LBAEE
May 2021 News

Happy Mother's Day – Your Rights as an Expectant Mother!

Women have long had to juggle work demands with family, and when pregnant these demands only heighten. Unfortunately, the U.S. is a bit of an outlier amongst developed countries in that there is no federal law that provides for *paid* pregnancy leave or baby bonding leave benefits. The tide may be changing. In the meantime, know that there are state and federal laws that protect the rights of pregnant and new mothers, although it can be a lot to sort out. This month, as we celebrate Mother's Day, we look at some of the options you have as an expectant mother.

Local Policies and MOU

Private Disability Insurance: In the most recent MOU negotiations, the LBAEE negotiated for City-paid private disability insurance. This includes a short-term disability (STD) policy and a long-term disability policy (LTD). If you have pregnancy complications, check with HR if it qualifies as a "disability "as defined by the policy. Some policies allow for women who experience pregnancy-related complications to qualify for paid insurance benefits. If you qualify, you may receive up to 50% of your salary or a maximum of $1,000 per week or $4,000 per month. Benefits are taxable to you, and the City's policies require that you exhaust your sick leave before receiving benefits. Check Appendix H in the new MOU, which provides more specifics about these benefits.

City's Parental Leave Program: The LBAEE also negotiated for a City-Paid Parental Leave Policy in the last MOU. It provides 30 consecutive calendar days of Parental Leave at 100% of salary, for the birth, adoption or foster placement of a child, regardless of the gender, marital status or sexual orientation of the parent. The purpose is to enable you to care for and bond with a newborn or a newly adopted or newly placed child. Paid Parental Leave may be taken at any time during the twelve-month period immediately

following the birth, adoption or placement of the child. The leave must be taken in full day increments, and within one year of the date of birth/placement of the child. This type of absence is not charged against your leave accruals and you will be afforded the same level of benefit continuation for the period of time that you are on Paid Parental Leave as if you were on active work status. This benefit may apply to you if you are a permanent full-time employee who is eligible for City health benefits, you have completed six (6) months of full-time City service, ***and*** you are the parent of a newborn child or you have adopted a child or have had a foster child placed in your home (in either case, the child must be age 17 or younger). The birth, adoption, or placement of the child must have occurred after January 1, 2021.

You may use up to 30 consecutive calendar days (160 hours) of Paid Parental Leave at your adjusted hourly rate of pay. Paid Parental Leave is paid on regularly scheduled pay dates. You may start your leave up to two consecutive weeks prior to and at any time during the twelve-month period immediately following the birth, adoption or placement of the child. The 30 consecutive calendar days of Paid Parental Leave will begin on the first day of Paid Parental Leave used, and in no event shall it exceed 30 calendar days within a 12-month period. Paid Parental Leave may not be used or extended beyond this twelve-month time frame and it must be taken in increments of a one-day shift according to your regular work schedule (*i.e.*, no partial days).

The policy does not allow you to receive more than 30 consecutive calendar days of Paid Parental Leave in a rolling 12-month period, regardless of whether more than one birth, adoption or foster care placement event occurs within that 12-month rolling time frame. But City employees who are co-parents with another City employee, will each have an individual right to paid Parental Leave. Paid Parental Leave runs concurrently with leave under the FMLA, CFRA and PDL. If a City holiday occurs while the employee is on Paid Parental Leave, such day will be charged as a holiday and will not count against your 30 consecutive calendar days of Paid Parental Leave.

You must provide your supervisor and Human Resources with notice of the request for leave at least 30 days prior to the proposed date of leave (or if the leave was not foreseeable, as soon as possible). If you do not give 30 days' notice you must explain why such notice was not practical. You must complete the necessary HR forms and provide all documentation as required by HR to substantiate the request.

Other MOU Language on Leave Benefits: Consider also proposing revisions to the terms of any existing sick leave, pregnancy leave, or baby bonding leave policies. This might include adding to or expanding existing job protection and leave rights or allowing employees more freedom to choose how to coordinate their leave accruals with any job-protected leave and employer benefits, including allowing employees the ability to keep some leave on the books for when they return to work after taking leave. Unfortunately, the need for time off for doctor's appointments and to care for sick children does not end once pregnancy disability or baby-bonding leave ends (think about all those sleepless nights and unscheduled trips to the pediatrician). Because of this, many employees prefer *not* to use all their own accrued leave, if possible, so they can preserve a bank of paid time for when they return to work. Other options to consider include sick leave donation policies or the employee receiving an advance of their sick leave that is paid back from future sick leave accruals.

California's Fair Employment & Housing Act (FEHA)

Pregnancy Disability Leave: The starting point is the FEHA, which guarantees all employees disabled by their own pregnancy the right to take *unpaid* medical leave, known as Pregnancy Disability Leave ("PDL"). (Gov't Code § 12945). 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. A woman is "disabled by pregnancy" if, in the opinion of her health care provider, she is unable because of pregnancy to perform any one or more of the essential functions of her job or to perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to others. Disability is defined *broadly* – it includes severe morning sickness, pre-natal or post-natal care, bed rest, gestational diabetes, hypertension, preeclampsia, post-partum depression, childbirth, loss/end of pregnancy, recovery from childbirth, *etc*. This is a non-exclusive list. Many pregnant mothers will qualify at some point during or after pregnancy.

Coordination with Leave Accruals: The employer may require an employee to use any accrued sick leave during the unpaid portion of her PDL. An employee may elect, at her option, to use vacation leave and any other accrued leave credits to receive pay during the PDL. Extending the four-month PDL by adding sick leave, vacation leave, or any other

leave credits is at the employer's discretion, but such requests should be granted in the same manner as similar requests from non-pregnant employees.

Notice and Certification: The employer must give notice of disability leave rights to an employee "as soon as practicable" after the employee tells the employer of her pregnancy. The employer is also required to provide notice of disability leave rights to any employee who asks about such leave. An employee should give the employer at least 30 days advance notice where the need is foreseeable. If such notice is not possible, such as during an emergency or unforeseen complication, the employee must give notice as soon as practicable. Once the employee gives notice, the employer must respond within 10 calendar days. The employer can require written medical certification but must advise the mother of the need, the deadline, what constitutes sufficient medical certification, and any consequences for failing to provide it, as well as provide any employer-required certification form for the mother's health care provider to complete.

Maintenance of Health Coverage: The employer must maintain and pay for health coverage at the level and under the conditions that would have been provided if the employee had remained continuously employed for the duration of the leave not to exceed four months over a twelve-month period. (Cal. Code Regs. Tit. 2 § 11044). The time that an employer provides health coverage during PDL shall not be used to meet an employer's obligation to pay for 12 weeks of health coverage during a leave under the California Family Rights Act (CFRA). This is true even where an employer designates PDL as family and medical leave under the Federal Family and Medical Leave Act (FMLA). The entitlements to health coverage during PDL and during CFRA are two separate and distinct entitlements. Therefore, an employee could have her health benefits maintained for four months (17 1/3 weeks) during PDL and another 12 weeks using CFRA for baby bonding.

No Discrimination: It is unlawful to discriminate, harass, or retaliate against an employee because of pregnancy or because that employee took PDL. An employer may not require the employee to take a medical or psychological exam or inquire about the employee's medical or psychological condition. An employer may require a return-to-work certification from her health care provider, but only if the employer has a uniformly applied policy or practice requiring such from other similarly situated employees returning from a non-pregnancy-related disability leave. The employer must reinstate the employee to the same or comparable position as the employee had when she began

leave. An employee returning from PDL shall return with no less seniority than she had when her leave commenced. She also must receive the same benefits as before the leave began, without any new qualification period, physical examination, or prerequisites. Generally, an employer may not treat employees disabled by pregnancy less favorably than it treats other disabled employees. For example, if an employer offers a more generous leave policy to other temporarily disabled employees than what is provided by the FEHA, the employer must provide equal leave to employees disabled by pregnancy.

California Family Rights Act (CFRA)

Baby Bonding Leave: The FMLA and CFRA provide up to 12 weeks of *unpaid* job-protected leave for a serious health condition and/or for baby bonding in a 12-month period. Typically, these two leaves run concurrently, meaning the employee is entitled only to 12 weeks of leave combined under both laws, not 24 weeks. But unlike the FMLA, the CFRA does not include pregnancy or related medical conditions within the definition of "serious health condition." For a mother who qualifies for PDL, an employer can run FMLA concurrently with the PDL, but the employer *cannot* run CFRA concurrently with either PDL or FMLA. Thus, the mother may still be entitled to take 12 weeks of *unpaid baby-bonding leave* under the CFRA on top of the leave taken under the FMLA/PDL. Baby bonding leave under CFRA can begin once the child is born, up to one year after the child's birth. So, in theory, if not in practice, a mother could use the FMLA/PDL for 17 1/3 weeks and CFRA for 12 weeks once the PDL runs out, for a total of 29 1/3 weeks (over seven months) of job-protected leave *with* the maintenance of health benefits.

Employers are not required to provide intermittent leave for baby bonding under the FMLA, but it is allowed under CFRA. The regulations say that the minimum duration of leave shall be two weeks, but it can be less than that under certain circumstances. You should request baby-bonding leave as soon as practicable. You have the right to use any available accrued leave concurrently (vacation, compensation time, *etc*.), and your employer can require you to use those leaves. But you may be able to reserve your sick leave for when you return. Because your leave is not for your own serious health condition, your employer cannot require that your sick leave run concurrently, absent your agreement.

SB 1383, signed into law in the fall of 2020, eliminated the limitation in the 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 to each take up to 12 weeks of baby bonding leave under CFRA.

Other Applicable Laws

The Federal Pregnancy Discrimination Act ("PDA") of 1978 – which amended Title VII of the Civil Rights Act of 1964 – and the Federal Americans with Disabilities Act ("ADA") of 1990 may also provide job protection. Neither provide a specific amount of leave. But the ADA (like the FEHA) may require the employer to reasonably accommodate a disability, which may include granting leave beyond what the employer's policies or other state and federal laws might require. For example, the employer may have to reasonably accommodate an employee disabled by pregnancy, even after she has exhausted all her statutorily protected PDL. Courts have held that additional unpaid leave may be a reasonable accommodation. *Sanchez v. Swissport, Inc*. (2013) 213 Cal. App. 4th 1331.

An employee can also use protected sick leave under the California Kin Care Law. (Labor Code § 233). The employee can use up to one-half of her annual sick leave accrual as paid sick leave for absences due to her own condition, to care for a sick child, or for baby bonding (parental leave). To be eligible, she must have accrued sick leave available.

Lactation Accommodation

Right to Breaks: State law requires all public agencies to provide a reasonable amount of break time to accommodate an employee who needs to express breast milk during duty hours. (Labor Code § 1030). The break time shall, if possible, run concurrently with any break time that you already get. If it does not run concurrently with the rest time, it shall be unpaid. However, the employer is not required to provide break time if doing so would "seriously disrupt the operations of the employer." (Labor Code § 1032). The employer must also provide you with a room or other location, other than a toilet stall, near your work area and shielded from view to express breast milk privately. (Labor Code § 1031). The location must have access to electricity or charging stations to operate an electric or battery-powered breast pump. The employer must also provide access to a sink with running water and a refrigerator suitable for storing milk near the employee's workspace.

The employer cannot discharge, discriminate, or retaliate against an employee for breastfeeding or attempting to breastfeed at work. (Labor Code § 1033). Violations are

enforced by filing a complaint with the Labor Commissioner. Also, the FEHA was amended in 2012 to include "breastfeeding and related medical conditions" within the definition of "sex," thereby prohibiting employers from discriminating or retaliating against female employees who express milk at work. (Gov't Code § 12926). The employer must develop and implement a policy regarding lactation accommodation that includes a statement about the employee's right to request lactation accommodation, the process for how to make a request, the employer's obligation to respond, and a statement about the employee's right to file a complaint with the Labor Commissioner for any violation. (Labor Code § 1034). The employer shall include the policy in any employee handbook or set of policies that the employer makes available to employees and shall distribute the policy upon hire and when an employee asks about or requests parental leave. If the employer cannot provide break time or a location that complies with the policy, the employer must provide the employee with a written response.

Conclusion:

The overlap between various state and federal laws and the coordination of those leave entitlements with local 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 are expecting – especially if this is your first – consult with professional staff, who can explore all your options with you and 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.

2.6% - CPI for All Urban Consumers (CPI-U) Nationally

2.4% - CPI-U for the West Region

2.2% - CPI-U for the Los Angeles Area

1.6% - CPI-U for San Francisco Bay Area (from February)

3.6% - CPI-U for the Riverside Area

4.1% - CPI-U for San Diego Area

New California Law (SB95) Provides COVID Paid Sick Leave Benefit

On March 19, 2021, Governor Newsom signed into law Senate Bill 95 (SB 95), which provides 80 hours of COVID supplemental paid sick leave. Any public employee who is *full-time* or is scheduled to work, on average, at least 40 hours per week is entitled to 80 hours of COVID leave. Part-time employees also get leave, but at a reduced amount.

SB 95 has terms similar to the Federal law (FFCRA) that expired December 31, 2020. You may be eligible if you are unable to work or telework because you are:

- Under quarantine/isolation pursuant to COVID local, state, or federal guidelines;
- Advised by a health care provider to self-quarantine due to COVID concerns;
- Experiencing COVID symptoms and seeking a medical diagnosis;
- Taking care of a family member who was recommended by a medical professional to stay home due to COVID, or who is under quarantine/isolation pursuant to COVID local, state, or federal guidelines; or
- Caring for a child whose school or place of care is closed or otherwise unavailable for reasons related to COVID on the premises.
- Attending a COVID vaccine appointment, or you are experiencing symptoms due to having received the COVID vaccine.

SB 95 applies retroactively to January 1, 2021 and expires September 30, 2021. If an employee is taking leave when SB95 expires, the employee can finish taking the leave they are entitled to. If an employee took leave from January 1, 2021 to March 28, 2021, due to the above reasons but was not *paid* by their employer, the employee can get retroactive *payment* of COVID leave.

If you have any questions on whether you qualify for leave under SB95, please contact your Association representative as soon as possible.

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: The Agency is rolling out a new background check system. We previously used LiveScan. I am no longer on probation, but I have concerns about this new background check service and whether past events will appear on their background check that do not appear on LiveScan. I have an upcoming meeting with my Manager and H.R. to discuss this. How do you suggest I approach this? It seems a bit intrusive. Should I be worried about my job? I would like to share my concerns, but I do not want them to think I am hiding something, and I do not want any criticism that I give to affect my employment.

Answer: The method of how the Agency conducts a pre-employment background check is within their management rights. However, the Association can meet and confer over the impacts of this management decision. This would provide an opportunity for your employee organization leaders to ask the Agency questions about the transition to the new provider and any potential impacts on both new and existing employees. At the meet and confer meeting, the Agency may be able to shed more light on the reason for the change, as well as what new information might be collected and what, if anything, the Agency would do with any information that is uncovered.

The Agency should also confirm that this is only for "pre-employment" background checks and not for current employees. If that is the case, you do not need to be worried about repercussions if you are not on probation and were truthful during your application process. But it is still best to have your employee organization leaders raise these issues with the Agency, rather than you, so let them know about your specific concerns.

Question: My shift supervisor is incredibly difficult to work with. She is often unable to execute her basic duties. There are numerous incidents that have been forwarded to our Manager that demonstrates how dangerous she is and how she continuously puts the Department and the public at risk. This has been going on for years, but her performance has really deteriorated

rapidly over the past six months. There are times where she makes it impossible for us to complete our assigned duties. What feedback can you provide and is there an alternative approach to dealing with this kind of situation? Can we file a grievance over it? Those of us who work her shift cannot continue in this vein.

Answer: Have you also shared these details with Human Resources? If the Manager has not addressed the issue, HR can and should. Providing HR with employee statements from everyone who is adversely impacted by her behavior along with a request that HR launch a fair and impartial investigation (using an outside investigator if need be) is a good place to start. Be sure to include specifics about dates, times, locations, and witnesses, as well as a description of how this has impacted you in performing essential duties. Be sure to emphasize how it affects your safety and is a risk to the public (*e.g.*, how it could create liability for the Department). That should get their attention. If HR turns a blind eye or is ineffective in correcting this supervisor's behavior, contact your representative, who can help your employee organization decide the best course of action to take next.

Question: Is vesting necessary to qualify to purchase health insurance through PERS after retirement. Apparently, it is not clear on the PERS website. I worked under PERS for about 4 years, having spent most of my career in another state. I would like to retire soon, but I am not yet Medicare eligible and so I need a good health plan in retirement. Can you help clear this up for me?

Answer: Yes. To qualify for CalPERS medical in retirement, you must receive a monthly CalPERS allowance. This can be either through a service retirement or a disability retirement. To qualify for service retirement, Classic Members must be age 50 and have at least 5 years of CalPERS service credit. If all your service credit was earned after January 1, 2013, then you are a New Member and must be at least age 52 to retire. CalPERS typically mails members a postcard once these requirements are met. There is no age requirement for disability retirement but Classic Members need at least 5 years and New Members need at least 10 years of service credit to be eligible, along with an injury or illness that prevents you from performing your usual job duties with your current Agency.

It sounds like you may be at the required CalPERS retirement age, but you do not have the full 5 years in. Your best bet (if you can control it) is to set your official retirement date with CalPERS for a date *after* you complete 5 full years of service. Keep in mind that your retirement date with CalPERS must be within 120 days of your separation date with the Agency. If you leave the Agency before you are eligible to retire with CalPERS, you will

not be eligible for CalPERS medical in retirement. You may be eligible for COBRA benefits, which could provide a bridge to help you stay covered post-separation and prior to Medicare eligibility (typically age 65). COBRA can last up to 36 months.

Question: One of the Management Assistant II's in our Department recently left the Agency. This resulted in a vacancy that needs to be filled. We just learned that the Department is planning to create a new Management Analyst position for the Department and hire someone to fill that role, instead of filling the existing and vacant Management Assistant II position. It looks like the Analyst will be doing the same work as the Assistant, but with different educational requirements as a minimum. We think they are doing this to avoid promoting one of the Management Assistant I's to the vacant II position, which only requires an Associate Degree. Are they allowed to do this? What recourse do we have? It seems like they always get to pick and choose who they want for an opening. It is not a transparent merit-based system.

Answer: When a vacancy occurs, management can assess the operational need, including the nature and title of any position needed to do the work going forward. So, assuming the new job class will perform higher-level work, yes, they can do it. But that does not mean that your employee organization lacks recourse. The key to figuring out what to do next is identifying if the Analyst is in your bargaining unit. If it is, your employee organization can request to meet and confer over the minimum educational requirements if this is a new job class. The meet and confer process is a great place to address career-ladder concerns. One way to resolve this is to propose a revised job spec that allows years of service to satisfy for the higher education requirement. Ideally, the Agency should want to promote from within. Your employee organization should alert management that the higher educational requirement is blocking Assistants from moving up.

If the Analyst is not in the unit, and the duties are the same as the Assistant II, your employee organization can file a grievance for erosion of the bargaining unit. If the Analyst is not in the unit, and the job spec does include higher-level duties, your employee organization can still raise the career ladder concerns informally and inquire if the need truly warrants a higher-level job class.

Question: Does the Agency have to pay for my time spent getting vaccinated? The Agency encouraged all the employees to get vaccinated because we are disaster relief workers. I did not have any problem taking the vaccine, but it did take a while, especially since I had to get two shots spaced several

weeks apart. The second shot, they made me wait for at least 15 minutes afterward to see if I developed serious symptoms. Between the travel time, the waiting time (before and after), and time filling out paperwork and getting the shot (twice), it is at least a couple hours. Does the Agency have to pay me my hourly rate for all of it?

Answer: The short answer is it depends. If your Agency *mandated* (not just encouraged) that you get the vaccine, the answer is yes. If you are an hourly employee, the Agency must pay your hourly rate for all time spent, including waiting and travel time. This might even include overtime at the rate of time-and-one-half for all hours worked over 40 in the workweek if the Agency directed you to get vaccinated during your off-duty hours. If you are a salaried employee, the Agency must pay your regular salary with no deductions in pay, but not overtime. The Federal Equal Employment Opportunity Commission (EEOC) has said that an employer directing an employee to get vaccinated from COVID may constitute a medical exam, depending on whether the employee will be asked for any medical information before or during the administering of the vaccine. Individuals are often asked about medical history to help determine if there might be an allergic reaction. Time spent in a medical exam, *if mandated* by the employer, is compensable time.

But even if it was not *mandated* (just encouraged), the Agency still must pay you for time missed from work getting vaccinated. That is because Governor Newsom recently signed Senate Bill 95 on March 19, 2021, which provides up to 80 hours to use to cover your time spent getting vaccinated and for time you are off work due to symptoms related to getting vaccinated that prevent you from working or teleworking. This leave was retroactively applied to January 1, 2021 and will remain available until September 30, 2021. If you took leave from work from January 1, 2021, to March 28, 2021, to get vaccinated or recover from symptoms due to the vaccine, but were not *paid* by the Agency, you can get retroactive *payment* using COVID leave.

If you run into problems getting paid for time spent getting vaccinated during work hours, contact your professional staff for help.