



## 706 Do My Employees Have to Come to Work?

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## Faculty Biographies

### Eileen A. Groves

Eileen A. Groves is an associate general counsel of United Space Alliance, LLC ("USA") in Houston, Texas. USA is the prime contractor for NASA for human spaceflight, responsible for the day-to-day operation and management of the U.S. Space Shuttle fleet, and is also involved in the construction of the International Space Station. Ms. Groves' responsibilities at USA include providing as day-to-day counsel to human resources and managers regarding labor and employment, wage and hour, Office of Federal Contract Compliance Programs (OFCCP), and Equal Employment Opportunity (EEO) issues and legal counsel to its benefits department regarding all USA's retirement, health, and welfare plans as well.

Prior to joining USA, Ms. Groves had been a partner with Baker & Daniels in Indiana. Previous to that, Ms. Groves had been associate corporate labor counsel for Borden, Inc. in Columbus, Ohio where she represented Borden on labor and employment issues in both state and federal agencies and advised on all Borden's USA benefits plans as well as Borden's Canadian plans.

She is the vice-chair of ACC's National Employment and Labor Law Committee (E&LL) executive board as well as a member of the board of directors of ACC's Houston Chapter. She was awarded the 2005 ACC Jonathan S. Silber Committee Member of the Year at the Annual Meeting in Washington, DC.

Ms. Groves received a B.A. from St. John's University, New York, M.A. from Purdue University, Indiana and her J.D. from the University of Notre Dame.

### Jeremy Kashian

Jeremy Kashian is the associate general counsel for NEC Corporation of America in Santa Clara, California. Her responsibilities include handling all aspects of employee and benefit related matters in North America, managing litigation, and overseeing the government contracts management department.

Prior to joining NEC, Ms. Kashian practiced employment and general litigation with a few Sacramento based law firms.

She currently serves as vice president of ACC's San Francisco Bay Area Chapter.

Ms. Kashian received a B.A. from UCLA and her J.D. from the University of the Pacific, McGeorge School of Law.

### Carolyn Ladd

Carolyn Ladd is in-house counsel in the labor, employment and benefits group at Boeing in Seattle. Her practice focuses on compliance with the ADA, FMLA, Title VII, and state equal employment opportunity laws. She provides day-to-day advice to human resource professionals, manages employment related litigation, and conducts training.

Prior to joining Boeing, she was in private practice with Jackson Lewis Schnitzler & Krupman, a nationwide law firm representing management in labor and employment law matters.

Ms. Ladd traveled to Ghana, West Africa to teach English to first graders for two weeks with Global Volunteers. She is currently working with books for Africa to ship 25,000 books to schoolchildren in Ghana this fall. She has taken previous "volunteer vacations" to the Blue Mountains of Jamaica and Tanzania, East Africa. Town & Country Magazine featured her volunteer work in an article in its June 2005 edition.

Ms. Ladd a B.A. from the University of Washington. She received a J.D. from the University of Oregon School of Law. She also has a Masters of Law (Labor Law) from the Georgetown University Law Center where she wrote her thesis on the Reasonable Accommodation requirement of the Americans with Disabilities Act.



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## **FMLA**

### • Employees Covered:

1. Must be employed for at least 12 months before qualifying for leave. These 12 months need not be consecutive; and
2. Must have had at least 1250 hours of service in the previous 12 months.

### • Entitlement:

An eligible employee shall be entitled to a *total* of 12 weeks of leave during any 12 month period. This is unpaid leave unless the employer requires at any paid vacation or personal leave shall be substituted for the leave provided under the Act.

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## FMLA

### ● Reasons for Leave:

1. Birth, adoption or placement of a child.
2. To provide care for spouse, child, parent of employee if such spouse, child or parent has a serious health condition.
3. Serious health condition that makes employee unable to perform the functions of position.

Entitlement under #1 above ends at the end of the 12 months from the date of birth or placement.



## FMLA

- What is "serious health condition"? Serious health condition means an illness, injury, impairment, or physical or mental condition that involves –

1. Inpatient care in a hospital, hospice, or residential care facility; or
2. Continuing treatment by a health care provider. This has been defined in the FMLA regulations as: "as a period of incapacity of more than 3 calendar days and any subsequent treatment that also involves: a) treatment 2 or more times by health provider; or b) treatment by health provider on 1 occasion resulting in regimen of continuing treatment under supervision of health provider.



## FMLA

3. Any period of incapacity due to pregnancy or for prenatal care.
4. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A "chronic serious health condition" is one which: a) requires periodic visits for treatment by a health care provider; b) continues over an extended period of time [including recurring episodes of a single underlying condition]; and c) may cause episodic rather than a continuing period of incapacity (e.g. asthma, diabetes, epilepsy, migraines).



## FMLA

5. A period of incapacity which is permanent or long-term for which treatment might not be effective.
6. Any period of absence for multiple treatments by a health care provider either for restorative surgery after accident or other injury, or for a condition likely to result in incapacity of more than 3 consecutive calendar days in the absence of medical intervention or treatment, e.g. chemotherapy or radiation for cancer, physical therapy for arthritis, dialysis for kidney disease.

Treatment does not include routine physicals, eye exams, or dental exams.



## FMLA

- If the need for leave is foreseeable, the employee shall provide employer with not less than 30 days' notice.
- The employee, if leave is foreseeable, should make a reasonable effort to schedule treatment so as to not disrupt the employer operation. If 30 days notice is impossible, the employee should provide such notices as practicable.
- If spouses are employed by the same employer, it is the aggregate of 12 weeks for both for care of child, or parent.
- Leave can be intermittent – chemo, migraines.



## FMLA

### ● Certification:

An employer may require that leave requested for care of child, spouse or parent or leave for serious health condition of employee be certified by a health care provider. The DOL has prepared a sample Certification Form providing the required information.

Look at 29 CFR 825.800 – Appendices at end.



## FMLA

If the employer questions the validity of the certification, the employer may require the employee to obtain a second opinion from provider designated or approved by the employer. This provider shall not be employed on regular basis by employer. If the second opinion differs from the first, the employer may require, at its expense, a third opinion which shall be binding.



## FMLA Interacts with ADA, Workers Comp and State FMLA

- According to FMLA regulations, employers must provide leave whichever statutory provision (ADA, WC or state law) provides the greater rights to employees. 29 CFR 825.702(a). But not every disability under ADA is a "serious health condition" under FMLA. The reverse is also true.
- FMLA allows 12 weeks leave but ADA might be longer as a reasonable accommodation!
- WC & FMLA may run simultaneously but if the WC certifies the employee for light duty, the employee is permitted, but not required to accept the position under FMLA. He can stay out the full 12 weeks, abet a portion not paid by WC.



### Attendance Policy under FMLA

“No fault” attendance policies can not consider absences due to approved FMLA leave. 29 CFR 825.220(c).

Employers cannot use the taking of FMLA as a negative factor in employment action. *Id.*



### Final Regulations of DOL re. Family Medical Leave Act – 29 CFR Part 825

- How is the 12 month Leave Year calculated?

It is up to employer. It can be calendar, any fixed 12 month period, any 12 month period measured forward from employee's first FMLA leave, or a “rolling” 12 months measured backward from the date employee used any FMLA leave.

The employer must notify employee what has been selected as method. If employer fails to notify employees, the option that provides the most beneficial outcome for the employee shall be used.





## FMLA Leave

- If there is a holiday during FMLA period, it will still be counted toward the FMLA period unless the employer is closed down. If employer closed, days aren't counted.
- **Must the employee ask for FMLA leave?**  
Yes and No. If the leave is a planned leave, the employee should give employer 30 days notice or whatever notice that is practicable if it is less than 30 days. But the employee need NOT use the magic words –FMLA. Courts have found that employee mentioning a circumstance which would put employer on notice that leave might qualify for FMLA is sufficient to require employer to inquire further.



## FMLA Leave

- Or – if the circumstances or employee's behavior are such that the employer should realize the absence might be attributable to FMLA qualifying reasons, the employer should inquire further. *Byrne v. Avon Products*, 378 F.3d 379 (7<sup>th</sup> Cir. 2003).
- **Must the employer post notice of FMLA? What other kind of notice must employer supply?**  
Every employer covered by FMLA is required to post and keep posted in conspicuous places a notice explaining the provisions of FMLA and procedures to file a complaint. If employer has any written guidance to employees concerning benefits or leave rights, such as a handbook, information regarding FMLA must be included.



## FMLA

- **How long does an employer have to determine if employee is eligible for FMLA?**

The employer must notify the employee within 2 days. 825.110(d). The regulation goes further and says that if employer fails to advise employee whether they are eligible before leave commences, “the employee is deemed eligible.” This provision has been declared contrary to Congressional intent in *Brungart v. BellSouth*, 231 F.3d 791 (11<sup>th</sup> Cir. 2000) and *Dormeyer v. Comerica*, 223 F.3d 579 (7<sup>th</sup> Cir. 2000).



## FMLA

- **Can notice of FMLA leave application be made retroactively?**

Yes contrary to the Regulations. 29 CFR 825.700(a) says that if employee takes paid or unpaid leave and employer *does not designate* leave as FMLA, the leave taken does not count against the entitlement. The U.S. Supreme Court in *Ragsdale v. Wolverine*, 535 U.S. 81 (2002), declared this provision contrary to the statute. An employee is entitled to no more protected leave than is allowed under the law.



## FMLA

- **If the employer doesn't notify the employee that paid leave is being counted toward FMLA, can employee get another 12 weeks unpaid leave?**

No. 29 CFR 825.208(c) and 29 CFR 825.700(a) provides that if an employer fails to give prospective notice that an absence is being counted against entitlement, the leave can not be counted and the employer would be required to give an additional 12 weeks in addition to any other leave the employer provided. The 11<sup>th</sup> Circuit in *McGregor v. AutoZone*, 180 F.3d 1305 (11<sup>th</sup> Cir. 1999), found this regulation contrary to the statute and invalid. Other courts have followed.



## FMLA

- **Does the employee have to declare it as FMLA for it to count as FMLA?**

No. 29 CFR 825.302(c) provides that "an employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under FMLA or even mention FMLA, *but may only state that leave is needed for expected birth or adoption, for example.*



## Scenario #1

- Taylor is a new employee. He has been on the job for only a month. He receives military orders calling him up from the reserves to active duty. He brings in a copy of his orders and gives them to Human Resources. He is going to be shipped to Iraq next week. The expected duration of his service is 2 years.

You're as patriotic as the next guy/gal (you even have Lee Greenwood's God Bless the USA on your iPod), but come on, 2 years? He's a brand new employee. No one even knows his name. Can't we just lay him off and say it didn't work out?

*Is Taylor entitled to the time off?*

*Is he entitled to be paid during the time off?*

*What about his health insurance?*

*What if Taylor's military orders had arrived after he had been given a job offer but before his start date?*



## Scenario #1 (cont'd)

*What if his military service is extended and he isn't able to return to work after 2 years. How long can he remain out on military leave?*

*When Taylor returns from military service, to what position should he be reinstated?*

*What if Taylor's military orders had arrived after he had been given a job offer but before his start date?*



## Scenario #2

Ruben works as a clerk for a major retailer that is open 7 days a week. He has worked there for a few months and has never had a problem working on Sundays. One day Ruben tells his manager that through marriage counseling with his fiancée at her church he has come to understand that the Sabbath is important and due to his religious beliefs he can no longer work on Sundays.

The manager is able to accommodate Sundays off and schedules Ruben to work on other days. This arrangement works for everyone for about a year. Then a new manager is assigned to the store. The new manager decrees that all employees must be “fully flexible” meaning able to work all shifts. She schedules Ruben to work on Sunday. When he objects and says he cannot work on Sundays because it is his Sabbath, she tells him he can become a part time employee, which would result in no eligibility for benefits. (Ruben’s wife is now pregnant so health insurance is very important to him.)



## Scenario #2 (cont'd)

Or, the manager tells Ruben, she can schedule him to work on Sunday after church. Ruben responds that his religion requires him not to work at all on Sunday. When Ruben does not show up for his scheduled Sunday shift his employment is terminated.

*Can the employer question the sincerity of Ruben’s religious beliefs? (Come on, he used to work on Sundays. Isn’t this just a scam to impress his fiancée? Or an excuse to watch football on Sundays?)*

*Does Ruben have to work on Sundays?*

*What if this is some flakey “religion” no one has ever heard of?*



## Scenario #2 (cont'd)

*What if Ruben's minister testifies that the Sabbath should be a day of rest but it is not an absolute requirement not to work?*

*What if other employees don't like that Ruben gets Sundays off?*

*What if the employer fears "The Bandwagon" effect – that every other employee is going to come up with a religious excuse not to work on Saturday or Sunday?*

*Facts based on Baker v. The Home Depot, 445 F.3d 541 (2<sup>nd</sup> Cir. 2006)]*



## Scenario # 3

Penelope was given a written warning for poor attendance. Her annual review reflected her poor attendance and poor performance. A week after her review Penelope calls in sick 5 days in a row stating that she was "really ill" and hoped to return to work. HR and her supervisors could only get her voicemail but on her voicemail demanded a doctor's note.

Penelope faxes in a doctor's note on the 6<sup>th</sup> day of absence stating that she was suffering from serious health conditions, needed 6 weeks' leave and then could return to work only if her supervisor was changed, moved to a quieter cubicle and that her hours could not exceed 40 per week.

Five weeks into her leave Penelope faxes in a letter stating that she needs an additional 10 weeks of leave and then will be able to return with the accommodations previously requested.



## Scenario # 3 (cont'd)

While she is out on leave, her supervisor (the one she is requesting to stop reporting to) finds emails that Penelope sent several coworkers badmouthing the supervisor. He wants to fire her now because she feels she is insubordinate. HR is recommending a final written warning.

Penelope returns to work and 30 days later announces she is pregnant and is very ill and her domestic partner has a serious health condition and she needs to be at home to care for her. She is requesting that she telecommute for a while.

She works ¾ time during her pregnancy but her productivity is poor. Supervisor never addressed it. She leaves to give birth and asks to take the most time allowed under the law. The day she returns to work she asks to go part time and then states she needs a private office rather than her cubicle because she needs to spend 45 minutes in the morning and afternoon to express milk for her baby.

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## Scenario # 3 (cont'd)

Two months later, Penelope doesn't report to work for two days and then calls in to state that she is at an undisclosed location because her domestic partner beat her up and she needs a few days off to seek medical attention and get services from a shelter.

Penelope comes back to work and a month later tells HR, her supervisor and other co-workers that she is afraid for herself and child because of the domestic partner and has taken steps to join the Army.

Company decides layoffs need to occur this quarter to a steep decline in business. Penelope's manager puts her in the RIF list.

*How do you handle this?*

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## Scenario #4

Sally Goodfellow worked for ABC Company for 15 years as a product receivable clerk. She knew her job and was frequently called upon to train new employees in the department. She never advanced in ABC because she had 1 annoying problem – she had a problem getting to work on Monday and Fridays. Her supervisor didn't like it but he didn't want to rock the boat because she did what he didn't want to do. But the plant manager was angry and wanted to fire her. She was a union employee and the union interceded. ABC agreed to resolve the situation with a “last chance” agreement. If she were absent from work for more than 2 days in the next three months, she would be fired.



## Scenario #4 (cont'd)

About two months after being put on probation, Sally is out on her motorcycle one weekend and had an accident. She suffered a concussion and a broken leg and had to be out of work for 6 weeks. ABC sent her the FMLA notice as soon as they heard about the accident in their basket of flowers but did not require any medical certification from Sally or tell her it was in the flowers. The company policy was that the employee had to respond to the FMLA notice within 15 days of receipt of the notice.

*What about her absences and her probation?*

When Sally returned to work after the accident, she was informed that none of her FMLA time would be regarded as out of work for the purposes of her probation, but she would have her probation extended by 6 weeks and she could not be out more than 2 days.





## Scenario #4 (cont'd)

Sally wasn't the same when she got back to work. She was no longer friendly and helpful. She told trainees to "bug-off". She wasn't concentrating on work and her paperwork on receivables was illegible. On the Monday before Thanksgiving, the plant manager told Sally that her work was unacceptable and if she didn't improve, she would be suspended from work. Sally was a no-show on Tuesday and Wednesday. When she didn't show-up for work on Friday, ABC sent Sally notice that she was terminated for violating company policy of being out three consecutive workdays without calling in as well as failing her probation. When Sally's husband got the letter, he called ABC to explain that Sally was suffering from severe depression from the motorcycle accident and had been hospitalized. Sally's husband didn't say anything about how long she would be out.



## Scenario #4 (cont'd)

When the HR manager heard the story, his reaction was –“this isn't the first time Sally was “sick” around Thanksgiving.” However, under the circumstances, the HR manager told the husband that he would send out the FMLA notice, which would require a medical certification from the doctor within 15 days. The HR thought that if he got actual proof that Sally was sick, he would talk the plant manager into reinstating Sally.

Sally's husband wasn't handling the care of 6 children on his own very well and he forgot about the telephone conversation with the HR manager and about getting Sally's doctor to fill out the certification form. Five weeks later, Sally had recovered and now, fully medicated, she could return to work. She called the plant manager to tell him that she will be in the next day. The plant manager is confused and told Sally – “I fired you and I hired your replacement last week.”



## Scenario #4 (cont'd)

*Could they fire her? Did they have notice of FMLA? Did she have time left?*

The following day Sally met with the HR manager. The HR manager was sympathetic, but he had spoken to senior management as well as the ABC in-house counsel. They all concluded that Sally could not be reinstated. Sally argued that she hadn't heard about the certification and her husband had forgotten to tell her. She argued that she wasn't in a condition to notify the company of her condition and she thought her husband's notification of her hospitalization was enough. "After all, it was good enough when I had my motorcycle accident."



## Scenario #4 (cont'd)

The HR manager reminded Sally that she had been on probation for unexcused absences and the company was justified in terminating her. But "because Sally had been such a long term and loyal employee, he was authorized to give her three months severance on condition that she sign a full release of ABC." Desperate for money because it was Christmas Eve, Sally signed the release and agreed not to sue ABC based upon Title VII, ADEA, ADA, PDA, FMLA, FSLA, OSHA, NLRB, FCA and the Geneva Convention!

*Did ABC violate FMLA? Did the release solve ABC's problems? What about the union?*

*(Thanks to the 7<sup>th</sup> Circuit in Byrne v. Avon Products, 378 F.3d 379 (7<sup>th</sup> Cir. 2003).*



## Scenario #5

Jim Taylor worked for Ajax Corp. as a computer programmer. He had worked for Ajax for about 10 years, was well liked by his colleagues, was always on time and never missed a day. Unfortunately in January 2004, Jim's wife Ann became sick and had to undergo chemotherapy. Jim's manager reminded him about his rights under the company FMLA policy and sent him to the company web site on FMLA to read and fill out the forms. Jim was very grateful to find out that he could take intermittent leave to take his wife to treatments and stay with her afterwards. He was especially grateful that he could take vacation time to cover his absences because he was concerned about money with all the doctor bills. Jim used about 200 hours of FMLA leave over about 4 months caring for his wife. Ajax ran FMLA eligibility on a calendar year basis.



## Scenario #5 (cont'd)

Ann recovered and was doing very well. To celebrate, Jim and Ann went for a skiing vacation to Colorado. Unfortunately for Jim, who was from Florida, snow skiing isn't like water skiing and he collided with a tree. Jim broke both his legs, about 5 ribs, and his right arm. Ann called Jim's manager to tell him about the accident. Because Ajax was "the company of choice", Jim's manager immediately completed Ajax's FMLA application forms and notified HR to start Jim on sick leave and send out the FMLA notices. Ajax's Third-party medical administrator approved his hospitalization and Ajax's Short Term Disability Administrator certified his disability leave.

After about 2 weeks in the Colorado hospital, Jim was transferred home to Florida where he was hospitalized for another 6 weeks. Jim had to remain home for another month before his doctor released him to



## Scenario #5 cont'd

return to work. Jim returns to his same job but can only work limited hours each week because of his rehab for the remainder of the year. By the end of 2004, Jim only actually worked 1225 hours.

In February 2005, Jim was driving to work when his car is T-boned by a bank robber running from the police in a high-speed chase. Jim's left leg, left arm are broken and he has suffered a concussion. Jim will be out of work another 6 weeks. Ajax now decides that it *isn't* the "company of choice" in regard to Jim and they come to you and ask – *can we fire him for extensive absenteeism?*

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### FMLA and Pseudo-FMLA Statutes

<u>States/Statutes</u>	<u>Who's Covered</u>	<u>Leave Paid or Unpaid</u>
Fed. FMLA	Private employers with 50 or more emees for 20 wks in current or past yr or public without reference to number of emees; 1250 hours in yr	Unpaid but emee can be required to substitute other paid leave
Alabama Bereavement	Public employers State employer	Paid Sick Leave Paid but must reimburse State w/in 1 yr
Alaska	Public Emers w/21 or more emees for 20 weeks	unpaid; emer can require substitution for paid leave
Arizona	State employers	Paid Sick; unpaid family leave
Arkansas	Public employers	Paid
California	Private emers with 50 or more; private with 5 or more emees for extended pregnancy leave; all public emers	Unpaid; emer can require substitution of accrued vacation or sick time; or emee <b>Leave Paid or Unpaid</b> could participate State Unemployment Fund
Cal. Sick Leave for Family	Any employer who provides sick leave for emees	Unpaid unless accrued sick leave
Cal Visit School Law	Emer with 25 or more in same location	Both
Cal. Bereavement	Public Emers	Both

Colorado	Public Emers for emees who have worked at least 12 mo.	Unpaid;emee can be required to use paid leave
Connecticut	Private emers with 75 or more emees on Oct. 1 of any yr;all public emees worked at least 12 mo. And 1,000 hrs	Unpaid
Delaware	State emers for full time emees for 12 mos.	Unpaid
District of Columbia	Private emers with 20 more;all public emers; emee for 12 mo. & 1000 hours	unpaid
DC School Visitation	individual,firm,association, corp or govt	unpaid unless emee uses accrued leave
<b>States/Statutes</b>	<b>Who's Covered</b>	<b>Leave Paid or Unpaid</b>
Florida	Public emers	unpaid
Georgia	State Emees employed 12 months & 1250 hours	paid
Hawaii	Private emers with 100 or more emees for 20 weeks in prior or current calendar year - emee with 6 months continuous employment	unpaid
Idaho	Public Emers; emee for 12 months or 1230 hours	unpaid
Illinois	Public emers; Public & Private emers with 50+ emees for school visitation	unpaid but emee can use accrued leave
Indiana	State agencies; full & part-time emees	unpaid maternity; emee must use accrued sick for

Iowa	Private emers with 4 or more emees for maternity leave; all public emers; emees worked 12 months or 1250 hours; not specified for maternity	family illness unpaid
<b>States/Statutes</b>	<b>Who's Covered</b>	<b>Leave Paid or Unpaid</b>
Kansas	State emer;permanent emees for sick leave;emees with 1250 hrs for family leave	both paid & unpaid
Kentucky	Public & Private emers for adoption; state emer for family leave	unpaid but emee must use all 10 days paid leave first
Louisiana	Public & Private emers  All emees school leave	Unpaid but emees must be able to substitute paid leave
Maine	Private & municipal emers with more than 25 emees at site; emees must have been employee 12 consecutive months	unpaid
Maryland	public & private emers for paid adoption leave	both paid & unpaid; 3 unpaid
Massachusetts	Public & private emers female emees for 3 mos.	unpaid; emer may require substitution of
<b>States/Statutes</b>	<b>Who's Covered</b>	<b>Leave Paid or Unpaid</b>
	for maternity leave; emees worked 1250 hrs in 12 months for school & medical appt.	sick, vacation &/or personal leave
Michigan	No statutes	

Minnesota	Public & private emers with more than 21 emees; all emees for school leave; emees who worked at least 1/2 time for 12 months	unpaid	North Dakota	State emers; emees who worked 20 hours per week for 12 months	unpaid; emees can substitute 40 hours paid sick in 12 month period
Mississippi	State of Mississippi	paid	Ohio	public emers if not covered by cba; permanent part & full-time emees	a emees receive 70% of pay after 14 unpaid day waiting period
Missouri	Public emers	both paid & unpaid	Oklahoma	Public emers; emees work worked 1250 hours	both paid & unpaid; emee can use accrued
Montana	State emer	paid	<b>States/Statutes</b>	<b>Who's Covered</b>	<b>Leave Paid or Unpaid</b>
Nebraska	public & private emers who grant childbirth leave	unpaid		previous 12 months	sick & annual leave
Nevada	public emers for parental leave; public & private emers for school visitation; emee with 1250 hrs in 12 months for family leave	unpaid; emer can require emee use paid leave	Oregon	Private emers with 25 emees for 20 weeks in 12 months; all public emers	unpaid; emee may substitute other paid leave
<b>States/Statutes</b>	<b>Who's Covered</b>	<b>Leave Paid or Unpaid</b>	Pennsylvania	no statute	
New Hampshire	no statute		Puerto Rico	Public & private emers "working women"	paid
New Jersey	Private emers with 50 emees for 20 weeks in 12 months; all public emers; emees who worked 1,000 hrs in 12 months	unpaid; public emers may require use of accrued sick leave	Rhode Island	Private emers with more than 50 emees; all public	unpaid
New Mexico	Public emers; full & part-time emees	paid - accrued sick leave	South Carolina	Public emers	paid
New York	Any emer offering biological parental leave		South Dakota	State emer; all emees for sick leave, emees who worked 1250 in 12 months for family leave	paid & unpaid
North Carolina	State emers; emees who worked 1040 hours in 12 months;	unpaid but may use other leave for family leave	Tennessee	Public emers	unpaid; emee may use sick leave for all or part of leave
school visitation	all emers	unpaid	Texas	State emer	unpaid family leave; paid sick leave

<u>States/Statutes</u>	<u>Who's Covered</u>	<u>Leave Paid or Unpaid</u>	<u>Duration</u>	<u>Citation</u>
Utah	State emers emees who worked 1250 in 12 months	unpaid; emees can be required to use other paid leave first	12 weeks in 12 months or intermittent to 480 hours	29 U.S.C.§§ 2611et seq.
Vermont	Public & private emers with more than 10 emees for parental leave; more than 15 for family leave; emees who worked at least 30 hours per week for 12 months	unpaid; emee may use up to 6 weeks of other paid leave	up to 225 days 3 days	Ala. Admin Code 670-x-14.01 Ala. Admin Code 36-26-36.3
Virginia	State emer; full & part-time emee	Paid	18 weeks in 24 months for serious health;	Alaska Stat § 39.20.500 et. seq
Washington	all emers with sick leave; all emers with 100 emees within 20 miles in a quarter; emees who worked 35 hrs per week for 52 weeks for family leave; all emees for sick leave	paid sick leave; unpaid family leave	otherwise 18 wks in 12mo 12 for childbirth or adoption;40 hrs for family illness;12 wks for serious health	Ariz. Admin. Code 2-5-404  Ark. Code. Ann. §21-4-203
West Virginia	State & county boards of education; permanent emees who have worked at least 12 consecutive weeks	unpaid	12 wks in 12 months plus 4 additional months for pregnancy under separate statute <u>Duration</u>	Cal.Govt Code §12945; Un.Ins.Code § 3300  <u>Citation</u>
Wisconsin	Private emers with 50 emees; all public emers; emees who worked 1000 hours in 12 months	unpaid; emee may substitute other leave	up to 40 hrs each yr, not exceeding 8 hrs in any calendar month	Cal. Labor Code § 233  Cal. Labor Code §230.8(d)
Wyoming	no statute		3 days	Cal. Gov't Code §19859.3

520 hrs max 4 Colo. Code Regs §8012

16 wks in 24 months emee could take 16 wks in 1 yr under state & 12 wks 2nd. Yr under federal Conn. Gen. Stat. §31-51kk

6 weeks Del. Code Ann. Tit 29 §5116, 5129

16 weeks in 24 months D.C. Code Ann. §32-1601 Ann §32-501

24 hours in 12 months D.C. Code Ann. §32-1601

**Duration** **Citation**

6 months Fla. Stat. Ann. §110.219

12 weeks GA. Comp. R. & Regs r. 478-1-23:100

4 weeks Haw. Rev. Stat. §398-1 et seq.

12 weeks Idaho Regs. §15.04.01.242

1 yr for maternity; 90 days for other leave; 8 hours in 1 school yr. 820 Ill. Comp. Stat 147/1 et seq.

1 yr for maternity; accrued sick for other Ind. Adm. Code r. 31-1-9-4,5;31-2-11-4

8 weeks for maternity (females only); 12 wks for other leave Iowa Code Ann. § 216.6

**Duration** **Citation**

accrued sick leave; 12 weeks in 12 months Kansas Admin. Regs. 1-9-5-27

6 weeks for adoption; Ky. Rev.Stat.Ann. at. Ann. §

12 weeks in 12 months for family leave 337.010,.015 Ky. Admin. Regs. 2:100

not specified La. Rev. Stat. Ann. §40:1299.124

16 hours in 12 months La. Rev. Stat. Ann. 23:1015

10 weeks in 2 years Me. Rev. Stat. Ann. Tit. 26, 843 et seq.

3 days in 30 for illness; 30 days for newborn/ adoption; additional unpaid up to 6 months Md. Code Ann. State Pers. & Pens. 9-501 et. seq; Lab. §3-801, 802

8 weeks for maternity or adoption; 24 hrs in Mass. Ann. Laws ch. 149, §105D; Mass. Regs. Code tit. 940,

**Duration** 12 months for school or medical appt. **Citation** §20.02 to .05;tit. 804, §8.01



6 weeks for parental leave; 4 wks for adoption; accrued sick for sick child; 16 hrs in 12 months for school leave-	Minn. Stat. §181.940 et seq.	2 months for part-time emees (25 hrs or less; 4 months for full-time emees;40 hrs accrued sick leave in 12 months	N.D. Cent. Code §54-52 N.D. Admin Code §4-07-13-01 et seq.
major medical leave accrued on service	Miss. Code Ann. §25.3-95	6 continuous weeks	Ohio Rev. Code Ann. §124.136
15 days; 6 weeks for pregnancy disability	Mo. Rev. Stat. §105.271 Mont. Code Ann § 2-18-606 Mont. Adm. R. 2.21.122, .132,.908,.1001et seq. Neb. Rev. Stat. §48-234	12 weeks in 12 months <b>Duration</b>	Okla. Stat. Ann. Tit. 74, § 840-2.22 <b>Citation</b> Okla. Admin. Code §530:10-15-45
unspecified for school leave; 6 mos for parental leave; 12 wks in 12 months for family leave <b>Duration</b>	Nev. Rev. Stat. Ann §284.360, 392.490 Nev. Admin. Code § 284.581 et seq. <b>Citation</b>	12 weeks in 12 months	Or. Rev. Stat. §659A.150 et seq.
12 weeks in 24 months	N. J. Stat. Ann. §34:11B-1 et seq.  N.M. Admin. Code tit 1, §7.7.10 N.Y. Lab. Law §201c	8 weeks total; up to 4 prenatal & up to 4 postnatal	P.R.Laws Ann. Tit. 29, §467 to 475
12 wks for family leave	N.C. Admin. Code tit. 25,r. 1E,1401 et seq.	13 weeks in 24 months;10 hours for school activities in 12 months	R.I. Gen. Laws §28-48-1 to 10
4 hours	N.C. Gen. Stat. § 9528.3	8 days for sick; 6 weeks for adoption	S.C. Code Ann. §8-11-40, -155
		40 days sick leave; 12 weeks family leave	S.D. Admin. R. 5:01:01:01, 55:01:22:08:02
		30 days	Tenn. Code. Ann. §8-50-806
		8 hours in 12 months for school leave; accrued sick leave; 12 weeks family leave	Tex. Gov't Code Ann. §661.202,.912

<u>Duration</u>	<u>Citation</u>
12 weeks in 12 months	Utah Admin. Code §477-8-9
12 weeks in 12 months; 24 hours in 12 months for school or medical appointment leave	Vt.Stat. Ann. Tit. 21, §470 to 474
40 hrs for emee with 10 yrs of service; 32 hours for others	Va. Code. Ann. §51-1-110,711,081,137
accrued sick leave;	Wash. Rev. Code Ann. §49.78.010 to .901;
12 weeks in 24 months	.12.270 to 295
12 weeks	W. Va. Code §21-60-1 to -9
<u>Duration</u>	<u>Citation</u>
6 weeks for childbirth or adoption; 2 weeks for illness, with max. of 8 weeks	Wis. Stat. Ann. §103.10

## THE CALIFORNIA FAMILY AND DISABILITY LEAVES OF ABSENCE CHECKLIST\*



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\* This is a complex area of law and this checklist is designed to help employers navigate the complex web of leave laws. However, it is not a full discussion of all the legal issues involved and is not a substitute for legal counsel.

S532184.1

**FAMILY AND MEDICAL LEAVE (FMLA/CFRA)****1. Threshold questions:****Are you a covered employer?**

- Employ 50 or more employees for 20+ calendar workweeks?
- Even if not a covered employer, any contractual language re voluntary compliance?

**Is employee eligible for leave?**

- Employ 50 or more employees within 75 mile radius?
- And, employee employed for at least 12 months?
- And, employee worked 1,250 hours in preceding 12 months?

**2. Reasons for taking leave:**

- Employee's own serious health condition
  - Illness, injury, impairment or physical or mental condition which involves inpatient care [i.e., an overnight stay] in a hospital, hospice, or residential health-care facility
  - Or, any period of incapacity requiring absence from work, or other regular daily activities, of 4 or more calendar days,
  - Or, continuing treatment by a health-care provider that requires intermittent absences from work.
- Or, Family leave
  - Serious health condition of child, parent or spouse [in California: also domestic partner]
  - Or, Birth or adoption of a child or placement of child in foster care
- Caution!**
  - Remember: disability for pregnancy, childbirth or related medical condition is not a serious health condition under California's Family Rights Act

**3. Amount of Leave: Employee is entitled to take up to 12 workweeks of leave during any 12 month period**

- Do you calculate 12 month period for all employees on leave?**
  - Calendar year
  - Or, Fiscal year
  - Or, Benefit year
  - Or, Measured from first leave request
  - Or, Rolling 12 month period
  - Has employee taken any other leave within the preceding 12 month period?
- Caution!**
  - Remember: California employees potentially may take 16 weeks pregnancy leave plus 12 weeks family leave.
- Caution!**
  - There is no "undue burden" exception under FMLA/CFRA

**4. Type of Leave: What type of leave does the employee seek?**

- Block leave: single period of leave taken all at once
- Or, Reduced schedule leave: Leave that reduces employee's usual number of working hours per workweek or workday
- Or, Intermittent leave: Leave taken in separate block of time for one qualifying reason
  - If the employee is taking intermittent leave, consider whether the company needs to transfer the employee temporarily to an available alternative position that better accommodates the intermittent leave

**5. Concurrent leave:**

- Domestic partner leave cannot run concurrently under FMLA
- California Pregnancy Leave (PDL) runs concurrent with leave under FMLA but not under CFRA

**6. Benefits and Pay During FMLA/CFRA**

- Generally unpaid
- Caution!**
  - Consider full or partial days of absence for exempt employees
  - Can require use of vacation or sick leave
  - Group health plan: Employer to maintain coverage under group health plan for duration of leave and under conditions which coverage would have provided had employee not taken leave
  - Other benefits: treat the same as employees on other LOAs

**7. Designating the leave for eligible employees:**

- Inform the employee in writing that the leave will be designated as FMLA/CFRA leave
  - Provide oral notice within two (2) business days from the time employee has given notice or employer has sufficient notice that the leave is FMLA/CFRA qualifying
  - Follow-up on oral notice in writing by next payday—otherwise may not retroactively designate
- Content of notice:
  - Date leave begins/began
  - Length of leave
  - Request for certification + periodic updates
    - And consequences for not providing
  - Leave is unpaid unless vacation or sick leave used
  - SDI or PFL info, if applicable
  - Maintenance of benefits info
  - Reinstatement rights
  - Need to provide certification of ability to return to work, if applicable
- Documents for employee:
  - Request for LOA forms
  - Certification of healthcare provider forms
  - Request for information forms

**8. Documentation from the health care provider:**

- Certification should include:**
  - For the employee's own serious health condition:

- Date on which serious health condition commenced
  - Probable duration of the condition
  - Statement that the employee is unable to perform the functions of his or her position because of the serious health condition
  - Spouse, domestic partner, child, parent:
    - Date on which serious health condition commenced
    - Probable duration of the condition
    - Estimate of amount of time needed to care for individual
    - Statement that the condition warrants the employee's care during period of treatment
  - Certification should NOT include:**
    - the specific serious health condition
    - any symptoms of the serious health condition
    - any medication the employee may be taking
  - If you receive information on the "should not include" list:
    - Protect the employee's right to privacy
    - Do not allow anyone without the need to know to see the information
    - Keep the medical information in a file separate from the personnel file
9. **If the employee requests additional leave beyond the 12 weeks provided by FMLA/CFRA**
- Analyze under ADA/FEHA disability analysis
10. **Reinstatement Rights**
- Restore to same or equivalent position with equivalent benefits, pay and other terms and conditions of employment assuming employee can still perform essential functions of the job
  - If employee can no longer perform the essential functions of the job analyze under ADA/FEHA disability analysis

**PREGNANCY LEAVE (PDL)**

1. **Threshold questions:**
- Are you a covered employer?**
- Employ 5+ full or part-time employees?
  - Even if not a covered employee, any contractual language re voluntary compliance?
- Is employee eligible for leave?**
- Female employee?
  - Disabled by pregnancy or pregnancy related medical conditions?
  - Caution!**
    - Remember: this leave is available regardless of length of service
2. **Reason for taking leave:**
- Employee is affected by pregnancy
    - Employers have an obligation to accommodate an employee affected by pregnancy-related conditions
  - Or, Employee is disabled by pregnancy
    - Employee is disabled if in the opinion of a licensed healthcare professional she is unable to perform the essential duties of her job or to perform such duties without undue risk to herself or others
    - Employers have an obligation to accommodate an employee disabled by pregnancy-related conditions
3. **Amount of Leave: Depends on whether employee is "affected" or "disabled"**
- If disabled by pregnancy-related medical condition: she is entitled to a LOA for a reasonable period of time not to exceed four (4) months
  - If a "normal" pregnancy: six (6) weeks.
4. **Type of Leave: What type of leave does employee seek?**
- Does not have to be taken in one consecutive block
  - Accumulated leave may be totaled in computing PDL
5. **Benefits and Pay During PDL**
- Generally unpaid
    - Caution!**
      - Consider full or partial days of absence for exempt employees
  - Can require use of sick leave
  - Employee can use vacation
  - Caution!**
    - Remember: must treat employees on PDL consistently with those on other leaves.
6. **Reinstatement Rights**
- An employee who returns from PDL within the time proscribed by law is entitled to return to the same or comparable job. Comparable means virtually identical in terms of pay, benefits and working conditions, including privileges, prerequisites and status

- Exceptions:
  - Legitimate business reason unrelated to pregnancy
  - Keeping job open would substantially undermine business operations

7. **Coordinating FMLA/CFRA and PDL**

- CFRA and PDL are separate and distinct
- FMLA and PDL run concurrently
- Start CFRA when PDL ends
- Maximum entitlement in CA for both pregnancy disability leave (FMLA and PDL) and CFRA leave for birth of a child is four months AND 12 workweeks.

**FAMILY TEMPORARY DISABILITY INSURANCE (FTDI)/PAID FAMILY LEAVE (PFL)**

1. **Threshold questions:**

**Are you a covered employer?**

  - Employ 1+ employee who participates in short term disability insurance (SDI)?

**Is employee eligible for leave?**

  - Caution!**
    - No minimum longevity requirements.
    - However the amount of time employed relates to amount of payout available from State of CA
2. **Reason for taking leave:**
  - Employee is unable to work due to sickness or injury of a family member
    - Caution!**
      - Family member includes domestic partner
  - Employee is unable to work due to birth, adoption or foster care placement or a new child
3. **Amount of Leave**
  - Provides up to 6 weeks of wage replacement benefits
  - Does not provide an independent right to a leave of absence
  - Seven day waiting period
4. **Benefits and Pay During FTDI/PFL**
  - Provides up to 6 weeks of wage replacement benefits
    - Most workers will receive approximately 55% of their pre-taxed weekly wage, up to a maximum of \$840, while on leave.
  - Employers may require that employees utilize up to two (2) weeks of earned but unused vacation leave prior to that employee's receipt of FTDI/PFL but not sick leave
5. **Reinstatement Rights**
  - No job protection under FTDI/PFL alone. Simply provides partial wage replacement when an employee cannot work due to the need to care for a child, parent, spouse, or registered domestic partner, or to bond with a new minor child.
  - Caution!**
    - Some employees will have reinstatement rights if FTDI/PFL runs concurrently with FMLA or CFRA.
6. **Coordinating FMLA/CFRA and FTDI/PFL**
  - FTDI/PFL does not change FMLA/CFRA. Merely provides six (6) weeks of paid benefits to employees who suffer a wage loss when they take time off work to care for others.
  - Employees may be eligible for FTDI/PFL (no longevity) but not for FMLA/CFRA (requires employment 1250 hours in preceding 12 months).
  - If employees eligible for FMLA/CFRA and FTDI/PFL may run concurrently.

**DISABILITY LEAVES: ADA AND FEHA****1. Threshold questions:****Are you a covered employer?**

- 5+ employees? Covered by FEHA
- 15+ employees? Covered by ADA

**Is the employee or applicant covered?**

- Qualified individual with a disability?
- Or, a Person regarded as having such a disability?
- Or, a Person with a record of such disability?

**Caution!**

- No minimum longevity requirements.

**Caution!**

- Applies to applicants and employees.

**2. Does the individual have a physical or mental disability that limits a major life activity?**

- Physical or mental disability must limit a major life activity besides working
  - ADA: physical or mental impairment must substantially limit a major life activity
  - FEHA: physical or mental impairment must limit a major life activity
  - Caution!**
    - Under CA law an individual need not to be substantially limited. Just limited. This is a low threshold.
  - Caution!**
    - Major life activity is broadly defined
    - Includes physical, mental and social activities and working (regardless of whether the limitation implicates a broad class of jobs)
      - Examples: sleeping, reading, interacting with others
  - Certain conditions are now disabilities as a matter of law:
    - HIV/AIDS
    - Hepatitis
    - Epilepsy
    - Seizure disorder
    - Diabetes
    - Clinical depression
    - Bipolar disorder
    - Multiple sclerosis
    - Heart disease
- Or, a Physical or mental disability that limits the major life activity of working?
  - ADA: Inability to perform a broad range of jobs
  - FEHA: Limited in ability to perform a specific job?

**3. Is the individual regarded as having a physical or mental disability that limits a major life activity?**

- Is individual regarded as having a physical or mental disability which limits a major life activity besides working?
  - Caution!**

- Major life activity is broadly defined
- Includes physical, mental and social activities and working (regardless of whether the limitation implicates a broad class of jobs)
  - Examples: sleeping, reading, interacting with others

- Certain conditions are now disabilities as a matter of law. Is employee regarded as having:
  - HIV/AIDS
  - Hepatitis
  - Epilepsy
  - Seizure disorder
  - Diabetes
  - Clinical depression
  - Bipolar disorder
  - Multiple sclerosis
  - Heart disease

- Is the individual regarded as having a physical or mental disability which limits the major life activity of working?

- ADA: Inability to perform a broad range of jobs
- FEHA: Limited in ability to perform a specific job?

**Caution!**

- Regarded as unable to perform does not equate to regarded as disabled.

**4. Is the disabled individual otherwise qualified?**

- Can the individual perform the essential functions of the job with or without reasonable accommodation?

**5. If the employee (or applicant) can only perform the job with reasonable accommodation, the employer and employee must engage in the Interactive Process**

- Areas subject to modification or adjustment as a reasonable accommodation
  - Job application process
  - Work environment
  - Benefits and privileges of employment: must be equal
    - Training
    - Services
    - Parties + social functions
    - Communications
    - Leaves of absence
- Caution!**
  - The EEOC guidance broadly defines "reasonable accommodation" to include anything from reassignment to providing qualified readers.

**Caution!**

- Failure to engage in the interactive process is a separate violation of FEHA under CA law. Employers must engage in this dialogue.

**6. Is the requested or needed accommodation an undue hardship?**

- Caution!**
  - The burden is on the employer to show an undue hardship
  - The burden is very high
- Undue hardship issues:

- Nature and cost of accommodation needed
- Overall financial resources of the facility as well as other facilities owned by the employer
- Type of operation
- Impact the accommodation will have on the operation of the facility

7. **What if the requested/needed accommodation is a leave of absence?**

- Determine whether FMLA/CFRA covered and so designate
  - Caution!**
    - Do not assume if covered under ADA/FEHA covered under FMLA
- If the individual needs a leave of more than 12 workweeks or not FMLA/CFRA covered:**
  - Undue burden analysis
    - Permitted to take into account initial 12 weeks of leave to determine whether an undue burden
  - Caution!**
    - Some California courts have found an unpaid LOA of one year is a reasonable accommodation
- Benefits and pay on an ADA/FEHA disability LOA: consistent with other employees on an LOA

8. **Request for medical certification from health care provider?**

- Under the ADA an employer may ask disability related questions or require employees to take medical examinations only if they are “job related” and “consistent with business necessity”
- Caution!**
  - Even though an employer may ask disability related questions under the ADA, employers should be careful and limit their inquiries to understanding the individual’s limitations in performing the essential functions of the job and the accommodations that will allow an employee to do so, rather than digging into the medical condition or symptoms underlying the disability or necessitating the accommodation.
- Caution! Employers must**
  - Protect the employee or applicant’s right to privacy
  - Do not allow anyone without the need to know to see the information
  - Keep the medical information in a file separate from the personnel file

9. **Benefits and Pay During an ADA/ FEHA Leave**

- Generally unpaid
- Caution!**
  - Consider full or partial days of absence for exempt employees
- Can require use of vacation or sick leave
- Group health plan: Employer to maintain coverage under group health plan for duration of leave and under conditions which coverage would have provided had employee not taken leave
- Other benefits: treat same as employees on other LOAs

**WORKERS COMPENSATION LEAVES**

1. **Threshold questions:**

**Are you a covered employer?**

- 1+ employees?

**Is the employee or applicant covered?**

- Injury arises out of and in the course of employment
- Caution!**
  - No minimum longevity requirements.

2. **Reasons for taking leave:**

- To provide medical treatment for employees injured in the course and scope of employment, including temporary and permanent disability work – or because unable to perform duties.

3. **Leave available:**

- Employees may reject an alternative work schedule or light duty and accept FMLA/CFRA leave
- Leave is provided at least until the employee is permanent and stationary

**NON-WORK RELATED INJURIES OR ILLNESSES**

1. **Do you provide sick leave through a sick leave policy? If yes:**

- Employee can only use accrued and available sick leave
- Employee can use for “illness” of self, child, spouse, parent, domestic partner or child of domestic partner (“kinicare”)
- Caution!**
  - Remember that illness need not be for a “serious health condition”
- Caution!**
  - Remember that an employee can use ½ of accrued leave to care for child, spouse, parent, domestic partner or child of domestic partner
- Use of sick leave is option of employee
- Employer can require compliance with policy
- Does not apply to insurance + ERISA plans
- Does not extend CFRA/FMLA leave unless used for a domestic partner

**DON'T FORGET TO CONSIDER OTHER LEAVE OBLIGATIONS THAT MIGHT APPLY!!**

**OTHER LEGALLY REQUIRED LEAVES IN CALIFORNIA TO CONSIDER**

1. Literacy Leave
2. Domestic Violence Leave
3. Crime Victims Leave
4. Jury/Witness Duty Leave
5. Military Leave
6. Drug & Alcohol Rehabilitation Leave
7. Parental School Function Leave
8. Volunteer Firefighter + Peace Officer Leave
9. Religious Accommodation Leave

**OTHER LEAVES THAT EMPLOYERS SOMETIMES PROVIDE BY CONTRACT OR HANDBOOK**

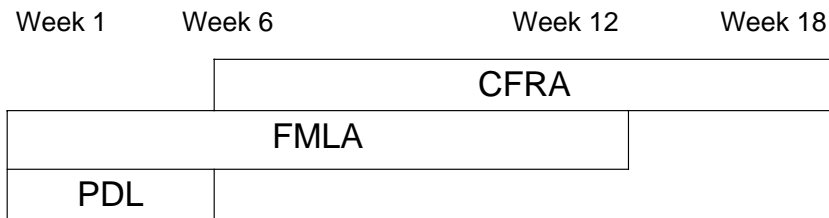
1. Vacation "Leave"
2. Holiday "Leave"
3. Bereavement "Leave"
4. Personal "Leave"

## Coordination of FMLA/CFRA and CPDL

- CFRA and CPDL are separate and distinct
- FMLA and CPDL run concurrently
- CFRA begins after CPDL ends
- Maximum entitlement in California for both pregnancy disability leave (FMLA and CPDL) and CFRA leave for reason of the birth of a child is four months and 12 workweeks



### A Sane Coordination of FMLA/ CFRA and CPDL



### A Sane Coordination of FMLA/ CFRA and CPDL

