Labor & Employment Law

Working Hard or Hardly Working?

*By David G. Evans**

California is a worker's paradise when it comes to taking time off from work. The Golden State provides for family leave under the California Family Rights Act (CFRA). The CFRA, as well as the federal Family and Medical Leave Act (FMLA), entitle eligible employees to take unpaid, job-protected leave for up to 12 workweeks in a 12-month period. The State also has laws for school appearance leave (up to 40 hours a year to participate in a child's school activities), alcohol and drug rehabilitation leave, and pregnancy leave – not to mention indefinite leaves under the State's workers' compensation system for work-related injuries and illnesses.

Recently the California Legislature passed a *paid* family leave law that creates a "family temporary disability insurance program." The very first of such state laws (taking effect on July 1, 2004), the FTDI law promises to be a nightmare for employers and employees, and an opportunity for those who want to get paid for not working. It also has some disturbing privacy issues that should give heartburn to the ACLU. (The fact that the ACLU supported the law is further evidence that the organization has veered from its original pursuit of civil liberties protection to new goals of "economic justice.")

Let me say at the outset that I fully support voluntarily provided paid or unpaid leave and other policies that would assist employees in balancing the demands of work and family. I have two kids, I had elderly ill parents, and I had a major illness. I know how tough it can be to balance the demands of work and family life. However, the California approach just goes too far and it is a major government intrusion on medical privacy.

An organization that is taking California to task on the new law is the National FMLA Technical Corrections Coalition. The Coalition is a nonpartisan group of companies, human resource professionals, and associations dedicated to making the practical application of the FMLA more consistent with its original intent. The Coalition was founded by the Society for Human Resource Mangement (SHRM).[1] Deanna R. Gelak, the Coalition's Executive Director, makes a compelling case against the California law.[2] The Coalition's arguments are summarized below.

The intent of the new FTDI program is to help reconcile the demands of work and family. Existing law provides for disability compensation payments for wage loss sustained by an individual unemployed because of sickness or injury. The compensation is financed by employee contributions at specified rates to a state-managed disability fund. The current state disability insurance benefits provide wage replacement for workers who need time off due to their own non-work related injuries, illnesses or conditions, including pregnancy, that prevent them from working; but they do not cover leave to care for a sick or injured child, spouse, parent, domestic partner,[3] or to bond with a new child.

The new FTDI program will be a component of the State's existing unemployment compensation disability insurance program; it will be funded through employee contributions, and administered in accordance with the policies of the state disability insurance program. The new law creates, within the state disability insurance program, a family temporary disability insurance program to provide up to six weeks of wage replacement benefits (after a 7 day waiting period) to workers who take time off work either to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child. Benefits are payable for leaves that begin on and after July 1, 2004.

An individual entitled to leave under the FMLA and the CFRA must take the family temporary disability insurance leave concurrent with leave taken under the FMLA and the CFRA. However, the new paid family leave program does not run concurrently with California's Pregnancy Disability Leave. The law permits employers to require that employees use up to 2 weeks of earned but unused vacation leave before that employee's receipt of the additional benefits.

The new program is much broader than other leave laws in many important respects. For instance:

1. The law covers all employers regardless of size. There is no small business exemption (Mom and Pop businesses are included);
2. There is no vesting requirement. If an employee is on-the-job just one day, he is entitled to take paid leave);
3. There is no key employee exemption (employees essential to company operations can take off); and
4. The medical certification the employee must obtain in order to qualify for leave goes to California's government, not to the employer. As such, there is no opportunity for employer to verify or challenge the need for leave. (In addition, the law will place an individual's confidential medical information in the hands of the government.)

Although the law was billed as not providing job protection, it does. Pursuant to California Unemployment Insurance Code Section 1237, "Retaliation for Contact with State Authorities," employees applying for the new paid family leave program will have protection against retaliation/termination by virtue of the fact that they "contacted" the California Employment Development Department.

Under the new law intermittent leave is permitted and can be taken in the smallest amounts of time by which an employer calculates pay. Experience with federal FMLA intermittent leave tracking shows that California will have a difficult (I'd say impossible) time accurately tracking the

increments of leave – which, in turn, will create problems in making over- and underpayments.

The medical certification that will be sent to the state will contain information about the employee's sickness, injury, or pregnancy; and, a diagnosis and diagnostic code prescribed in the International Classification of Diseases, or, where no diagnosis has yet been obtained, a detailed statement of symptoms.[4] The certification will also have a statement of medical facts within the physician's or practitioner's knowledge based on a physical examination, a documented medical history of the employee by the physician or practitioner indicating his conclusion as to the employee's disability, and a statement of the physician's or practitioner's opinion as to the expected duration of the disability.

For the serious health condition of a family member, employees will need a diagnosis and diagnostic code prescribed in the International Classification of Diseases, or, where no diagnosis has yet been obtained, a detailed statement of symptoms; the date, if known, on which the condition commenced and the probable duration of the condition; and an estimate of the amount of time that the physician or practitioner believes the employee is needed to care for the child, parent, spouse, or domestic partner. There also must be a statement that the serious health condition warrants the participation of the employee to provide care for his or her child, parent, spouse, or domestic partner. "Warrants the participation of the employee" includes, but is not limited to, providing psychological comfort, and arranging third-party care, for the child, parent, spouse or domestic partner as well as directly providing or participating in the medical care.

The California medical certification is far more intrusive than the certification required by the FMLA and the CFRA. In addition, the FMLA and CFRA certification forms only go to the employer, and the employer is required by law to maintain confidentiality protections. The FTDI program's forms go directly to the government.

Employers have little protection from false claims. Existing California law makes it unlawful to falsely certify the medical condition of any person in order to obtain disability benefits, to knowingly present a false statement in support of a claim for benefits, to knowingly solicit or receive any payment for soliciting a claimant to apply for disability insurance benefits, or to assist any person who engages in certain specified fraudulent or prohibited actions. The new program is subject to the above proscriptions; however, this provision will likely go unenforced unless the state hires an army of bureaucrats.

This state funded or administered paid leave program will require massive administrative and personnel resources. The resources that employers currently divert in tracking segments of the FMLA by the minute provide a preview of the administrative complexity that California will experience under this State-enforced, mandated paid leave system. With the FMLA, human resource staff are consumed by "administrivia" and minute counting, drawing away from time spent developing progressive programs, policies and practices.

The California law will foster employee resentment in two major ways.

First, the mandatory employee payroll taxes are a direct cost to all employees. This new economic burden will foster resentment among those employees who cannot afford to participate and who do not need or benefit from the program.

Secondly, research shows that the primary method used by employers to cover for FMLA absences is to assign the absent employee's work to co-workers. One study[5] estimates that, on average, 60% of employees taking FMLA leave do not schedule the leave in advance. As a result, HR staff often lack the ability to plan for work disruptions. HR professionals (34%) report employee complaints in the past 12 months due to co-workers' questionable use of FMLA. Employees do not mind when the leave is legitimate, but the current state of the law under the FMLA (i.e., overbroad interpretations and legal confusion) tempts employees to mischaracterize absences as FMLA protected leaves. California's new law will only exacerbate such misunderstandings and abuses of leave. Furthermore, employers will have limited ability to correct abuses because the system will be administered by the state.

The Coalition recommends that, given the existence of privately funded leave and the FMLA, voluntary incentives to increase the provision of paid leave will work better and will cause fewer negative consequences, less confusion and legal challenges than the government-administered leave and its attendant bureaucracy and mandates. This approach can be accomplished by building on voluntarily provided private sector paid leave policies through a targeted incentive or savings program. Incentive approaches also will avoid raising the privacy concerns implicated by the government tracking and presumably verifying leaves under the new law.

The best approach is to preserve and foster competition among employers for providing paid leave policies, flexible schedules and creative benefits. We must not usurp the competitive free enterprise spirit by creating a system where the government takes over, removing all such incentives for employers to "do more" for their workforce. All government mandates eventually become viewed as entitlements – with the government as the benefactor rather than the employer.

The Coalition recommends the following alternative steps:

1. Enact a tax incentive for companies to expand their employment leave policies to provide paid leave.
2. Enact a family and medical leave savings account provision at the state level, similar to the federal 401(K) program, to allow employees to place funds into a tax-deferred family leave savings account. An incentive can be created for employers to match the employee's family and medical leave contributions.

This recommended approach does not create a new tax or the big government leave tracking system found in the California approach. Lacking the unnecessary divisiveness, expense

and bureaucracy of the mandated system, this approach would more effectively accomplish the goal of increasing the availability of paid leave for employees. The approach enjoys the added benefit of constructively building on existing private sector funded leaves without replacing private sector dollars with government funds. Furthermore, it avoids adding the burden of an unnecessary, enormously costly and ultimately inefficient government leave administration and tracking function to the state's financial concerns. Incentive systems are also more of a "win-win" for employees and employers – as opposed to government paid leave entitlements, which foster ill-will between employees and employers and invite misapplication and abuse.

The California paid leave law will have grave unintended consequences for the State's economy, the workplace (small businesses in particular), the privacy rights of the citizens of the State, and the government agency charged with administering and tracking leave under such a poorly conceived plan. The FTDI program will result in a maze of ambiguous leave complexities, employee morale problems, and costs for California employers already challenged in their good faith attempts to comply with the various laws and to provide their own competitive benefits.

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Footnotes

[1] To get the full text of the Coalition's materials, visit its website at: http://www.Workingforthefuture.org. The Coalition's address is: National FMLA Technical Corrections Coalition, 7505 Inzer Street, Springfield, VA 22151, (703) 256-0829. The Coalition also provides assistance to employers in FMLA compliance.

[2] See Testimony of Deanna R. Gelak, SPHR, Executive Director, National FMLA Technical Corrections Coalition, Presented to the Oregon Legislature's Paid Family Leave Task Force, Oregon State Capitol, October 3, 2002; Summary and Analysis of California Senate Bill No. 1661 by Senator Kuehl, As Passed by the Assembly, August 28, 2002; letter to The Honorable Gray Davis, RE: Senate Bill No. 166, September 16, 2002

[3] California Family Code Section 297 defines domestic partner as two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring where both persons have a common residence (even if one or both have additional residences), both persons agree to be jointly responsible for each other's basic living expenses incurred during the domestic partnership, neither person is married or a member of another domestic partnership, the two persons are not related by blood in a way that would prevent them from being married to each other in this state, and both persons are at least 18 years of age.

[4] In California you can get "medical" marijuana by describing "symptoms" over the phone to a doctor.

[5] The Society for Human Resource Management (SHRM®) 2000 FMLA Survey, p. 14 Chart 7.