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Old FMLA Regs Have Second Life

By Jennifer Redmond and Evgenia Fkiaras

There are many aspects of the new Family and Medical Leave Act of 1993 (FMLA) regulations, which took effect on Jan. 19, 2009, that would help California employers better manage leaves of absence, including, for example, the right to require fitness-for-duty certifications every 30 days when an employee uses intermittent leave and the employer has reasonable safety concerns about the employee's ability to perform his or her duties because of a serious health condition. Yet, most California employers have no idea whether any of the new regulations can be used in the Golden State.

Here's why. The California Family Rights Act (CFRA) provides most of the same rights that the FMLA provides. However, the CFRA regulations expressly incorporate the old, 1995 version of the FMLA regulations and there is no current plan to update them. This means that the old FMLA regulations govern interpretation of the CFRA on any point on which the CFRA regulations are silent or underdeveloped.

The practical result is that on issues that are covered by the CFRA, employers must determine whether the new FMLA regulations or the CFRA regulations provide greater employee benefits.

New or Old Regs?

For example, the CFRA is vague on employer notice requirements, and thus employers have always looked for guidance to the FMLA regulations. The notice requirements under the new FMLA regulations require employers to provide more information to employees than the old FMLA regulations do, and they require two notices in response to a request for leave where the old FMLA regulations require only one. If an employee's certification is incomplete or insufficient, the new regulations require employers to provide written notice of the information necessary to cure the certification and seven days to correct it on top of the usual turnaround time.

The old FMLA regulations, by contrast, vaguely require that an employer "advise" the employee and provide the employee "a reasonable opportunity" to correct the problem. To maximize employees' benefits, employers should follow the two-step notice requirements of the new FMLA regulations and, when necessary, provide the seven-day cure period and notice of deficiencies.

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But in other instances, California employers may still be bound by the old FMLA regulations. The CFRA does not address whether employers may require a fitness-for-duty certification clearing an employee to return to work after intermittent leave, so California employers should look to the old FMLA regulations, which prohibit such certifications. Thus, employers cannot take advantage of the new FMLA regulations allowing fitness-for-duty certifications every 30 days in certain situations because of the added burden on employees.

Another example where the old FMLA regulations continue to govern in California is in the definition of "serious health condition." Eligible employees are entitled to leave for chronic serious health conditions that require periodic visits to a health care provider for treatment. The CFRA again relies on the old FMLA regulations to interpret this provision. The old FMLA regulations do not define "periodic visits." The new FMLA regulations define "periodic visits" as visits that occur at least twice a year. Because an employee who visits her health care provider only once a year can get leave under the old regulations but not under the new regulations, California employers are bound by the prior definition of "periodic visits."

Clarity on Return Certification

By contrast, it is unnecessary to consult the old FMLA regulations for how long an employee may have to return certification; the CFRA regulations clearly impose a 15-day time frame. The new FMLA regulations impose the same standard. This marks an improvement for employers that used to be bound to the old FMLA regulations, which allowed employees more time in certain situations.

California employers can neither apply the new FMLA regulations nor reject them wholesale. They and their counsel must do a point-by-point analysis to determine which set of regulations apply in each situation. Only after this has been done can California employers be confident that they are in compliance with state and federal law. ◆

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