# *LBAEE*
# *June 2021 News*

## Happy Father's Day – Your Workplace Rights as a Father!

COVID-19 has not only highlighted the struggles working mothers face in the U.S., but also the challenges confronting working fathers as well. Whether continuing to work on-site or remotely, the challenge of juggling work demands with family responsibilities has only increased. As discussed last month, though the tide may be changing, the U.S. has not kept pace with other developed countries in providing nationwide *paid* baby bonding or family care leave. Here is what you should know about your rights as a father at work.

**Baby Bonding Leave**: The Federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) both provide up to 12 weeks of *unpaid* job-protected leave for baby bonding in a 12-month period. Typically, these two leaves run concurrently, meaning a father is entitled only to 12 weeks of leave combined under both laws, not 24 weeks. But there are differences in the laws that may prevent them from running concurrently. For example, unlike the FMLA, the CFRA does not include pregnancy or related medical conditions within the definition of "serious health condition." This means a father can first use 12 weeks of FMLA leave to care for a pregnant spouse with medical complications and then also take 12 weeks of CFRA leave to bond with a new baby, for a total of 24 weeks (6 months) of job protected leave. Also, under the FMLA, same-sex couples must be legally married, but CFRA allows leave for a registered domestic partner. So, if a father first takes 12 weeks to care for a registered domestic partner under CFRA, he is still eligible for 12 weeks of FMLA to care or bond with a new child, whether the child is born via a surrogate or placed through adoption or foster care.

Under CFRA, baby bonding leave can be taken either once the child is born or up to one year after the child's birth. Employers are not required to provide intermittent leave for baby bonding under the FMLA (employers can require it be taken all at once), but it is allowed under CFRA. The CFRA regulations say that the minimum duration of leave shall generally be two weeks. A father should request baby-bonding leave as soon as practicable and may use any available accrued leave concurrently (vacation,

compensation time, etc.). An employer can require a father to use those leaves, but a father may be able to reserve sick leave for when he returns. Because baby bonding leave is not for the father's own serious health condition, an employer cannot require that his sick leave run concurrently, absent his agreement.

A new state law, SB 1383, eliminated a limitation in CFRA on the amount of leave parents can take to bond with a new child when the same employer employs both parents. Therefore, it is now possible for both parents (regardless of whether they are married) to each take up to 12 weeks of baby bonding leave under CFRA. Under the FMLA, however, an employer may limit baby bonding leave to 12 weeks total for parents if they are married to one another. For unmarried parents who work for the same employer, the FMLA allows for each parent to take 12 weeks to care for the child.

**SDI**: State Disability Insurance is a paid leave benefit run by the Economic Development Department ("EDD"). Is there an SDI deduction on your paycheck? If so, you may be eligible for benefits. This program is funded through your contributions to SDI via regular payroll deductions. It is paid by the employee and costs about 1% of pay. SDI offers a generous paid parental leave benefit. It allows up to 8 weeks of paid leave for baby-bonding. The benefits are known as wage replacement benefits and they cover up to 60% to 70% of the father's wages depending on his income. The EDD provides an online calculator to help estimate the weekly benefit amount. Leave can be taken intermittently on an hourly, daily, or weekly basis as needed. An employer cannot require a father receiving PFL to use paid time off, sick leave, or vacation concurrently. But the employer may *allow* him to supplement his PFL claim with accrued leave and receive up to 100 percent of his pay. The employer will run the FMLA and CFRA concurrently with PFL.

**Caring for a Pregnant Spouse**: As discussed last month, the California Fair Employment and Housing Act ("FEHA"), Gov't Code § 12945, guarantees all employees disabled by their own pregnancy the right to take *unpaid* medical leave, known as Pregnancy Disability Leave ("PDL"). The mother is entitled to up to four months (17 1/3 weeks) for the period she is disabled for each pregnancy. PDL can be taken intermittently – it does not have to be taken in one continuous period. Disability is defined *broadly* – it includes severe morning sickness, prenatal or post-natal care, bed rest, gestational diabetes, hypertension, preeclampsia, post-partum depression, childbirth, loss/end of pregnancy, recovery from childbirth, and other similar conditions. Many pregnant mothers will qualify at some point during or after pregnancy.

In total, the *father* may be able to use up to 24 weeks (6 months) of job-protected leave, first to care for a pregnant spouse under the FMLA, and then under the CFRA for either (1) baby bonding, (2) the father's own serious medical condition, or (3) to care for a family member with a serious medical condition. As discussed above, typically, the FMLA and CFRA run concurrently, meaning the father is entitled only to 12 weeks of leave combined under both laws, not 24 weeks. The FMLA includes pregnancy or related medical conditions within the definition of "serious health condition," so a father can use FMLA leave – up to 12 weeks of job-protected leave – to care for a pregnant spouse with medical complications. The CFRA, on the other hand, does *not* include pregnancy or related medical conditions within the definition of "serious health condition." Therefore, a father can use FMLA leave to care for a pregnant spouse with medical conditions and still have another 12 weeks of job protected leave under CFRA for baby bonding, his own serious medical condition, or to care for a family member with a serious medical condition. An employer must maintain and pay for health coverage at the level and under the conditions it would have provided if the father had not taken FMLA or CFRA leave. But the law only requires up to 12 weeks of medical benefits coverage in a 12-month period.

CFRA leave does not have to be used to bond with a new baby, though it often is. A father could also use it to care for a spouse (assuming it is not a pregnancy or related medical condition) or a child with a serious medical condition. Until this year, the only family members for whom an employee could take leave under CFRA were a spouse, registered domestic partner, parent, and minor or dependent child. But starting January 1, 2021, a new state law (SB 1383) dramatically expanded the definition of a family member to include a spouse, registered domestic partner, parent, child (which includes an adult child and the child of a registered domestic partner), grandparent, grandchild, and sibling.

It is also important to note that CFRA covers domestic partners registered with the state, whereas the FMLA covers legally married same-sex spouses. Furthermore, the father must be legally married to the spouse – for example, a boyfriend or fiancé cannot take FMLA to care for a pregnant non-married partner with medical conditions. The FMLA defines "family member" to include only a spouse, parent, and minor or dependent child.

**Caring for a Sick Child**: A father can also use protected sick leave under Labor Code § 233, known as the California Kin Care Law. He can use up to one-half of his annual sick leave accrual as paid sick leave for absences to care for a sick child or for baby bonding. To be eligible, he must have accrued sick leave available. Under SB 579, this protected leave can be used to care for a spouse, registered domestic partner, child, or grandchild. It can be used not only when the family member is sick but also to attend to their diagnosis,

care, preventative treatment, or treatment of an existing health condition. A "family member" includes a child regardless of age or dependency status. A "child" includes biological, foster, adopted, step, or legal guardianship relationships, including those who stand in the place of a father ("*in loco parentis*"), as well as a child of a domestic partner.

An employer can require a father to provide advanced notice if an absence is foreseeable. But an employer cannot retaliate against a father for using sick leave for his family if he has accrued and available Kin Care sick leave. Also, California's Paid Sick Leave Law – the Healthy Workplaces, Healthy Families Act of 2014 (AB1522), now codified as Labor Code § 245 – requires employers to provide up to three days of sick leave for an employee to care for a child, grandchild, spouse, or registered domestic partner. As with the California Kin Care Law, this applies even if the family member does not suffer from a serious health condition, for example, a cold or flu, or for annual physicals or flu shots. SB 579 extended the California Kin Care Law to permit an employee to use sick leave for the purposes specified in the Healthy Workplaces, Healthy Families Act of 2014, as set forth above.

A father may also take up to 12 weeks of unpaid leave under the FMLA or CFRA to care for a child with a serious health condition (it is not limited to just bonding leave). The FMLA defines a child as under 18 years of age, whereas CFRA applies to children of all ages, whether minor or adults. Family medical leave includes time for the placement of a child in connection with adoption or foster care. For example, it may include leave to attend counseling sessions, court hearings, or legal consultations in connection with the placement of a child, as well as for a physical examination or travel to another country to complete an adoption. Under both the FMLA and CFRA, if the leave is to care for a child or spouse with a serious medical condition (as opposed to bonding), there is no minimum amount of leave that must be taken. However, an employer may limit leave increments to the shortest amount of time that the employer's payroll system uses to account for leave usage. If a father is taking leave to care for a family member with a serious medical condition, an employer cannot require that he use sick leave concurrently under the CFRA, although he can choose to use sick leave for this purpose.

When taking leave under CFRA to care for a child, grandchild, spouse, registered domestic partner, grandparent, or sibling, a father does not have to identify the serious health condition involved. An employer must accept as sufficient a certification that identifies the date when the condition commenced (if known), the probable duration of the condition, and an estimate of time which a health care provider believes the father needs to care for the family member. The certification must also include a statement that the

condition warrants the father's participation to provide care during a period of treatment or supervision of the family member. Under the CFRA, an employer cannot challenge the medical certification of a covered family member if it satisfies these four requirements. "Warrants participation" includes, but is not limited to, providing psychological comfort, arranging third-party care, and providing or participating in the medical care.

**Child-Related Activities Leave**: Under California law, Labor Code § 230.8, a father can take up to 40 hours of leave each year to attend to his child's school activities. A father can request leave to (1) find, enroll, and re-enroll a child in school or with a licensed childcare provider, (2) address a childcare provider or school emergency, or (3) participate in school-sponsored or childcare-sponsored activities, such as a field trip, graduation, or holiday party. Under SB 579, stepparents, foster-parents, grandparents, legal guardians, and those standing *in loco parentis* are also allowed this kind of leave.

A father can only use up to 8 hours per month unless it is an emergency. An "emergency" is when the child cannot stay at school because the school says the child needs to be picked up, the child is having disciplinary/behavioral problems, or there is a school closure or natural disaster. To qualify, an employer must employ 25 or more people working at the same location, and the child must be in grades K-12. A father may use existing paid leave or comp time or request unpaid leave. A father must give reasonable notice to his employer of the planned absence before taking time off or as soon as practicable in the case of an emergency. As with other forms of protected leave, an employer cannot retaliate against or discriminate against a father for using this kind of leave.

## Conclusion:

Although the law provides fathers with important workplace benefits, be sure to check your employer's policies and your labor contract (MOU), both of which may allow for greater protections than what the law requires. This might include added or expanded job protection and leave rights or allowing a father more freedom to choose how to coordinate his leave accruals with any job-protected leave and employer benefits. It may also include sick leave donation policies or the ability to receive an advance of sick leave that is paid back from future sick leave accruals.

The overlap between state and federal laws and coordinating those leave entitlements with employer policies and MOUs can make it difficult to figure out what might apply to your situation. The general discussion above is an excellent place to start. But if you want advice about your specific situation – especially if you are expecting your first child – consult with professional staff who can help you make the best choice for your situation.

## ***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.

4.2% - CPI for All Urban Consumers (CPI-U) Nationally

3.9% - CPI-U for the West Region

3.6% - CPI-U for the Los Angeles Area

3.8% - CPI-U for San Francisco Bay Area

3.6% - CPI-U for the Riverside Area (from March)

4.1% - CPI-U for San Diego Area (from March)

# 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: Our Department is telling us we now need to report 15 minutes earlier than our ordinary scheduled start time. They said they are *not* going to pay us for the 15 minutes, it is on our own time. Can they require that we report early, and do they have to pay us? I do not mind working, but I *do* mind working for free.**

**Answer:** Yes, and yes. Your department *can* change your work schedule, including making the start time 15 minutes earlier, but they must pay you for the time you are at work.

Work hours are a term and condition of employment. This means that, even though management has a right to adjust hours, it must meet and confer with your Association before making the adjustment. However, some MOUs allow management to adjust schedules as needed, without meeting and conferring, so long as management provides advanced notice. If that is the case, the employee organization does not have a right to meet and confer over the schedule change, but it can insist that management follow the agreed-upon language governing schedules changes. If there is no MOU language, and management has not met and conferred about this change, be sure to let your Association leadership know so they can

ask to meet on this topic. This can be a time-sensitive matter, so *do not wait*.

Once the meet and confer is done, the question becomes, can your Department control your time but not pay you. The answer is clear – no, they cannot. Federal law (the Fair Labor Standards Act) requires an employer to pay for all time employees perform tasks under its control. Requiring you to be at work at a given time means they are requiring you to start work at that time. All hours worked must be paid. If you have trouble getting paid for the hours your employer requires you to be at work for, contact your professional staff, and they can help you get paid for all hours worked.

**Question: I just came back from a trip out of the Country. Before I left, I told my manager about my plans and destination. Today is my first day back. My temperature and symptom screening were normal. I went to the job site and was working with the crew for an hour or so. I was then pulled off the job site and sent to the office and told that based on the State's travel advisory I must quarantine at home for 7 days with a negative test or 10 days with no test. The Agency is providing 80 hours of COVID time, but it is one-time use only. My issue is that the Agency did not provide any information on this travel ban or its requirements before my trip. Managers are unsure how to implement it. There is no published policy provided to employees or the Association. Can they do this?**

**Answer:** They probably can. This will be evaluated in the same way as employer compliance with other newly issued laws. Most employers have rules that say they will comply with all applicable laws and regulations. The State's travel advisory requiring quarantine is one example. If returning from a trip out of the country without quarantining would violate those rules, the employer must comply. But while an employer must follow new State laws and regulations, they must also meet and confer with the Association over any new policy, change to existing policy, or over any negotiable impacts of complying with those new State laws and regulations, at least insofar as it impacts terms and conditions of employment.

Although not directly relevant to your question, it is worth noting that SB 95 is the new law that gives 80 hours of leave for specific COVID-related reasons, including being subject to a quarantine order, what you are referring to as "COVID time." That leave is only good until September 30th of this year. So, in many cases, it is probably better to use it than to let it expire in four months' time.

**Question: Management has asked all employees to sign a consent form that authorizes the City to use our employee photo, which we initially took for our**

**identification badges. Management now wants to use the photo for any purpose they choose. First it was just for ID badges, then they said it was for their new facial recognition technology, now they are saying they want to post it publicly, for example, on social media. I have serious concerns about anyone in the public being able to see or use my image. There are a lot of crazy people out there, some who have a bone to pick with the City, and I do not want them coming after me because of the work that I do. The public already does not like our Department. Are there laws that protect employees from the City using their image in this way?**

**Answer:** Although California Civil Code §3344 prohibits using a photo or video of another person without permission for any sort of commercial purpose in most situations, unfortunately there are no special laws protecting against the use of photos of public employees. In fact, there is usually much *more* information about public employees available than there are about private-sector employees. For example, names, job titles, and compensation are reported publicly and posted on websites and all of it is legal.

But that does not mean management can do whatever it wants. They may try to introduce new workplace requirements and conditions of employment, but they must meet and confer with your Association before doing so. In those meetings, the Association can raise privacy concerns – and you raise some very legitimate ones – and try to create a policy limiting Management's use of your photo. Contact your Association leaders or your professional staff directly so that they can help negotiate over any restrictions.

**Question: We work a Standby Crew rotation. Our practice is, the Manager for our workgroup posts a calendar and each worker in the rotation picks a specific week for Standby assignment. In the past, after we have picked weeks, if something has come up, we have always been free to switch with someone else. However, our Manager just announced that from now on, all trades must be approved by him, first. This was never a requirement before. He also said that no one can switch for an entire week, just a day. This is not how we have done this in the past. Is this something that he can enforce? What are our options?**

**Answer:** This depends on the specifics of your MOU, Personnel Rules, or Standby Policy. There are often rules that may include something about whether and how you can go about trading assignments. If those rules are clear – your Association or professional staff can help you enforce them. Even if there are no written rules, but there is a clear past practice, management may not modify the current practice without first

negotiating with the Association. Absent a clear rule, an established practice is probably binding on the employer. They cannot change that practice without meeting and conferring.

If you have rules that talk about trading assignments, but the rules are ambiguous, then you *might* have a past practice argument. When rules are ambiguous, they are often interpreted with reference to the past practice. To have a winning argument, the rules must be ambiguous, the past practice must be long-standing, and it must be "clearly established." In essence, this means that it is not enough to have been trading shifts for a long time; you need to be able to provide evidence that management knew of *and approved of* this practice. This is an area where the last decade has seen some changes in precedent, so if you think your rules are ambiguous and a past practice argument might apply, contact your professional staff who can help you identify the evidence you will need to win the argument (and help you present it).

**Question: I have serious health issues and have been off work for over two months. I completed the FMLA forms and management approved it. However, my anticipated return is next week, and I do not feel that I am well enough to be able to return to work. I scheduled another procedure for next month and I will need to be off until at least then. I can get a doctor's note to support this. What do I do? Am I supposed to contact my boss, or wait for them to contact me? I am concerned that they will tell me that my leave is expiring, and I must return to work on the date that was agreed upon when I initially took leave. Since I know that will not work, I am at a loss as to what to say. I have never been in this situation before. How do you think I should approach this?**

**Answer:** Do not worry. This situation happens often. It sounds like it involves at least two laws – the Family Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). It also involves your leave accruals and your paid status at work. We will walk you through how each applies.

The FMLA and ADA both deal with protecting your job while you are unable to work due to illness. They can help you get time off, but they do not get you paid – you need to use accrued leaves for that.

The FMLA provides 12 weeks of job-protected leave annually. While you are off on FMLA leave, your job is protected and will be waiting for you when you return. If you have been off for more than two months and will need to be off for at least one more month, you will probably exhaust your full 12 weeks of FMLA before you are ready to return to work.

Until you do, the situation is simple – you provide an updated doctor's note that says that you will need to be out longer than the first doctor's note said. Instead of waiting for management to contact you, you should do this ahead of time since, if you do not update them on your situation, they will expect you to come back as scheduled.

Once you exhaust your FMLA, you should try to ensure that any time you still need to remain off work is protected and your job is waiting for you once you are well – you can do that through the ADA. A lot of nuance goes into ADA decisions, so please view this as only an overview and reach out to professional staff for help with contacting your employer with an ADA request and negotiating for a reasonable accommodation. The (very condensed) summary is that the ADA will, in most circumstances, allow you to stay off work via unpaid (or accrued leave) for up to 6 months as a reasonable accommodation for a major health condition or disability.

Remember that all the leave under the ADA or FMLA is unpaid unless you have accrued leave. If you do, you can use accrued sick time to make sure you get paid while off work. If you run out of sick time while requesting an ADA medical accommodation, you can ask to use your vacation for those absences to ensure you get paid.

As you can tell, with many laws and moving parts involved, and with the "individualized assessment" required by the ADA, even though your situation is a common one, it can get complicated quickly. Your best bet to make sure you navigate everything correctly is to have your professional staff evaluate the specifics of your situation and help make sure that you get to use the full extent of the protections and benefits that exist in the law. Please call for help with your specific situation.