

ATTACHMENT D

Fair Employment & Housing Council Employment Regulations Regarding Criminal History, the California Family Rights Act, and the New Parent Leave Act

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 2. Discrimination in Employment

Article 2. Particular Employment Practices; Article 11. California Family Rights Act and New Parent Leave Act

TEXT

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Article 2. Particular Employment Practices

§ 11017.1. Consideration of Criminal History in Employment Decisions.

(a) Except in the circumstances addressed in subsections (1) - (4) below, employers and other covered entities (“employers” for purposes of this section) are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant. Employers are prohibited from inquiring about criminal history on employment applications or from seeking such information through other means, such as a background check or internet searches directed at discovering criminal history, until after a conditional employment offer has been made to the applicant. The prohibition against inquiring about or using any criminal history before a conditional offer of employment has been made does not apply in the following circumstances:

(1) If the position is one for which a state or local agency is otherwise required by law to conduct a conviction history background check;

(2) If the position is with a criminal justice agency, as defined in Section 13101 of the Penal Code;

(3) If the position is as a Farm Labor Contractor, as described in Section 1685 of the Labor Code; or

(4) If the position is one that an employer or an employer’s agent is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. Federal law, for purposes of this provision, includes rules or regulations promulgated by a self-regulatory organization as defined in Section 3(a)(26) of the Security Exchange Act of 1934, 15 U.S.C. § 78c(a)(26).

(b) A labor contractor, union hiring hall and client employer are governed in the same way by section 11017.1 of these regulations as are other employers.

(1) A labor contractor or union hiring hall may not decline to admit a worker to a pool or availability list, discontinue a worker’s inclusion in a pool or availability list, or decline to refer a worker to a position with a client employer, because of the worker’s criminal history unless the labor contractor or union hiring hall has complied with the procedures and requirements outlined in section 11017.1 of these regulations. To the extent labor contractors or union hiring halls place applicants in to a pool of workers from which individuals may be assigned to a variety of positions, the labor contractors or union hiring halls must still comply with the requirements of section 11017.1, including the individualized assessment of whether any criminal history being considered has a direct and adverse relationship with the specific duties of the jobs for which the applicant may be assigned from the pool or hall.

(2) If a labor contractor or union hiring hall re-conducts inquiries into criminal history to maintain the eligibility of

workers admitted to a pool or availability list, then it must comply with the procedures and requirements outlined in section 11017.1 of these regulations. When re-conducting an inquiry, labor contractors or union hiring halls cannot satisfy the requirements of subsection (c) if they disqualify a worker from retention in a pool based on conviction history that was already considered and deemed not disqualifying for entry into the pool in the first place unless the decision is based on new material developments such as changes to job duties, legal requirements or experience or data regarding the particular convictions involved.

(3) A client employer may inquire into or consider the conviction history of a worker supplied by a labor contractor or union hiring hall only after extending a conditional offer of employment to the worker and when following the procedures described in subsections (a) through (c), unless exempted pursuant to subsection (a)(1) – (4). A client employer violates this section by instructing labor contractors or union hiring halls to refer only workers without conviction records, unless exempted by subsection (a)(1) – (4).

(4) For purposes of section 11017.1 of these regulations only:

(A) “Employer” includes a labor contractor and a client employer.

(B) “Client employer” means a business entity, regardless of its form, that selects workers from a pool or availability list, or obtains or is provided workers to perform labor within its usual course of business from a labor contractor.

(C) “Labor contractor” means an individual or entity, either with or without a contract, which supplies a client employer with, or maintains a pool or availability list of, workers to perform labor within the client employer’s usual course of business. This definition is not intended to include Farm Labor Contractors.

(D) “Hiring hall” means an agency or office operated by a union, by an employer and union, or by a state or local employment service, to provide and place employees for specific jobs.

(E) “Pool or availability list” means applicants or employees admitted in to entry in the hiring hall or other hiring pool utilized by one or more employers and/or provided by a labor contractor for use by prospective employers.

(c) Consideration of Criminal History after a Conditional Offer of Employment Has Been Made. Employers in California are prohibited from inquiring into, considering, distributing, or disseminating information regarding the following types of criminal history both after a conditional offer has been made and in any other subsequent employment decisions such as decisions regarding promotion, training, discipline, lay-off, and termination:

Introduction. Employers and other covered entities (“employers” for purposes of this section) in California are explicitly prohibited under other state laws from utilizing certain enumerated criminal records and information (hereinafter “criminal history”) in hiring, promotion, training, discipline, lay off, termination, and other employment decisions as outlined in subsection (b) below. Employers are prohibited under the Act from utilizing other forms of criminal history in employment decisions if doing so would have an adverse impact on individuals on a basis enumerated in the Act that the employer cannot prove is job related and consistent with business necessity or if the employee or applicant has demonstrated a less discriminatory alternative means of achieving the specific business necessity as effectively.

(b) Criminal History Information Employers Are Prohibited from Seeking or Considering, Irrespective of Adverse Impact. Except if otherwise specifically permitted by law, employers are prohibited from considering the following types of criminal history, or seeking such history from the employee, applicant or a third party, when making employment decisions such as hiring, promotion, training, discipline, lay-off and termination:

(1) An arrest or detention that did not result in conviction (Labor Code section 432.7 (see limited exceptions in subsections (a)(1) for an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial and (f)(1) for specified positions at health facilities); Government Code section 12952 (for hiring decisions));

(2) Referral to or participation in a pretrial or post-trial diversion program (Labor Code section 432.7 and Government Code section 12952(d));

(3) A conviction that has been judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant

to law (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45) or any conviction for which the person has received a full pardon or has been issued a certificate of rehabilitation (Id.);

(4) An arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law (~~Id.~~ Labor Code section 432.7); and

(5) A non-felony conviction for possession of marijuana that is two or more years old (Labor Code section 432.8).

(6) In addition to the limitations provided in subdivisions (1)-(5), employers that obtain investigative consumer reports such as background checks are also subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and the California Investigative Consumer Reporting Agencies Act (Civil Code section 1786 et seq.).

(7) Employers may also be subject to local laws or city ordinances that provide additional limitations.

(d) Requirements if an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant's Conviction History.

(1) If an employer intends to deny an applicant the employment position they were conditionally offered based solely or in part on the applicant's conviction history, the employer must first make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. The standard for determining what constitutes a direct and adverse relationship that justifies denying the applicant the position is the same standard described in subdivision (g) of this section that is used to determine whether the criminal conviction history is job-related and consistent with business necessity. The individualized assessment needs to include, at a minimum, consideration of the following factors:

(A) The nature and gravity of the offense or conduct;

(B) The time that has passed since the offense or conduct and/or completion of the sentence; and

(C) The nature of the job held or sought.

(2) If, after conducting an individualized assessment, the employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant from the employment conditionally offered, the employer shall notify the applicant of the preliminary decision in writing. The written notice to the applicant may, but is not required to, justify or explain the employer's reasoning for making the decision. However, the notice to the applicant must include all of the following:

(A) Notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;

(B) A copy of the conviction history report utilized or relied on by the employer, if any (such reports include, but are not limited to: consumer reports; credit reports, public records, results of internet searches, news articles or any other writing containing information related to the conviction history that was utilized or relied upon by the employer); and

(C) An explanation of the applicant's right to respond to the notice before the preliminary decision rescinding the offer of employment becomes final and the deadline by which to respond (which can be no less than five business days from the date of receipt of the notice). If notice is transmitted through a format that does not provide a confirmation of receipt, such as a written notice mailed by an employer without tracking delivery enabled, the notice shall be deemed received five calendar days after the mailing is deposited for delivery for California addresses, ten calendar days after the mailing for addresses outside of California, and twenty calendar days after mailing for addresses outside of the United States. The explanation shall inform the applicant that the response may include submission of evidence challenging either the factual accuracy of the conviction history report, and/or evidence of rehabilitation or mitigating circumstances, or both. The types of evidence that may demonstrate

rehabilitation or mitigating circumstances may include, but is not limited to: the length and consistency of employment history before and after the offense or conduct; the facts or circumstances surrounding the offense or conduct; whether the individual is bonded under a federal, state or local bonding program; and rehabilitation efforts such as education or training. If, within five business days of receipt of the notice (or any later deadline set by the employer), the applicant notifies the employer in writing that the applicant disputes the factual accuracy of the conviction history being relied upon and that the applicant is taking specific steps to obtain evidence supporting the applicant's assertion, then the applicant shall be permitted no less than five additional days to respond to the notice before the employer's decision to rescind the employment offer becomes final.

(3) The employer shall consider any information submitted by the applicant before making a final decision regarding whether or not to rescind the conditional offer of employment. If the employer makes a final decision to rescind the conditional offer and deny an application based solely or in part on the applicant's conviction history, the employer shall notify the applicant in a writing that includes the following:

(A) The final denial or disqualification decision reached. The employer may also include, but is not required to include, the justification or an explanation of the employer's reasoning for reaching the decision that it did;

(B) Any procedure the employer has for the applicant to challenge the decision or request reconsideration; and

(C) The right to contest the decision by filing a complaint with the Department of Fair Employment and Housing.

(e) Disparate Treatment. The Act also prohibits employers from treating applicants or employees differently in the course of considering criminal conviction history, or any evidence of rehabilitation or mitigating circumstances, if the disparate treatment is substantially motivated by a basis enumerated in the Act.

(e) Additional Criminal History Limitations, Irrespective of Adverse Impact.

~~(1) State or local agency employers are prohibited from asking applicants for employment to disclose information concerning their conviction history, including on an employment application, until the employer has determined that the applicant meets the minimum employment qualifications as stated in the notice for the position (Labor Code section 432.9).~~

~~(2) Employers may also be subject to local laws or city ordinances that provide additional limitations. For example, in addition to the criminal history outlined in subsection (b), San Francisco employers are prohibited from considering a conviction or any other determination or adjudication in the juvenile justice system; offenses other than a felony or misdemeanor, such as an infraction (other than driving record infractions if driving is more than a de minimis element of the job position); and convictions that are more than seven years old (unless the position being considered supervises minors, dependent adults, or persons 65 years or older) (Article 49, San Francisco Police Code).~~

~~(3) Employers that obtain investigative consumer reports such as background checks are also subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and the California Investigative Consumer Reporting Agencies Act (Civil Code section 1786 et seq.).~~

(df) Consideration of Other Criminal Convictions and the Potential Adverse Impact. In addition to the types of criminal history addressed in subsection (c) that employers are explicitly prohibited from inquiring about or considering unless an exception applies, cConsideration of other forms of criminal convictions, not enumerated above, may have an adverse impact on individuals on a basis protected by the Act, including, but not limited to, gender, race, and national origin. An applicant or employee bears the burden of demonstrating that the policy of considering criminal convictions has an adverse impact on a basis enumerated in the Act. For purposes of such a determination, adverse impact is defined at Sections 11017 and 11010 and the *Uniform Guidelines on Employee Selection and Procedures* (29 C.F.R. 1607 (1978)) incorporated by reference in Section 11017(a) and (e). The applicant(s) or employee(s) bears the burden of proving an adverse impact. An adverse impact may be established through the use of conviction statistics or by offering any other evidence that establishes an adverse impact. State- or national-level statistics showing substantial disparities in the conviction records of one or more categories enumerated in the Act are presumptively sufficient to establish an adverse impact. This presumption may be rebutted by a showing that there is a reason to expect a markedly different result after accounting for any particularized circumstances such as the geographic area encompassed by the applicant or employee pool, the particular types of convictions being considered, or the particular job at issue.

(ge) Establishing “Job-Related and Consistent with Business Necessity.”

(1) If the policy or practice of considering criminal convictions creates an adverse impact on applicants or employees on a basis enumerated in the Act, the burden shifts to the employer to establish that the policy is nonetheless justifiable because it is job-related and consistent with business necessity. The criminal conviction consideration policy or practice needs to bear a demonstrable relationship to successful performance on the job and in the workplace and measure the person’s fitness for the specific position(s), not merely to evaluate the person in the abstract. In order to establish job-relatedness and business necessity, any employer must demonstrate that the policy or practice is appropriately tailored, taking into account at least the following factors:

(A) The nature and gravity of the offense or conduct;

(B) The time that has passed since the offense or conduct and/or completion of the sentence; and

(C) The nature of the job held or sought.

(2) Demonstrating that a policy or practice of considering conviction history in employment decisions is appropriately tailored to the job for which it is used as an evaluation factor requires that an employer demonstrate the applicant’s conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position~~either:~~

~~(A) Demonstrate that any “bright line” conviction disqualification or consideration (that is, one that does not consider individualized circumstances) can properly distinguish between applicants or employees that do and do not pose an unacceptable level of risk and that the convictions being used to disqualify, or otherwise adversely impact the status of the employee or applicant, have a direct and specific negative bearing on the person’s ability to perform the duties or responsibilities necessarily related to the employment position. Bright-line conviction disqualification or consideration policies or practices that include conviction-related information that is seven or more years old are subject to a rebuttable presumption that they are not sufficiently tailored to meet the job-related and consistent with business necessity affirmative defense (except if justified by subsection (fh) below). An individualized assessment must involve notice to the adversely impacted employee (before any adverse action is taken) that they have been screened out because of a criminal conviction; a reasonable opportunity for the individuals to demonstrate that the exclusion should not be applied due to their particular circumstances; and consideration by the employer as to whether the additional information provided by the individuals or otherwise obtained by the employer warrants an exception to the exclusion and shows that the policy as applied to the employee is not job related and consistent with business necessity;~~or~~~~

~~(B) Conduct an individualized assessment of the circumstances and qualifications of the applicants or employees excluded by the conviction screen. An individualized assessment must involve notice to the adversely impacted employees or applicants (before any adverse action is taken) that they have been screened out because of a criminal conviction; a reasonable opportunity for the individuals to demonstrate that the exclusion should not be applied due to their particular circumstances; and consideration by the employer as to whether the additional information provided by the individuals or otherwise obtained by the employer warrants an exception to the exclusion and shows that the policy as applied to the employees or applicants is not job related and consistent with business necessity.~~

~~(3) Regardless of whether an employer utilizes a bright line policy or conducts individualized assessments, bBefore an employer may take an adverse action such as declining to hire, discharging, laying off, or declining to promote an adversely impacted individual based on conviction history obtained by a source other than the applicant or employee (e.g. through a credit report or internally generated research), the employer must give the impacted individual notice of the disqualifying conviction and a reasonable opportunity to present evidence that the information is factually inaccurate. If the applicant or employee establishes that the record is factually inaccurate, then that record cannot be considered in the employment decision.~~

(hf) Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History. In some instances, employers are subject to federal or state laws or regulations that prohibit individuals with certain criminal records from holding particular positions or occupations or mandate a screening process employers are required or permitted to utilize before employing individuals in such positions or

occupations (e.g., 21 U.S.C. § 830(e)(1)(G); Labor Code section 432.7). Examples include, but are not limited to, government agencies employing individuals as peace officers, employers employing individuals at health facilities where they will have regular access to patients, and employers employing individuals at health facilities or pharmacies where they will have access to medication or controlled substances. Some federal and state laws and regulations make criminal history a determining factor in eligibility for occupational licenses (e.g., 49 U.S.C. § 31310). Compliance with federal or state laws or regulations that mandate particular criminal history screening processes, or requiring that an employee or applicant possess or obtain any required occupational licenses constitute rebuttable defenses to an adverse impact claim under the Act.

(~~g~~) Less Discriminatory Alternatives. If an employer demonstrates that its policy or practice of considering conviction history is job-related and consistent with business necessity, adversely impacted employees or applicants may still prevail under the Act if they can demonstrate that there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer.

~~(h) Disparate Treatment. As in other contexts, the Act prohibits employers from treating applicants or employees differently in the course of considering criminal conviction history if the disparate treatment is substantially motivated by a basis enumerated in the Act.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, ~~and~~ 12940, and 12952, Government Code.

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

§ 11087. Definitions.

The following definitions apply only to this article. The definitions in the federal regulations that became effective March 8, 2013 interpreting the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. § 2601 et seq.) shall also apply to this article, to the extent that they are not inconsistent with the following definitions:

(a) "Certification" means a written communication from the health care provider of the child, parent, spouse, or employee with a serious health condition to the employer of the employee requesting a family care leave to care for the employee's child, parent or spouse, or a medical leave for the employee's own serious health condition.

(1) For family care leave for the employee's child, parent, or spouse, this certification need not identify the serious health condition involved, but shall contain the information identified in Government Code section 12945.2.

(A) the date, if known, on which the serious health condition commenced,

(B) the probable duration of the condition,

(C) an estimate of the amount of time which the health care provider believes the employee needs to care for the child, parent or spouse, and

(D) a statement that the serious health condition warrants the participation of the employee to provide care during a period of treatment or supervision of the child, parent or spouse.

1. "Warrants the participation of the employee," within the meaning of Government Code section 12945.2, includes, but is not limited to, providing psychological comfort and arranging third party care for the child, parent or spouse, as well as directly providing, or participating in, the medical care.

(2) For medical leave for the employee's own serious health condition, this certification need not, but may, at the employee's option, identify the serious health condition involved. Any certification shall contain the information identified in Government Code section 12945.2, as is demonstrated in section 11097 of these regulations. For purposes of the certification "unable to perform the function of ~~the employee's his or her position~~" means that an employee is unable to perform any one or more of the essential functions of ~~the employee's his or her position~~.

The certification shall contain:

(A) The date, if known, on which the serious health condition commenced,

(B) The probable duration of the condition, and

(C) A statement that, due to the serious health condition, the employee is unable to work at all or is unable to perform any one or more of the essential functions of ~~his or her~~ the employee's position.

(b) "CFRA" means the Moore-Brown-Roberti California Family Rights Act of 1993. (California Family Rights Act, Gov. Code, §§ 12945.1-12945.2.) "CFRA leave" means family care or medical leave taken pursuant to CFRA as compared to "NPLA" which means the New Parent Leave Act, Gov. Code, § 12945.6.

(c) "Child" means a biological, adopted, or foster ~~son or daughter~~ child, a ~~stepson or stepdaughter~~ stepchild, a legal ward, or a child of an employee who stands in loco parentis to that child, who is either under 18 years of age or an adult dependent child. An adult dependent child is an individual who is 18 years of age or older and who is incapable of self-care because of a mental or physical disability within the meaning of Government Code section 12926(j) and (l).

(1) "In loco parentis" means in the place of a parent; instead of a parent; charged with a parent's rights, duties, and responsibilities. It does not require a biological or legal relationship.

(d) "Covered employer" means any person or individual, including successors in interest of a covered employer, engaged in any business or enterprise in California who directly employs ~~50 or more persons~~ 20 or more persons for purposes of the NPLA, or 50 or more persons for purposes of the CFRA, 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. It also includes the state of California, counties, and any other political or civil subdivision of the state and cities, regardless of the number of employees. There is no requirement that the 20 employees (for purposes of the NPLA) or 50 employees (for purposes of the CFRA) work at the same location or work full-time. "Employer" as used in these regulations means "covered employer."

(1) "Directly employs" means that the employer maintains an aggregate of at least 20 (NPLA) or 50 (CFRA) part or full-time employees on its payroll(s) for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The workweeks do not have to be consecutive. The phrase "current or preceding calendar year" refers to the calendar year in which the employee requests the leave or the calendar year preceding this request. Employees on paid or unpaid leave, including CFRA or NPLA leave, leave of absence, disciplinary suspension, or other leave, are counted.

(2) "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.

(3) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under CFRA or NPLA. Joint employers may be separate and distinct entities with separate owners, managers, and facilities. A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality based on the economic realities of the situation. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(A) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(B) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or

(C) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(e) “Eligible employee” means a full- or part-time employee working in California who has been employed for a total of at least 12 months (52 weeks) with the employer at any time prior to the commencement of a CFRA or NPLA leave, and who has actually worked (within the meaning of the California Labor Code and Industrial Welfare Commission Wage Orders) for the employer at least 1,250 hours during the 12-month period immediately prior to the date the CFRA or NPLA leave is to commence.

(1) Once the employee meets these two eligibility criteria and takes a leave for a qualifying event, the employee does not have to requalify, in terms of the numbers of hours worked, in order to take additional leave for the same qualifying event during the employee’s 12-month leave period.

(2) Employment periods prior to a break in service of seven years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months, except for a break in service caused by a military service obligation or written agreement to the contrary. Nothing in this section prevents an employer from considering employment prior to a continuous break in service of more than seven years so long as the employer does so uniformly, with respect to all employees with similar breaks in service.

(3) For an employee who takes a pregnancy disability leave, and who then wants to take CFRA or NPLA leave for reason of the birth of ~~her~~ the employee’s child immediately after ~~her~~ the employee’s pregnancy disability leave, the 12-month period during which ~~she~~ the employee must have worked 1,250 hours is that period immediately preceding ~~her~~ the employee’s first day of pregnancy disability leave, not the first day of the subsequent CFRA or NPLA leave for reason of the birth of ~~her~~ the employee’s child.

(4) In order to be eligible, the employee must also work for an employer who maintains on the payroll, as of the date the employee gives notice of the need for leave, for purposes of the CFRA, at least 50 part- or full-time employees, or for purposes of the NPLA, 20 part- or full-time employees, within 75 miles, measured in surface miles, using surface transportation, of the worksite where the employee requesting the leave is employed. A worksite can refer to either a single location or a group of contiguous locations.

(A) For employees with no fixed worksite, the worksite is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, for the purpose of counting 20 (NPLA) or 50 (CFRA) employees, if a salesperson works from home in California, but reports to and receives assignments from ~~her~~ the salesperson’s corporate headquarters in New York, the New York headquarters, not ~~her~~ the salesperson’s home, would constitute the worksite from which there must be 20 (NPLA) or 50 (CFRA) employees within a 75-mile radius in order for the salesperson to be eligible under the NPLA or CFRA.

(B) When an employee is jointly employed by two or more employers, the employee’s worksite is the primary employer’s office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee’s worksite is that of the secondary employer. The employee is also counted by the secondary employer to determine CFRA or NPLA eligibility for the secondary employer’s employees.

(C) Once the employee meets this eligibility criterion and gives notice of the need for a leave, the employer may not deny the leave, cut short the leave, or deny any subsequent leave taken for the same qualifying event during the employee’s 12-month leave period, even if the number of employees within the relevant 75-mile radius falls below 20 employees for purposes of NPLA, or 50 employees for purposes of CFRA. In such cases, however, the employee would not be eligible for any subsequent leave requested for a different qualifying event.

(5) If an employee is not eligible for CFRA or NPLA leave at the start of a leave because the employee has not met the 12-month length of service requirement, the employee may nonetheless meet this requirement while on leave, because leave to which ~~he/she~~ the employee is otherwise entitled counts toward length of service (although not for the 1,250 hour requirement). The employer should designate the portion of the leave in which the employee has met the 12-month requirement as CFRA or NPLA leave. For example, if an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g. workers’ compensation, group health plan benefits, etc.), the week counts as a week of employment.

(f) “Employment in the same position” means employment in, or reinstatement to, the original position the employee held prior to taking a CFRA or NPLA leave.

(g) “Employment in a comparable position” means employment in a position that is virtually identical to the employee’s original position in terms of pay, benefits, and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority. It must be performed at the same or geographically proximate worksite from where the employee was previously employed. It ordinarily means the same shift or the same or an equivalent work schedule. It has the same meaning as the term “equivalent position” in FMLA and its implementing regulations.

(h) “Family care leave” means either:

(1) Leave of up to a total of 12 workweeks in a 12-month period for reason of the birth of a child of the employee or the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, and a guarantee of employment, made at the time the leave is granted, in the same or a comparable position upon termination of the leave; or

(2) Leave of up to a total of 12 workweeks in a 12-month period to care for a child, parent, or spouse of the employee who has a serious health condition, and a guarantee of employment, made at the time the leave is granted, in the same or a comparable position upon termination of the leave.

(i) “FMLA” means the federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq., and its implementing regulations, 29 C.F.R. Part 825 that became effective March 8, 2013. “FMLA leave” means family care or medical leave taken pursuant to FMLA.

(j) “Health care provider” means either:

(1) an individual holding either a physician’s and surgeon’s certificate issued pursuant to Article 4 (commencing with section 2080) of Chapter 5 of Division 2 of the Business and Professions Code or an osteopathic physician’s and surgeon’s certificate issued pursuant to Article 4.5 (commencing with section 2099.5) of Chapter 5 of Division 2 of the Business and Professions Code, 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 of others “capable of providing health care services,” as set forth in FMLA and its implementing regulations.

(k) “Key employee” means an employee who is paid on a salary basis and is amongst the highest paid 10 percent of the employer’s employees who are employed within 75 miles of the employee’s worksite at the time of the leave request, as described in Government Code section 12945.2.

(l) “Medical leave” means leave of up to a total of 12 workweeks in a 12-month period because of an employee’s own serious health condition that makes the employee unable to work at all or unable to perform any one or more of the essential functions of the position of that employee. The term “essential functions” is defined in Government Code section 12926. “Medical leave” does not include leave taken for an employee’s pregnancy disability, as defined in (n) below, except as specified below in section 11093(c)(1).

(m) “NPLA” means the New Parent Leave Act. (Gov. Code, § 12945.6.) “NPLA leave” means leave taken pursuant to the NPLA.

(n) “Parent” means a biological, foster, or adoptive parent, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child. A biological or legal relationship is not necessary for a person to have stood in loco parentis to the employee as a child. Parent does not include a parent-in-law.

(o) “Pregnancy disability leave” means a leave taken for disability on account of pregnancy, childbirth, or a related medical condition, pursuant to Government Code section 12945 and defined in section 11035(r) of the regulations.

(p) “Reason of the birth of a child,” within the meaning of Government Code section 12945.2 and these regulations includes, but is not limited to, bonding with a child after birth.

(q) “Reinstatement” means the return of an employee to the position that the employee held prior to CFRA or NPLA leave, or a comparable position, and is synonymous with “restoration” within the meaning of FMLA and its implementing regulations.

(r) “Serious health condition” means an illness, injury (including, but not limited to, on-the-job injuries), impairment, or physical or mental condition of the employee or a child, parent, or spouse of the employee that involves either inpatient care or continuing treatment, including, but not limited to, treatment for substance abuse.

(1) “Inpatient care” means a stay in a hospital, hospice, or residential health care facility, any subsequent treatment in connection with such inpatient care, or any period of incapacity. A person is considered an “inpatient” when a health care facility formally admits ~~him or her~~ the person to the facility with the expectation that ~~he or she~~ the person will remain at least overnight and occupy a bed, even if it later develops that such person can be discharged or transferred to another facility and does not actually remain overnight.

(2) “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.

(3) “Continuing treatment” means ongoing medical treatment or supervision by a health care provider, as detailed in section 11097 of these regulations.

(s) “Spouse” means a partner in marriage as defined in Family Code section 300 or a registered domestic partner, within the meaning of Family Code sections 297 through 297.5. As used in this article and the Family Code, “spouse” includes same-sex partners in marriage.

(t) “Twelve workweeks” means the equivalent of 12 of the employee’s normally scheduled workweeks. (See also section 11090(c).)

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12945.2 and 12945.6, Government Code; *J.E. Robinson v. FEHC* (1992) 2 Cal.4th 226 [5 Cal.Rptr.2d 782]; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, ~~2611-et seq.~~; and 29 C.F.R. § 825.

§ 11088. Right to CFRA or NPLA Leave: Denial of Leave; Reasonable Request; Permissible Limitation.

(a) It is an unlawful employment practice for a covered employer to refuse to grant, upon reasonable request, a CFRA or NPLA leave to an eligible employee, unless such refusal is justified by the permissible limitation specified below in subdivision (c).

(b) Denial of leave.

(1) Burden of proof.

Denial of a request for CFRA or NPLA leave is established if the Department or the employee shows, by a preponderance of the evidence, that the employer was a covered employer, the employee making the request was an eligible employee, the request was for a CFRA-qualifying or NPLA-qualifying purpose, the request was reasonable, and the employer denied the request for CFRA or NPLA leave.

(2) Reasonable request.

A request to take a CFRA or NPLA leave is reasonable if it complies with any applicable notice requirements, as specified in section 11091, and if it is accompanied, where required, by a certification, as that term is defined in section 11087(a).

(c) Limitation on Entitlement.

If both parents are eligible for CFRA or NPLA leave but are employed by the same employer, that employer may limit leave for the birth, adoption or foster care placement of their child to a combined total of 12 workweeks in a 12-month period between the two parents. The employer may, but is not required to, grant simultaneous leave to both of the employees. The employer may not limit their entitlement to CFRA leave for any other qualifying purpose. For example, parents employed by the same employer each may take 12 weeks of CFRA leave if needed to care for a child with a serious health condition. If the parents are unmarried, they may have different family care leave rights under FMLA.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12945.2 and 12945.6, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, 2611, 2612-et seq.; and 29 C.F.R. § 825.

§ 11089. Right to Reinstatement: Guarantee of Reinstatement; Rights upon Return; Refusal to Reinstatement; Permissible Defenses.

(a) Guarantee of Reinstatement.

(1) Upon granting the CFRA leave, the employer shall inform the employee of its guarantee to reinstate the employee to the same or a comparable position, subject to the defenses permitted by section 11089(d), and shall provide the guarantee in writing upon request of the employee. For purposes of the NPLA, on or before the commencement of the leave, an employer must provide a guarantee of reinstatement to the same or a comparable position, subject to the defenses permitted in section 11089(d), and shall provide the guarantee in writing upon request of the employee.

(2) It is an unlawful employment practice for an employer, after granting a requested CFRA or NPLA leave, to refuse to reinstate the employee to the same or a comparable position at the end of the leave, unless the refusal is justified by the defenses stated in section 11089(d).

(A) An employee is entitled to reinstatement even if the employee has been replaced or the employee's his or her position has been restructured to accommodate the employee's absence.

(B) If an employee is no longer qualified for the position because of the employee's 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, the employee shall be given a reasonable opportunity to fulfill those conditions upon returning to work.

(b) Rights upon Return.

The employee is entitled to the same position or to a comparable position that is equivalent (i.e., virtually identical) to the employee's former position in terms of pay, benefits, shift, schedule, geographic location, and working conditions, including privileges, perquisites, and status. The position must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(1) Equivalent benefits include benefits resumed in the same manner and at the same levels as provided when the leave began, subject to any changes in benefit levels that may have taken place during the period of CFRA or NPLA leave affecting the entire workforce, unless otherwise elected by the employee.

(2) CFRA and NPLA do~~es~~ not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, position, or geographic location that better suits the employee's personal needs on return from leave, from offering a promotion to a better position, or from complying with an employer's obligation to provide reasonable accommodation under the disability provisions of the Fair Employment and Housing Act (FEHA).

(c) Refusal to Reinstatement.

(1) Definite Date of Reinstatement.

Where a definite date of reinstatement has been agreed upon at the beginning of the leave, a refusal to reinstate is

established if the Department or employee proves, by a preponderance of the evidence, that the leave was granted by the employer and that the employer failed to reinstate the employee to the same or a comparable position by the date agreed upon.

(2) Change in Date of Reinstatement.

If the reinstatement date differs from the employer's and employee's original agreement, a refusal to reinstate is established if the Department or employee proves, by a preponderance of the evidence, that the employer failed to reinstate the employee to the same or a comparable position within two business days, where feasible, after the employee notifies the employer of ~~his or her~~ the employee's readiness to return.

(d) Permissible Defenses.

(1) Employment Would Have Ceased or Hours Would Have Been Reduced.

An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the CFRA or NPLA leave period. An employer has the burden of proving, by a preponderance of the evidence, that an employee would not otherwise have been employed on the requested reinstatement date in order to deny reinstatement. As per (a)(1) of this section, this burden shall not be satisfied if the employee has been replaced or ~~his or her~~ the employee's position has been restructured to accommodate the employee's absence.

(A) If an employee is laid off during the course of taking CFRA or NPLA leave and employment is terminated, the employer's responsibility to continue CFRA or NPLA leave, maintain group health plan benefits and reinstate the employee ceases at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise.

(B) If a shift has been eliminated or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon reinstatement.

(2) "Key Employee."

An employer may refuse to reinstate a "key employee," as defined in section 11087(k) of these regulations, to ~~his or her~~ the employee's same position or to a comparable position only if the employer establishes, by a preponderance of the evidence, that all of the following conditions exist:

(A) The employee requesting the CFRA or NPLA leave is a salaried employee. As used in Government Code section 12945.2 (r), "salaried employee" means an employee paid on a salary basis.

(B) The employee requesting the leave is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which that employee is employed at the time of the leave request. Whether an employee is "among the highest paid 10 percent," pursuant to Government Code section 12945.2, is determined by comparing the year-to-date wages, within the meaning of the California Labor Code and Industrial Welfare Commission Wage Orders, of the employer's employees within 75 miles of the worksite where the requesting employee is employed at the time of the leave request, divided by the number of weeks worked (including weeks in which paid leave was taken).

(C) The refusal to reinstate the employee is necessary because the employee's reinstatement will cause substantial and grievous economic injury to the operations of the employer. A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury.

(D) An employer who believes it may deny reinstatement to a key employee must inform the employee in writing at the time the employee gives notice of the need for CFRA or NPLA leave (or when CFRA or NPLA leave

commences, if earlier) that the employee ~~he or she~~ is a key employee. At the same time, the employer must also inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that reinstatement will result in substantial and grievous economic injury to its operations. If the employer cannot give such notice immediately because of the need to determine whether the employee is a key employee, it shall give the notice as soon as practicable after the employee notifies the employer of a need for leave (or the commencement of leave, if earlier). An employer who fails to provide notice in compliance with this provision will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(E) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if it reinstates a key employee who has given notice of the need for CFRA or NPLA leave (or who is on CFRA or NPLA leave), the employer shall notify the employee in writing that it cannot deny CFRA or NPLA leave, but that it intends to deny reinstatement on completion of the leave. An employer should ordinarily be able to give such notice prior to the employee starting leave. The employer must serve the notice either in person or by certified mail. The notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the duration of the leave and the urgency of the need for the employee to return.

(F) If an employee on leave does not return to work in response to the employer's notification of intent to deny reinstatement, the employee continues to be entitled to maintenance of health benefits coverage as provided by section 11092(c) and the employer may not recover its cost of health benefit premiums. A key employee's rights under CFRA or NPLA continue unless and until the employee either gives notice to the employer that ~~he or she~~ the employee no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave.

(G) After an employer notifies an employee that substantial and grievous economic injury will result if the employer reinstates the employee, the employee still is entitled to request reinstatement at the end of the leave period even if ~~he or she~~ the employee did not return to work in response to the employer's notice. The employer must then again determine whether reinstatement will result in substantial and grievous economic injury, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of reinstatement.

(3) Fraudulently-obtained CFRA or NPLA Leave.

An employee who fraudulently obtains or uses CFRA or NPLA leave from an employer is not protected by CFRA's or NPLA's job restoration or maintenance of health benefits provisions. An employer has the burden of proving that the employee fraudulently obtained or used CFRA or NPLA leave.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12945.2 and 12945.6, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, 2611, 2612, 2614 et seq.; and 29 C.F.R. § 825.

§ 11090. Computation of Time Periods: Twelve Workweeks; Minimum Duration.

(a) CFRA or NPLA leave does not need to be taken in one continuous period of time. It cannot exceed more than 12 workweeks total for any purpose in a 12-month period.

(b) If the leave is common to both CFRA and FMLA, this 12-month period will run concurrently with the 12-month period under FMLA. An employer may choose any of the methods (the calendar year, any fixed 12-month "leave year," the 12-month period measured forward from the date any employee's first CFRA leave begins, or a "rolling" 12-month period measured backward from the date an employee uses any CFRA leave) allowed in the FMLA regulations that became effective March 8, 2013, 29 C.F.R. Part 825, section 825.200, subdivision (b), for determining the 12-month period in which the 12 weeks of CFRA leave entitlement occurs. The employer must, however, apply the chosen method consistently and uniformly to all employees in California and notify employees requesting CFRA or NPLA leave of its chosen method. If an employer fails to select one of the above methods for measuring the 12-month period, the method that provides the most beneficial outcome for the employee will be used. An employer wishing to change to another method is required to give at least 60 days' notice to all employees, and the transition must take place in such a

way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstance may a new method be implemented in order to avoid the Act's leave requirements.

(c) "Twelve workweeks" as that term is defined in section 11087(s), means the equivalent of 12 of the employee's normally scheduled workweeks. For eligible employees who work more or less than five days a week, or who work on alternative work schedules, the number of working days that constitutes 12 workweeks is calculated on a pro rata or proportional basis. If an employee's schedule varies from week to week to such an extent that an employer is unable to determine with any certainty how many hours the employee would otherwise have worked (but for the taking of CFRA or NPLA leave), a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period (including any hours for which the employee took leave of any type) shall be used for calculating the employee's leave entitlement.

(1) For example, for a full-time employee who works five eight-hour days per week, 12 workweeks means 60 working and/or paid eight-hour days of leave entitlement. For an employee who works half time, 12 workweeks may mean 30 eight-hour days or 60 four-hour days, or 12 workweeks of whatever is the employee's normal half-time work schedule. For an employee who normally works six eight-hour days, 12 workweeks means 72 working and/or paid eight-hour days of leave entitlement.

(2) If an employee takes leave on an intermittent or reduced work schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which the employee is entitled. For example, if an employee needs physical therapy that requires an absence from work of two hours a week, only those two hours may be charged against the employee's CFRA leave entitlement. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations.

(3) If a holiday falls within a week taken as CFRA or NPLA leave, the week is nevertheless counted as a week of CFRA or NPLA leave. If, however, the employer's business activity has temporarily ceased for some reason and employees generally are not expected to report for work for one or more weeks, (e.g., a school closing for two weeks for the Christmas/New Year holiday or summer vacation or an employer closing the plant for retooling), the days the employer's activities have ceased do not count against the employee's CFRA or NPLA entitlement. Similarly, if an employee uses CFRA or NPLA leave in increments of less than one week, the fact that a holiday may occur within a week in which an employee partially takes leave does not count against the employee's CFRA or NPLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday.

(4) If an employee normally would be required to work overtime, but is unable to do so because of a CFRA-qualifying or NPLA-qualifying reason that limits the employee's ability to work overtime, the hours that the employee would have been required to work may be counted against the employee's CFRA or NPLA entitlement. In such a case, the employee is using intermittent or reduced schedule leave. For example, if an employee normally would be required to work 48 hours in a particular week, but due to a serious health condition the employee works 40 hours that week, the employee would utilize eight hours of CFRA-protected leave out of the 48-hour workweek. Voluntary overtime hours that an employee does not work due to a serious health condition shall not be counted against the employee's CFRA leave entitlement.

(5) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than CFRA or NPLA, and prior to the employee notice of need for CFRA or NPLA leave), the hours worked under the new schedule are to be used for making this calculation.

(d) Minimum duration for CFRA or NPLA leaves taken intermittently or on a reduced leave schedule for the birth, adoption, or foster care placement of a child: CFRA or NPLA leave taken for reason of the birth, adoption, or foster care placement of a child of the employee does not have to be taken in one continuous period of time. Any leave(s) taken shall be concluded within one year of the birth or placement of the child with the employee in connection with the adoption or foster care of the child by the employee. The basic minimum duration of the leave shall be two weeks. However, an employer shall grant a request for a CFRA or NPLA leave of less than two weeks' duration on any two occasions and may grant requests for additional occasions of leave lasting less than two weeks.

(e) Minimum duration for CFRA leaves taken intermittently or on a reduced leave schedule for the serious health

condition of a parent, child, or spouse or for the serious health condition of the employee: Where CFRA leave is taken for a serious health condition of the employee's child, parent, or spouse or of the employee, leave may be taken intermittently or on a reduced work schedule when medically necessary, as determined by the health care provider of the person with the serious health condition. However, intermittent or reduced work schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition, even if ~~he or she~~ the employee does not receive treatment by a health care provider. An employer must limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave provided it is not greater than one hour.

(1) If an employee needs intermittent leave or leave on a reduced work schedule that is foreseeable based on planned medical treatment for the employee or a family member, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily to an available alternative position. This alternative position must have the equivalent rate of pay and benefits, the employee must be qualified for the position, and it must better accommodate recurring periods of leave than the employee's regular job. It need not have equivalent duties, although an employer may not transfer the employee to an alternative position to discourage the employee from taking leave or to otherwise work a hardship on the employee. Transfer to an alternative position may include altering an existing job to accommodate better the employee's need for intermittent leave or a reduced work schedule and must comply with any applicable collective bargaining agreement or employer leave policy, the FEHA, and any other applicable state or federal law.

(2) CFRA leave, including intermittent leave and/or reduced work schedules, is available to instructional employees of educational establishments and institutions under the same conditions as apply to all other eligible employees.

(3) Where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift, such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time, the entire period that the employee is forced to be absent is designated as CFRA leave and counts against the employee's CFRA entitlement. However, an employee shall be permitted to return to work if ~~he or she~~ the employee is able to perform other aspects of the work that are not physically impossible, such as administrative duties, and thereby shorten the time designated as CFRA leave.

(4) Employers may reduce exempt employees' pay for CFRA intermittent leave or a reduced work schedule, provided the reduction is not inconsistent with any applicable collective bargaining agreement or employer leave policy, the FEHA, and any other applicable state or federal law.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12945.2 and 12945.6, Government Code; DLSE Opinion Letter 03.12.2002; DLSE Opinion Letter 04.08.2002; Stats. 1993, ch. 827 (AB 1460), § 2; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, 2611, 2612 ~~et seq.~~; and 29 C.F.R. § 825.

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

(a) Advance Notice.

(1) Verbal Notice.

Unless an employer waives its employees' notice obligations described herein, an employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA or NPLA leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA, ~~or FMLA, or NPLA~~ or even mention CFRA, ~~or FMLA, or NPLA~~ to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. The mere mention of "vacation," other paid time off, or resignation does not render the notice insufficient, provided the underlying reason for the request is CFRA-qualifying or NPLA-qualifying, and the employee communicates that reason to the employer. The employer should inquire further of the employee if necessary to determine whether the employee is requesting CFRA leave or NPLA leave and to obtain necessary information concerning the leave (i.e., commencement date, expected duration, and other permissible information). An employee has an obligation to respond to an employer's

questions designed to determine whether an absence is potentially CFRA-qualifying or NPLA-qualifying. Failure to respond to permissible employer inquiries regarding the leave request may result in denial of CFRA or NPLA protection if the employer is unable to determine whether the leave is CFRA-qualifying or NPLA-qualifying.

(A) Under all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as CFRA, ~~or CFRA/FMLA~~, or NPLA qualifying, based on information provided by the employee or the employee's spokesperson, and to give notice of the designation to the employee.

(B) Employers may not retroactively designate leave as CFRA leave or NPLA leave after the employee has returned to work, except with appropriate notice to the employee and where the employer's failure to timely designate does not cause harm or injury to the employee.

(2) 30 Days' Advance Notice.

An employer may require that employees provide at least 30 days' advance notice before CFRA leave or NPLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member. The employee shall consult with the employer and make a reasonable effort to schedule any planned medical treatment or supervision so as to minimize disruption to the operations of the employer. Any such scheduling, however, shall be subject to the approval of the health care provider of the employee or the employee's child, parent or spouse.

(3) When 30 Days Not Practicable.

If 30 days' notice is not practicable, such as because of a 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.

(4) Prohibition against Denial of Leave in Emergency or Unforeseeable Circumstances.

An employer shall not deny a CFRA or NPLA leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide advance notice of the need for the leave, so long as the employee provided notice to the employer as soon as practicable.

(5) Employer Obligation to Inform Employees of Notice Requirement.

An employer shall give its employees reasonable advance notice of any notice requirements that it adopts. The employer may incorporate its notice requirements in the general notice requirements in section 11095 and such incorporation shall constitute reasonable advance notice. Failure of the employer to give or post such notice shall preclude the employer from taking any adverse action against the employee, including denying CFRA leave or NPLA leave, for failing to furnish the employer with advance notice of a need to take CFRA leave or NPLA leave.

(6) Employer Response to Leave Request.

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

(b) Medical Certification.

(1) Serious Health Condition of Child, Parent, or Spouse.

As a condition of granting a leave for the serious health condition of the employee's child, parent or spouse, the employer may require certification of the serious health condition, as defined in section 11087(a)(1). If the certification satisfies the requirements of section 11087(a)(1), the employer must accept it as sufficient. Upon expiration of the time period the health care provider originally estimated the employee needed to take care of the employee's child, parent or spouse, the employer may require the employee to obtain recertification, but only if additional leave is requested. The employer may not contact a health care provider for any reason other than to

authenticate a medical certification.

(2) Serious Health Condition of Employee.

As a condition of granting a leave for the serious health condition of the employee, the employer may require certification of the serious health condition, as defined in section 11087(a)(2). Upon expiration of the time period the health care provider originally estimated the employee needed for ~~his/her~~ the employee's own serious health condition, the employer may require the employee to obtain recertification, but only if additional leave is requested. The employer may not contact a health care provider for any reason other than to authenticate a medical certification.

(A) If the employer has a good faith, objective reason to doubt the validity of the certification the employee provides for ~~his/her~~ the employee's own serious health condition, the employer may require, at the employer's own expense, the employee to obtain the opinion of a second health care provider, designated or approved by the employer, concerning any information in the certification. The health care provider designated or approved by the employer shall not be employed on a regular basis by the employer.

1. The employer may not ask the employee to provide additional information (e.g. symptoms, diagnosis, etc.) in the medical certification beyond that allowed by these regulations.

2. The employer is responsible for complying with all applicable law regarding the confidentiality of any medical information received.

(B) In any case in which the second opinion described in (b)(2)(A) 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 both the employer and the employee, concerning any information in the certification.

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

(D) The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, without cost, upon the request of the employee.

(E) As a condition of an employee's return from medical leave, the employer may require the employee to obtain a release to return-to-work from ~~his/her~~ the employee's health care provider stating that ~~he/she~~ the employee is able to resume work, but only if the employer has a 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. An employer is not entitled to a release to return-to-work for each absence taken on an intermittent or reduced leave schedule. However, an employer is entitled to a release to return-to-work for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform ~~his or her~~ the employee's duties.

(F) An employer may not require an employee to undergo a fitness-for-duty examination as a condition of an employee's return. After an employee returns from CFRA leave, any fitness-for-duty examination must be job-related and consistent with business necessity, in accordance with section 11071 of these regulations.

(3) Providing Certification.

The employer may require that the employee provide any certification within no less than 15 calendar days of the employer's request for such certification, unless it is not practicable for the employee to do so despite the employee's good faith efforts. This means that, in some cases, the leave may begin before the employer receives the certification. Absent extenuating circumstances (e.g., unavailability of healthcare provider), if the employee fails to timely return the certification, the employer may deny CFRA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. The same rules apply to recertification. If the employee never produces the certification or recertification, the leave is not CFRA leave. At the time the employer requests certification, the employer also must advise the employee of the anticipated consequences of ~~his or her~~ the employee's failure to provide

adequate certification.

Note: Authority cited: Section 12935, Government Code. Reference: Sections 12945.2 and 12945.6, Government Code; *White v. County of Los Angeles* (2014) 225 Cal.App.4th 690; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, 2611, 2612, 2614 et seq.; and 29 C.F.R. § 825.

§ 11092. Terms of CFRA Leave or NPLA Leave.

(a) The following rules apply to the permissible terms of a CFRA leave or NPLA leave, to the extent that they are consistent with the requirements of the Employee Retirement Income Security Act (ERISA). Nothing in these regulations infringes on the employer's obligations, if any, under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) or prohibits an employer from granting CFRA leave or NPLA leave on terms more favorable to the employee than those listed below.

(b) Paid Leave.

An employer is not required to pay an employee during a CFRA leave or NPLA leave except:

(1) An employee may elect to use or an employer may require an employee to use any accrued vacation time or other paid accrued time off (including undifferentiated paid time off (PTO)), that the employee is eligible to take during the otherwise unpaid portion of the CFRA leave or NPLA leave. An employee may also elect to use, or an employer may require an employee to use, any accrued sick leave that the employee is eligible to take during the otherwise unpaid portion of a CFRA leave if the CFRA leave is for the employee's own serious health condition or any other reason if mutually agreed between the employer and the employee. If an employee is receiving a partial wage replacement benefit during the CFRA leave or NPLA leave, the employer and employee may agree to have employer-provided paid leave, such as vacation, paid time off, or sick time supplement the partial wage replacement benefit, unless otherwise prohibited by law.

(2) For leave for an employee's own serious health condition, the employee may also substitute leave taken pursuant to a short- or long-term disability leave plan, as determined by the terms and conditions of the employer's leave policy, during the otherwise unpaid portion of the CFRA leave. This paid disability leave runs concurrently with CFRA leave, and may continue longer than the CFRA leave if permitted by the disability leave plan. An employee receiving any form of disability payments is not on "unpaid leave" and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation.

(3) An employee receiving Paid Family Leave to care for the serious health condition of a family member or to bond with a new child is not on "unpaid leave," and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation.

(4) Only if the employee requests leave for what would be a CFRA-qualifying or NPLA-qualifying event may an employer require the employee to use any accrued vacation time or other paid accrued time off (including PTO) that the employee is eligible to take during the otherwise unpaid portion of the CFRA leave or NPLA leave. If an employee uses paid leave under circumstances that do not qualify as CFRA leave or NPLA leave, the leave will not count against the employee's CFRA leave or NPLA leave entitlement.

(A) If an employee requests to utilize accrued vacation time or other paid accrued time off without reference to a CFRA-qualifying or NPLA-qualifying purpose, an employer may not ask whether the employee is taking the time off for a CFRA-qualifying or NPLA-qualifying purpose.

1. If the employer denies the employee's request and the employee then provides information that the requested time off is or may be for a CFRA-qualifying or NPLA-qualifying purpose, the employer may inquire further into the reasons for the absence. If the absence is CFRA-qualifying or NPLA-qualifying, then the applicable rules in section 11092(b)(1) and (2), above, apply.

(5) An employer and employee may negotiate for the employee's use of any additional paid or unpaid time off instead of using CFRA leave or NPLA leave provided by this section.

(c) Provision of Health Benefits.

If the employer provides health benefits under any group health plan, the employer has an obligation to continue providing such benefits during an employee's CFRA leave, FMLA leave, or ~~both~~ NPLA leave. The following rules apply:

(1) The employer shall maintain and pay for an employee's health coverage at the same level and under the same conditions as coverage would have been provided if the employee had not taken CFRA leave or NPLA leave.

(2) The employer's obligation commences on the date leave first begins under CFRA or NPLA for the duration of the leave, up to a maximum of 12 workweeks in a 12-month period. As section 11044(c) of the Council's pregnancy disability leave regulations state, "The time that an employer maintains and pays for group health coverage during pregnancy disability leave shall not be used to meet an employer's obligation to pay for 12 weeks of group health coverage during leave taken under CFRA. This shall be true even where an employer designates pregnancy disability leave as family and medical leave under FMLA. The entitlements to employer-paid group health coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements."

(3) A "group health plan" is as defined in section 5000(b)(1) of the Internal Revenue Code of 1986. If the employer's group health plan includes dental care, eye care, mental health counseling, or other types of coverage, or if it includes coverage for an employee's dependents as well as for the employee, the employer shall also continue this coverage.

(4) Although the employer's obligation to continue group health benefits under either FMLA and CFRA, or ~~both~~ NPLA, does not exceed 12 workweeks in a 12-month period, nothing shall preclude the employer from maintaining and paying for health care coverage for longer than 12 workweeks.

(5) An employer may recover the premium that the employer paid for maintaining group health care coverage during any unpaid part of the CFRA leave or NPLA leave if both of the following conditions occur:

(A) The employee fails to return from leave after the period of leave to which the employee is entitled has expired. An employee is deemed to have failed to return from leave if ~~he/she~~ the employee works less than 30 days after returning from CFRA leave or NPLA leave. An employee who retires during CFRA leave or NPLA leave or during the first 30 days after returning is deemed to have returned from leave.

(B) The employee's failure to return from leave is for a reason other than the continuation, recurrence, or onset of a serious health condition that entitles the employee to CFRA leave, or other circumstances beyond the control of the employee.

(6) Group health plan coverage must be maintained for an employee on CFRA leave or NPLA leave until:

(A) The employee's CFRA leave or NPLA leave entitlement is exhausted;

(B) The employer can show that the employee would have been laid off and the employment relationship terminated for lawful reasons during the period of the CFRA leave or NPLA leave; or

(C) The employee provides unequivocal notice of intent not to return to work.

(d) Employee Payment of Group Health Benefit Premiums.

If employees are required to pay premiums for any part of their group health coverage, the employer must provide the employee with advance written notice of the terms and conditions under which premium payments must be made.

(1) If CFRA leave or NPLA leave is paid, the employee's share of premiums must be paid by the method normally used during any paid leave, typically as a payroll deduction, unless a voluntary agreement between the employer and the employee dictates otherwise.

(2) If CFRA leave or NPLA leave is unpaid, the employer may require that payment be made to the employer or to

the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(A) Payment due at the same time as if made by payroll deduction;

(B) Payment due on the same schedule as payments are made under COBRA;

(C) Payment prepaid pursuant to a cafeteria plan at the employee's option;

(D) The employer's existing rules for payment by employees on leave without pay would apply, provided that such rules do not require prepayment (i.e., prior to the commencement of the leave) of the premiums that will become due during a period of unpaid CFRA leave or NPLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or

(E) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (e.g., through increased payroll deductions when the need for the CFRA leave or NPLA leave is foreseeable).

(3) Unless an employer policy provides a longer grace period, an employer's obligation to maintain health benefits coverage ceases under CFRA or NPLA if an employee's premium payment is more than 30 days late. In order to drop coverage, an employer must provide written notice at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the written notice unless payment has been received by that date.

(A) The employer may recover the employee's share of any premium payments missed by the employee for any CFRA leave or NPLA leave period during which the employer maintains health coverage by paying the employee's share.

(B) Regardless of whether an employee pays premiums while on CFRA leave or NPLA leave, all other obligations of an employer under CFRA or NPLA would continue, such as reinstatement upon return and complete restoration of coverage/benefits equivalent to those that the employee would have had if leave had not been taken, including family or dependent coverage.

(C) If an employer terminates an employee's health benefits coverage in accordance with this section because of the employee's non-payment of premiums and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

(e) Other Benefits and Seniority.

During the period of CFRA leave or NPLA leave, the employee is entitled to accrual of seniority and to participate in health plans for any additional period of leave not covered by (c) above; in any employee benefit plans, including life, short-term or long-term disability or accident insurance; pension and retirement plans; and supplemental unemployment benefit plans to the same extent and under the same conditions as would apply to any other leave granted by the employer for any reason other than CFRA leave or NPLA leave.

(1) Unpaid CFRA leave for the serious health condition of the employee shall be compared to other unpaid disability leaves whereas unpaid CFRA leaves for all other purposes and unpaid NPLA leave shall be compared to other unpaid personal leaves offered by the employer. CFRA leave or NPLA leave shall not constitute a break in service or cause the employee to lose seniority, even if other paid or unpaid leave constitutes a break in service for purposes of establishing longevity or seniority, or for layoff, recall, promotion, job assignment, or seniority-related benefits.

(2) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on CFRA leave or NPLA leave, the employer must give written notice to the employee that ~~he or she~~ the employee

is subject to the new or changed plan/benefits to the same extent as if the employee were not on leave.

(f) Continuation of Other Benefits.

If the employer has no policy, practice or collective bargaining agreement that requires or authorizes any other type of unpaid personal or disability leave or if the employer's other unpaid personal or disability leaves do not allow for the continuation of benefits during these leaves, an employee taking a CFRA leave or NPLA leave shall be entitled to continue to participate in the employer's health plans, pension and retirement plans, supplemental unemployment benefit plans or any other health and welfare employee benefit plan, in accordance with the terms of those plans, during the period of the CFRA leave or NPLA leave.

(1) As a condition of continued coverage of group medical benefits (beyond the employer's obligation during the 12-week period described above in (c)), life insurance, short- or long-term disability plans or insurance, accident insurance, or other similar health and welfare employee benefit plans during any unpaid portion of the leave, the employer may require the employee to pay premiums at the group rate.

(A) If the employee elects not to pay premiums to continue these benefits, this nonpayment of premiums shall not constitute a break in service for purposes of longevity, seniority under any collective bargaining agreement or any employee benefit plan requiring the payment of premiums.

(2) An employer is not required to make plan payments to any pension and/or retirement plan or to count the leave period for purposes of time accrued under any such plan during any unpaid portion of the CFRA leave or NPLA leave. The employer shall allow an employee covered by a pension and/or retirement plan to continue to make contributions, in accordance with the terms of these plans, during the unpaid portion of the leave period.

(g) Employee Status.

The employee shall retain employee status during the period of the CFRA leave or NPLA leave. The leave shall not constitute a break in service for purposes of longevity and/or seniority under any collective bargaining agreement or under any employee benefit plan. Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualification period, physical exam, et cetera.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12945.2 and 12945.6, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, 2611, 2612, 2614 et seq.; ERISA, 29 U.S.C. § 1001 et seq.; and COBRA, 29 U.S.C. § 1161 et seq.

§ 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.

(a) Separate and Distinct Entitlements.

The right to take a CFRA leave under Government Code section 12945.2 and the right to take NPLA leave under Government Code section 12945.6 ~~are~~ separate and distinct from the right to take a pregnancy disability leave under Government Code section 12945 and section 11035 et seq. of the regulations.

(b) Serious Health Condition - Pregnancy.

An employee's own disability due to pregnancy, childbirth or a related medical condition is not included as a serious health condition under CFRA. Any period of incapacity or treatment due to pregnancy, including prenatal care, is included as a serious health condition under FMLA.

(c) CFRA Leave after Pregnancy Disability Leave.

At the end of the employee's period(s) of pregnancy disability, or at the end of four months of pregnancy disability leave, whichever occurs first, a CFRA-eligible or NPLA-eligible employee may request to take CFRA leave or NPLA leave of up to 12 workweeks for reason of the birth of ~~her~~ the employee's child, if the child has been born by this date. There is no requirement that either the employee or child have a serious health condition in order for the employee to

take CFRA leave or NPLA leave. There is also no requirement that the employee no longer be disabled by ~~her~~the employee's pregnancy, childbirth or a related medical condition before taking CFRA leave or NPLA leave for reason of the birth of ~~her~~the employee's child.

(1) Where an employee has utilized four months of pregnancy disability leave prior to the birth of ~~her~~the employee's child, and ~~her~~the employee's health care provider determines that a continuation of the leave is medically necessary, an employer may, but is not required to, allow an eligible employee to utilize CFRA leave prior to the birth of ~~her~~the employee's child. No employer shall, however, be required to provide more CFRA leave than the amount to which the employee is otherwise entitled, but this does not excuse the employer's other obligations under the FEHA, such as the obligation to provide reasonable accommodation under the disability provisions, where applicable.

(d) Maximum Entitlement.

The maximum possible combined leave entitlement for both pregnancy disability leave (under FMLA and Government Code section 12945) and CFRA leave or NPLA leave for reason of the birth of the child (under this article) is four months and 12 workweeks. This assumes that the employee is disabled by pregnancy, childbirth or a related medical condition for four months and then requests, and is eligible for, a 12-week CFRA leave or NPLA leave for reason of the birth of ~~her~~the employee's child. This maximum entitlement does not include leave provided as a reasonable accommodation for a physical or mental disability under the FEHA.

(e) Disability Leave.

The right to take a CFRA leave under Government Code section 12945.2 is separate and distinct from the right to take a disability leave under Government Code section 12945 and section 11064 et seq. of the regulations. If an employee has a serious health condition that also constitutes a disability as defined by Government Code section 12926 and cannot return to work at the conclusion of ~~her~~the employee's CFRA leave, the employer has an obligation to engage that employee in an interactive process to determine whether an extension of that leave would constitute a reasonable accommodation under the FEHA.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12945, ~~and~~ 12945.2, and 12945.6, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, ~~2651 et seq.~~; and 29 C.F.R. § 825.

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

(a) Any violation of CFRA, NPLA or ~~these~~ implementing regulations constitutes interfering with, restraining, or denying the exercise of rights provided by CFRA or NPLA. "Interfering with" the exercise of an employee's rights includes, for example, refusing to authorize CFRA leave or NPLA leave and discouraging an employee from using such leave. It would also include an action by a covered employer to avoid responsibilities under CFRA or NPLA, for example:

- (1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites below the 20-employee or 50-employee threshold for employee eligibility under NPLA or CFRA;
- (2) Changing the essential functions of the job in order to preclude the taking of leave;
- (3) Reducing an employee's hours available to work in order to avoid employee eligibility; and
- (4) Terminating an employee when it anticipates an otherwise eligible employee will be asking for a CFRA-qualifying or NPLA-qualifying leave in the future.

(b) CFRA's and NPLA's prohibition against "interference" prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise CFRA or NPLA rights or giving information or testimony regarding ~~his or her~~the employee's CFRA or NPLA leave, or another person's CFRA or NPLA leave, in any inquiry or proceeding related to any right guaranteed under this article. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid CFRA or NPLA leave. By the same token,

employers cannot use the taking of CFRA or NPLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can CFRA or NPLA leave be counted against an employee under an employer's attendance policies.

(c) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under CFRA or NPLA. For example, employees (or their collective bargaining representatives) cannot "trade off" the right to take CFRA or NPLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of CFRA or NPLA claims by employees based on past employer conduct without the approval of a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be reinstated to the same position the employee held at the time the employee's CFRA or NPLA leave commenced or to a comparable position.

(d) All individuals, and not merely employees who are CFRA-qualified or NPLA-qualified, are protected from retaliation for opposing (e.g., filing a complaint about) any practice that is unlawful under CFRA or NPLA. They are similarly protected if they oppose any practice that they reasonably believe to be a violation of CFRA, NPLA, or ~~its~~ these implementing regulations.

(e) In addition to retaliation prohibited by CFRA, retaliation is also prohibited by the NPLA and by Government Code 12940 and section 11021 of the regulations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12940, ~~and~~ 12945.2, and 12945.6, Government Code; Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, 2611, 2615 et seq.; and 29 C.F.R. § 825.

§ 11096. Relationship with FMLA Regulations.

To the extent that they are within the scope of Government Code section 12945.2 and not inconsistent with this article, other state law, or the California Constitution, the Council incorporates by reference the federal regulations interpreting FMLA that became effective March 8, 2013 (29 C.F.R. Part 825), which govern any FMLA leave that is also a leave under this article.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12945.2 and 12945.6, Government Code; ~~Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq.~~; and 29 C.F.R. § 825.