



Winter 2008

Leaves of Absence (New Law in California and Other Reminders)

Military Spouse Leave (Effective immediately)

A California law signed by the Governor in October 2007 permits the spouse (or registered domestic partner) of an individual in the military to take up to 10 days of unpaid leave when the military spouse is on leave from deployment during a period of military conflict.

What employers are covered?

An employer with 25 or more employees (including temporary, part-time, employees on leave, and employees outside of California).

What employees are eligible? (Must satisfy all of the following)

- (1) A spouse (or registered domestic partner) of a person in the Armed Forces of the United States, the National Guard, or the Reserves who has been deployed during a period of military conflict; and
- (2) Works an average of 20 or more hours per week (independent contractors are not included); and
- (3) Provides the employer with notice, within two (2) business days of receiving official notice that the military spouse will be on leave from deployment, of his or her intention to take the leave; and
- (4) Submits written documentation to the employer certifying that the military spouse will be on leave from deployment during the time the leave is requested.

Other considerations:

An employer cannot retaliate against an employee for requesting or taking military spouse leave. Additionally, military spouse leave cannot affect an employee's rights with respect to other employee benefits. In other words, an employer cannot force an employee to use accrued vacation time or other paid time off during military spouse leave.

Family and Medical Leave Act (FMLA)

A recent decision by the U.S. Court of Appeals (Seventh Circuit) held that an employer cannot require an employee to use sick and/or vacation leave while on FMLA leave and receiving disability benefits (even if those benefits are not from an employer-sponsored disability plan).

FMLA guarantees qualifying employees twelve weeks of unpaid medical leave each year. An employer is not required to pay an employee while he/she is on FMLA leave, however, the employer may require the employee to substitute any of his/her accrued paid vacation or personal leave for leave provided. This substitution is

limited to unpaid leave. If an employee on an FMLA leave is receiving temporary disability benefits (which would most likely include California SDI benefits) or workers' compensation benefits, the leave is not unpaid. Even though this opinion would not be controlling in California the ruling referred to specific language in the federal regulations on this subject. Therefore, substitution of the employee's accrued sick or vacation leave should not be required in these circumstances.

"Rolling Year"

Employers may select one of four methods to determine the "12-month period" for the Family and Medical Rights Act (FMLA) or California Family Rights Act (CFRA) – calendar year; "fixed" year; "forward year"; or "rolling year". The rolling year method precludes the employee from taking 24 weeks of leave as is possible with the calendar or fixed year method. The rolling year is measured by looking back 12 months from the first date of the employee's FMLA leave. The amount of leave available is then 12 weeks minus whatever leave the employee took in the 12-month period prior to the first day of the current leave. In other words, if the required FMLA leave starts August 1, 2007, looking back the past 12 months (to July 31, 2006), the employee would be entitled to the entire 12 weeks only if he/she had not taken other leave since July 31, 2006. If other leave had been taken, then the 12 weeks would be diminished by the amount of weeks already taken.

Remember: Employees must have notice of the method used to determine the 12-month period; therefore it is important to have it clearly stated in the Employee Handbook. If proper notice is not provided, then an employer must offer the calendar year method to the employee. Additionally, an employer must give the employees a 60-day notice before altering the method used to determine the 12-month period for FMLA leave.

For assistance in revising your leave of absence policy contact Employer's Legal Advisor, Inc.



Jeanne Flaherty is the President and Managing Attorney of Employer's Legal Advisor, Inc., which represents and advises employers on all employment matters. The firm specializes in conducting employment practices compliance reviews and advising employers on day-to-day legal issues in the workplace.