# UNDERSTANDING LEAVES

## The Interaction between Medical Leave under FMLA/CFRA and Leaves of Absence as Reasonable Accommodation for a Disability under FEHA

**Sonya Smallets**

As a plaintiff's employment lawyer, I often represent employees who have been terminated because of their need to take time off work for medical reasons. In these cases, sometimes the evidence indicates that the employer's termination decision was motivated by a desire to rid the workplace of a disabled employee, and sometimes the evidence indicates that the termination decision was the result of a legitimate dispute as to the employer's legal obligations. But surprisingly often, the evidence shows that the termination decision was the result of the employer's failure to understand its legal obligations, particularly with respect to the relationship between an employee's right to medical leave under the federal Family Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) on one hand, and the employee's right to reasonable accommodations under the California Fair Employment and Housing Act (FEHA) on the other. This lack of understanding can lead to problems for employers, particularly those who are faced with meritorious employment discrimination claims because of their failure to understand their legal obligations. And it can lead to very difficult, sometimes tragic, consequences for employees, who are faced with losing their jobs at a time when they are particularly vulnerable, economically and emotionally, as a result of being ill. With this in mind, this article aims to shed some light on the interaction between these two areas of law, with the hope of preventing such problems.[1]

FMLA and CFRA contain detailed and specific rules with respect to an employer's obligation to provide medical leave to its employees. Under these statutes, an employer with more than fifty employees located within seventy-five miles of a given job site must provide up to twelve weeks of medical leave to an employee who has worked for the employer for a year or more, has worked more than 1,250 hours in the preceding year, and has a serious health condition that requires the employee to take medical leave. With limited exceptions, if an employee qualifies for FMLA/CFRA leave, the employer must provide the leave and reinstate the employee to his or her position at the end of the leave. An employer cannot refuse to allow an employee to take FMLA/CFRA leave because the employer believes that it would be burdensome for the employee to miss work; if the employee qualifies for and needs FMLA/CFRA leave, he or she is entitled to take it.

Because of FEHA's reasonable accommodation obligations, an employer cannot conclude that it has satisfied its obligations to an employee in need of time off work for health-related reasons simply because it has provided the employee with twelve weeks of FMLA/CFRA leave.

The right to leave as a reasonable accommodation for a disability under FEHA is different. Disability leave as a reasonable accommodation is not governed by the same kind of bright-line rules. Instead, FEHA provides that an employer with five or more employees must provide an employee with a physical or mental disability medical leave as a reasonable accommodation for the disability. 2 Cal. Code Regs. §11065(p)(2)(M). The length of leave that the employer must provide is not set by statute. An employer must provide disability leave of the length of time that is necessary to allow the employee to be able to return to work, provided that doing so would not constitute an undue hardship for the employer. 2 Cal. Code

The employer must engage in a good faith interactive process with the employee to determine whether the employer can provide other reasonable accommodations that will enable the employee to remain employed.

Regs. §11068(c) ("When the employee cannot presently perform the essential functions of the job, or otherwise needs time away from the job for treatment and recovery, holding a job open for an employee on a leave of absence or extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer's leave plan may be a reasonable accommodation provided that the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further reasonable accommodation, and does not create an undue hardship for the employer."); see also *Sanchez v. Swissport, Inc.* (2013) 213 Cal. App. 4th 1331, 1338 ("[A] disabled employee is entitled to a reasonable accommodation—which may include leave of no statutorily fixed duration—provided that such accommodation does not impose an undue hardship on the employer."). The length of disability leave that an employer must provide as a reasonable accommodation thus varies with the circumstances. For example, while it may be reasonable for a large company to provide a yearlong leave of absence to one of several hundred customer service employees working in a call center, it may not be reasonable for a small company to provide a leave of a similar length to its vice president of finance.

Because of FEHA's reasonable accommodation obligations, an employer cannot conclude that it has satisfied its obligations to an employee in need of time off work for health-related reasons simply because it has provided the employee with twelve weeks of FMLA/CFRA leave. Instead, the employer must consider whether it has an obligation also to provide a reasonable accommodation to the employee in the form of a disability leave. Moreover, in making that determination, an employer cannot rely upon a company policy limiting leave to a fixed duration. Equal Employment Opportunity Commission Publication, "Employer-Provided Leave and the Americans with Disabilities Act," www.eeoc.gov/eeoc/publications/ada-leave.cfm#_edn1; *Garcia-Ayala v. Lederle Parenterals, Inc.* (1st Cir. 2000) 212 F.3d 638, 648 (requiring an employer to provide a reasonable accommodation of a leave of absence beyond that allowed by the employer's leave policy). Instead, the employer must engage in a fact-based assessment as to whether it can provide the leave being requested without undue hardship.

Moreover, even if an employer believes that providing additional leave to an employee would impose undue hardship, the employer cannot simply terminate the employee

when the employee's FMLA/CFRA leave ends. Instead, the employer must engage in a good faith interactive process with the employee to determine whether the employer can provide other reasonable accommodations that will enable the employee to remain employed. 2 Cal. Code Regs. §11069(b)(3). For example, the employer must consider whether the employee could return to work if the employee was allowed to work from home or if the employee was allowed to work part time. The employer must also consider if there is an open position at the company that the employee is qualified for and able to perform. All of these are potential reasonable accommodations that an employer must consider providing before terminating an employee who has exhausted his or her entitlement to FMLA/CFRA leave.

As this article has tried to make clear, what an employer generally should not do is terminate an employee through a letter on the last day of the employee's FMLA/CFRA leave because the employee has exhausted his or her right to FMLA/CFRA leave. California's protections for disabled workers require the employer to do more.

*Sonya Smallets is a partner at Minnis & Smallets in San Francisco. Her practice focuses on representing employees who have been discriminated against, harassed, or wrongfully terminated by their employers.*

Note

1. There are a number of other laws under which an employee may be entitled to take time off of work, and there are several other reasons for which an employee may be entitled to take FMLA/CFRA leave. However, this article focuses on the employer's obligation to provide FMLA/CFRA leave because of an employee's own serious health condition and to provide a leave of absence as a reasonable accommodation for an employee's disability under FEHA.


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