LBAEE
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Family Medical Leave for Mental Health Conditions

The U.S. Department of Labor's Wage and Hour Division recently published new guidance on the rights workers have to medical leave for mental health conditions under the Family and Medical Leave Act (FMLA). The guidance was published to recognize Mental Health Awareness Month, which is in May. The new guidance includes a Fact Sheet and Frequently Asked Questions on the FMLA's mental health provisions. The guidance is timely considering the surge in mental health issues that have arisen in the wake of the COVID-19 pandemic.

Under the FMLA, mental health issues may qualify as a serious health condition that allows workers to take up to 12 work weeks of job-protected unpaid leave in a 12-month period. An eligible employee may take FMLA leave for their own serious health condition or to care for a spouse, child, or parent because of their serious health condition. FMLA leave may also be used to care for adult children with mental health conditions in certain circumstances. (*See, e.g., Fact Sheet #28K*). Employers may not retaliate against employees for taking FMLA leave, including for qualifying mental health reasons.

The new guidance explains that mental health may qualify as a serious medical condition under the FMLA if it requires (1) inpatient care or (2) continuing treatment by a health care provider. Inpatient care includes an overnight stay in a hospital or other medical care facility, such as a treatment center for addiction or eating disorders. Continuing treatment includes conditions that incapacitate an individual for more than three consecutive days and require ongoing medical treatment, either multiple appointments with a health care provider (such as a psychiatrist, clinical psychologist, or clinical social worker), or a single appointment and follow-up care (such as prescription medication, outpatient rehabilitation counseling, or behavioral therapy). Chronic conditions such as anxiety, depression, or dissociative disorders that cause occasional incapacitated periods and require treatment at least twice a year are also considered "continuing treatment."

Leave may also be taken to provide care for a spouse, child, or parent who is unable to work or perform other regular daily activities because of a serious health condition. Providing care includes providing psychological comfort and reassurance that would be beneficial to a family member with a serious health condition who is receiving inpatient or home care. FMLA leave for the care of a child with a serious health condition is generally limited to providing care for a child under the age of 18. But a parent may use FMLA leave to care for a child 18 years of age or older who needs care because of a serious health condition if the individual is incapable of self-care because of a mental or physical disability. The tests for "disability" and "serious health condition" are different, but some mental health conditions will satisfy both definitions.

Employees may be able to take FMLA leave on an intermittent or reduced schedule basis. That means an employee may take leave in separate blocks of time or by reducing the time he or she works each day or week for a single qualifying reason. Intermittent leave is often needed when managing mental health conditions. However, when leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operations.

Under certain circumstances, employees may choose, or employers may require, to run any accrued paid leave – such as sick or vacation – concurrently to cover all or some of the FMLA leave period. Whether accrued paid leave is run concurrently is determined by the law, your employer's leave policy, and your MOU.

An employee must request leave 30 days in advance, or as soon as practicable if the need for leave is unforeseeable. When requesting leave for an FMLA-qualifying reason for the first time, the employee need not expressly assert "FMLA." But the employee may need to have their health care provider, or their covered family member's health care provider, complete an FMLA certification form and get it on file with the employer. If an employee later requests additional leave for the same qualifying condition, the employee must specifically reference either the qualifying reason or the need for "FMLA." Employers may require periodic recertification of a serious health condition.

An employee's use of FMLA leave cannot be counted against the employee under a "no-fault" attendance policy or be used as a negative factor in employment decisions, such as hiring, promotions, or disciplinary actions. Employers are also required to continue group health insurance coverage for an employee on FMLA leave under the same terms and conditions as if the employee had not taken leave. Employers must restore the employee

to the same or virtually identical position at the end of the leave period. The FMLA also requires employers to keep employee medical records confidential and maintain them in separate files from more routine personnel files. However, the employer may inform supervisors or managers of an employee's need to be away from work, or if an employee needs work duty restrictions or accommodations.

The Department of Labor's Wage and Hour Division enforces the FMLA for all private, state, and local government employees. It will investigate complaints, and if violations cannot be resolved, the DOL may bring legal action in court to compel compliance. An employee may also be able to bring a private civil action against an employer for violations. In general, any allegation must be raised within two years from the date of the violation. But it's often best to contact your employee organization's professional staff to see if the matter can be resolved informally or through a grievance. Time limits are often within days or weeks, so don't delay!

News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

9.1% - CPI for All Urban Consumers (CPI-U) Nationally

8.8% - CPI-U for the West Region

8.6% - CPI-U for the Los Angeles Area

6.8% - CPI-U for San Francisco Bay Area

9.4% - CPI-U for the Riverside Area (from May)

8.3% - CPI-U for San Diego Area (from May)

CalPERS Announces New Health Plan Premiums For 2023

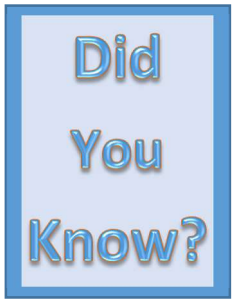
On July 12, the CalPERS Board approved health plan premiums for calendar year 2023, at an overall premium increase of 6.75%. Members enrolled in HMO plans will see an average premium increase of 4.35%. Those enrolled in PPO plans will see an overall increase of 15.76%! Within the HMO plans, statewide, the Anthem Traditional HMO and Blue Shield Access+ HMO are going down about 6%, while the Kaiser plan is going up about 6%. But in LA-Riverside-San Bernardino, there is essentially no change in the Anthem Traditional HMO. In Southern California and the Central Valley, the Health Net Salud y Mas plan is going up 30%, while the Gold PPO is going up 18%, and the Platinum PPO is going up 15%. The PPO plans are seeing similar increases in Northern California.

According to Rob Feckner, chair of the Pension & Health Benefits Committee (and former CalPERS Board President), "we focused on giving our members even more choices of plans offering lower out-of-pocket costs while also adding benefit designs focused on equity and high-quality care." CalPERS provides health insurance for more than 1.5 million people, about half being public employees and retirees, and the other half being their dependents. CalPERS members can change health plans during open enrollment (September 19 to October 14). New premiums take effect January 1, 2023. Rates vary based on region. Visit https://www.calpers.ca.gov/page/active-members/health-benefits/plans-and-rates for detailed information on premiums for each region, and visit https://www.calpers.ca.gov/page/newsroom/calpers-news/2022/calpers-announces-health-plan-premiums-for-2023 for the CalPERS press release.

CalPERS cited inflation for medical and pharmaceutical costs as the main drivers for the premium increases, though CalPERS says the HMO premium increases "are well below national benchmarks for premium inflation." CalPERS considers utilization trends (ER, hospital, and office visits), cost trends (costs for services and pharmaceuticals), and benefit design changes when negotiating premiums with insurance companies. CalPERS sets premiums differently than other group insurance plans by using a risk mitigation strategy that prices premiums based on the value of the benefits and network instead of the risk profile of the plan participants. CalPERS expects this approach will result in smoother, more predictable premium changes in future years.

Heat Illness Prevention

The U.S. Department of Labor website has "Best Practices on Preventing Heat Illness at Work" that are designed to help employers reduce the risk of heat related illness for workers as we head deep into summer. Here are the suggestions:



Train All Workers. Employers should train supervisors and workers on how to control and recognize heat hazards. This includes first aid.

Follow the 20% Rule. On a worker's first day, no more than 20% of the duration of their shift should be at full intensity in the heat. The duration of time at full intensity should be increased by no more than 20% a day until workers are used to working in the heat.

Remember These Three Words: "Water. Rest. Shade." Workers should drink 1 cup of water every 20 minutes while working in the heat to stay hydrated. When the temperature is high, employers should make sure workers take frequent rest breaks in shaded, cool, or air-conditioned areas to recover from the heat.

Workers New to the Job are at Higher Risk. Workers who are new or returning to working in warm or hot environments need more time to adapt. More than 75% of heat-related fatalities occur during a worker's first week, which is why "acclimatization" – the process of building resistance to increased temperatures – is so important to protect new workers from heat-related illness. Employers should monitor them until they are acclimated.

Hazardous Heat Exposure Can Happen Indoors or Outdoors. Though heat stress is typically related to outdoor work environments, and construction workers account for about one-third of heat-related deaths, workers in hot indoor environments like warehouses and electrical utilities are also at risk.

Engineering Controls and Modified Work Practices Can Reduce the Risk of Heat Illness. Employers should consider reducing physical activity as much as possible by planning for the work ahead and rotating job functions among workers to help minimize exertion.

If you encounter unsafe heat conditions, tell your employer and if nothing changes, contact your professional staff. You can also reach OSHA at 1-800-321-6742 (OSHA).

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: My last day of work is approaching, and I'm being told I won't be paid my final wages and leave cash outs until almost two weeks after I quit. I'm moving to a very expensive area, and I really need my wages and vacation when I quit. I saved them for this reason. I don't think it's right to have to wait until the next pay date after my last day of employment. What can I do?

Answer: Various provisions of the Labor Code codify the public policy favoring the timely payment of wages due. Several sections in particular set forth deadlines for when final payments are due to discharged or resigning employees. (Labor Code §201-203).

Unfortunately, these deadlines do not apply to most public employees. Although the prompt payment requirement imposes a general obligation on employers, local public agencies are expressly exempt from its reach. For example, sections 200-211 and 215-219 "do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation." (Labor Code §220(b)). The term "municipal corporation" includes, for the purposes of the exemption, special districts such as hospital districts, community college districts, and water storage districts. This exemption includes not only the final payment of wages, but also the sections on penalties for failure to make timely payments (Labor Code §210), actions to recover penalties (Labor Code §211), and the enforcement provisions (Labor Code §215-219). State employees, however, are not exempt from these provisions.

Assuming you work for a county, city, or special district, the employer is allowed to issue your final check and leave cash outs on the next regularly scheduled payroll run, which in most agencies is bi-weekly (26 pay periods). This means the longest you will typically have to wait is about two weeks. But check your MOU – it may have a provision that requires final payment sooner.

Question: IT recently began requiring 2-step authentication. The new security feature – multi-factor authentication (MFA) – is broken into two parts. First for accessing Microsoft products. Second for remote VPN users. There are

four options to deliver the six-digit MFA code. The options are a mobile app, texting, email, or voice call. We are being asked to use our personal cell phones for MFA. I have privacy concerns about this. What can they require and what rights do I have to refuse? Can my personal phone be inspected simply because I use it for MFA and nothing else?

Answer: This is a timely question. Multi-factor Authentication (MFA) is becoming more frequently used in the workplace. In short, an employer can implement whatever security protocols it wants for its own equipment and infrastructure, but it should provide notice to any employee organizations and allow for a reasonable opportunity to meet and confer over the impact this might have on any terms and conditions of employment prior to implementing.

For example, are members being required to use their own device for MFA, are members receiving a cell phone stipend for using their personal device, are members subject to discipline for failure to follow the MFA protocols, *etc*.

The employer shouldn't be requiring employees to use their own device for work purposes, including for MFA, without negotiated compensation. If the employer is not requiring employees to use personal devices but is setting criteria for those who choose to use them for work purposes, this is likely permissible. Your employee organization will want to clarify this, ideally in writing. There may be other aspects to negotiate, like the scope of any apps or technology that employees must load on their own phones, when employees can delete them, and the circumstances in which employees can use their own device instead of employer-provided devices.

If you use your own device for MFA only, it's unlikely the employer will have a justification for inspecting your personal device. Also, the California Public Records Act is broad and can include communications sent on your personal device, but it's not clear MFA, standing alone, constitutes a "public record." Even if it did, the data showing when an employee used their personal device for MFA should be within the hands of the employer without having to resort to a physical inspection of your own personal device. Regardless, you should be able to opt-out of using your own personal device for MFA if you choose.

Question: The Department is in the process of creating a position but has not made it official. I know by chance. I also know that they are "shoulder tapping" to try to fill the position. Isn't this a violation of the personnel policies and procedures? This isn't the first time this has happened. I don't think it is fair to create positions and fill them with whomever they want instead of opening

the opportunity to other staff and/or the public. Can you please advise?

Answer: If this is a new job classification, the employer should meet and confer with the employee organization over the job specifications including the salary, duties, and qualifications. This should be done before the position is formally announced for a recruitment.

Often, the meet and confer process doesn't begin until the Department or Human Resources finishes all the details. Public agencies will sometimes try and create a new job classification as part of the budget (so they can get funding for it) even though the specifications aren't ironed out until later. Regardless, the employee organization should review the specifications and share it with any affected employees for their input prior to approving.

As for the recruitment, there is probably nothing wrong with the Department gauging employee interest in the role, at least for now. But yes, when it comes time to fill it, they should be following their existing hiring policies and procedures.

Although most employers maintain a lot of discretion in deciding who to hire or promote, some MOUs and/or hiring policies contain language to ensure current qualified employees are given a chance to apply, interview, and compete for openings. If those rules are violated, affected employees or the employee organization may have a grievance.

If the existing policies and procedures are not adequate, the employee organization might consider negotiating for some improvements during the next round of contract negotiations. Negotiating safeguards for how recruitments are conducted and how vacancies are filled can help prevent favoritism, nepotism, and unfairness in the workplace.

Question: I am an accountant and there is one other accountant. He makes $1,000 more per month than I do. He is Y-Rated, meaning his pay rate exceeds the salary for the position. I am at the top step. I'm going to retire in a year. I feel that it's unfair that even if I were to continue working, I would never make the same pay as my male counterpart. I believe it's an inequity issue and that we should both make the same amount for the same work. Can my pay be increased to match his?

Answer: An employee is considered "Y-rated" when his or her current pay rate is above the job classification's maximum salary. This sometimes happens because of a layoff, demotion, or implementation of a classification and compensation study. An employee who is Y-Rated will typically not receive base wage increases or cost of living adjustments until the top

of the salary range exceeds their current pay rate.

It is not likely a gender equity issue, but that could depend on how your male colleague came to be Y-Rated. For public employment and/or union negotiated wage scales, the question is typically whether the ranges and job titles themselves are discriminatory.

If the employer pays you within your published range and provides any increases you are entitled to under your union contract or the employer's personnel policies, there probably isn't a viable challenge, even if it seems unfair.

Also, even if there was a basis to challenge it, the remedy is likely to reduce your co-worker's salary to the top of the range, not pay you above the range. Keep in mind, when your male colleague leaves, the Y-Rating will end.

Question: I'm a Classic Member and I'm being transferred into a new bargaining unit because of the implementation of a classification and compensation study. I have concerns about whether certain items are PERSable. Is the longevity pay I received (but no longer will in the new unit) PERSable? Is my bilingual pay PERSable? Are my sick and vacation balances that will be cashed out when I transfer units PERSable? I formerly served in a temporary promotion for several months and received premium pay. Is that PERSable?

Answer: Special compensation written into an MOU and part of an employer's contract with CalPERS can be counted towards final compensation depending on whether you are a "Classic Member" or "New Member." For Classic Members, California Code of Regulations §571 defines special compensation. For New Members, Gov't Code §7522.34 applies.

In general, yes, longevity pay is PERSable if it's not tied to performance (such as an evaluation). Longevity pay is defined as additional compensation to employees who have been with an employer, or in a specified job classification, for a certain minimum time exceeding five years. (CCR §571(a)(1)). Bilingual pay is listed as special assignment pay and is also PERSable. (CCR §571(a)(4)). Vacation, Sick, or Annual Leave cash-outs are not PERSable. Premium pay for serving in a higher job classification is PERSable. It's known as temporary upgrade pay, defined as compensation to employees who are required by their employer or governing board or body to work in an upgraded position/classification of limited duration. (CCR §571(a)(4)). These items should be regularly reported to CalPERS, not just in your final year of employment. So, check with CalPERS prior to retirement to ensure your employer is correctly reporting it.