EMPLOYEE LEAVES OF ABSENCE

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SCHOOLS LEGAL SERVICE STAFF
Ronald D. Wenkart, General Counsel
Claire Y. Morey, Counsel
Lysa M. Saltzman, Counsel
Kelly R. Barnes, Counsel
Ruth Y. Diep, Counsel
Norma Garcia, Paralegal

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FAMILY AND MEDICAL LEAVE
AND PREGNANCY LEAVE

A. Statutory Requirements

The federal Family and Medical Leave Act of 1993("FMLA")[1] and the California Family Rights Act of 1991 ("CFRA")[2] set forth the requirements for providing school district employees with family medical leave.

Both the FMLA and the CFRA authorize an eligible employee to use unpaid family and medical leave for the employee's own "serious health condition, as well as for the care of a serious health condition of a parent, spouse or child. Leave for the birth or adoption of a child also qualifies for leave with the Act."[3] Both FMLA and CFRA allow for up to 12 weeks of leave per twelve-month period. An employee is eligible for leave under the FMLA and the CFRA if the employee has worked for the employer for at least twelve months and at least 1,250 hours over the past twelve months. The term "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves either of the following:

1. Inpatient care in a hospital, hospice, or residential health care facility.

2. Continuing treatment or continuing supervision by a health care provider.

Certificated and classified employees also have a right to take paid sick leave for their own serious health conditions. Family and medical leave may be run concurrently with regular sick leave if the employee is given prior notice. Medical benefits must be continued during family and medical leave.[4]

When an employee requests family and medical leave, or the employer acquires knowledge of a leave that falls within FMLA/CFRA, the employer must notify the employee of his or her eligibility to take family and medical leave within five business days. The employer also must provide the employee with a written notice of the employee's rights and responsibilities under the law. This notice may inform the employee that he/she is required to furnish certification of a serious health condition.

When an employer learns that leave is being taken for a qualifying purpose, the employer must promptly (ordinarily within two business days) notify the employee that the paid leave is designated and will be counted as family and medical leave. The notification may be oral or in writing. If the initial notice is oral, it must be confirmed in writing, ordinarily no later than the following payday. The written notice may be in any form, including a notation on the

[1] 29 U.S.C. Section 2601 et seq.
[2] Government Code section 12945.2.
[3] 29 U.S.C. Section 2612(a)(1)(D); Government Code section 12945.2(b)(3)(C).
[4] 29 C.F.R. Section 825.209; Government Code section 12945.2(f).

employee's pay stub. Districts may consider providing the notice in a memorandum or letter to the employee.

If an employer does not designate leave in the timeframe set forth above, the employer may retroactively designate the leave as FMLA/CFRA provided the employer's failure to timely designate the leave does not cause harm or injury to the employee. If an employer has enough knowledge to determine that leave is for a qualifying purpose prior to commencement of the leave, the employer may not retroactively designate the leave as family and medical leave for purposes of counting the time taken against the employee's twelve-week entitlement. The employer may only prospectively designate the leave as family and medical leave as of the date that the employer notifies the employee of the designation.

On the other hand, if an employer does not learn that leave is for a qualifying purpose until after leave has begun, all or a portion of the paid leave may be retroactively counted as family and medical leave. If the employer was not aware of the reason for the leave, leave may be designated as FMLA leave retroactively only while the leave is in progress or within two business days of the employee's return to work. As another example, if an employee goes out on paid sick leave and his or her condition worsens into a "serious health condition," the entire period of the serious health condition may be counted as family and medical leave.

Employers may wish to take advantage of their right to provisionally designate a leave as family and medical leave, while awaiting receipt from the employee of medical certification or other documentation confirming that the leave is for a qualifying purpose. When a provisional designation is made, the employer must so notify the employee at the time the leave begins or as soon as the reason for the leave becomes known. The provisional designation becomes final upon receipt of the medical condition or documentation confirming that the leave is for a qualifying purpose.

B. Notice to Employees

When an employer receives certification that leave is being taken for a qualifying purpose, the employer must promptly (ordinarily within five business days) notify the employee in writing that the leave is designated as FMLA/CFRA leave and will be counted towards the twelve-week leave period. The Department of Labor has issued a sample Eligibility Notice, as well as a Sample Rights and Responsibilities Notice and a sample Designation Notice.[5] Districts should review their medical certification forms to be sure they are not requesting an employee's healthcare provider to provide the district with a diagnosis or identify the serious health condition of the employee or the employee's family member. In addition, forms that request information concerning health information must comply with the Genetic Information Nondiscrimination Act (GINA).[6] To comply with GINA, the form must contain the following language:

[5] www.dol.gov/whd/forms (see Forms WH-381 and WH-382). For CFRA posting, see http://www.dfeh.ca.gov/files/2016/09/DFEH-100-21rv201507.pdf.
[6] 42 U.S.C. Section 2000ff et seq.

"THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008 (GINA) PROHIBITS EMPLOYERS AND OTHER ENTITIES COVERED BY GINA TITLE II FROM REQUESTING OR REQUIRING GENETIC INFORMATION OF AN INDIVIDUAL OR FAMILY MEMBER OF THE INDIVIDUAL, EXCEPT AS SPECIFICALLY ALLOWED BY LAW. TO COMPLY WITH THIS LAW, WE ARE ASKING THAT YOU NOT PROVIDE ANY GENETIC INFORMATION WHEN RESPONDING TO THIS REQUEST FOR MEDICAL INFORMATION. 'GENETIC INFORMATION' AS DEFINED BY GINA, INCLUDES AN INDIVIDUAL'S FAMILY MEDICAL HISTORY, THE RESULTS OF AN INDIVIDUAL'S OR FAMILY MEMBER'S GENETIC TESTS, THE FACT THAT AN INDIVIDUAL OR FAMILY MEMBER SOUGHT OR RECEIVED GENETIC SERVICES, AND GENETIC INFORMATION OF A FETUS CARRIED BY AN INDIVIDUAL OR AN INDIVIDUAL'S FAMILY MEMBER OR AN EMBRYO LAWFULLY HELD BY AN INDIVIDUAL OR FAMILY MEMBER RECEIVING ASSISTIVE REPRODUCTIVE SERVICES. YOU MAY PROVIDE FAMILY MEDICAL INFORMATION TO SUBSTANTIATE AN EMPLOYEE'S REQUEST FOR LEAVE TO CARE FOR A FAMILY MEMBER."

If FMLA documents contain family information, employers must keep such information confidential pursuant to the Genetic Information Nondisclosure Act ("GINA").[7] GINA prohibits employers or other entities from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by law. Under GINA, genetic information includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or family member sought or received genetic services, and genetic information of a fetus carried by or embryo held by an individual or individual's family member.[8]

The coordination of family and medical leave with pregnancy disability leave is complicated because it involves reconciling four distinct bodies of law: the FMLA, the CFRA, Government Code section 12945 (pregnancy disability leave), and the sick leave provisions of the California Education Code. The FMLA allows an employee to take a total of twelve weeks in a twelve-month period both for prenatal medical care or if her condition makes her unable to work and to care for the newborn child.[9] However, the employee is not entitled to twelve weeks for each event.

[7] 42 U.S.C. Section 2000ff.
[8] 42 U.S.C. Section 2000ff (4); 29 C.F.R. Section 1635.3 (c).
[9] 29 C.F.R. Section 825.112.

C. Family Medical Leave Act Regulations

The United States Department of Labor updated the regulations for the Family Medical Leave Act (FMLA),[10] effective on March 8, 2013. The regulations clarify intermittent leave and recordkeeping requirements, expand coverage for military servicemembers and families, and reference optional model forms and posters.[11] The regulatory provisions regarding military servicemembers and families were updated to align with changes from the National Defense Authorization Act. In addition, a subsequently issued Administrator's Interpretation from the Department of Labor clarifies requirements for FMLA leave to care for an adult child. Below is a summary of key provisions for schools and community colleges.

One of the significant clarifications regarding intermittent leave is that an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave.[12] The physical impossibility provisions apply only in the most limited situations (examples in the regulations include 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, and no equivalent position is available).[13] The regulations reiterate that employers must restore the employee to the same or equivalent position as soon as possible.[14]

The regulations further clarify that FMLA leave must be counted using the shortest increment of leave used to account for any other type of leave.[15] For example, if an employer accounts for the use of annual leave in increments of one hour and the use of sick leave in increments of one-half hour, use of FMLA leave must be accounted for using increments no larger than one-half hour. Even if an employer accounts for other forms of leave use in increments greater than one hour, the employer must account for FMLA leave use in increments no greater than one hour. An employer may account for FMLA leave in shorter increments than used for other forms of leave.[16] However, the regulations emphasize that employers cannot charge FMLA leave for periods during which employees are working.[17] This provision applies to reduced work leave schedules as well as intermittent leaves.[18]

Administrator's Interpretation No. 2013-1 clarifies the regulations regarding who is a "son or daughter" for purposes of a FMLA leave of an eligible employee to provide care to an adult child. For purposes of leave to care for an adult child,[19] FMLA defines a "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable

[10] 29 U.S.C. Section 2601 et seq.
[11] The new regulations are set forth in Title 29, section 825.100 and following.
[12] 29 C.F.R. Section 825.205.
[13] 29 C.F.R. Section 825.205 (a) (2).
[14] 29 C.F.R. Sections 825.205 (a) (2), 825.214, 825.215.
[15] 29 C.F.R. Section 825.205 (a).
[16] 29 C.F.R. Section 825.205 (a) (1).
[17] 29 C.F.R. Section 825.205 (a).
[18] 29 C.F.R. Section 825.205 (b).
[19] The Department of Labor's Administrator's Interpretation does not apply to an employee's entitlement to take FMLA military family leave for a son or daughter, for which there are separate definitions with no age restrictions. See, 29 C.F.R. Sections 825.122(g)-(h), 825.126(b)(1), 825.127(b)(1).

of self-care because of a mental or physical disability."[20] The FMLA does not require that a biological or legal relationship exist between the eligible employee and the child, so an employee with day-to-day responsibilities to care for or financially support a child would qualify for FMLA leave under these provisions.[21]

FMLA follows the Americans with Disabilities Act broad definition of "disability" as a physical or mental impairment that substantially limits a major life activity (as interpreted by the EEOC) to define "physical or mental disability."[22] The FMLA regulations define "incapable of self-care because of mental or physical disability" as when an adult son or daughter "requires active assistance or supervision to provide daily self-care in three or more of the 'activities of daily living' (ADLs) or 'instrumental activities of daily living' (IADLs)."[23] Under the regulations, a parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the adult son or daughter meets all of the following requirements:

(1) Has a disability as defined by the ADA;

(2) Is incapable of self-care due to that disability;

(3) Has a serious health condition; and

(4) Is in need of care due to the serious health condition.

The Administrator's Interpretation also states that based on this analysis and examination of the relevant factors, the disability of a son or daughter may occur or manifest at any age for purposes of coverage for a "son or daughter" 18 years of age or older under the FMLA.[24]

In determining FMLA eligibility, any absence from work due to military service covered under the Uniformed Services Employment and Reemployment Rights Act ("USERRA") must be counted toward the employee's twelve-month employment period.[25] Under the regulations, referred to as the military caregiver leave provisions, several new and clarified definitions were added with regard to military servicemembers and families. In general, these provisions authorize family members to take FMLA leave to provide care for military servicemembers and provide assistance under qualifying exigency leave.

"Current servicemember" includes (1) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness, or (2) a covered veteran who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness. "Covered veteran" is defined as an individual who was a member of the Armed Forces, including a member of the National Guard or Reserves, and was discharged or released under conditions other than

[20] 29 C.F.R. Section 825.122(c).
[21] 29 C.F.R. Section 825.122(c)(3).
[22] 29 C.F.R. Section 825.122(c)(2).
[23] 29 C.F.R. Section 825.122(c)(1).
[24] U.S. Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2013-1.
[25] 29 C.F.R. Section 825.110.

dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran.[26] In calculating this coverage period, the time between October 28, 2009 and March 8, 2013, the effective date of these regulations, shall not count towards the determination of the five-year period for covered veteran status.[27] If the servicemember is discharged on or after March 8, 2013, the five-year period begins on the date of discharge.

"Covered active duty" is further clarified in the regulations. For a member of the Regular Armed Forces, covered active duty or call to covered active duty status means duty during deployment to a foreign country.[28] For a member of the Reserve components of the Armed Forces (members of the National Guard and Reserves), covered active duty or call to covered active duty status means duty during deployment to a foreign country or order to active duty in support of a contingency operation. Deployment to a foreign country means the military member is deployed to an area outside of the United States, the District of Columbia, or any Territory or possession of the United States and includes deployment to international waters.[29] The regulations expand the definition of serious injury or illness for a current servicemember, whether a current member of the armed forces or a covered veteran, to include injuries or illnesses that existed prior to the servicemember's active duty but were aggravated in the line of duty on active duty (for covered veterans, the injury or illness could manifest before or after becoming a veteran).[30] In addition, covered veterans must show the serious injury or illness is one of the following:

1. A continuation of a serious injury or illness that was incurred or aggravated when the veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or

2. A physical or mental condition for which the veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater, and the need for military caregiver leave is related to that condition; or

3. A physical or mental condition that substantially impairs the veteran's ability to work because of a disability or disabilities related to military service, or would do so absent treatment; or

4. An injury, including a psychological injury, on the basis of which the veteran is enrolled in the Department of Veterans

[26] 29 C.F.R. Section 825.102; 825.127 (b) (2).
[27] 29 C.F.R. Section 825.127 (b) (2) (i).
[28] 29 C.F.R. Sections 825.102, 825.126.
[29] 29 C.F.R. Section 825.126.
[30] 29 C.F.R. Section 825.127.

Affairs Program of Comprehensive Assistance for Family Caregivers.[31]

The family member of a veteran only needs to show that the veteran meets one of these definitions to establish that the veteran has a serious injury or illness.

As an additional consideration, the Administrator's Interpretation notes that the FMLA military caregiver leave provision allows for subsequent leaves.[32] For example, if the same servicemember has a subsequent serious injury or illness (e.g., on another deployment), or subsequently manifests a separate serious injury or illness based on the same service (e.g., is subsequently diagnosed with post-traumatic stress disorder), the covered family member would be entitled to another 26 workweek period of military caregiver leave in a separate single twelve-month period.[33]

For medical certification, the regulations expand the list of health care providers who can certify FMLA military caregiver leave to include health care providers who are not affiliated with the military.[34] If a medical certification is obtained from a health care provider who is not affiliated with the military, the employer may request a second or third opinion from the employee. However, healthcare certifications obtained from healthcare providers associated with the military may not be subject to second and third opinions. In either situation, employers are not permitted to request recertification.[35] In addition, the new regulations permit eligible employees to submit a copy of a VASRD rating determination or documentation of enrollment in the Program of Comprehensive Assistance for Family Caregivers from the Department of Veterans Affairs to certify that the veteran has a serious injury or illness. However, if an employee submits such documents, the employee may still be required to provide additional information.[36]

The regulations updated "qualifying exigency leave" provisions, which entitle an eligible employee whose spouse, son, daughter, or parent is a military member on covered active duty to take unpaid, job-protected leave. Under a new category, an eligible employee may take qualifying exigency leave related to the care of the military member's parent who is incapable of self-care where those activities arise from the military member's covered active duty, such as arranging for alternative care; providing care on a non-routine, urgent, immediate need basis; admitting or transferring the military member's parent to a new care facility; and attending certain meetings with staff at a care facility, such as meetings with hospice or social service providers.[37] For qualifying exigency leave for child care and school activities, the regulations clarify that the military member must be the spouse, son, daughter or parent of the employee requesting leave in order to qualify for leave.[38] The regulations also increase the amount of time from five days to up to fifteen calendar days that an eligible employee may take to spend with his

[31] 29 C.F.R. Section 825.127.
[32] U.S. Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2013-1.
[33] 29 U.S.C. Section 2612(a)(3); 29 C.F.R. section 825.127.
[34] 29 C.F.R. Section 825.125.
[35] 29 C.F.R. Section 825.310.
[36] 29 C.F.R. Section 825.310.
[37] 29 C.F.R. Section 825.126 (b) (8).
[38] 29 C.F.R. Section 825.126 (b) (3).

or her military family member during the military member's Rest and Recuperation leave, subject to the timeframe allowed in the military member's Rest and Recuperation orders, or other documentation issued by the military.[39] Employers should note that this leave may be taken intermittently or in a block as long as the leave is taken during the time indicated on the orders.

The United States Department of Labor issued model posters and forms in compliance with these regulations. The optional forms, including forms related to the provisions regarding military servicemembers and their families, can be found on the United States Department of Labor's web site: http://www.dol.gov/whd/fmla/index.htm.

D. California Law and Pregnancy Leaves

Under California law, an employee of a public educational agency has two different entitlements with regard to pregnancy disability. Under Government Code section 12945, a woman is entitled to up to four months of pregnancy disability leave for disability caused by pregnancy, childbirth, or related medical conditions. Additionally, the California Education Code guarantees pregnancy leave for classified and certificated employees of public educational agencies, and provides also that regular and differential sick leave may be taken for pregnancy related disabilities.[40]

However, the CFRA provides that family care and medical leave under California law does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions.[41] Government Code section 12945.2(s) provides that CFRA leave runs concurrently with FMLA leave except for any leave taken under the FMLA for pregnancy disability.

Therefore, an employee may take up to four months of pregnancy disability leave, consecutively or intermittently, including twelve weeks of FMLA leave. To the extent that the employee has available regular and extended sick leave, these days of pregnancy disability leave would be fully paid. Then, after childbirth, the employee would have up to twelve weeks of CFRA leave to bond with the newborn child.

Additionally, it is unlawful for an employer to refuse to maintain and pay for group health insurance for the duration of the pregnancy leave, not to exceed four months over the course of the twelve-month period, commencing on the date the leave was taken. The employer may recover the cost of the health insurance premium the employer paid if both of the following conditions are met:

1. The employee fails to return from leave after the period of leave has expired.

2. The employee's failure to return from leave is for a reason other than family leave per Government Code section

[39] 29 C.F.R. Section 825.126 (b) (7).
[40] Education Code sections 44965, 44978, 45193.
[41] Government Code section 12945.2(c)(3)(C).

12945.2 or due to a health condition or other circumstances beyond the employee's control.[42]

The California Legislature amended the state provisions relating to pregnancy leave and family leave, effective January 1, 2012.[43] Government Code sections 12945(a)(4) and 12945.2(t) make it unlawful for any employer to interfere with, restrain, or deny the exercise, or the attempt to exercise, any right provided under the pregnancy leave and family and medical leave provisions of state law.

In addition, Government Code section 12945 makes it unlawful for an employer to refuse to maintain and pay for coverage for an eligible female employee who takes pregnancy leave under a group health plan for the duration of the leave, not to exceed four months over the course of a twelve-month period, commencing on the date the leave begins, at the level and under the conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. An employer may recover from the employee the premium that the employer paid as required for maintaining coverage for the employee under the group health plan if both of the following conditions occur:

1. The employee fails to return from leave after the period of leave to which the employee is entitled has expired.

2. The employee's failure to return from leave is for a reason other than family leave or the continuation, recurrence, or the onset of a health condition that entitles the employee to leave or other circumstances beyond the control of the employee.[44]

The coordination of family and medical leave with pregnancy disability leave is complicated because it involves reconciling four distinct bodies of law: the FMLA, the CFRA, Government Code section 12945 (California pregnancy disability leave), and the sick leave provisions of the California Education Code. The FMLA allows an employee to take a total of twelve weeks in a twelve-month period both for prenatal medical care or if her condition makes her unable to work, and to care for the newborn child.[45] However, the employee is not entitled to twelve weeks for each event.

Under California law, an employee of a public educational agency has two different entitlements with regard to pregnancy disability. Under Government Code section 12945, a woman is entitled to up to four months of pregnancy disability leave for disability caused by pregnancy, childbirth, or related medical conditions. Additionally, the California Education Code guarantees pregnancy leave for classified and certificated employees of public educational agencies, and provides also that regular and differential sick leave may be taken for pregnancy related disabilities.[46]

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[42] Government Code section 129.45(a)(2). It is also unlawful for an employer to interfere with, restrain, deny or attempt to deny any right to pregnancy leave or family leave. See, Government Code sections 129.45(a)(4) and 129.45.2(t).
[43] Stats. 2011, ch. 510 (S.B. 299); Stats. 2011, ch. 678 (A.B. 592).
[44] Government Code section 12945(a)(2).
[45] 29 C.F.R. Section 825.112.
[46] Education Code sections 44965, 44978, 45193, 87766, 87781, 88193.

In Richey v. Autonation, Inc.,[47] the California Supreme Court held that an employer could dismiss an employee who is on medical leave if the employee violates a company policy during leave. This decision would apply to both public employers and private employers.

In Richey, the employee violated a company policy that prohibited employees from working while they were on medical leave. The employee was aware that outside employment while on California Family Rights Act (CFRA) leave was not allowed. Employees who had violated this policy in the past had been fired.

In October 2007, Mr. Richey decided to open a restaurant while he was still working at Power Toyota. In March 2008, Mr. Richey injured his back at home and was unable to work as a result of his injury. Mr. Richey filed for leave under the CFRA and the federal Family Medical Leave Act (FMLA) and Power Toyota granted the leave.

While Mr. Richey was on leave, Power Toyota sent him a letter stating that employees were not allowed to engage in outside employment while on leave. Mr. Richey failed to respond to the letter. After receiving information that Mr. Richey was working while on medical leave, Power Toyota investigated and determined that Mr. Richey was working at his restaurant.

The California Supreme Court held that the evidence overwhelmingly supported the arbitrator's factual findings that Mr. Richey was fired because he pursued outside employment while on CFRA leave[48] and FMLA[49] leave and the court upheld the employee's termination.

E. Revisions to the California Pregnancy Disability Leave Regulations

The Fair Employment and Housing Commission issued regulations implementing the Pregnancy Disability Leave Law, effective December 30, 2012.[50] The pregnancy disability leave ("PDL") regulations contain provisions to comply with current statutes, additional clarifications, and guidance for coordination with other leave laws. [51] The following are the most significant clarifications and changes for schools and colleges:

The regulations provide an expanded definition of pregnancy disability, including examples of potentially disabling conditions. Related medical conditions include any medically recognized physical or mental condition related to pregnancy, childbirth, or recovery from pregnancy or childbirth. The regulations contain non-exhaustive examples including "lactation-related medical conditions such as mastitis; gestational diabetes; pregnancy-induced hypertension; preeclampsia; post-partum depression; loss or end of pregnancy; and recovery from childbirth, loss or end of pregnancy."[52] A woman is "disabled by pregnancy" if, in her health care provider's opinion, she is unable to perform any one or more essential function(s) of her job without undue risk to herself, to her pregnancy's successful completion, or to others. Her

[47] 60 Cal. 4th 909 (2015).
[48] Government Code section 12945.2.
[49] 29 U.S.C. 2601, et seq.
[50] California Government Code sections 12935(a), 12945.
[51] The new regulations are set forth in Title 2 of the California Code of Regulations, sections 7291.2 and following.
[52] 2 C.C.R. Section 7291.2 (u).

health care provider may indicate that she is disabled by pregnancy due to severe morning sickness or needs to take time off for pre- or post-natal care, bed rest, or related medical conditions.[53]

The definition of "Health Care Provider" contains a non-exhaustive list of additional examples of qualified providers to certify the pregnancy disability and to indicate a need for leave or reasonable accommodations. As noted in the regulations, marriage and family therapists, acupuncturists, licensed midwives, clinical psychologists, clinical social workers, chiropractors, and physician assistants who directly treat or supervise the applicant's or employee's pregnancy, childbirth or related medical condition now explicitly qualify.[54] There is no provision for obtaining a second opinion.

"Perceived pregnancy," defined as being regarded or treated by an employer as being pregnant or having a related condition, is now a potential basis for a discrimination complaint.[55] Under the regulations, an employer faces liability for any acts of discrimination based on the employer's perception that an applicant or employee is pregnant, whether or not she is. Perceived pregnancy does not, however, entitle the claimant to any leave or reasonable accommodations.

The regulations clarify an employer's obligation for reasonable accommodations, which is defined as "any change in the work environment or in the way a job is customarily done that is effective in enabling an employee to perform the essential functions of a job."[56] The definition includes examples, such as modifying work practices or policies, modifying work schedules to provide earlier or later hours, modifying work duties, providing furniture (such as stools) or acquiring or modifying equipment or devices, and/or providing additional break time for lactation or rest room needs.[57] Employers cannot deny a request for reasonable accommodations if (1) the employee's request is based on the advice of her health care provider that the accommodation is medically advisable and (2) the requested accommodation is reasonable.

The employee and employer must engage in a good faith interactive process, similar to the process for other types of disabilities.[58] Whether an accommodation is reasonable is a factual determination and the employer may consider factors including but not limited to the employee's medical needs, the duration of the accommodation, and legally permissible past and current practices of the employer.[59] The process begins with oral or written notice by the employee of the need for reasonable accommodations. If the need is foreseeable, the employee should notify the employer at least 30 days in advance. The regulations state that if 30 days is not practicable due to a change in circumstances, medical emergency, or other good cause, notice must be given as soon as practicable.[60] Direct notice to the employer from the employee is preferred but not required. An employer may not deny the reasonable accommodation for lack of adequate notice

[53] 2 C.C.R. Section 7291.2 (f).
[54] 2 C.C.R. Section 7291.2 (n).
[55] 2 C.C.R. Section 7291.2 (q).
[56] 2 C.C.R. Section 7291.2 (s).
[57] 2 C.C.R. Section 7291.2 (s).
[58] 2 C.C.R. Section 7291.7.
[59] 2 C.C.R. Section 7291.7 (a).
[60] 2 C.C.R. Section 7291.17.

if the need is an emergency or otherwise unforeseeable. Employers must respond to requests no later than ten calendar days after receiving the request. As a condition of granting reasonable accommodations, transfers, or pregnancy disability leave, employers may require medical certification. Please see section on medical certification, below, for more details about this process.

The regulations have modified the definition of "four months" so that an eligible employee's "four month" leave period can be calculated in hours rather than days. This clarification is helpful for intermittent leave or reduced work hours for PDL. The four-month leave under PDL is per pregnancy, not per year. "Four months" is defined as one-third of a year or 693 hours and the regulations include sample full-time employee and part-time employee hourly calculations.[61] Intermittent leave or reduced work schedules should be calculated using the shortest period of time that the employer's payroll system uses to account for other forms of disability leave provided it is not greater than one hour.[62] An example provided for a full-time employee follows: if the employee takes 180 hours of intermittent leave, she would still be entitled to take 513 hours of PDL (almost three months of leave) because the four month total of hours for a full time employee is calculated at 693 hours of leave entitlement.[63]

The regulations restate that unlike the Family Care and Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA"), PDL does not have a minimum hours worked or length of service requirement for the employee's entitlement to pregnancy disability leave, reasonable accommodation, or transfer.[64] In addition, the regulations clarify that the right to take pregnancy disability leave is separate and distinct from the right to take leave of absence under CFRA or disability leave laws.[65] Therefore, employees who qualify for both pregnancy disability leave and CFRA can take them consecutively, not concurrently; for example, the employee may be disabled by pregnancy for four months under PDL plus qualify for twelve weeks of CFRA leave. Employers may require employees to use any accrued sick leave during pregnancy disability leave. Also, an employee may request the use of her sick leave, vacation leave, and/or any other leave credits she has in order to receive compensation during the otherwise unpaid portion of her pregnancy disability leave.[66]

Regarding group health coverage, employers must maintain and pay for health coverage for an eligible female employee who takes PDL for the duration of the leave (not to exceed four months in a twelve-month period) at the same level and under the same conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. This coverage period is separate from an employer's obligation to pay for twelve weeks of group health coverage during CFRA or FMLA leave.[67] However, in specified circumstances, an employer may recover from the employee premiums paid while the employee was on PDL. Recovery is permitted if the employee fails to return at the end of the leave and the employee's failure to return is for a reason other than one of the following: (1) taking CFRA

[61] 2 C.C.R. Section 7291.9.
[62] 2 C.C.R. Section 7291.9.
[63] 2 C.C.R. Section 7291.9 (a) (3) (A).
[64] 2 C.C.R. Section 7291.12.
[65] 2 C.C.R. Sections 7291.13, 7291.14.
[66] 2 C.C.R. Section 7291.11.
[67] 2 C.C.R. Section 7291.11 (c).

leave; (2) continuation or recurrence or onset of health condition that entitles employee to pregnancy disability leave; (3) non-pregnancy related medical conditions requiring further leave; or (4) any other circumstance beyond the control of the employee, including where the employer is responsible for the employee's failure to return (for example, for failure to reinstate the employee).[68]

Under the regulations, employers must reinstate the employee returning from leave to the same position or, if the position no longer exists for legitimate business reasons unrelated to her leave (e.g., due to reduction in force), a comparable position in the same manner as if she had been working and not on leave.[69] Upon request of the employee, the employer must provide a written guarantee of reinstatement.[70] However, reinstatement is not guaranteed if the employer can show the employee would not have been reinstated regardless of pregnancy disability leave or transfer due to unrelated, legitimate business reasons such as layoff.[71] Employees on PDL have no greater right to reinstatement to a comparable position than an employee who has been continuously employed in another position that is being eliminated.[72]

In addition, an employer who eliminates an employee's position while she is on PDL (as in a reduction in force) must use reasonable means to notify her of other available comparable positions for which she is qualified within 60 calendar days of the date on which she would have been reinstated. The employee also has a right to reinstatement to her previous position when her health care provider certifies there is no further medical advisability for the transfer, intermittent leave, or leave on a reduced work schedule, in the same way as if she were returning from leave.[73] If the employee takes a separate leave following the end of her pregnancy disability leave, the reinstatement rights pertaining to that leave, not PDL, would apply.[74] For example, if she takes a CFRA leave after PDL, under CFRA, the employer may reinstate an employee to the same or comparable position.

An employer may require an employee to provide a release to return to work from her health care provider as a condition of return to work from a pregnancy disability leave or transfer if the employer requires such a release for non-pregnancy related disability leaves or transfers.[75]

The regulations provide clarification regarding transfers.[76] If the employee's health care provider indicates that intermittent leave or a reduced work schedule is medically advisable, an employer may require the employee to temporarily transfer to an alternative position. Although the alternative position need not have equivalent duties, it must have an equivalent rate of pay and benefits and the employee must be qualified for the position. Temporary transfer to an alternative position may include altering an existing position to accommodate the employee's need for intermittent leave or a reduced work schedule.

[68] 2 C.C.R.Section 7291.11 (c) (3).
[69] 2 C.C.R. Section 7291.10.
[70] 2 C.C.R. Section 7291.10 (a).
[71] 2 C.C.R. Section 7291.10 (c) (1).
[72] 2 C.C.R. Section 7291.10 (c) (2).
[73] 2 C.C.R. Section 7921.8 (d).
[74] 2 C.C.R.Section 7291.10.
[75] 2 C.C.R. Section 7291.17 (d).
[76] 2 C.C.R. Section 7291.8.

As a condition of granting reasonable accommodation, transfer, or pregnancy disability leave, the employer may require medical certification.[77] Under the regulations, employers must notify employees of the need to provide medical certification, the deadline for providing the medical certification, what constitutes sufficient medical certification, and the consequences for failing to provide medical certification. If the employee is already out on leave due to unforeseeable circumstances, the employer's notice can be oral, followed by a mailed, emailed, or faxed delivery of the medical certification form to the employee or her doctor as she determines. For a foreseeable leave where at least 30 days' notice has been provided, the employee shall provide the medical certification prior to the leave.[78]

Employers must provide this notice each time medical certification is required and provide the employee with any employer-required medical certification form for the employee's health care provider to complete.[79] As part of the regulations, a model medical certification form is included as an option for employers to use. It is strongly advised that districts use this form, as it contains all required components.

Under the provisions of the regulations, employers can delay granting (or continuing) a requested reasonable accommodation, transfer or leave to an employee who fails to provide timely certification after the employer requests it.[80] The regulations are silent as to whether an employer may terminate employment based on a failure to provide medical certification.

As noted above, employers must notify employees of the regulatory requirements for medical certification as well as the employees' right to request reasonable accommodations, transfer, or pregnancy disability leave and employees' notice obligations.[81] This notice must be posted in a conspicuous place or where employees gather.[82] The regulations encourage employers to incorporate this notice into employee handbooks or alternatively distribute copies of this notice at least annually to all employees, which can be done via email.[83] The regulations also contain a requirement that employers give oral or written notice to non-proficient English speakers and written notice translated into any language spoken by 10% or more of the workforce at a particular workplace.[84] The regulations include sample notices to address this requirement. Since school districts and colleges are subject to the Family Care and Medical Leave Act and California Family Rights Act, sample Notice B is appropriate. The most current version of Notice B can be accessed on the Department of Fair Employment and Housing website at http://www.dfeh.ca.gov/Publications_Publications.htm.

[77] 2 C.C.R. Section 7291.17 (b).
[78] 2 C.C.R. Section 7291.17 (a).
[79] 2 C.C.R. Section 7291.17 (b) (1).
[80] 2 C.C.R. Section 7291.17 (a) (6).
[81] 2 C.C.R. Section 7291.16.
[82] 2 C.C.R. Section 7291.16 (d).
[83] 2 C.C.R. Section 7291.16 (d) (3).
[84] 2 C.C.R. Section 7291.16 (d) (4).

F. Designation of FMLA Leave

In Ragsdale v. Wolverine World Wide, Inc.,[85] the United States Supreme Court held that even if an employer does not designate medical leave as FMLA leave, the leave taken may count against an employee's FMLA entitlement. The decision means an employee is not entitled to an additional twelve weeks of leave as a penalty for an employer's failure to designate other sick leave as FMLA leave.

Ragsdale began working at a Wolverine factory in 1995, but in the following year she was diagnosed with Hodgkin's disease, a form of cancer. She was eligible for seven months of unpaid sick leave under the company's leave plan. She took full advantage of this leave entitlement, missing 30 consecutive weeks of work. Her position with the company was held open throughout this leave period, and the company maintained her health benefits and paid her premiums during the first six months of her absence. However, Wolverine did not notify her that twelve weeks of the absence would count as her FMLA leave entitlement.[86]

When Ragsdale sought a 30-day extension of leave, Wolverine advised her that she had exhausted her seven months under the company plan. The company denied her request for additional leave, and terminated her when she did not come back to work. She sued Wolverine, relying on a U.S. Department of Labor regulation implementing the FMLA,[87] which provides that if an employee takes medical leave "and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement." Since Wolverine had not designated her leave as FMLA leave, she contended that she was entitled to twelve more weeks of leave.[88]

The Supreme Court rejected Ragsdale's argument, and struck down Section 825.700(a) as contrary to the FMLA and beyond the Secretary of Labor's authority. The court advanced several reasons for its decision, but primarily, the Court found that the penalty set forth in Section 825.700(a) was incompatible with the remedial mechanism of the FMLA itself. Under the statute,[89] an employer is subjected to consequential damages and equitable relief, if the employer interferes with, restrains, or denies the exercise of an employee's FMLA rights. Even then, the FMLA provides no relief unless the employee has been prejudiced by the violation. Instead of requiring the employee to prove prejudice, the Court found that the regulation[90] establishes an "irrebuttable presumption" that the employee's exercise of FMLA rights was restrained. The Court found no empirical or logical basis for this presumption. Ragsdale herself did not demonstrate that she would have taken less, or intermittent, leave had she received the required notice. In fact, her physician did not clear her to work until long after the 30-week leave period had ended. In short, she was not prejudiced by the employer's failure to designate her medical leave as FMLA leave, because she received the full twelve weeks of leave to which she was entitled under the Act.

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[85] 535 U.S. 81, 122 S.Ct. 1155 (2002).
[86] Id. at 1159.
[87] 29 C.F.R. Section 825.700(a).
[88] 122 S.Ct. 1155, 1161 (2002).
[89] 29 U.S.C. Section 2617.
[90] 29 C.F.R. Section 825.700(a).

The Court also noted that the FMLA's guarantee of entitlement to a "total" of twelve weeks of leave in a twelve-month period represented a compromise between employers who wanted fewer weeks and employees who wanted more. The Court found that the penalty set forth in Section 825.700(a) subverted this compromise by entitling certain employees to leave beyond the statutory mandate.[91]

Significantly, while the Court invalidated the penalty of Section 825.700(a), the Court did not invalidate Section 825.208(a), which still makes it the employer's responsibility to notify an employee that an absence will be considered FMLA leave. The Court stated: "[W]e do not decide whether the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute."

G. Failure to Give Adequate Notice

In Bachelder v. America West Airlines, Inc.,[92] the Court of Appeals held that the employer failed to give adequate notice of its "leave year" for the purpose of calculating eligibility under the FMLA.

The plaintiff, Penny Bachelder, was a customer service representative for America West Airlines. From 1994 to 1996, she was often absent from work for various health- and family-related reasons. In 1994, she took five weeks of medical leave to recover from a broken toe, and in mid-1995, she took maternity leave for approximately three months. Both of these leaves were covered by the FMLA. In January of 1996, one of the airline's managers had a discussion with Bachelder regarding her attendance record. She was advised to improve her attendance and was required to attend meetings at which her progress would be evaluated. In February 1996, she was absent from work again for a total of three weeks. In early April, she called in sick for one day to care for her baby. Right after that, she was fired. The supervisor's termination letter gave three reasons for the company's decision, including Bachelder's sixteen absences after being counseled about her attendance in January. Bachelder sued America West, contending that the airline impermissibly considered her use of FMLA-protected leave in its decision to terminate her. In response, America West contended that none of the plaintiff's February 1996 absences were covered by the FMLA, because the airline used the "rolling" leave year method for calculating eligibility for FMLA leave.[93]

The FMLA "leave year" regulation, 29 C.F.R. Section 825.200, allows employers to calculate the twelve-month period in which an employee is limited to twelve weeks of protected leave by one of the following four methods:

> "(1) The calendar year;
>
> "(2) Any fixed twelve-month 'leave year,' such as a fiscal year, a year required by State law, or a year starting on an employee's 'anniversary';

[91] 122 S.Ct. 1155, 1161 (2002).
[92] 259 F.3d 1112.
[93] Id. at 1118-1119.

"(3) The twelve-month period measured forward from the date an employee's first FMLA leave begins; or

"(4) A 'rolling' twelve-month period measured backward from the date an employee uses any FMLA leave."

Under the "rolling" method, each time an employee takes FMLA leave, the remaining leave entitlement would be any balance of the twelve weeks which has not been used during the immediately preceding twelve months. America West contended that Bachelder had, therefore, exhausted her full annual allotment of FMLA leave as of June 1995, and was entitled to no more such leave until twelve months had elapsed from the commencement of her 1995 maternity leave. Therefore, America West maintained her February 1996 absences could not have been protected by the FMLA.[94]

The court rejected America West's contention that Bachelder's February 1996 absences were not covered by the FMLA, finding that the airline had failed to provide adequate notice to employees of the "leave year." Although FMLA's implementing regulations do not expressly require employers to notify their employees of the leave year for calculating eligibility, the court nevertheless interpreted the law as embodying a notice requirement. In particular, the court noted that 29 C.F.R. Section 825.200(b)(1) requires employers to give at least 60 days' notice of a change in the "leave year." The court observed that "notifying employees of a change of methods is only meaningful if they are aware that another method was previously in use."[95]

America West maintained that it had adequately notified employees of the rolling "leave year" calculation method, because its employee handbooks stated that "employees are entitled to up to 12 calendar weeks of unpaid [FMLA] leave within any 12 month period." The court rejected this argument, finding that the statement in the handbook "does nothing more than parrot the language of the act." Because the statute may be read to allow for any of the four different methods, the handbook language did not inform employees of the particular method the airline had chosen.[96]

Because choosing a "leave year" carries with it the obligation to inform employees of that choice, the court found that America West had failed to select a calculating method. Therefore, under 29 C.F.R. Section 825.200(e), "the option that provides the most beneficial outcome for the employee" must be used to determine whether the plaintiff's 1996 absences were covered by the FMLA. The "calendar year" method provided the most favorable outcome to Bachelder. Because she began 1996 with a fresh bank of FMLA-protected leave, her February 1996 absences were covered by the FMLA.[97]

Unfortunately, the court did not provide clear guidance concerning the method of notifying employees of the "leave year." Clearly, notice may be provided in an employee

[94] Id. at 1119-1121.
[95] Id. at 1129.
[96] Ibid.
[97] Id. at 1129-1136.

handbook, but California public educational agencies do not typically provide handbooks to their employees. The court found that the notice requirement is not satisfied by posting the sample poster provided by the Wage and Hour Division of the United States Department of Labor, because the sample poster does not mention the methods by which employers calculate leave eligibility. It remains open to question whether the notice requirement would be satisfied if the sample poster were modified to specify the employer's choice of "leave year."[98]

The "leave year" should be specified in a document that is disseminated to employees. This document could be a collective bargaining agreement or board policy or regulation that is distributed to employees. Alternatively, a district could specify the leave year on the FMLA "fact sheet" which the United States Department of Labor provides to satisfy the requirement of providing employees who request family and medical leave with written guidance concerning their rights and obligations under the FMLA. As modified, the fact sheet should be provided to all employees, not just employees who have requested family and medical leave.

H. Exemption from Layoff

In Tomlinson v. Qualcomm, Inc.,[99] the Court of Appeal held that California's Family Rights Act, Government Code section 12945.2, does not immunize or exempt an employee from an otherwise valid layoff. This ruling would apply to all employers in California, public and private. Therefore, if a district lays off certificated or classified employees in conformance with the statutory provisions in the Education Code, an employee on family leave would not be immunized or exempted from that layoff.

In Tomlinson, the employee had been granted maternity and family leave in 1998 and 1999. During the period of time that the employee was on leave, the employer instituted a company-wide workforce reduction, or layoff. The employee filed suit in Superior Court alleging that since she was on family leave, she was immunized or exempted from the layoff. The employee argued that Government Code section 12945.2 guaranteed employment in the same or comparable position upon the termination of the leave. However, the Court of Appeal held that California Code of Regulations, Title 2, Section 7297.2, adopted by the Fair Employment and Housing Commission, clarified that the guarantee of reinstatement to the same or comparable position does not preclude an employer from terminating the employee's employment as part of a workforce reduction.[100] Section 7297.2 states:

> "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 this CFRA leave period. The employer has the burden of proving, by a preponderance of the evidence that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny reinstatement. . . ."

[98] Ibid.
[99] 97 Cal.App.4th 934, 118 Cal.Rptr.2d 822 (2002).
[100] Id. at 939-940.

The Court of Appeal noted that the regulation was consistent with the federal FMLA.[101] The court in Tomlinson noted that the California law was modeled after the FMLA and that the FMLA confirms that a guarantee of continued employment after leave may coexist with a prohibition on conferring greater rights to an employee on leave.[102]

I. Activities That Do Not Qualify For FMLA Leave

In Tellis v. Alaska Airlines,[103] the Court of Appeals concluded that an employee retrieving a family car on the other side of the country, and making periodic cell phone calls to his wife during the retrieval, was not "caring for" his wife for purposes of the FMLA. The decision highlights the requirement that there be a minimum "level of participation in the ongoing treatment" of a seriously ill family member before leave to "care for" that individual will qualify under the state federal family leave laws.

The court concluded that the employee's activities could not be considered "caring for" his wife. The court stated:

> "Instead of participating in his wife's on-going treatment by staying with her, he left her for almost four days. [Plaintiff] claims his trip provided psychological reassurance to his wife, but he did not travel to Atlanta to participate in his wife's medical care. Having a working vehicle may have provided psychological reassurance; however, that was merely an indirect benefit of an otherwise unprotected activity – traveling away from the person needing care. [Plaintiff] also claims his phone calls provided moral support and comfort, but his phone calls during his trip did not constitute participation in on-going treatment."[104]

The decision in Tellis establishes a standard for determining whether an employee is "caring for" a seriously ill family member. It is clear from the judicial decisions and the regulations that "caring for" a seriously ill family member includes psychological care, and even includes indirect care – e.g., caring for three healthy children while a spouse attends to a seriously ill fourth child. In essence, activity will not be deemed "caring for" a seriously ill family member unless the employee is in close and continuing proximity to the ill family member.

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[101] 29 U.S.C. Section 2614 (FMLA).

[102] See, 29 U.S.C. Section 2614(a).

[103] 414 F.3d 1045 (9th Cir. 2005). See also Pellegrino v. Communications Workers of America, Civ. No. 10-0098 (W.D. PA. May 18, 2011) (employee traveling to Mexico without permission while on FMLA leave not permitted). But see Ballard v. Chicago Park District, 741 F.3d 838 (7th Cir. 2014) (employee permitted to travel with mother to Las Vegas while providing palliative care).

[104] Id. at 1048.

J. Military Caregiver Leave Under FMLA

On October 28, 2009, President Obama signed the National Defense Authorization Act for Fiscal Year 2010.[105] This law modified the entitlements for qualifying exigency leave and military caregiver leave under the FMLA. The changes discussed below will require districts to alter the notices they have posted regarding these leaves. Districts also will need to consider whether board policies, leave-related forms and collective bargaining agreements will need to be modified to reflect current law.

The law extends qualifying exigency leave to family members whose relative is a member of the regular Armed Forces. However, the law also limits qualifying exigency leave to occasions in which the servicemember is deployed to a foreign country or returning from such deployment. Qualifying exigencies include short-notice-deployment, military events and related activities, child care and school activities, financial and legal arrangements, counseling, rest and recuperation, post-deployment activities, and any other event the employer and employee agree is a qualifying exigency. The right to take qualifying exigency leave extends to the spouse, son, daughter, or parent of the servicemember.

The law extends military caregiver leave to family members of veterans provided the veteran was a member of the Armed Forces (including the National Guard or Reserves) at any time during the previous five years prior to the date on which the veteran undergoes medical treatment, recuperation or therapy; the injury or illness must have been incurred in the line of duty. The leave entitlement is 26 weeks in a twelve-month period. The right to take military caregiver leave extends to the spouse, son, daughter, parent, or next of kin of the servicemember.

K. Restoration of Employment

In White v. County of Los Angeles,[106] the Court of Appeal held when an employee takes leave under the Family Medical Leave Act (FMLA),[107] the employee is entitled to be restored to employment upon certification from the employee's healthcare provider that the employee is able to resume work. The employer is not permitted to seek a second opinion regarding the employee's fitness for work prior to restoring the employee to employment.

However, the Court of Appeal held that if the employer is not satisfied with the employee's healthcare provider's certification, the employer may restore the employee to work, but then seek its own evaluation of the employee's fitness for duty at its own expense.[108]

The case involved an investigator for the Los Angeles County District Attorney's Office who was on FMLA leave for depression. The District Attorney's Office based its request for reevaluation on the employee's erratic behavior prior to her FMLA leave.[109]

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[105] P.L. 111-84.
[106] 225 Cal.App.4th 690, 170 Cal.Rptr.3d 472 (2014).
[107] 29 U.S.C. Section 2601 et seq.
[108] Id. at 694.
[109] Ibid.

The Court of Appeal held that the FMLA protections no longer apply after the employee returns to work and the employer may require a fitness for duty examination consistent with the Americans with Disabilities Act (ADA). The ADA requires that the examination be job-related and consistent with business necessity.[110]

L. Employee's Right to Decline FMLA Leave

In Escriba v. Foster Poultry Farms, Inc.,[111] the Ninth Circuit Court of Appeal held that, based on the facts presented in this case, an employee can affirmatively decline to use Family Medical Leave Act ("FMLA")[112] leave even if the reason for the absence would qualify under the FMLA. Under Escriba, upon notice from the employee of an FMLA-qualifying reason for leave, if the employer informs the employee s/he is eligible to take FMLA leave,[113] the employee can affirmatively elect not to take FMLA leave.

Maria Escriba worked in a Foster Poultry Farms, Inc. processing plant for eighteen years. Escriba requested two weeks' vacation, informing her supervisor that her father was ill in another country and she wanted to care for him. The supervisor granted the request, but followed up two days later with leave forms and asked Escriba if she needed more time. Escriba stated she did not need more time, and Escriba testified that she made her vacation request to her supervisor and not the Human Resources Department because she intended to request vacation time, not family leave.[114] Escriba's supervisor signed off on the vacation leave request and informed Escriba that she would need to contact Human Resources if she wanted to request an extension of leave. Escriba went to the plant facility superintendent and asked for additional vacation time, but the facility superintendent indicated he could not approve additional leave. When Escriba asked what she should do if she could not return in two weeks, the facility superintendent suggested she send documentation to Human Resources. No steps were taken to designate this request as FMLA by either manager.[115]

When Escriba arrived to assist her father, she testified that she realized she would need more than two weeks, but never contacted Foster Poultry Farms. Her husband, also an employee at the processing plant who shared the same Human Resources Department contact, remained working while she was away. Escriba testified that although she spoke with her husband several times while she was out of the country, she never asked him to contact Human Resources on her behalf. Upon her return, Escriba contacted her union representative sixteen days after she was scheduled to return to work. Her union representative informed her she would likely be fired under the plant's "three day no-show, no-call rule," which called for automatic termination of an employee who misses three work days without notifying the employer or seeking a leave of

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[110] Id. at 706-07.
[111] 743 F.3d 1236 (9th Cir. 2014).
[112] 29 U.S.C. Section 2601 et seq.
[113] 29 C.F.R. Section 825.300 (b) provides the following: "Eligibility notice. (1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying reason, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances."
[114] Escriba had successfully requested FMLA leave on fifteen prior occasions, which was introduced at evidence to show her knowledge of and compliance with FMLA policies and procedures at Foster Poultry Farms (__ F.3d ___-, 2014 WL 715547 (C.A. 9 (Cal.)), at 7, 8).
[115] 743 F.3d 1236, 1239 (9th Cir. 2014).

absence. Escriba was terminated under this policy. As a labor relations manager from Foster Poultry Farms testified, if an employee elects to take vacation time and expressly declines FMLA-protected leave, the employer would not force the employee to take FMLA leave because it would reduce the benefit to the employee, since by policy taking FMLA leave required concurrent use of vacation time.[116]

Escriba filed suit for violations of the FMLA and the California Family Rights Act, and California public policy.[117] The Ninth Circuit analyzed all three cases under the standards of the FMLA. Noting that the district court found that Escriba had "knowledge of FMLA leave and how to invoke it," and that although she "was given the option and prompted to exercise her right to take FMLA leave, [she] unequivocally refused to exercise that right,"[118] the Ninth Circuit determined that there was no FMLA interference by Foster Poultry Farms. The opinion states:

> "Holding that simply referencing an FMLA-qualifying reason triggers FMLA protections would place employers like Foster Farms in an untenable situation if the employee's stated desire is *not* to take FMLA leave. The employer could find itself open to liability for forcing FMLA leave on the unwilling employee."[119] (Emphasis in original.)

In the Escriba decision, the Ninth Circuit provided clear guidance that FMLA leave can be affirmatively declined by an employee, even when the employee is requesting time off for an FMLA-qualifying event. However, administrators should pay close attention to the facts of the case, which indicate the level of evidence needed to show that an employee expressly declined FMLA leave. Practical steps district employers can take to ensure compliance with the FMLA and the Escriba decision would include the following:

1. Policies and procedures regarding different types of leave, including FMLA/CFRA, as well as absence policies or contract provisions, must be clear and the district should be able to show how employees are notified of these policies and procedures and that they are consistently applied.

2. Managers should ask whether the employee might need additional time off, if an FMLA-qualifying reason is provided for the requested leave, and direct employees to Human Resources should additional time be requested or offer that contact information should the employee later decide to request additional time under FMLA.

3. Employees should be provided with forms appropriate to the type of leave requested, with an explanation of each process.

[116] Id. at 1240-41.
[117] Government Code section 12945.2 et seq.
[118] 743 F.3d 1236, 1242 (9th Cir. 2014).
[119] Ibid.

4. The requesting employee should clearly complete the appropriate form depending on the type of leave requested.

5. Managers and Human Resources administrators should document communications regarding requests for leave, including which forms were provided to the employee.

HEALTHY FAMILIES, HEALTHY WORKPLACES ACT

A. Enactment of Legislation

On September 10, 2014, Governor Brown signed Assembly Bill 1522,[120] effective July 1, 2015. Assembly Bill 1522 requires all employers, public and private, to provide a maximum of three days of paid sick leave per year to qualifying employees. Community college districts, school districts, county offices of education, and regional occupational programs are required to provide paid sick leave to employees who are exempt from paid sick leave benefits under the Education Code and meet the requirements under these Labor Code provisions.

Assembly Bill 1522 added Labor Code sections 245 through 248.5 and amends Labor Code section 2810.5. The provisions of this law are in addition to and independent of any other rights, remedies or procedures available under any other law and do not diminish, alter, or negate any other legal rights, remedies, or procedures available to an aggrieved person.

Assembly Bill 304[121] further amended Labor Code sections 245.5, 246 and 247.5, effective July 13, 2015.

B. Applicability to Public Agencies

Labor Code section 245.5 exempts employees covered by a valid collective bargaining agreement if the agreement expressly provides for the wages, hours of work, and working conditions of employees, and expressly provides for paid sick days or a paid time off policy that permits the use of sick days for those employees, final and binding arbitration of disputes concerning the application of its paid sick days provisions, premium wage rates for all overtime hours worked, and regular hourly rate of pay of not less than 30% more than the state minimum wage rates. Section 245.5 most likely exempts most public employees since most public employees are covered by collective bargaining agreements meeting the requirements of the Act and their regular hourly rate of pay is 30% more than the state minimum wage. However, Section 245.5 will not exempt public employees who are not covered by a collective bargaining agreement meeting the requirements of the statute and are not paid more than 30% than the state minimum wage rate.[122] However, many of these employees receive sick leave pursuant to the Education Code which exceeds the amount of sick leave mandated by Assembly Bill 1522.

[120] Stats. 2014, ch. 317.
[121] Stats. 2015, ch. 67.
[122] This provision applies to substitutes, noon and yard duty aides who are not covered by a collective bargaining agreement and may not be paid 30% more than the state minimum wage.

Assembly Bill 304 amended Labor Code section 245.5(a), which provides that an employee of a state, city, county, city and county district or any other public entity who is a recipient of a retirement allowance and employed without reinstatement into his or her respective retirement system is exempt from receiving paid sick leave. The purpose of this latest amendment was to clarify that retirees are not entitled to sick leave.[123]

Labor Code section 245.5(b) defines "employer" and expressly includes political subdivisions of the state. Section 245.5(c) defines a "family member" as any of the following:

1. A child, which for purposes of this article means a biological, adopted, or foster child, stepchild, legal ward, or a child to whom the employee stands in loco parentis. This definition of a child is applicable regardless of age or dependency status.

2. 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.

3. A spouse.

4. A registered domestic partner.

5. A grandparent.

6. A grandchild.

7. A sibling.

C. Scope of Sick Leave Benefits

Labor Code section 246.5(a) states that upon the oral or written request of an employee, an employer shall provide paid sick days for the following purposes:

1. Diagnosis, care, or treatment of an existing health condition of, or preventive care for, an employee or an employee's family member.

2. For an employee who is a victim of domestic violence, sexual assault, or stalking.

Labor Code section 246(a) states that an employee who, on or after July 1, 2015, works in California for thirty or more days within a year from the commencement of employment is

[123] For school districts, community college districts, and county offices of education, this particular exemption applies to retirees under PERS, but not retirees under STRS.

entitled to paid sick days. Section 246(b) states that an employee shall accrue paid sick days at the rate of not less than one hour per every thirty hours worked, beginning at the commencement of employment or July 1, 2015, whichever is later. An employee who is exempt from overtime requirements as an administrative executive or professional employee is deemed to work forty hours per work week for purposes of Section 246, unless the employee's work week is less than forty hours, in which case the employee shall accrue paid sick days based upon that normal work week.

Labor Code section 246(b)(3) states that an employer may use a different accrual method, other than providing one hour per every thirty hours worked, provided that the accrual is on a regular basis so that an employee has no less than 24 hours of accrued sick leave or paid time off by the 120th calendar day of employment or each calendar year, or in each twelve-month period. Section 246(b)(4) states that an employer may satisfy the accrual requirements of Section 246 by providing not less than 24 hours or three days of paid sick leave that is available to the employee to use by the completion of his or her 120th calendar day of employment.

Labor Code section 246(c) states that an employee shall be entitled to use accrued paid sick days beginning on the 90th day of employment, after which day the employee may use sick days as they are accrued. Section 246(d) states that accrued paid sick days shall carry over to the following year of employment. However, an employer may limit an employee's use of accrued paid sick days to 24 hours or three days in each year of employment. Section 246 shall be satisfied and no accrual or carryover is required if the full amount of leave is received at the beginning of each year of employment, calendar year, or twelve-month period. The term "full amount of leave" means three days or 24 hours.

An employer is not required to provide additional paid sick leave if the employer has a paid leave policy or paid time off policy, the employer makes available an amount of leave that may be used for the same purpose and under the same conditions, and the policy does either of the following:

1. Satisfies the accrual, carry over, and use requirements of Section 246.

2. Provided paid sick leave or paid time off to a class of employees before January 1, 2015, pursuant to a sick leave policy or a paid time off policy that use an accrual method different than providing one hour per thirty hours worked, provided that the accrual is on a regular basis so that an employee, including an employee hired into that class after January 1, 2015, has no less than one day or eight hours of accrued sick leave or paid time off within three months of employment of each calendar year, or each twelve month period, and the employee was eligible to earn at least three days or 24 hours of sick leave or paid time off within nine months of employment. If an employer modifies the accrual method used in the policy it had in place prior to January 1,

2015, the employer shall comply with any accrual methods set forth in subdivision (b) or provide the full amount of leave at the beginning of each year of employment, calendar year, or twelve month period. This section does not prohibit the employer from increasing the accrual amount or rate for a class of employees covered by this subdivision.

3. Notwithstanding any other law, sick leave benefits provided pursuant to the provisions of Section 19859 or 19868.3, inclusive, of the Government Code, or annual leave benefits provided pursuant to Sections 19858.3 to 19858.7, inclusive, of the Government Code, or by provisions of the memorandum of understanding reached pursuant to Section 3517.5, that incorporate or receive provisions of Section 19859 to 19868.3, inclusive, or Sections 19858.3 to 19858.7, inclusive, of the Government Code, meet the requirements of this section.

Labor Code section 246(f) states that an employer is not required to provide compensation to an employee for accrued, unused paid sick days upon termination, resignation, retirement, or other separation from employment, except if an employee separates from an employer and is rehired by the employer within one year from the date of separation. In such cases, previously accrued and unused paid sick days must be reinstated. The employee shall be entitled to use those previously accrued and unused paid sick days and to accrue additional paid sick days upon rehiring subject to the use and accrual limitations set forth in Section 246. An employer is not required to reinstate accrued paid time off to an employee that was paid at the time of termination, resignation or separation of employment.

Labor Code section 246(g) states that an employer may lend paid sick days to an employee in advance of accrual, at the employer's discretion and with proper documentation. Section 246(h) states that an employer shall provide an employee with written notice that sets forth the amount of paid sick leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either the employee's itemized wage statement or in a separate writing provided on the designated pay date with the employee's payment of wages.

If an employer provides unlimited paid sick leave or unlimited paid time off to an employee, the employer may satisfy Section 246 by indicating on the notice or the employee's itemized wage statement unlimited.

Labor Code section 246(i) states that an employer has no obligation under Section 246 to allow an employee's total accrual of paid sick leave to exceed 48 hours or six days, provided that an employee's rights to accrue and use paid sick leave under this section are not otherwise limited. Section 246(j) states that an employee may determine how much paid sick leave he or she needs to use, provided that an employer may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave.

Labor Code section 246(k) states that for purposes of Section 246, the employer shall calculate sick leave using any of the following calculations:

1. Paid sick time for non-exempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.

2. Paid sick time for non-exempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior ninety days of employment.

3. Paid sick time for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

Labor Code section 246(l) states that if the need for paid sick leave is foreseeable, the employee shall provide reasonable advance notification. If the need for paid sick leave is unforeseeable, the employee shall provide notice of the need for the leave as soon as practicable. Section 246(m) states that an employer shall provide payment for sick leave taken by an employee no later than the payday for the next regular payroll period after the sick leave was taken.

Labor Code section 246.5(b) states that an employer shall not require as a condition of using paid sick days that the employee search for or find a replacement worker to cover the days during which the employee uses paid sick days. Section 246.5(c) states that an employer shall not deny an employee the right to use accrued sick days, discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using accrued sick days, attempting to exercise the right to use accrued sick days, filing a complaint with the Department of Labor or alleging a violation of these sick leave provisions, cooperating in an investigation or prosecution of an alleged violation of these sick leave laws, or opposing any policy or practice or act that is prohibited by these sick leave laws. There shall be a rebuttable presumption of unlawful retaliation if an employer denies an employee the right to use accrued sick days, discharges, threatens to discharge, demotes, or suspends, or in any manner discriminates against an employee within 30 days of any of the following:

1. The filing of a complaint by the employee with the Labor Commissioner or alleging a violation of these sick leave laws.

2. The cooperation of an employee with an investigation or prosecution of an alleged violation of these sick leave laws.

3. Opposition by the employee to a policy, practice, or act that is prohibited by these sick leave laws.[124]

D. Posting of Information

Labor Code section 247(a) states that in each workplace of the employer, the employer shall display a poster in a conspicuous place containing all of the information required by Section 247(b). The Labor Commissioner is required to create a poster containing this information and make it available to employers. Section 247(c) states that an employer who willfully violates the posting requirements of Section 247 is subject to a civil penalty of not more than $100 per each offense.

E. Maintenance of Records

Labor Code section 247.5 states that an employer shall keep for at least three years records documenting the hours worked and paid sick days accrued and used by an employee, and shall allow the Labor Commissioner to access these records. An employer shall make these records available to an employee in the same manner as required by Labor Code section 226. If an employer does not maintain adequate records, it shall be presumed that the employee is entitled to the maximum number of hours accruable, unless the employer can show otherwise by clear and convincing evidence.

Notwithstanding any other provisions of this legislation, an employer is not obligated to inquire into or record the purposes for which an employee uses paid leave or paid time off.

F. Enforcement by Labor Commissioner

Labor Code section 248.5(a) states that the Labor Commissioner shall enforce the provisions of these laws relating to sick days, including investigating an alleged violation, and ordering appropriate temporary relief to mitigate the violation or to maintain the status quo pending the completion of a full investigation or hearing. Section 248.5(b) states that if the Labor Commissioner, after a hearing that contains adequate safeguards to ensure that the parties are afforded due process, determines that a violation has occurred, the Labor Commissioner may order any appropriate relief, including reinstatement, backpay, the payment of sick days unlawfully withheld, and the payment of an additional sum in the form of an administrative penalty to an employee or other person whose rights were violated. If paid sick days were unlawfully withheld, the dollar amount of paid sick days withheld from the employee multiplied by three, or $250, whichever amount is greater, but not to exceed an aggregate penalty of $4,000, shall be included in the administrative penalty. If a violation results in other harm to the employee or person, such as discharge from employment, or otherwise results in a violation of the rights of the employee or person, the administrative penalty shall include a sum of $50 for each day or portion thereof that the violation occurred or continued, not to exceed an aggregate penalty of $4,000.

[124] Labor Code section 246.5(c)(2).

Labor Code section 248.5(c) states that where prompt compliance by an employer is not forthcoming, the Labor Commissioner may take any appropriate enforcement action to secure compliance, including the filing of a civil action. Section 248.5(d) states that an employee or other person may report to the Labor Commissioner a suspected violation of these sick day provisions.

Section 248.5(e) states that the Labor Commissioner or the Attorney General may bring a civil action in a court of competent jurisdiction against the employer or other person for violations and, upon prevailing, shall be entitled to collect legal or equitable relief on behalf of the aggrieved as may be appropriate to remedy the violation, including reinstatement, backpay, the payment of sick days unlawfully withheld, the payment of an additional sum, not to exceed an aggregate penalty of $4,000, as liquidated damages in the amount of $50 to each employee or person whose rights were violated for each day or portion thereof. If the employer has unlawfully withheld paid sick days to an employee, the dollar amount of paid sick days withheld from the employee multiplied by three, or $250, whichever amount is greater, and reinstatement in employment or injunctive relief; and further shall be awarded reasonable attorney's fees and costs, provided however, that any person or entity enforcing these provisions on behalf of the public as provided for under applicable state law shall, upon prevailing, be entitled only to equitable, injunctive, or restitutionary relief, and reasonable attorney's fees and costs.

Labor Code section 248.5(f) states that in an administrative or civil action, the Labor Commissioner or court, as the case may be, shall award interest on all amounts due and unpaid. Section 248.5(g) states that the remedies, penalties, and procedures provided under these provisions are cumulative. Section 248.5(h) states that an employer shall not be assessed any penalty or liquidated damages due to an isolated and unintentional payroll error or written notice error that is a clerical or an inadvertent mistake regarding the accrual or available use of paid sick leave.

G. Effect on Other Laws

Labor Code section 249(a) states that this article does not limit or affect any laws guaranteeing the privacy of health information, or information related to domestic violence or sexual assault, regarding an employee or an employee's family member. That information shall be treated as confidential and shall not be disclosed to any person except to the affected employee, or as required by law. Section 249(b) states that this article shall not be construed to discourage or prohibit an employer from the adoption or retention of a paid sick days policy more generous than the one required by these provisions. Section 249(c) states that this article does not lessen the obligation of an employer to comply with a contract, collective bargaining agreement, employment benefit plan, or other agreement providing more generous sick days to an employee than required by these provisions. Section 249(d) states that this article establishes minimum requirements pertaining to paid sick days and does not preempt, limit, or otherwise affect the applicability of any other law, regulation, requirement, policy, or standard that provides for greater accrual or use by employees of sick days, whether paid or unpaid, or that extends other protections to an employee.

In addition, the "kin care" provision of Labor Code section 233 is harmonized with this Act. Labor Code section 233 states that any employer who provides sick leave for employees

shall permit an employee to use in any calendar year the employee's accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months at the employee's then current rate of entitlement. Such sick leave can be used for the same reasons as sick leave under the Healthy Families, Healthy Workforces Act. Labor Code section 233 notes that this section does not extend the maximum period of leave to which an employee is entitled under Section 12945.2 of the Government Code or under the federal Family and Medical Leave Act of 1993 (29 U.S.C. Sec. 2601 et seq.), regardless of whether the employee receives sick leave compensation during that leave.

The Victims of Domestic Violence Employment Leave Act[125] also harmonizes with the Healthy Families, Healthy Workplaces Act with regard to time off for victims of domestic violence. Under Labor Code section 230, an employer shall not discharge or in any manner discriminate or retaliate against an employee, who is a victim of a crime, for taking time off to appear in court to comply with a subpoena or other court order as a witness in any judicial proceeding, including a proceeding to obtain or attempt to obtain any relief, including, but not limited to, a temporary restraining order, restraining order, or other injunctive relief, to help ensure the health, safety, or welfare of the victim or his or her child.[126]

H. Notice to Employee

Labor Code section 2810.5, as amended, requires that at the time of hiring, an employer shall provide to each employee a written notice, in the language the employer normally uses to communicate employment-related information to the employee, containing information that an employee may accrue and use sick leave, has a right to request and use accrued paid sick leave, may not be terminated or retaliated against for using or requesting the use of accrued paid sick leave, and has the right to file a complaint against an employer who retaliates.

LEAVES OF ABSENCE - CERTIFICATED EMPLOYEES

A. Leaves of Absence in General

Leaves of absence may be granted by the governing boards of school districts to certificated employees.[127] Governing boards are expressly authorized to grant leaves of absence to employees in connection with certain judicial appearances and jury duty.[128] The governing boards of school districts may also grant leaves of absence with pay on a non-discriminatory

[125] Labor Code section 230.

[126] Labor Code section 230 further provides the following protections: (d) (1) As a condition of taking time off for a purpose set forth in subdivision (c), the employee shall give the employer reasonable advance notice of the employee's intention to take time off, unless the advance notice is not feasible. (2) When an unscheduled absence occurs, the employer shall not take any action against the employee if the employee, within a reasonable time after the absence, provides a certification to the employer. Certification shall be sufficient in the form of any of the following: (A) A police report indicating that the employee was a victim of domestic violence, sexual assault, or stalking. (B) A court order protecting or separating the employee from the perpetrator of an act of domestic violence, sexual assault, or stalking, or other evidence from the court or prosecuting attorney that the employee has appeared in court. (C) Documentation from a licensed medical professional, domestic violence counselor, as defined in Section 1037.1 of the Evidence Code, a sexual assault counselor, as defined in Section 1035.2 of the Evidence Code, licensed health care provider, or counselor that the employee was undergoing treatment for physical or mental injuries or abuse resulting in victimization from an act of domestic violence, sexual assault, or stalking.

[127] Education Code section 44962.

[128] Education Code section 44036.

basis to employees absent from duty because of religious holidays.[129] At the expiration of the leave of absence, the employee must be reinstated to the position held by the employee at the time of granting the leave of absence unless the employee otherwise agrees.[130]

B. Sick Leave

All certificated employees employed five days a week by a school district are entitled to ten days leave of absence for illness or injury and such additional days as the governing board may allow with full pay for each school year of service. A certificated employee employed for less than five school days a week is entitled to a proportionate part of the ten days leave of absence for illness or injury plus any additional time allowed by the governing board.[131] The employee need not have accrued credit for the leave of absence prior to taking such leave and such leave of absence may be taken at any time during the school year.[132]

The governing board of each school district is required to adopt rules and regulations prescribing the manner of proof of illness or injury for the purposes of sick leave.[133] Sick leave may be utilized for absences necessitated by pregnancy, miscarriage, childbirth and recovery therefrom.[134] Unused sick leave may be accumulated from year to year and accumulated sick leave may be transferred when a certificated employee transfers from one school district to another, to a county superintendent of schools, to a community college district, or to the California Department of Education.[135]

C. Pregnancy Leave

The governing board of the school district is required to provide for leave of absence from duty for any certificated employee of the district who is required to be absent from duty because of pregnancy, miscarriage, childbirth and recovery therefrom.[136] The length of the leave of absence, including the date on which the leave shall commence and the date on which the employee shall resume duties, shall be determined by the employee and the employee's physician.[137] As noted above, this leave should be coordinated with any applicable leaves under the FMLA, CFRA, and/or PDL.

D. Extended Sick Leave

The Education Code also contains provisions for extended sick leave benefits.[138] The period of extended sick leave benefits begins when the employee has exhausted all available sick leave, including accumulated sick leave for a period of five school months or one hundred

[129] 28 Ops.Cal.Atty.Gen. 118 (1956).
[130] Education Code section 44973.
[131] Education Code section 44978.
[132] Ibid.
[133] Education Code section 44978.
[134] Ibid.
[135] Education Code sections 44979, 44980, 44982. For academic employees of community college districts, see Education Code sections 88782-88783.
[136] Education Code section 44965.
[137] Ibid.
[138] Education Code section 44977.

days.[139] A certificated employee receives only one period of extended sick leave benefits for each illness or accident.[140]

This provision was interpreted by the courts in Veguez v. Long Beach Unified School District.[141] In Veguez, the Court of Appeal held that an employee was not entitled to differential pay because the medical condition the employee was treated for at that time and the injuries for which she had been treated and received differential pay two years earlier fell within the "per illness" or "per accident" limitation in Education Code section 44977. The court found that the employee's request for sick leave in 2002 was the product of an accident which occurred in 1998 and, therefore, it constituted the same illness or accident. The court concluded that because there were no further accidents causing injury to the employee's left knee following her return to work in May of 2000, the medical leave she took in 2002 resulted from the November 1998 accident.

During the extended sick leave period, the certificated employee is entitled to his/her salary less the amount actually paid to a substitute employee employed to fill his position during his absence or the amount which would have been paid to the substitute had one been employed.[142]

Under Education Code section 44983, it is permissible for districts to adopt a rule that certificated employees will receive one-half of their pay when they have exhausted their sick leave. Section 44983 provides an alternative to deducting the substitute employee's salary from the employee's salary for a period of five months or less.

In a case where the employee's physician has released the employee to return to work for four hours per day and a substitute is employed for the remainder of the day, based on the wording of Section 44983, in our opinion, the employee is entitled to one-half of his or her salary for the portion of the day that he or she is absent for up to five months. The employee would receive a prorated salary for the four hours that he or she works and one-half of his or her salary for the remaining hours that he or she is absent.

A permanent certificated employee on sick leave for work-related mental illness is entitled to reinstatement upon presentation of prima facie medical evidence of recovery sufficient to resume teaching.[143] In order to refuse reinstatement of the tenured teacher, the school district has the burden of proving mental incompetence to resume teaching duties and must comply with the procedural provisions of Education Code section 44942.[144]

E. Exhaustion of Leave

When a certificated employee has exhausted all available sick leave, including accumulated sick leave, and continues to be absent on account of illness or accident for a period

[139] Education Code section 44977; amended Stats.1998, ch. 30 (S.B. 1019), effective January 1, 1999.
[140] Ibid.
[141] 127 Cal.App.4th 406, 25 Cal.Rptr.3d 526 (2005).
[142] Education Code section 44977.
[143] Raven v. Oakland Unified School District, 213 Cal.App.3d 1347, 262 Cal.Rptr. 354 (1989).
[144] Ibid.

beyond the five-month period and the employee is not medically able to resume the duties of his or her position, the district must engage in the interactive process of accommodation with the employee to determine if the employee can perform the essential functions of his/her position with or without reasonable accommodation. This process may include discussions regarding possible job restructuring, additional leave, and/or reassignment. If the employee cannot be reasonably accommodated, the employee may be placed on a reemployment list for a period of 24 months (if a probationary employee) or 39 months (if a permanent employee).[145] If the employee is medically able to return during the reemployment period, the employee shall be returned to employment for which he or she is credentialed and qualified.

It should be noted that the language for certificated employees in Education Code section 44978.1 is different than the language for classified employees in Sections 45192 and 45195. Under Section 44978.1, a certificated employee has the right to return to work when medically able regardless of whether there is a vacant position.[146] In Veguez, the Court of Appeal stated, "…section 44978.1 does not condition reinstatement on the availability of a position; it requires reinstatement once an employee is medically able to return to work."

The employee does not necessarily have the right to bump another certificated employee who has taken their former position but the employee does have the right to a position for which they are credentialed and qualified.

F. Industrial Accident and Illness Leave

Governing boards of school districts must establish rules and regulations for industrial accidents and illness leaves for all certificated employees.[147] Such rules and regulations must include allowable leave not less than sixty days in any one fiscal year for the same accident. Allowable leave shall not be accumulated from year to year.

Industrial accident or illness leave shall commence on the first day of absence. The certificated employee, when absent from duty, shall be paid that portion of the salary due him or her for any month when added to his/her temporary disability indemnity check for workers compensation so that payment to him/her will not be more than his/her full salary.[148] In addition, industrial accident or illness leaves shall be reduced by one day for each day of authorized absence. When industrial accident or illness leave overlaps into the next fiscal year, the employee shall be entitled to only the amount of unused leave due him/her for the same injury or illness.[149] Upon termination of the industrial accident or illness leave, the employee shall be entitled to other sick leave benefits. The governing board may, by rule or regulation, provide for additional industrial accident or illness leaves as it deems appropriate.[150] The certificated employee may endorse to the district the temporary disability indemnity checks received under

[145] Education Code section 44978.1.
[146] Veguez v. Governing Board of the Long Beach Unified School District, 127 Cal.App.4th 406 (2005).
[147] Education Code section 44984.
[148] Education Code section 44984.
[149] Education Code section 44984(e).
[150] Education Code section 44984.

workers compensation and the district in turn shall issue the employee appropriate salary warrants for payment of the employee's salary.[151]

G. Disability Benefits

The governing board of the school district shall grant a leave of absence to any certificated employee who has applied for disability benefits for a period not to exceed thirty (30) days beyond the final determination of the disability benefits by the State Teachers Retirement System.[152] If the employee is determined to be eligible for the disability benefits by the State Teachers Retirement System, the leave of absence shall be extended for the term of disability but not for more than thirty-nine months from the date of approval of the disability benefits.[153]

However, the application for receipt of disability benefits from the State Teachers Retirement System, by itself, does not affect a retirement or terminate the teacher's previous status or right to seek reinstatement.[154] It is unclear whether after 39 months, the application for disability benefits, if received, would result in a retirement or resignation from the district. If a certificated employee is found not to be disabled by the State Teachers Retirement System, the school district must reinstate the employee to his former position upon receipt by the employer of notification from the State Teachers Retirement System of the denial of the disability benefits.[155]

H. Personal Necessity Leave

A certificated employee may use his leave of absence for illness or injury in cases of personal necessity.[156] The governing board of each school district shall adopt rules and regulations requiring and prescribing the manner of proof of personal necessity. The employee is not required to secure advance permission for a personal necessity leave where there is a death or serious illness of a member of the employee's immediate family, an accident involving his person, property or the personal property of a member of his immediate family.[157] The use of sick leave for personal necessity purposes is limited to seven days, unless the collective bargaining agreement of the district provides for additional days.[158]

Every certificated employee is entitled to a leave of absence, not to exceed three days, or five days if out of state travel is required, on account of the death of any member of his immediate family. No deduction shall be made from the salary of the certificated employee nor shall such leave be deducted from leave granted by other sections of the Education Code.[159] Members of the immediate family for purposes of bereavement leave include mother, father, grandmother, grandfather or a grandchild of the employee and the spouse, son-in-law, daughter,

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[151] Ibid.
[152] Education Code section 44986.
[153] Ibid.
[154] Kalinowski v. Board of Education of Arcadia Unified School District, 90 Cal.App.3d 245, 153 Cal.Rptr. 178 (1979).
[155] Education Code section 44986.1
[156] Education Code section 44981.
[157] Ibid.
[158] Education Code section 44981.
[159] Education Code section 44985.

daughter-in-law, brother or sister of the employee or any relative living in the immediate household of the employee.[160]

I. Study or Travel Leave

The governing boards of school districts may also grant certificated employees leaves of absence for the purpose of permitting study or travel by the employee which will benefit the schools and pupils of the district.[161] The certificated employee must have served the district for at least seven consecutive years preceding the granting of the leave, and not more than one such leave of absence shall be granted in each seven-year period.[162]

Every employee granted a study or travel leave of absence may be required to perform services during the leave as the governing board of the school district and the employee may agree upon in writing, and the employee shall receive compensation during the period of the leave as the governing board and employee may agree upon in writing.[163] The amount of compensation shall not be less than the difference between the salary of the employee on leave and the salary of the substitute employee in the position in which the employee held prior to the granting of the leave or, in lieu of such difference, the board may pay one half of the salary of the employee on leave or any additional amount up to and including the full salary of the employee on leave.[164] An employee may agree in writing with the governing board of the school district not to receive compensation during the period of the leave.[165]

Every employee, as a condition to being granted a leave of absence for study or travel, must agree in writing to render a period of service in the employ of the governing board of the district following his return from his leave of absence which is equal to twice the period of the leave.[166] Compensation shall be paid to the employee while on the leave of absence in the same manner as if the employee were teaching in the district upon the furnishing by the employee of a suitable bond indemnifying the governing board of the district against loss in the event that the employee fails to render the agreed upon period of service in the employ of the governing board following the return of the employee from the leave of absence.[167]

[160] Ibid.
[161] Education Code section 44966.
[162] Education Code section 44967.
[163] Education Code section 44968.
[164] Ibid.
[165] Education Code section 44968.5.
[166] Education Code section 44969.
[167] Education Code section 44969.

J. Legislative Leave

Every certificated employee who is elected to the Legislature shall be granted a leave of absence from his duties as an employee of the district.[168] The certificated employee shall be entitled to return to the school district within six months after the employee's term of office in the Legislature has expired.[169]

K. Compulsory Leave of Absence

Whenever a certificated employee of a school district has been charged with the commission of a sex offense or a controlled substance offense as specified in the Education Code by complaint, information or indictment filed in a court of competent jurisdiction, the governing board of the school district must immediately place the employee upon compulsory leave of absence for a period of time extending not more than ten days after the date of the entry of the judgment in the proceedings.[170] The teacher's credential is suspended for the same period of time.[171] The governing board of the school district may extend the compulsory leave of absence of the employee beyond the period by giving notice to the employee within ten days after the entry of judgment in the proceedings that the employee will be dismissed at the expiration of thirty days from the date of service of the notice, unless the employee demands a hearing as provided in the Education Code.[172]

Any employee placed upon compulsory leave of absence pursuant to Section 44940 shall continue to be paid his or her regular salary, if during that time the employee furnishes to the school district a suitable bond or other security acceptable to the governing board as a guarantee that the employee will repay to the district the amount of salary so paid to him or her during the period of the compulsory leave of absence in case the employee is convicted of the charges or fails or refuses to return to service following an acquittal of the offense or dismissal of the charges.[173] If the employee is acquitted of the offense or the charges against the employee are dismissed, the school district shall reimburse the employee for the cost of the bond upon his or her return to service in the district.[174]

In Unzueta v. Ocean View School District, the Court of Appeal held that where a suspended teacher completed a drug diversion program pursuant to Penal Code section 1000.5, the teacher was entitled to back pay upon reinstatement after dismissal of the criminal case which led to the teacher's suspension.[175] The court held that the school district was entitled to a credit for the amount earned by the teacher in other employment while on suspension, but that the Education Code required the school district to pay the teacher back pay under the circumstances.[176]

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[168] Education Code section 44801.
[169] Ibid.
[170] Education Code section 44940.
[171] Ibid.
[172] Education Code section 44940.5.
[173] Education Code section 44940.5.
[174] Ibid.
[175] Unzueta v. Ocean View School District, 6 Cal.App.4th 1689, 8 Cal.Rptr.2d 614 (1992).
[176] Ibid. Penal Code section 1000, et seq., generally authorizes the court to divert from the normal criminal process, first time drug possessors, for the purpose of rehabilitation. The purpose of this statute is to restore first time drug users to productive

In Unzueta, the teacher had been arrested and charged with possession and use of cocaine. The school district exercised its discretion and placed the teacher on compulsory leave of absence pursuant to Education Code section 44940. Unzueta satisfactorily completed a drug diversion program for first time offenders and Unzueta resumed his teaching position. Unzueta then petitioned the superior court for a writ of mandate to compel the district to pay him $40,000 for two years of back pay. The Court of Appeal affirmed the trial court's award of back pay and reduced his award to $10,000 by offsetting other earnings during the period of the leave of absence.[177]

In Tuffli v. Governing Board,[178] the Court of Appeal held that a certificated employee was properly dismissed without a hearing upon his conviction of a sex offense. However, if the conviction was reversed on appeal and the charges were dismissed, the school district must conduct a dismissal hearing in accordance with the Education Code since the certificated employee's property interest in continued employment had been revived or reinstate the employee.[179]

L. Military Leave

Every certificated employee who enters the active military service of the United States or of the State of California, as defined, during any period of national emergency declared by the president or during any war in which the United States is engaged, is entitled to a leave of absence.[180] Such absence does not affect the classification of the employee and the employee's rights with regard to computation of time toward permanent status.[181] Additional protections are afforded to the employee under the Uniformed Services Employment and Reemployment Rights Act of 1994.[182] In addition, under state law, the Military and Veterans Code sections 395 and following provide for military leave for public employees, including the right to be restored to their former position or a position of like seniority, status, and pay[183] and compensation as specified.[184]

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citizenship without the stigma of a criminal conviction, and to reduce the criminal justice system's backlog of cases. Persons who have been previously convicted, or who have been in the diversion program in the last five years or who have sold or furnished drugs to another person, are not eligible for the diversion program. If the individual completes the program's requirements the criminal charges are dismissed. Penal Code Section 1000.5. states that on successful completion of the diversion program, the arrest upon which the diversion was based is deemed never to have occurred. Section 1000.5 also states that an arrest resulting in successful completion of the diversion program shall not be used in any way which could result in the denial of any employment benefit, license or certificate.

[177] Unzueta v. Ocean View School District, 6 Cal.App.4th 1689 (1992).

[178] 30 Cal.App.4th 1398, 36 Cal.Rptr.2d 433 (1994).

[179] Id. at 1409-1410.

[180] Education Code section 44800. For academic employees of community college districts, see Education Code section 87700.

[181] Ibid.

[182] 38 U.S.C. Section 4301-4335.

[183] Military and Veterans Code section 395 also provides for if a position exists, or if no position exists the employee shall have the same rights and privileges that he or she would have had if he or she had occupied the position when it ceased to exist and had not taken temporary military leave of absence.

[184] Military and Veterans Code sections 395.01-395.05.

LEAVES OF ABSENCE - CLASSIFIED EMPLOYEES

A. Sick Leave

In both merit and non-merit districts, the Education Code contains certain statutory provisions which require the governing boards of school districts to grant certain specified types of leaves of absence to classified employees. In addition, the governing boards of school districts may grant additional leaves of absence with or without pay to classified employees.[185]

Every classified employee employed five days a week by a school district is entitled to twelve days leave of absence for illness or injury and such additional days as the governing board may grant.[186] Part-time employees are entitled to a prorated amount of sick leave.[187] Sick leave accumulates from year to year.[188]

B. Industrial Accident and Illness Leave

Classified employees are entitled to industrial accident and illness leave for not less than sixty working days in any one fiscal year for the same accident.[189] Each school district must adopt rules and regulations which include allowable leave for not less than sixty working days in any one fiscal year for the same accident, which shall not accumulate from year to year. Industrial accident or illness leave commences on the first day of absence. Payment for wages lost in any day, when added to an award granted the employee under the workers' compensation laws of this state, shall not exceed the normal wage for the day. Industrial accident leave will be reduced by one day for each day of authorized absence regardless of any compensation award made under workers' compensation. When the sixty days overlap into the next fiscal year, the employees shall be entitled to only that amount remaining at the end of the fiscal year in which the illness or injury occurred.[190]

C. Extended Sick Leave

All classified employees are entitled to extended sick leave benefits for a period of five months or less whether or not the absence arises out of or in the course of employment of the employee.[191] The employee shall have deducted from his salary a sum actually paid a substitute employee employed to fill his position during his absence or, if the district has adopted an alternative procedure, the employee shall be paid fifty percent of his regular salary for 100 working days.[192] The time period for the extended sick leave benefits commences on the first day of illness.[193]

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[185] Education Code section 45190.
[186] Education Code section 45191.
[187] Education Code sections 45136, 45191.
[188] Education Code section 45191.
[189] Education Code section 45192.
[190] Ibid.
[191] Education Code section 45196.
[192] Ibid.
[193] 53 Ops.Cal.Atty.Gen. 111 (1970).

In California School Employees Association v. Tustin Unified School District,[194] the Court of Appeal held that when a classified school district employee is on disability leave for five months or less, the employer may not, under Education Code section 45196,[195] deduct from the absent employee's salary, an amount exceeding the sum actually paid a substitute employee employed to fill his position during his absence. The Court of Appeal held that a substitute employee under Education Code section 45196 does not include a currently employed classified employee who is assigned the absent employee's hours or tasks.

The Court of Appeal held that Education Code section 45103[196] defines a substitute employee as any person employed to replace any classified employee who is temporarily absent from duty. The Court of Appeal concluded that the term substitute employee, as used in Section 45196 and defined in Section 45103, means a person hired for the purpose of filling in for a temporarily absent employee. The Court of Appeal held that a substitute employee does not include a current classified employee who is assigned voluntarily or involuntarily the absent employee's hours or tasks.[197]

The Court noted that in CSEA v. Tustin Unified School District, the school district did not adopt Education Code section 45196's alternative scheme for compensating temporarily disabled employees, which authorizes school districts to maintain a policy for crediting regular classified employees with not less than 100 working days per year of paid sick leave compensated at fifty percent of the employee's regular salary.

The Court of Appeal reviewed the underlying facts and found that the employee was placed on a five-month disability leave of absence. Since 1978, the school district had maintained the practice of offering some or all of the hours made available by a classified employee's disability leave of absence to other regular classified employees willing to work additional hours. When other qualified employees from the same job classification are not available to accept the hours made available by the disability leave of absence, the school district hires nonemployee substitutes to work the absent employee's hours. The school district deducts from the wages of a classified employee on disability leave the amount paid to the current employee or hired substitute who worked the absent employee's hours. On any given day of absence, the total amount deducted does not exceed the amount of the absent employee's pay for that day.[198]

In this case, the school district utilized nine different people to work the employee's hours while she was on disability leave. Six of those persons were school district employees. They voluntarily accepted the additional work normally assigned to the employee to supplement their income. The other three were nonemployees from the school district's roster of substitutes. The school district deducted from the employee's pay the amounts paid both to the existing classified employees and to the hired nonemployee substitutes who worked her hours.[199]

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[194] 148 Cal.App.4th 510, 55 Cal.Rptr.3d 739 (2007).
[195] Education Code section 88196 for community college districts.
[196] Education Code section 88003 for community college districts.
[197] 148 Cal.App.4th 510, 514 (2007).
[198] Id. at 515.
[199] Ibid.

The Court of Appeal held that the plain language of Section 45196 does not permit a school district to deduct from the employee's pay the amounts paid to the six existing employees. The Court of Appeal pointed out that as an alternative, a school district may adopt and maintain a rule requiring the school district to credit a regular classified employee with at least 100 working days per year of sick leave, compensated at not less than fifty percent of the employee's regular pay.[200]

Districts should consider adopting the alternative rule if districts have a practice of assigning existing employees additional hours when an employee is on leave.

In CSEA v. Colton Joint Unified School District,[201] the Court of Appeal held that a school district may not run the 100 days under Education Code section 45196 concurrently with accrued vacation leave, even if the district and the union have agreed to such coordination in their collective bargaining agreement.[202]

Education Code section 45196 provides in part:

> ". . . The foregoing provisions shall not apply to any school district which adopts and maintains in effect a rule which provides that a regular classified employee shall once a year be credited with a total of not less than 100 working days of paid sick leave, including days to which he is entitled under Section 45191. Such days of paid sick leave in addition to those required by Section 45191 shall be compensated at not less than 50 percent of the employee's regular salary. **The paid sick leave authorized under such a rule shall be exclusive of any other paid leave, holidays, vacation, or compensating time to which the employee may be entitled**." [Emphasis added.]

Notwithstanding the language in bold from the statute, the district believed it could run the vacation and 100-day leave concurrently because of the language of its collective bargaining agreement which provided:

> "When entitlement for industrial accident or illness leave has been exhausted (60 days), the District will coordinate the following: a. Temporary Disability; b. Sick Leave; c. Vacation; d. Long-Term Illness Leave (100-day half-pay benefit) keeping the employee in a full-pay status with benefits as long as accumulated benefits allow."[203]

[200] Id. at 520.
[201] 170 Cal.App.4th 857, 88 Cal.Rptr.3d 486 (2009).
[202] Id. at 859.
[203] Id. at 864.

The past practice of the District was to run vacation leave and 100-day leave concurrently. The court, however, held that the agreement did not clearly permit this practice and even if it did, the statutory rights of the employees would prevail over the agreement.[204]

The court held that the plain language of Section 45196 provides that 100-day leave is exclusive of vacation. All districts (those who have implemented a 100-day leave provision and those who have not) should allow employees to use their accrued vacation before deducting from the employee's differential/fifty percent pay leave entitlement.

D. Leaves of Absence – Break in Service

Periods of leaves of absence, paid or unpaid, shall not be considered a break in service. During all paid leaves of absence, whether industrial accident leave, sick leave, vacation, compensated time off or other leave provided by law or the action of the governing board, the employee shall endorse to the district wage loss benefit checks received under the workers' compensation laws of the state to the district.[205] The district in turn shall issue the employee appropriate warrants for payment of wages or salary, and shall deduct normal retirement and other authorized reduction.[206]

E. Exhaustion of Leave

When all available leaves of absence, paid or unpaid, have been exhausted, and if the employee is not medically able to assume the duties of his or her position, the employee may, if not placed in another position, be placed on a reemployment list for 39 months.[207] Prior to placing the employee on the 39-month reemployment list, the district should engage in the interactive process of reasonable accommodation as required by federal and state disability laws. If the employee cannot be reasonably accommodated, then the district may place the employee on the 39-month reemployment list. When available, during the 39-month period, the person shall be employed in a vacant position in the class of the person's previous assignment over all other available candidates except for a reemployment list established because of lack of work or lack of funds, in which case the person shall be listed in accordance with appropriate seniority regulations.[208]

Education Code section 45195 contains similar language. Section 45195 states in part, "Upon resumption of duty, the break in service will be disregarded and the employee shall be fully restored as a permanent employee."[209] However, an employee, ". . . who has been medically released for return to duty and who fails to accept an appropriate assignment shall be dismissed."[210]

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[204] Id. at 864-65.
[205] Education Code section 45192.
[206] Ibid.
[207] Education Code section 45192.
[208] Ibid.
[209] Education Code section 45195.
[210] Education Code section 45192(f).

Therefore, an employee who has failed to accept an appropriate offer of a position may be taken off the 39-month reemployment list and considered terminated as a matter of law. As to an employee who has accepted an offer of an appropriate assignment, upon resumption of their duties, the break in service will be disregarded and the employee will be restored to all the rights and duties of a permanent employee. However, if that employee fails to report for work on a regular basis, the employee may be documented and disciplined in the same manner as other permanent classified employees.

An employee is not entitled to a hearing prior to being placed on the 39-month reemployment list. Placement on the list is not a disciplinary action.[211]

F. Pregnancy Leave

The governing board of a school district may provide for leave of absence from duty due to pregnancy or convalescence following childbirth.[212] The employee shall be entitled to sick leave benefits for absence due to illness or injury resulting from pregnancy.[213] As noted above, this leave should be coordinated with any applicable leaves under the FMLA, CFRA, and/or PDL.

G. Bereavement Leave

Every classified employee must be granted a bereavement leave of absence, not to exceed three days or five days if out of state travel is required, on account of the death of any member of his immediate family. No deduction shall be made from the salary of such employee nor shall such leave be deducted from leave granted by other sections of the Education Code or provided by the governing board of the district.[214] Members of the immediate family are defined as mother, father, grandmother, grandfather, or a grandchild of the employee, or of the spouse of the employee and the spouse, son-in-law, daughter, daughter-in-law, brother, or sister of the employee, or any relative living in an immediate household of the employee or any relative defined by the governing board.[215]

H. Transfer of Sick Leave

Any classified employee of the school district or county superintendent of schools who has been employed for a period of one calendar year or more whose employment is terminated other than for cause and who subsequently accepts employment with another school district, community college district, or county superintendent of schools within one year of such termination of his former employment, is entitled to have his sick leave transferred to the second district or county superintendent of schools.[216]

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[211] Trotter v. Los Angeles County Board of Education, 167 Cal.App.3d 891, 213 Cal.Rptr. 841 (1985).
[212] Education Code section 45193.
[213] Ibid.
[214] Education Code section 45194.
[215] Ibid.
[216] Education Code section 45202. For classified employees of community college districts, see Education Code section 88202.

I. Personal Necessity Leave

Classified employees shall be entitled to personal necessity leave not to exceed seven days in any school year in the event of death of a member of the immediate family when additional leave is required beyond bereavement leave, the cause of an accident involving his personal property or the personal property of a member of his immediate family, the appearance in any court before any administrative tribunal, and for such other reasons as may be prescribed by the governing board.[217]

J. Due Process Before Being Placed on Sick Leave

Classified employees are entitled to notice and an opportunity for a hearing before being placed on involuntary sick leave. Under what circumstances classified employees are entitled to a hearing is somewhat unclear.[218]

In Bostean v. Los Angeles Unified School District,[219] the Court of Appeal held that a permanent classified school district employee was entitled to notice and a hearing before being placed on involuntary sick leave.

Plaintiff George Bostean was a permanent classified employee who suffered from diabetes and epilepsy. Since September 1990, he had been working subject to certain restrictions which had been imposed by his personal physician. In November 1993, he was placed on indefinite, unpaid, involuntary sick leave. He was not provided notice of any allegations prior to being placed on involuntary sick leave, nor was he afforded a hearing.

The employee appealed to the district personnel commission under a rule permitting such appeals from placement of an employee on involuntary illness leave. Eventually, the employee was examined by a district-appointed physician, who concluded that the employee was capable of working with certain minimal restrictions. Approximately seven months after the employee was placed on involuntary sick leave, the personnel commission granted his appeal and determined that he could return to work. The district denied the employee's request for back pay for the period of the leave. The employee sued the district, the personnel commission, and the personnel director, alleging violation of the due process clause of the United States Constitution.

The Court of Appeal held that the employee had a protectable property interest in maintaining his job that was impaired when he was involuntarily placed on unpaid sick leave. In this regard, the court stated that the district's action was tantamount to a suspension without pay, and can properly be viewed as punitive or disciplinary. The court held further that the employee was entitled to a hearing before he was placed on involuntary sick leave. The court held that since the employee was wrongfully deprived of a property interest, he was entitled to a writ of mandate directing that the district reinstate his lost benefits and/or salary for the period of the involuntary leave.

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[217] Education Code section 45207.
[218] Bostean v. Los Angeles Unified School District, 63 Cal.App.4th 95, 73 Cal.Rptr.2d 523 (1998).
[219] Ibid.

Since George Bostean was eventually reinstated in his position, the court did not address whether a pretermination hearing would be required prior to placement of a classified employee on the 39-month reemployment list. In Trotter v. Los Angeles County Board of Education,[220] the Court of Appeal held that a probationary personnel analyst with the county board of education was not entitled to a hearing after due notice concerning her placement on the 39-month list caused by her inability to perform her duties due to medical reasons because her placement on the list was not disciplinary.

K. Military Leave

A classified employee who enters the active military service of the United States or of the State of California, as defined, during any period of national emergency declared by the president or during any war in which the United States is engaged, is entitled to a leave of absence.[221] Such absence does not affect the classification of the employee and the employee's rights with regard to computation of time toward permanent status.[222] Additional protections are afforded to the employee under the Uniformed Services Employment and Reemployment Rights Act of 1994.[223] Under state law, the Military and Veterans Code sections 395 and following provide for military leave for public employees, including the right to be restored to their former position or a position of like seniority, status, and pay[224] and compensation as specified.[225]

PARENTAL LEAVE FOR COMMUNITY COLLEGE AND SCHOOL DISTRICT EMPLOYEES

A. Eligible Employees

Education Code sections 44977.5, 45196.1, 87780.1 and 88196.1 provide that, notwithstanding any other law, during each school year, eligible employees may use their sick leave for purposes of parental leave for a period of up to twelve work weeks.

Eligible employees include (1) a person employed in a position requiring certification qualifications,[226] (2) a classified employee of a school district,[227] (3) a person employed in an academic position of a community college district,[228] and (4) a classified employee of a community college district.[229] Notwithstanding subdivision (a) of Section 12945.2 of the Government Code, or CFRA, an employee must have been employed at least twelve months prior to the leave, but is not required to have 1,250 hours of service with the employer during the previous twelve-month period in order to take parental leave pursuant to this section.

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[220] 167 Cal.App.3d 891 (1985).
[221] 38 U.S.C. Section 4301-4335; Military and Veterans Code section 395 et seq.
[222] Ibid.
[223] Ibid.
[224] Military and Veterans Code section 395 also provides that if no position exists the employee shall have the same rights and privileges that he or she would have had if he or she had occupied the position when it ceased to exist and had not taken temporary military leave of absence.
[225] Military and Veterans Code sections 395.01-395.05.
[226] Ed. Code section 44977.5.
[227] Ed. Code section 45196.1.
[228] Ed. Code section 87780.1.
[229] Ed. Code section 88196.1.

B. Definition of Parental Leave

"Parental leave" means leave 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. The twelve-workweek period of parental leave shall be:

1. Provided only once during any twelve-month period.

2. Reduced by any period of sick leave, including accumulated sick leave, taken during a period of parental leave.

3. Run concurrently with parental leave taken pursuant to Section 12945.2 of the Government Code, and the aggregate amount of parental leave taken pursuant to this section and Section 12945.2 of the Government Code shall not exceed twelve workweeks in a twelve-month period.

C. Calculation of Parental Leave

In school districts and community college districts that use differential pay systems, when an employee has exhausted all available sick leave, including all accumulated sick leave, and continues to be absent from his or her duties on account of parental leave pursuant to Section 12945.2 of the Government Code:

1. For school districts that use the differential pay system described in 44977 or the first paragraph of 45196 and community college districts that use the differential pay system described in Section 87780 or 88196: The amount deducted from the salary due to the employee for any of the remaining portion of the twelve-workweek period in which the absence occurs shall not exceed the sum that is actually paid a substitute employee employed to fill his or her position during his or her absence.

    a. For a certificated employee of a school district, if no substitute employee was employed, the amount that would have been paid to a substitute had he or she been employed is deducted.

    b. For a person employed in an academic position at a community college district, if no temporary employee was employed, the amount that would have been paid to the temporary employee had he or she been employed is deducted.

2. For school districts that use the differential pay system described in 44983 or the last paragraph of 45196 and community college districts that use the differential pay system described in Section 87786 or the last paragraph of 88196: The employee shall be compensated at no less than fifty percent of his or her regular salary for the remaining portion of the twelve-workweek period of parental leave.

However, the change in law shall not be construed to diminish the obligation of a public school employer to comply with any collective bargaining agreement entered into by a public school employer and an exclusive bargaining representative pursuant to Chapter 10.7 (commencing with Section 3540) of Division 4 of Title 1 of the Government Code that provides greater parental leave rights to employees than the rights established under this section.