



5 Is the New 50: A Crash Course on Compliance with the Expanded California Family Rights Act



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SB 1383

- Added to, and amended, the California Family Rights Act – CFRA
- Effective January 1, 2021
- Applies to more employers
- Provides broader protections to employees

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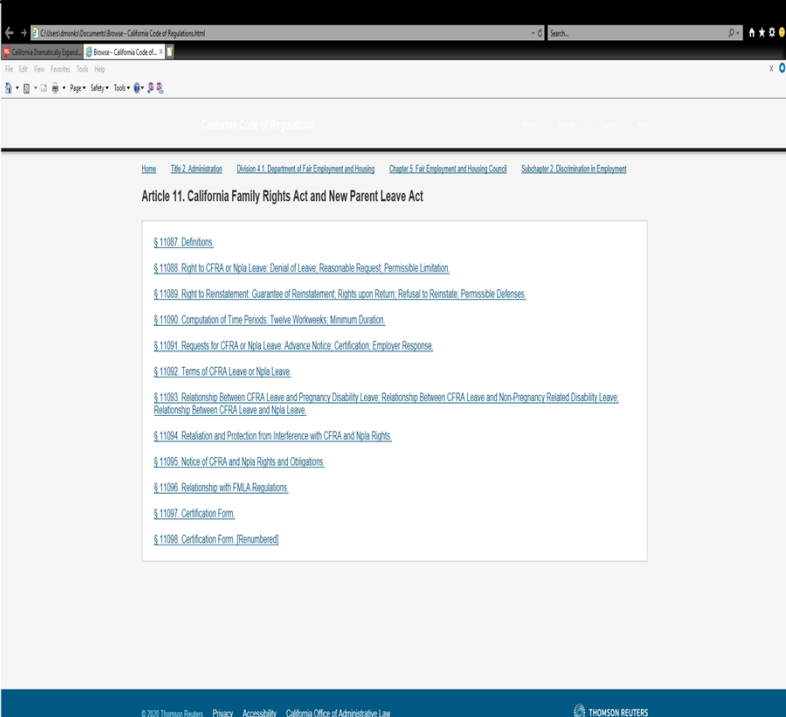


CFRA

- California Government Code section 12945.2
- California Code of Regulations
 - Google “code regulations California family rights act”

➤ govt.westlaw.com

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California Code of Regulations

Home Title 2 Administration Division 11 Department of Fair Employment and Housing Chapter 5 Fair Employment and Housing Council Subchapter 2 Discrimination in Employment

Article 11. California Family Rights Act and New Parent Leave Act

§ 11097. Definitions

§ 11098. Right to CFRA or NPLA Leave: Denial of Leave, Reasonable Request, Permissible Limitation

§ 11099. Right to Reinstatement, Guarantee of Reinstatement, Rights upon Return, Refusal to Reinstale, Permissible Defenses

§ 11090. Computation of Time Periods, Twelve Workweeks, Minimum Duration

§ 11091. Requests for CFRA or NPLA Leave: Advance Notice, Certification, Employer Response

§ 11092. Terms of CFRA Leave or NPLA Leave

§ 11093. Relationship Between CFRA Leave and Pregnancy Disability Leave: Relationship Between CFRA Leave and Non-Pregnancy Related Disability Leave: Relationship Between CFRA Leave and NPLA Leave

§ 11094. Retaliation and Protection from Interference with CFRA and NPLA Rights

§ 11095. Notice of CFRA and NPLA Rights and Obligations


§ 11096. Relationship with FMLA Regulations

§ 11097. Certification Form

§ 11098. Certification Form (Renumbered)

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Covered Employers

- Any person or individual engaged in any business in California who directly employs **5** or more persons within any state of the United States, the District of Columbia, or any territory or possession of the United States to perform services for a wage or salary
- Includes successors-in-interest of a covered employer

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Covered Employers

- “directly employs” means that the employer maintains an aggregate of at least **5** part- or full-time employees to perform services for a wage or salary for any part of the day on which the unlawful conduct occurred
- **5?** Used to be 50!!
- Must count employees on paid or unpaid leave of absence (including CFRA), disciplinary suspension, or other leave
- Must count employees inside and outside of California

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Covered Employers

- “perform services for a wage or salary” excludes independent contractors as defined in the Labor Code, but includes persons who are compensated in whole or in part by commission
- Joint employer
 - Whether joint employment relationship exists depends on totality of circumstances and based on economic realities
 - May not need common ownership/management

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The Process

- Is the employee eligible?
 - Service requirement
 - Hours requirement
 - Qualifying reason
- Has there been proper notice?
- Calculate number of hours available
- Intermittent leave?
- Respond to request in timely manner
- Certification of serious health condition?
- Designation?
- Pay? Benefits?
- Is reinstatement required?
- Require medical release to work?

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Employee Eligibility

- Full-time or part-time
- Employed for 12 months with employer *before the start* of CFRA leave
- Worked 1,250 hours in 12-month period *before the start* of CFRA leave
- Employment periods before a break in service of seven years or more need not be counted (except: military service or by written agreement)
- Employee is eligible if satisfies 12-month requirement while on leave (e.g., work comp, sick leave, vacation)
 - Should designate portion of leave during which employee is eligible as CFRA leave

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Employee Eligibility

Old rule: To be eligible, the employee had to work at worksite with 50 employees within 75-mile radius when leave was requested

Now: No such requirement

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Qualifying Reasons for Leave

1. Employee's serious health condition
2. Caring for family member with serious health condition
3. Bonding with newborn, adopted child, or foster child
4. New -- Qualifying exigency dealing with covered active duty, or call to covered active duty, of employee's spouse, domestic partner, child, or parent in the Armed Forces

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Serious Health Condition

- Employee unable to perform essential functions of their position
- Child, parent, grandparent, grandchild, sibling, spouse, or domestic partner of employee
 - (used to be child, parent, spouse)
- “Child” includes all adult children (regardless of whether they are dependent) and children of a domestic partner

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Serious Health Condition

“Serious health condition” is illness, injury, impairment, or physical or mental condition that involves either of the following:

- **Inpatient care** in hospital, hospice, or residential health care facility
- **Continuing treatment** or continuing supervision by health care provider
- Includes treatment for substance abuse
- Does not include cosmetic surgery, colds, flu, stomach aches, dental problems, and the like

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Serious Health Condition

- “Inpatient care”
 - a stay in a hospital, hospice, or residential health care facility (and any subsequent treatment in connection with such inpatient care)
 - includes when a health care facility formally admits the person with the expectation that the person will remain at least overnight and occupy a bed -- even if that does not happen
 - any subsequent treatment in connection with such inpatient care
 - any period of **incapacity**

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Serious Health Condition

- “Incapacity” means the inability to work, attend school, or perform other regular daily activities due to a serious health condition, its treatment, or the recovery that it requires
- “Continuing treatment” means ongoing medical treatment or supervision by a health care provider

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Continuing Treatment

1. *Absence plus treatment*

- Employee must be incapacitated more than three consecutive, full calendar days and either:
 - Receive two treatments by healthcare provider*; or
 - Receive one treatment plus regimen of continuing treatment

*Or by (1) nurse or physician's assistant under direct supervision of health care provider, or (2) provider of health care services (e.g., physical therapist) under orders of, or on referral by, health care provider

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Continuing Treatment

2. *Chronic condition*

- requiring periodic visits for treatment by health care provider;
- continuing over an extended period of time (including recurring episodes of a single underlying condition); and
- may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

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Continuing Treatment

3. *Permanent/long-term condition*

- A period of incapacity that is permanent or long-term due to condition for which treatment may not be effective
- Employee or family member must be under continuing supervision of, but need not be receiving active treatment by, health care provider
- Examples: Alzheimer's, severe stroke, terminal stages of a disease

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Continuing Treatment

4. *Multiple treatments for non-chronic condition*

- period of absence to receive multiple treatments (including any period of recovery from such treatments) by health care provider
- either for:
 - restorative surgery after an accident or other injury
 - a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), or kidney disease (dialysis)

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Recap – Serious Health Condition

- Unable to perform one or more essential functions?
- Illness, injury, impairment, or physical or mental condition?
- Does it involve inpatient care?
 - Stay in hospital or similar?
 - Period of incapacity?
- If not, does it involve continuing treatment?
 - Absence plus treatment
 - Chronic condition
 - Permanent/long-term condition
 - Multiple treatments for non-chronic condition

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Baby Bonding

- Pregnancy Disability Leave not included within CFRA leave
- Employee gets four months of PDL
- If child born by end of that period, employee can get up to 12 weeks of leave under CFRA for baby bonding
- No “serious health condition” or other criteria needed

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Both Parents Eligible for Baby Bonding?

Yes.

- SB 1383 removes the provision stating that if both parents work for same employer, employer is not required to provide more than a total of 12 weeks for leave in connection with the birth/adoption/foster-care placement of a child.
- Now, each parent can get their own 12 weeks.

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Qualifying Exigency

(Not yet defined in statute or regulations; FMLA will be likely guidance)

- Employee's spouse, child, or parent must be member of Armed Forces and on covered active duty or called to active duty
- Types of events that count as qualifying exigencies:
 - Short-notice deployment
 - Military events
 - Childcare and school-related activities
 - Financial and legal arrangements
 - Counseling
 - Parental care activities
 - Rest and recuperation
 - Post-deployment activities
 - Any other event that employee and employer agree is a qualifying exigency

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Employee's Notice of Need for Leave

- Employee must give at least verbal notice sufficient to make employer aware that employee needs CFRA leave, and anticipated timing and duration of leave
- Employee need not expressly assert rights under CFRA or even mention the Act, but must state reason for leave, such as expected birth of child or medical treatment
- Employer should inquire further if necessary to determine whether employee is requesting CFRA leave and to obtain necessary information concerning leave
- Employer can require 30 days' advance notice when need for leave is anticipated/foreseeable, and the leave is for birth/adoption/foster care or for planned treatment for serious health condition of employee or family member
- Where 30 days' notice is not practicable (lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency), notice must be given as soon as practicable

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Calculating Leave Entitlement (Hours)

- 12 workweeks = 12 of employee's normally scheduled workweeks
- For employee with varying schedule: use weekly average of hours scheduled over the 12 months before beginning of leave period (including any hours for which employee took leave of any type)
- Example: for employee who works half time, 12 workweeks is equal to 30 eight-hour days, 60 four-hour days, or 12 workweeks of whatever is employee's normal half-time work schedule
- Normally-worked overtime counts against leave entitlement
- Voluntary overtime does not

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Determining the 12-Month Period

1. Calendar year
2. Any fixed 12-month period (e.g., fiscal year)
3. Forward Looking
 - a. Least common
 - b. 12-month period measured from date of employee's first family leave
4. Rolling Backward
 - a. Most common
 - b. Rolling 12-month period measured backward from date employee uses any family leave
 - c. Each time employee takes leave, remaining entitlement is any balance of the workweeks not used during the immediately preceding 12 months
 - d. Prevents stacking of leave

Important: Choose a method and apply it consistently!! And notify employee of the chosen method.

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Intermittent and Reduced-Schedule Leave

- Employee may take leave on intermittent or reduced-schedule basis
- Rules depend on whether leave is for birth/adoption/foster care or serious health condition
- ***Know the rules!*** (regulations, section 11090(d) and (e))
- ***Keep thorough records!***

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Responding to Leave Request

- Employer must respond to leave request as soon as practicable and in any event no later than five business days after receiving the request.
- Employer must attempt to respond to leave request before date when leave is due to begin. Once given, approval shall be deemed retroactive to date of first day of leave.

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Certification of Serious Health Condition

- Employer can require certification of serious health condition of employee or employee's family member
- *Important: California law prohibits the release of a medical diagnosis supporting certification, unless the patient signs a valid waiver. Please do not ask employee for a diagnosis or for details about their condition.*
- Use CFRA certification form – not the forms for the federal Family and Medical Leave Act
- For form by Department of Fair Employment and Housing, Google: "cfra medical certification form" (also see regulations, section 11097)
- Information in certification depends on whether for employee or family member

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Certification of Serious Health Condition

- Employer may not contact health care provider for any reason other than to authenticate a medical certification (may not seek clarification)
- Employee must provide certification within 15 calendar days (or more), unless not practicable to do so despite good-faith efforts
- Absent extenuating circumstances (e.g., unavailability of health care provider), if employee fails to timely return certification, employer may deny CFRA protections for leave following expiration of 15-day period until sufficient certification is provided

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Second and Third Opinions

- Good-faith, objective reason to doubt validity of certification
- Second opinion
 - Employer designates or approves health care provider
 - Employer pays
- Third opinion
 - If second opinion differs from first
 - Jointly designated/approved health care provider
 - Employer pays
 - Binding

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Designation of Leave

- Employer has duty to designate leave as CFRA leave
- Must notify employee – do it in writing
- Cannot retroactively designate leave as CFRA leave after employee has returned to work, except with appropriate notice to employee and where failure to timely designate does not cause harm or injury to employee
- Must guarantee reinstatement to same or comparable position

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Pay

- Leave is unpaid
- Vacation/PTO – Employer may require use; employee may elect to use
- Paid sick leave
 - If leave is for employee's serious health condition -- Employer may require use; employee may elect to use
 - If leave is for any other reason – Employer and employee must agree
- Disability pay – Employee may use if leave is for own serious health condition
- **Note:** If employee requests to utilize accrued vacation/PTO without reference to a CFRA-qualifying purpose, employer may not ask whether employee is taking time off for a CFRA-qualifying reason

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Benefits

- Regulations, section 11092 – many rules
- Employer must continue and pay for employee's health benefits at same level and under same conditions as if no leave, until:
 - Employee's CFRA leave is exhausted;
 - Employer can show that employee would have been laid off and the employment relationship terminated for lawful reasons during CFRA leave; or
 - Employee provides unequivocal notice of intent not to return to work.
- With advance written notice, employer can require employee to pay their share of premiums
 - Paid leave
 - Unpaid leave

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Benefits

- Unless an employer policy provides longer grace period, employer's obligation to maintain health benefits ceases under CFRA if employee's premium payment is more than 30 days late
- Employer must restore benefits when employee returns from leave
- Employer can recover premiums paid for employee during unpaid leave if both of these apply:
 - Employee fails to return from leave after the period of leave to which the employee is entitled has expired (works less than 30 days after returning from CFRA leave)
 - Employee's failure to return from leave is for reason other than continuation, recurrence, or onset of a serious health condition that entitles employee to CFRA leave, or other circumstances beyond employee's control

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Reinstatement – Same or Comparable Position

- When granting leave request, employer must inform employee that employer guarantees to reinstate them in the same or comparable position
- Employee is entitled to reinstatement even if employee has been replaced or their position has been restructured to accommodate employee's absence
- If employee is no longer qualified for position because of inability to attend a necessary course, renew a license, fly a minimum number of hours, or other non-qualifying reason, as a result of the leave, employee must be given reasonable opportunity to fulfill those conditions upon returning to work
- “comparable position” means one that is equivalent (i.e., virtually identical) to employee's former position in terms of pay, benefits, shift, schedule, geographic location, and working conditions, including privileges, perquisites, and status.

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Reinstatement – Return-to-Work Release

- Employee's return from medical leave can be conditioned on having release to return to work from health care provider stating that employee is able to resume work
 - Must tell employee of this requirement before leave begins
- Employer can require release only if it has uniformly applied practice or policy of requiring such releases from other employees returning to work after illness, injury or disability (and there is no collective bargaining agreement forbidding the practice)
- For intermittent or reduced leave:
 - Employer is not entitled to a release for each absence taken
 - However, can require one for such absences up to once every 30 days if reasonable safety concerns exist regarding employee's ability to perform their duties.

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Reinstatement – No Fitness-for-Duty Exam

- Employer may not require employee to undergo fitness-for-duty examination as condition of employee's return.
- After employee returns from CFRA leave, any fitness-for-duty examination must be job-related and consistent with business necessity

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Reinstatement – When Not Required

- Employment would have ceased or hours would have been reduced
 - To deny reinstatement, employer has burden of proving, by a preponderance of the evidence, that employee would not otherwise have been employed on requested reinstatement date
 - If a shift has been eliminated or overtime has been decreased, employee not entitled to return to work that shift or the original overtime hours upon reinstatement
- Employee fraudulently obtained CFRA leave
 - Employer has burden of proving this
- No "key employee" defense – removed from statute

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Required Postings and Notices

- Poster in workplace – Google “dfeh cfra required poster”
- Give to employees
- Non-English speaking employees – 10% rule
- Regulations, section 11095

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Legal Claims – Interference and Retaliation

Interference with exercise of employee's rights

- refusing to authorize CFRA leave
- discouraging an employee from using leave
- avoiding responsibilities under CFRA:
 - Changing essential functions of job to preclude taking leave
 - Reducing employee's hours available to work to avoid employee eligibility
 - Firing employee in anticipation of employee's request for CFRA-qualifying leave in the future

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Legal Claims – Interference and Retaliation

Retaliation – Protected Activity

- Employee exercised or attempted to exercise CFRA rights
- Employee gave information or testimony about their CFRA leave, or another person's CFRA leave, in any inquiry or proceeding related to any right guaranteed under the CFRA.

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Legal Claims – Interference and Retaliation

Retaliation – Prohibited Acts

- Not providing same benefits to employee on unpaid CFRA leave as are provided to employees on other kinds of unpaid leave
- Using employee's taking of CFRA leave as negative factor in employment actions, such as hiring, promotions, or disciplinary actions
- Counting CFRA leave against employee under employer's attendance policies
- Terminating employment

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Mediation Pilot Program

- For employers of 5 to 19 employees
- After receiving DFEH's right-to-sue letter to employee, employer can request, within 30 days, mediation with DFEH
- Employee cannot sue in court until mediation is complete

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Action Items

- Workplace posters
- Handbook addendum; update handbook
- Develop process for receiving, evaluating, and responding to leave requests
- Create documents
- Train managers!
 - Avoid casual comments in conversations, emails
 - Hold them accountable
- Communicate with employee
- Document, document, document
- Ensure request for/taking of CFRA leave is not a factor in any employment decisions
- Consult with employment-law attorney

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Thank You



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