

California's Time-Off Laws Present HR Challenges

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By Stephen Miller

NEW ORLEANS—Where California has gone, the federal government often follows, San Francisco-based attorney Mary L. Topliff said during her Tuesday morning session, "Leaves of Absence and Other Time-Off Challenges in California," at SHRM's 61st Annual Conference & Exposition. And that can mean overlapping state and federal employment regulations that result in headaches for HR professionals.

The California Family Rights Act (CFRA) and Pregnancy Disability Act (PDA) predate and overlay the federal Family and Medical Leave Act (FMLA). Throw in local laws such as San Francisco's paid-sick-leave ordinance, the "kin care" requirements under the state labor code (section 233), and spousal-deployment leave under the California Military Code—which overlaps with the federal Uniformed Services Employment and Reemployment Rights Act (USERRA)—and you're left with a mix of regulatory leave mandates that are not just perplexing but an open invitation to litigation.

Which Applies?

With differing state and federal eligibility requirements (based on employer size and employee's length of service), diverse leave "triggers," conflicting leave durations, various medical certification issues, different definitions of family (California treats domestic partners as spouses), assorted limits on paid-time-off benefits, sundry fitness-for-duty certifications, and distinct retroactive designation rules, reconciling job protection rights quickly gets complicated. "One challenge is whether multistate employers should adopt one set of policies by applying the [generally more liberal] California statutes everywhere they operate, or have a separate Employee Handbook for California" Topliff said. While employers may answer that question differently, "it's an issue that's better to work through sooner rather than later," she advised.

Topliff advised adopting a formal procedure for leave requests, using employee information checklists. "Don't rely on an employee's e-mail or phone call," she said. The Request for Leave of Absence form should include:

- Type of leave of absence (LOA).
- Date of LOA.
- Reason for LOA.
- How to be contacted during LOA.

"Ensure that this form gets to HR and doesn't sit in a manager's drawer," Topliff said. Follow up with a health care provider certification form.

Also, provide transparent LOA guidelines in various media, including the employee handbook and online, and ensure accessibility to these guidelines. "The more specific information provided regarding notification and medical certification rules, the more accountable you may hold employees," she said.

Among other tips:

- Upon Request for Leave, send an Eligibility Notice within five business days.
- If approved, HR calculates the length of leave and job reinstatement period.
- Send a Designation Notice of Approval/Denial of Leave within five business days from receipt of completed documentation from the employee/health care provider. Tailor it to the employee and include dates of approved time off, benefit premium payment schedule, how employee will be paid, and any employee responsibilities.

- Notify supervisor and assist with staffing issues during absence.
- Designate and track time off as FMLA/CFRA, etc.

Educate Managers

Provide front-line managers with basic knowledge of legal issues, Topliff said. This includes avoiding comments and behavior that could be seen as dissuading employees from taking legally protected time off. Explain their role regarding job reinstatement and return to work obligations, as well as performance and compensation review for returning employees.

Written guidelines and protocols for managers also should include when to contact HR (e.g., when an employee calls in sick for a third consecutive day, before any disciplinary action of an employee returning from a leave of absence, etc.).

"It's all about the process," Topliff said. "Have all your ducks in a row, spell out procedures, and proactively educate manager and employees."

Legal Risks

Liability should serve as a motivator for putting formal leave procedures in place. Potential repercussions include lawsuits charging violation of job protection rights, retaliation claims, discrimination/harassment claims, care-giver discrimination claims, and failure to accommodate disability claims.

But employees can protect themselves. "Checklists for forms and significant dates provide a roadmap for compliance," Topliff advised. "Good recordkeeping provides evidence of compliance and establishes consistency in applying policies."

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