, family support or assistance programs, informational briefings)
- **Childcare and school activities** (caused by exigency) of minor or dependent disabled adult child of covered servicemember (arranging for alternative childcare, provide urgent childcare, enroll or switch schools, meet with teachers)
- **Financial and legal arrangements** (transferring bank accounts, preparing wills)
- **Counseling** (to attend counseling for self or other, related to exigency)
- **Rest and Recuperation** (up to 15 days)
- **Post-deployment activities** (ceremonies or briefings occurring within 90 days of return from deployment, funeral arrangements)
- **Parental care activities** (caused by exigency) for servicemember's parent who is incapable of self-care (arranging for alternative care, provide urgent care, admit or transfer to care facility, attend meetings with facility staff)

MILITARY EXIGENCY DOCUMENTATION

- 1) A copy of the military member's covered **active duty orders AND**
- 2) A copy of a meeting announcement for informational briefings sponsored by the military; a document confirming the military member's Rest and Recuperation leave; a document confirming an appointment with a third party, such as a counselor or school official, or staff at a care facility; or a copy of a bill for services for the handling of legal or financial affairs.

NATIONAL GUARD
U.S. ARMY RESERVE PERSONNEL COMMAND
1 RESERVE WAY
ST. LOUIS, MO 63132-5200

ARPC-PLT-07-E618
ORDERS T-03-906308

2/1/2015

ANDREW ARITHMETIC
PO BOX 111
ANYWHERE, US 29111

PLT-07-E618

SPC 71LI 111-11-1111
WSBTTO
21 MC HSP GEN (HUB)

YOU ARE ORDERED TO ACTIVE DUTY FOR TRAINING (ADT) FOR THE PERIOD SHOWN. ON COMPLETION OF THE PERIOD OF ADT, UNLESS SOONER RELEASED OR EXTENDED BY PROPER AUTHORITY, YOU WILL RETURN TO THE PLACE WHERE YOU ENTERED ADT.

PERIOD: 29 DAYS PLUS ALLOWABLE TRAVEL TIME
REPORT TO: JOINT TRANSPORTATION RESERVE UNIT, 508 SCOTT DR, SCOTT AFB
SCOTT AFB IL 62225
REPORTING DATE: RPT BETWEEN 0730 & 0800 HRS. 2/6/15
ATTACHED TO: JOINT TRANS RES UNIT BLDG 1961, 508 SCOTT D SCOTT AFB IL 62225
PURPOSE: TRANSCOM SPT

ADDITIONAL INSTRUCTIONS: YOU ARE ATCHD FOR ADMIN SPT TO INCLUDE ADMIN OF UCMJ.
INJURY/DISEASE/ILLNESS/DEATH REQ LODI IAW AR 600-8-4. ID CARDS/TAGS RQD ON PERSON WHILE ON GOVT ORDERS. BREAK IN TVL TIME TO/FR HOR NOT AUTH. CALL AR-PERSCOM POC PRIOR TO TOUR IF UNABLE TO COMPLY WITH ORDERS. REIMBURSEMENT FOR TVL LIMITED TO GOVT RATE. COMPLIANCE WITH THIS ORDER IS RQD;
NONCOMPLIANCE JEOPARDIZES FUTURE TNG. ATTENDANCE IN UNIFORM IS MANDATORY.
HIV CLEARED. APFT RQD IAW AR 350-41. JOGGING SHOES/PT CLOTHING RQD FOR PHYS TNG & APFT. FWD RESULTS IAW AR 140-1 PARA 3-3C. RENTAL CAR NOT AUTH. OER RQD PER AR 623-105 OR AER RQD PER AR 623-1, FWD TO CDR AR-PERSCOM ATTN:
ARPC-PSV-E. SUBMIT CERTIFICATE OF PERFORMANCE (ARPC FM 3924) AT COMPL OF TOUR TO PAY PROC OFC. NO PER DIEM AUTH. DUTY WITHIN COMMUTING DISTANCE.
TRAVELER DOES NOT HAVE A GOVERNMENT CHARGE CARD. TVL ADVANCES WILL BE ISSUED ONLY BY DFAS-IN (DNO) S12102. SUBMIT APPROVED TVL VOUCHERS TO DFAS-IN (DNO), WITHIN 5 DAYS OF COMPLETION OF DUTY.

FOR ARMY USE: AUTH: 10 USC 672(D)& 683(A)(1) ADT W
ACCT CLAS: 2192070 23-6600 P4G33.11000 JON25839063080/(Q8CADE) S12102
ESTIMATE ONLY((198- \$1435)(1199- \$650)(1210-)(1250- \$109)(2578-)
(21T1-)(21T2- \$13)(22NZ-)(22NL-)
PPN: COMP: USAR PEBD: 07 APR 92 SEX: M TYTR: 11Y SCTY CL: SECRET
DOR: 06 SEP 97 HOR: SAME AS SNL

FORMAT: 260

* AR-PERSCOM *
* OFFICIAL *

JOHN Q. SMITH
COL, AG
COMMANDING

DISTRIBUTION: 1A PACKET: 6C
1 89TH REG SPT CMD (RSC) 3130 GEORGE WASHINGTON WICHITA KS 67210 1598
1 21 MC HSP GEN (HUB) 4350 S KINGSHIGHWAY BL ST LOUIS MO 63109 2494

Certification of Military Exigency Form
<http://www.dol.gov/whd/forms/WH-384.pdf>

MILITARY EXIGENCY LEAVE

Andrea's supervisor comes to you and says that Andrea is requesting one week of leave to assist her husband who has been called to military duty on short notice. Should you approve the leave? What sort of certification is required?



RETURN TO WORK

RETURN FROM LEAVE

If you anticipate that you may want to require a Fitness-for-Duty examination, then:

- 1) Return the employee to work with an appropriate medical release from his/her health care provider.
- 2) Consider placing the employee on compulsory sick leave following his/her return to work, if facts suggest the employee is a danger to self or others.

However...

FITNESS FOR DUTY BEST PRACTICE

**Request the Fitness for Duty Exam
after the employee returns to work
from a FMLA/CFRA leave.**

An employer can request a FFD evaluation after the employee is restored to her previous position if the evaluation request is made based on the employee's *conduct prior* to the FMLA leave.

White v. County of Los Angeles (2014) 225 Cal. App. 4th 690

RETALIATION

CFRA RETALIATION CLAIMS

Did the employee suffer an adverse employment action because of taking or requesting CFRA leave?

- **What adverse employment actions should we be mindful of avoiding?**
- **Does the City have a legitimate, non-discriminatory reason for the adverse employment action?**

Rogers v. County of Los Angeles, 198 Cal.App.4th 480, 491 (2011).

SUMMARY OF BEST PRACTICES

- Assess which leave laws apply and how they might overlap.
- Follow CFRA/FMLA notice requirements, and apply the more generous law.
- When a leave is requested following FMLA/CFRA, or if employee is ineligible for FMLA/CFRA, assess whether a temporary leave extension granted as a reasonable accommodation will permit the employee to return to work.
- For post FMLA/CFRA leave extensions, assess whether the proposed duration of the leave is reasonable in light of the employee's specific position, *i.e.*, perform an individualized assessment under the ADA/FEHA as to the reasonableness of the length of the leave.
- Document how the department is impacted by the leave if it is granted, *i.e.*, who takes over certain essential functions, whether temporary employees are needed. Have this information readily available and understood by management should the employee request additional leave.

SUMMARY OF BEST PRACTICES, CONT.

- Communicate with employee throughout the leave process, from initial request through return to work (and beyond if accommodations still required).
- Avoid maximum leave policies and practices. If an employee has been absent for an extended period of time, be sure to continue to engage in an interactive process with that individual if he or she needs additional leave. (But employees are not entitled to indefinite leaves of absence under the ADA/FEHA.)
- Workplace accommodations may be required to permit an employee to return from a leave of absence.
- Consider whether light duty should be offered as a reasonable accommodation to allow employees to transition to full time work.

THANK YOU!

**Please contact us
if you have any
questions:**

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(415) 551-8903

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Medical Leave Program
Administrative Analyst
(415) 557-4830

