The Complex Nature of Leaves

CASBO Annual Conference &
California School Business Expo 2016

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Presented by:
Dulcinea A. Grantham

Roadmap

- Leaves under the Education Code
- Family & Medical Leave under federal and California law
- Parental Leave
- Paid Sick Leave Law, Kin Care and Child Activities
Have You Ever...

Education Code Leaves

<table>
<thead>
<tr>
<th>Primary Leaves Available Under the Education Code</th>
</tr>
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<tbody>
<tr>
<td><strong>Leave</strong></td>
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<tr>
<td>Industrial Accident Leave</td>
</tr>
<tr>
<td>Sick Leave</td>
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<tr>
<td>Differential Leave</td>
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</tbody>
</table>

Lozano Smith
Industrial Illness & Accident Leave

• Job-related illnesses and accidents
• 60 working days of full pay*
• Only one period per accident or illness
• Does not accumulate from year to year
• Coordination with other leaves

Industrial Illness & Accident Leave – RECENT CHANGES TO THE LAW

• Prior to January 1, 2016, certificated and classified employees were not authorized to travel outside of California while on Industrial Illness and Accident Leave, unless authorized by their governing board
• This restriction was removed by AB 915

Sick Leave

• Full-time certificated employees receive 10 days
• 12-month classified employees receive 12 days
• Part time employees receive appropriate number of days
When Can You Request a Doctor's Note?

- First time employee calls in sick?
- After a week of absence?
- Whenever you want?

The case of the questionable doctor’s note...

John Smith, MD
BS Medical Group
Endocrinology Specialists
123 Anywhere Street
Anytown, USA 99999

October 25, 2015

To whom it may concern:

Please excuse my patient, Mr. Employee, from work for two weeks because he is currently under my care for treatment.

Sincerely,
John Smith, M.D.
Differential Leave

Differential Leave – Certificated

- Generally begins after an employee has exhausted all available sick leave
- Five months per accident or illness
- Employee is entitled to the difference between the employee's salary and what is paid to a substitute OR what would have been paid to a substitute if one was hired.

Differential Leave – Classified Leave

- Five months, generally running concurrent with sick leave
- No "per accident or illness" language
- Employee is entitled to sub-deduct pay if a substitute is actually hired or full pay if no substitute is hired
100 Day Extended Sick Leave

- 100 working days per year
- Employees receive 50% of their pay
- Coordination with other leaves

Catastrophic Leave

- Optional—subject to bargaining
- Allows employees to donate vacation and sick leave to employees who experience a "catastrophic illness or injury"
- Must meet requirements

Certificated Employees

<table>
<thead>
<tr>
<th>5 School Months</th>
<th>Differential Pay Period Begins To Run</th>
<th>Placement on Reemployment List</th>
<th>Certification Employees</th>
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</thead>
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<tr>
<td>00 Days</td>
<td>5 School Months</td>
<td>24 Months - Probationary</td>
<td>30 Months - Permanent</td>
</tr>
<tr>
<td>Industrial</td>
<td></td>
<td></td>
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<tr>
<td>Accident Leave</td>
<td></td>
<td></td>
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<td>Per Injury</td>
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Current Year's Available Sick Leave and Accumulated Full Pay Sick Leave

Education Code § 44978

Catastrophic Leave (if applicable)

Education Code § 44043.5

Differential Pay (if no substitute is hired, employee gets difference between salary and what substitute would have been paid)

Education Code § 44977

The 5 school-month period includes legal holidays and runs continuously for 5 school months.

* Omit if absence is not due to industrial illness or accident.
Classified Employees: 5 Month

- Classified Employees: 5 Month
  - CFRA and FMLA may run concurrently with all other paid and unpaid leaves as of the first day of the qualifying "serious medical condition."
  - 5 Months Differential pay Period Begins to Run [Not Including Holidays]*

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<tr>
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<th>Sick Leave Both Current and Accumulated, Vacation Pay or Other Available Paid Leave</th>
<th>Catastrophic Leave if applicable</th>
<th>Differential Pay [If No Sub is Hired - Employee Gets Full Pay]</th>
<th>Placement on 39-Month Reemployment List</th>
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Classified Employees: 100 Day

- Classified Employees: 100 Day
  - CFRA and FMLA Leave may run concurrent if the employee has a "serious medical condition."
  - 100 Working Days Period
    - Excluding Holidays: vacations, compensating time, and any other paid leave

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Family and Medical Leave
### Family & Medical Leave (State & Federal Law)

- California Family Rights Act ("CFRA")
  - Gov. Code, §12945.2
- Federal Family Medical Leave Act ("FMLA")
  - 29 U.S.C. § 2601 et seq.
  - 29 C.F.R. § 825.100 et seq.

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### FMLA v. CFRA

**Some Differences Between FMLA/CFRA**

1. Pregnancy
2. Military

- As of March 27, 2015, registered domestic partners are considered "spouses" under FMLA
- Employers should apply the law that provides the greater amount of protections for employees

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### Family & Medical Leave (State & Federal Law)

- Employee’s own serious health condition where unable to perform functions of the job, including pregnancy disability leave
- Serious health condition of an employee’s child, parent or spouse
- Bonding with a new baby, including the adoption and foster care
Family & Medical Leave (State & Federal Law)

- Basic protection: 12 weeks of unpaid, job-protected leave with benefits in any 12-month period
  - Does not need to be taken in one continuous period of time
  - 12 normally scheduled work weeks
- Runs concurrently with all other leaves (exception for pregnancy disability in CA)

Eligibility for FMLA/CFRA

- Covered employer (public entities are covered); and
- Covered employee: employee must work at location with at least 50 employees in a 75-mile radius of his/her employer

Eligibility for FMLA/CFRA (cont’d)

- Employee must have total of 12 months of service with employer (at any time)
- Employee must work 1,250 hours during the 12-month period before leave begins
  - Full-time teachers presumed eligible
  - Paid time off and unpaid leaves of absence not counted toward 1,250 hours (e.g. sick, vacation, prior FMLA/CFRA)
Eligibility for FMLA/CFRA (cont’d)

- Calculating 12-month period for CFRA - Employer may choose
  - The calendar year
  - Any fixed “leave year” of 12 months, such as a fiscal year or a year starting on an employee’s anniversary date
  - The 12-month period measured from the date an employee’s first CFRA leave begins
  - A rolling 12-month period measured backward from the date an employee uses any leave

“Serious health condition” = illness, injury, impairment, or physical or mental condition that involves either:
- In-patient care in a hospital, hospice, or residential health care facility
  - CFRA-Expected in-patient care enough
  OR
  - Continuing treatment or supervision by a health care provider

Family & Medical Leave (State & Federal Law)

- What triggers a CFRA/FMLA determination?
  - Employee request
  - Employer acquiring knowledge that employee leave may be for a qualifying reason
### Family & Medical Leave (State & Federal Law)

- Notices required by employer
  - General notice
  - Eligibility notice
  - Rights and responsibilities notice
  - Designation notice

### Rights of employee during leave

- Intermittent leave

### Reinstatement Rights of Employee

- Same or comparable (virtually identical) position
  - Pay
  - Benefits
  - Working conditions
Hypothetical

- Employee has been taking FMLA/CFRA time for years. Can you terminate for excessive absenteeism?
# Parental Leave – Classified Employees

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# Parental Leave – Certificated Employees (AB 375)

- New Education Code section 44977.5 provides that certificated employees have a right to **differential pay** during “maternity or paternity leave.”
- “Maternity or paternity leave” → 12 workweeks of baby-bonding leave under CFRA
- Such leave has been unpaid, but now certificated employees are entitled to differential pay during these 12 workweeks
- Before employees are entitled to use differential pay, they must use any **available** sick leave
- Districts do not have to comply right away if their CBAs “conflict” with AB 375

# Parental Leave – Certificated Employees

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Baby-Bonding Leave under CFRA

- Intermittent Use
- Calculating “Workweeks”
- Two parents who work at the same school district
- Deadline for use

Paid Sick Leave Law

Paid Sick Leave

- Basic Impact
- Requirements and Exceptions
- Unique Employees
Basic Impact

- District is required to provide paid sick leave to "eligible employees"
- "One size fits all" approach
  - Will mostly impact employees that are not accruing enough sick leave or any sick leave at all because they are in unique positions
- Potential changes to district's definition of "family member" and permissible reasons for use of sick leave
- Notice requirements

Eligibility

- Employees who work 30 calendar days within 12 months of employment are eligible for paid sick leave

Providing Sick Leave

1. Accrual Method
2. Front-Loading
Accrual or Front-Loading?

What Do You Do?

Permissible Limits to Usage & Accrual

- Employers may establish policies to limit both use and accrual of paid sick leave as follows:
  - **Accrual:** Limit the accrual of sick leave to 48 hours (6 days) per year (Labor Code, § 246(i))
  - **Use Per Year:** Limit an employee’s use of paid sick days to 24 hours or 3 days per year (Labor Code, § 246(e)(2))
  - **Use Per Absence:** Require the employee to use leave in reasonable minimum increments, not to exceed 2 hours (Labor Code, § 246(j))

Exceptions

- Two exceptions to the requirements of AB 1522:
  - Collective bargaining agreement (“CBA”) exception (Labor Code, § 2810.5 (c)(3))
  - Paid leave policy exception (Labor Code, § 246(e))
## Unique Employees

- Yard duty supervisor
- Substitutes
- Retirees
- Coaches

## Reasons For Use

- Upon the employee’s oral or written request, paid leave available for following reasons:
  - Diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee’s “family member”
  - Use related to being a victim of domestic violence, sexual assault, or stalking

## “Family Member”

- A child (i.e. biological, adopted, or foster child, stepchild, legal ward, or child to whom the employee stands in loco parentis)
  - Applicable regardless of age/dependency status
- A biological, adoptive, or foster parent, stepparent, or legal guardian of an employee or the employee’s spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child
- A spouse
- A registered domestic partner
- A grandparent
- A grandchild
- A sibling
Effect of Termination of Employment

- Not required to “cash out” accrued, unused sick leave upon termination
- Required to reinstate previously accrued and unused sick leave if employee is reinstated within one year from the date of separation

Posting Requirements

- Effective January 1, 2015, District must display a poster created by the Labor Commissioner in a conspicuous location at each work site:
  - Employee is entitled to accrue, request, and use paid sick days
  - The amount of sick days provided for
  - The terms of use of sick days
  - Anti-retaliation and anti-discrimination statement

Notice & Recordkeeping Requirements

- Effective July 1, 2015
- Written notice of the amount of sick leave available or paid time off provided in lieu of sick leave on either the employee’s itemized wage statement or by separate written notice provided on the employee’s designated pay date with the employee’s payment of wages
- Recordkeeping: District must retain for at least 3 years records documenting hours worked and paid days accrued and used by employee
Anti-Retaliation Provisions

- District cannot:
  - Deny employee right to use accrued sick days;
  - Discharge, threaten to discharge;
  - Demote;
  - Suspend; or
  - Discriminate

... against an employee for using or attempting to use paid sick days, filing a complaint, cooperating in an investigation or prosecution of a violation, or opposing any policy or practice or act that is prohibited by paid sick leave article

Potential Damages Against District

- Reinstatement, backpay, payment of sick days unlawfully withheld, and payment of an administrative penalty to employee
- Administrative Penalties:
  1) The dollar amount of paid sick days withheld from the employee x 3, or $250 – whichever is greater
  2) $50/day that the violation occurred
  3) Aggregate maximum of $4,000.00 for (1) and (2)
- If compliance not forthcoming, Labor Commissioner can also order up to $50 per day or portion of a day that violation continues to occur

Key Things To Remember

- The District may offer more time and usage than provided in AB 1522 but not less
- Policies can vary across employee groups (i.e. represented vs. non-represented)
  - Review your policies and CBAs!
- Review how your leave tracking systems and implementation of notice requirements are working since July 2015
- Applies to all employees – not just employees traditionally offered paid sick leave. Need to start accounting for unique employee situations.
Kin Care & Child Activities

**Kin Care**

- What is Kin Care?
  - An employee is authorized to use one-half of their "accrued and available sick leave entitlement" toward kin care. (Labor Code section 233)

- Recent changes to the law have expanded the uses for kin care to include care for an employee’s own health condition or preventative care.

**Child Activities**

- Employees have a right to use their vacation, personal or compensatory time off for certain child activities as defined in Labor Code section 230.8.

- This leave is limited to 40 hours each year and no more than 8 hours per month.
Additional Leave & Reemployment List

Additional Leave

• CBA

• Classified employees have a right to request additional paid or unpaid leave (Ed. Code, § 45195.)

Reemployment List

• Certificated employees – 24 months or 39 months
• Classified employees – 39 months