

Administrative Regulation

AR 4161.8 4261.8,4361.8

Personnel

Family Care And Medical Leave

Note: Both federal and state law provide for family care and medical leave (29 USC 2601-2654, the Family and Medical Leave Act of 1993 (FMLA), and Government Code 12945.1-12945.2, the California Family Rights Act (CFRA)). In most situations, the entitlements under both laws overlap; however, where there is a conflict between state and federal law, the law that grants greater benefits generally controls. In these situations, legal counsel should be consulted as appropriate.

Note: This regulation may be subject to collective bargaining agreements. Districts that include such provisions in their agreements may delete the following optional administrative regulation.

Definitions

Child means a biological, adopted, or foster child; a stepchild; a legal ward; or a child of a person standing in loco parentis as long as the child is under 18 years of age or an adult dependent child. (29 USC 2611; Government Code 12945.2)

Eligible employee means an employee who has at least 12 months of service with the district and who has at least 1,250 hours of service with the district during the previous 12-month period. Full-time teachers are deemed to meet the 1,250 hours of service requirement. (29 USC 2611; 29 CFR 825.110; Government Code 12945.2)

Full-time teacher means an employee whose principal function is to teach and instruct students in a class, a small group, or individual setting. (29 CFR 825.800)

Parent means a biological, foster, or adoptive parent; a stepparent; a legal guardian; or another person who stood in loco parentis to the employee when the employee was a child. (29 USC 2611; Government Code 12945.2)

Serious health condition means an illness, injury, impairment, or physical or mental condition that involves either of the following: (29 USC 2611; 29 CFR 825.114; Government Code 12945.2)

1. Inpatient care in a hospital, hospice, or residential health care facility
2. Continuing treatment or continuing supervision by a health care provider, including one or more of the following:

- a. A period of incapacity of more than three consecutive days
- b. Any period of incapacity or treatment for such incapacity due to a chronic serious health condition
- c. For purposes of leave under the Family and Medical Leave Act (FMLA), any period of incapacity due to pregnancy or for prenatal care

Eligibility

Note: Pursuant to Government Code 12945.2 and 29 USC 2601, a district is required to grant family care and medical leave to an eligible employee for any of the reasons stated in the following paragraphs, except where the district employs less than 50 employees within 75 miles of the worksite where the employee requesting the leave is employed. The determination of eligibility is made at the time the employee gives notice of the need for the leave (e.g., if the district employs 51 people in August when the employee requests leave, but anticipates having 48 employees in October, the district is subject to FMLA for purposes of that employee's request).

The district shall grant family care and medical leave to eligible employees for the following reasons: (29 USC 2612; Family Code 297.5; Government Code 12945.2)

1. Because of the birth of a child of the employee or placement of a child with the employee in connection with the adoption or foster care of the child by the employee.

Note: Pursuant to Family Code 297.5, registered domestic partners have the same rights, protections, and benefits as spouses under the law.

2. To care for the employee's child, parent, spouse, registered domestic partner, or child of a registered domestic partner with a serious health condition.

3. Because of the employee's own serious health condition that makes him/her unable to perform one or more essential functions of his/her position. However, for purposes of leave under the California Family Rights Act (CFRA), this does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions.

The district shall not interfere with, restrain, or deny the exercise of any right provided to an eligible employee under the law. Also, the district shall not discharge or discriminate against any employee for opposing any practice made unlawful by, or because of, his/her involvement in any inquiry or proceeding related to the family care and medical leave. (29 USC 2615; Government Code 12945.2)

(cf. 4030 - Nondiscrimination in Employment)

Terms of Leave

An eligible employee shall be entitled to a total of 12 work weeks of leave during any 12-month period. (29 USC 2612; Government Code 12945.2)

Note: To determine the 12-month period in which the leave entitlement occurs, the district may use any of the methods specified in Options #1-5 below which are examples listed in 29 CFR 825.200. However, a district may choose not to use any of these options and may instead choose some other fixed 12-month period. Whatever option is selected must be applied uniformly to all employees.

This 12-month period shall coincide with the School year (July 1 – June30)
(29 CFR 825.200)

Note: Except in the situations described below, Government Code 12945.2 provides that leave granted under the state CFRA must run concurrently with leave granted under the federal FMLA. Thus, CFRA leave may not be combined with FMLA leave and the total leave may not exceed 12 weeks.

Leave taken pursuant to the CFRA shall run concurrently with leave taken pursuant to the FMLA, except in the following circumstances:

1. Leave taken to care for a registered domestic partner or a child of a domestic partner. Such leave shall count as leave under the CFRA. (Family Code 297.5)

Note: Pursuant to 2 CCR 7297.6, an employee's right to take pregnancy disability leave under Government Code 12945 is separate from her right to take leave under the CFRA.

2. Leave taken under the FMLA for disability on account of pregnancy, childbirth, or related medical conditions. In addition to family care and medical leave, an employee may be entitled to take pregnancy disability leave of up to four months. During the otherwise unpaid portion of pregnancy disability leave, the employee may use any accrued vacation, sick time, or other paid leave. Such FMLA leave shall run concurrently with any pregnancy disability leave taken by the employee, except that CFRA leave shall not commence until the expiration of the pregnancy disability leave. (Government Code 12945, 12945.2; 2 CCR 7297.6)

(cf. 4161.1/4361.1 - Personal Illness/Injury Leave)

(cf. 4261.1 - Personal Illness/Injury Leave)

Note: The following paragraph reflects the provisions of 29 USC 2612, indicating that leave taken for the birth or placement of a child must be concluded (not initiated) within one year of the child's birth or placement.

Leave taken for the birth or placement of a child must be concluded within the 12-month period beginning on the date of the birth or placement of the child. Such leave does not have to be taken in one continuous period of time. The basic minimum duration of the leave for birth or placement of a child shall be two weeks. However, the district shall grant a request for leave of less than two weeks' duration on any two occasions. (29 USC 2612; 2 CCR 7297.3)

Note: The following optional paragraph is for use by districts that limit family care and medical leave related to the birth or placement of the child to a total of 12 weeks when both parents work for the district.

If both parents of a child work for the district, their family care and medical leave related to the birth or placement of the child shall be limited to a total of 12 weeks. This restriction shall apply whether the parents are married, registered domestic partners, or not married. (29 USC 2612; Government Code 12945.2)

Note: The district may require employees (Option 1) or give employees discretion (Option 2) to substitute paid leave for the unpaid family care and medical leave, so that the paid leave and unpaid family care and medical leave would run concurrently. However, paid leave may be substituted only to the extent that the employee would otherwise be eligible to take the leave.

During the period of family care and medical leave, the district shall require the employee to use his/her accrued vacation leave, other accrued time off, and any other paid or unpaid time off negotiated with the district. If the leave is because of the employee's own serious medical condition, the employee shall use accrued sick leave pursuant to collective bargaining agreements and/or Board policy. (29 USC 2612; Government Code 12945.2)

(cf. 4141/4241 - Collective Bargaining Agreement)
(cf. 4161/4261 - Leaves)

Intermittent Leave/Reduced Leave Schedule

Leave related to the serious health condition of the employee or his/her child, parent, spouse, or registered domestic partner may be taken intermittently or on a reduced leave schedule when medically necessary, as determined by the health care provider of the person with the serious medical condition. However, the district may limit leave increments to the shortest period of time that the district's payroll system uses to account for absences or use of leave. (29 USC 2612; 2 CCR 7297.3)

If an employee needs intermittent leave or leave on a reduced work schedule that is foreseeable based on planned medical treatment for the employee or a family member, the district may require the employee to transfer temporarily to an available alternative position. This alternative position must have equivalent pay and benefits, the employee

must be qualified for the position, and the position must better accommodate recurring periods of leave than the employee's regular job. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent leave or a reduced leave schedule. (29 USC 2612; 2 CCR 7297.3)

(cf. 4113.4/4213.4/4313.4 - Temporary Modified/Light-Duty Assignment)

Request for Leave

If an employee's need for leave is foreseeable, the employee shall provide the district with reasonable advance notice for the leave. If an employee's need for leave is foreseeable due to a planned medical treatment or supervision, the employee shall make a reasonable effort to schedule the treatment or supervision to avoid disruption of district operations. This scheduling shall be subject to the health care provider's approval. (Government Code 12945.2)

Certification of Health Condition

Note: The following optional section is for use by districts that require the employee's request for leave to include a medical certification of the need for the leave, as specified below. In order to help avoid claims of discrimination, the district should generally treat all employees uniformly; thus, districts using this section should request a medical certification from all employees.

A request by an employee for family care and medical leave for his/her serious health condition, or to care for a child, parent, spouse, registered domestic partner, or child of a registered domestic partner with a serious health condition, shall be supported by a certification from the health care provider of the employee or such other person as applicable. The certification shall include the following: (29 USC 2613; Government Code 12945.2; 2 CCR 7297.0)

1. The date on which the serious health condition began
2. The probable duration of the condition
3. If the employee is requesting leave to care for a child, parent, spouse, registered domestic partner, or child of a registered domestic partner with a serious health condition, the health care provider's certification of both of the following:
 - a. Estimated amount of time the health care provider believes the employee needs to care for the child, parent, spouse, registered domestic partner, or child of the registered domestic partner
 - b. Statement that the serious health condition warrants the participation of a family member to provide care during a period of the treatment or supervision of the child, parent, spouse, registered domestic partner, or child of a registered domestic partner

Note: 2 CCR 7297.0 provides that the health care provider's certification need not identify the serious health condition involved. Where an employee is requesting leave for his/her own serious health condition, the employee may provide this information at his/her option.

4. If the employee is requesting leave because of his/her own serious health condition, a statement that due to the serious health condition, he/she is unable to work at all or to perform one or more essential functions of his/her job

5. If the employee is requesting leave for intermittent treatment or is requesting leave on a reduced leave schedule for planned medical treatment, a statement of the medical necessity for the leave, the dates on which treatment is expected to be given, the duration of such treatment, and the expected duration of the leave

If the district doubts the validity of a certification that accompanies a request for leave, the Superintendent or designee may require the employee to obtain a second opinion from a district-approved health care provider, at district expense. If the second opinion is contrary to the first, the Superintendent or designee may require the employee to obtain a third medical opinion from a third health care provider approved by both the employee and the district, again at district expense. The opinion of the third health care provider shall be final and binding. (29 USC 2613; Government Code 12945.2)

Note: Government Code 12945.2 and 29 USC 2613 allow districts to require subsequent recertification on a reasonable basis and in the same manner as outlined above.

If additional leave is needed when the time estimated by the health care provider expires, the district may require the employee to provide recertification in the manner specified in items #1-5 above. (29 USC 2613; Government Code 12945.2)

Fitness for Duty

Note: Pursuant to Government Code 12945.2 and 29 CFR 825.310, the district may require an employee to submit a fitness-for-duty report upon returning to work when the following two conditions are met: (1) the leave was a result of the employee's own serious health condition, and (2) the district has adopted a policy that is applied uniformly to all similarly situated employees. However, if the district's collective bargaining agreement governs the employee's return to work, the collective bargaining agreement shall supersede any policy requirements. The following paragraph is for use by districts that choose to require such a certification and may be modified to list the specific positions for which certification is required.

Employees who take family care and medical leave for their own serious health conditions shall present certification from their health care provider to the effect that they are able to resume work.

(cf. 4112.4/4212.4/4312.4 - Health Examinations)

Rights to Reinstatement and Maintenance of Benefits

Note: Pursuant to Government Code 12945.2 and 29 USC 2614, an employee on family care and medical leave has the right to be reinstated to the same or a comparable position when he/she returns from such leave with certain exceptions, as described below.

Upon granting an employee's request for family care and medical leave, the Superintendent or designee shall guarantee to reinstate the employee in the same or a comparable position when the leave ends. (29 USC 2614; Government Code 12945.2)

The district may refuse to reinstate an employee returning from leave to the same or a comparable position if all of the following apply: (29 USC 2614; Government Code 12945.2)

1. The employee is a salaried "key employee" who is among the highest paid 10 percent of those district employees who are employed within 75 miles of the employee's worksite.
2. The refusal is necessary to prevent substantial and grievous economic injury to district operations.
3. The district informs the employee of its intent to refuse reinstatement at the time it determines that the refusal is necessary, and the employee fails to immediately return to service.

An employee who takes leave has no greater right to reinstatement than if he/she had been continuously employed during the leave period. If the district reduces its work force during the leave period and the employee is laid off for legitimate reasons at that time or if the employee is terminated for reasons unrelated to the leave, he/she is not entitled to reinstatement, provided the district has no continuing obligations under a collective bargaining agreement or otherwise. (29 CFR 825.216)

(cf. 4117.3 - Personnel Reduction)

(cf. 4217.3 - Layoff/Rehire)

During the period when an employee is on family care and medical leave, he/she shall maintain his/her status with the district and the leave shall not constitute a break in service for purposes of longevity, seniority under any collective bargaining agreement, or any employee benefit plan. (29 USC 2614; Government Code 12945.2)

For a period of 12 weeks, the district shall continue to provide an eligible employee on family care and medical leave the group health plan coverage that was in place before

he/she took the leave. The employee shall reimburse the district for premiums paid during the family care and medical leave when he/she fails to return to district employment after the expiration of the leave and the failure is for any reason other than the continuation, recurrence, or onset of a serious health condition, or other circumstances beyond his/her control. (29 USC 2614; 29 CFR 825.213; Government Code 12954.2)

(cf. 4154/4254/4354 - Health and Welfare Benefits)

In addition, during the period when an employee is on family care and medical leave, he/she shall be entitled to continue to participate in other employee benefit plans including life, short-term or long-term disability, or accident insurance, pension and retirement plans, and supplemental unemployment benefit plans to the same extent and under the same conditions as apply to an unpaid leave taken for any other purpose. However, for purposes of pension and retirement plans, the district shall not be required to make plan payments for an employee during the leave period and the leave period shall not be counted for purposes of time accrued under the plan. (Government Code 12945.2)

Notifications

Note: Samples of notices which describe an employee's rights, as required by 29 USC 2619 and 2 CCR 7297.9, are available on the web sites of the state Department of Fair Employment and Housing and the federal Department of Labor. 2 CCR 7297.9 further requires that if the workforce at any facility contains 10 percent or more of persons with a primary language other than English, the posted notice of state law must be translated into the language(s) these employees speak.

The Superintendent or designee shall post notices about federal and state law related to family care and medical leave in a conspicuous place. Information about employee rights and obligations related to such leaves shall also be included in employee handbooks. (29 USC 2619; 2 CCR 7297.9)

At least the first time in each six-month period that an employee requests family care and medical leave, the Superintendent or designee shall provide written notice detailing specific expectations and obligations, and explaining any consequences of a failure to meet these obligations. The notice shall include: (29 CFR 825.301)

1. A statement that the leave will be counted against the employee's annual family care and medical leave entitlement
2. Any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to provide the notice
3. The employee's right to substitute paid leave, conditions related to any substitution, and whether the district requires this substitution

4. Health benefit arrangements
5. If applicable, the employee's status as a "key employee" and information related to restoration of that status
6. The employee's right to restoration to the same or an equivalent job
7. The employee's potential liability for health benefits should the employee not return to service

Note: Item #8 below is for use by districts that require medical certification to the effect that the employee is able to resume work. See section entitled "Fitness for Duty" above.

8. The district's requirement that the employee, upon return, present medical certification to the effect that he/she is able to resume work

Records

Note: Government Code 12946, 29 USC 2616, and 29 CFR 825.500 require districts to maintain records of, among other things, applications, dates, and personnel and employment action related to family care and medical leave.

The Superintendent or designee shall maintain records pertaining to an individual employee's use of family care and medical leave in accordance with law.

Servicemember Family Leave

Note: P.L. 110-181 amended 29 USC 2612, effective January 28, 2008, to authorize an employee to take up to 26 work weeks of unpaid leave to care for a spouse, son, daughter, parent, or next of kin who is a member of the Armed Forces and who is undergoing medical treatment, recuperation, or therapy, as specified below. As is the case with other leaves granted under the FMLA, these amendments apply to districts that employ at least 50 employees within 75 miles of the worksite where the employee requesting the leave is employed; see the section entitled "Eligibility" above.

Note: In addition, 29 USC 2612, as amended, authorizes an employee to take up to 12 weeks of unpaid leave to attend to an "exigency" arising out of the fact that a spouse, child, or parent of the employee is on active duty or has been notified of an impending call or order to active duty. This section of the law will not take effect until regulations have been developed by the Department of Labor to define a qualifying "exigency."

Note: Until the Department of Labor develops further guidance, districts with questions regarding the applicability of other FMLA requirements to this type of leave should consult with legal counsel. According to the Department of Labor, employers should act in "good faith" in providing such leaves and FMLA-type procedures should be used as appropriate.

The district shall grant up to a total of 26 work weeks of leave during a single 12-month period to an employee to care for a covered servicemember who is his/her spouse, child, parent, or next of kin. (29 USC 2611, 2612)

Covered servicemember means a member of the Armed Forces, including a member of the National Guard or Reserves, who has suffered a serious injury or illness and who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for that injury or illness. (29 USC 2611, 2612)

Next of kin means the nearest blood relative to that individual. (29 USC 2611, 2612)

Outpatient status means the status of a member of the Armed Forces assigned to a military medical treatment facility as an outpatient or a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients. (29 USC 2611)

Serious injury or illness means an injury or illness incurred by the member in the line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. (29 USC 2611)

The employee shall provide reasonable and practicable notice of the need for the leave when the necessity for the leave is foreseeable. (29 USC 2612)

The leave can be taken intermittently or on a reduced schedule when medically necessary. An employee taking servicemember leave in combination with other leaves pursuant to this regulation shall be entitled to a combined total of 26 work weeks of leave during a single 12-month period. When both spouses work for the district and both wish to take such leave, the spouses are limited to a maximum combined total of 26 work weeks during a single 12-month period. (29 USC 2612)

Note: Pursuant to 29 USC 2612, as amended by P.L. 110-181, the district may require employees (Option 1) or give employees discretion (Option 2) to substitute paid leave for the unpaid servicemember leave. However, paid leave may be substituted only to the extent that the employee would otherwise be eligible to take the leave.

During the period of servicemember leave, the district shall require the employee to use his/her accrued vacation leave, other accrued time off, and any other paid or unpaid time off negotiated with the district. (29 USC 2612)

Legal Reference:

FAMILY CODE

297-297.5 Rights, protections and benefits under law; registered domestic partners

GOVERNMENT CODE

12940 Unlawful employment practices

12945 Pregnancy; childbirth or related medical condition; unlawful practice

12945.1-12945.2 California Family Rights Act

CODE OF REGULATIONS, TITLE 2

7291.2-7291.16 Sex discrimination: pregnancy and related medical conditions

7297.0-7297.11 Family care leave

UNITED STATES CODE, TITLE 29

2601-2654 Family and Medical Leave Act of 1993, as amended

CODE OF FEDERAL REGULATIONS, TITLE 29

825.100-825.800 Family and Medical Leave Act of 1993

COURT DECISIONS

Tellis v. Alaska Airlines, (9th Cir., 2005) 414 F.3d 1045

Management Resources:

WEB SITES

California Department of Fair Employment and Housing: <http://www.dfeh.ca.gov>

U.S. Department of Labor, Compliance Assistance, FMLA:

<http://www.dol.gov/esa/whd/fmla>

Adopted: July 9, 2008

**Gravenstein Union School District
Sebastopol, California**