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California's expanded domestic partnership law, effective January 1, 2005, presents thorny issues for California employers covered by both the state and federal family leave laws.

The Domestic Partner Rights and Responsibilities Act Presents Thorny Issues for Some California Employers

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California's expanded domestic partnership law, Assembly Bill 205, goes into effect January 1, 2005. Known as the "California Domestic Partner Rights and Responsibilities Act" (DPRRA), this new law grants registered domestic partners the same rights, benefits, duties and responsibilities that spouses have under California law.

Although the DPRRA will significantly affect the obligations that some employers have under California law, the Act does not affect an employer's obligation under federal law. Accordingly, areas regulated by both state and federal law may present some employers with conflicting obligations. Nowhere is this tension more apparent than with respect to an employer's obligations under the state and federal family and medical leave statutes.

The California Domestic Partner Rights and Responsibilities Act

The DPRRA requires that domestic partners be treated the same as spouses for most purposes under California law. New Family Code section 297.5 provides:

> Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities and obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted and imposed upon spouses.

Among other things, this means that employees may use their leave entitlement under the CFRA to care for a domestic partner. This expansion of the CFRA only applies to employees who are "registered domestic partners," however.

To qualify as "registered domestic partners," both individuals must file a declaration of domestic partnership with the Secretary of State and satisfy certain additional requirements. Specifically, domestic partners must share a common residence, be over the age of 18, be capable of consenting to the partnership, not be married to someone else or be a member of another domestic partnership, and not be related by blood in such a way that would prevent the individuals from being married to each other. In addition, the domestic partners must be of the same sex or, if they are of the opposite sex, at least one of the partners must be over the age of 62.

Conflicting Family Leave Obligations

Despite the newly expanded applicability of the CFRA, family leave under the federal FMLA only may be taken to care for a *spouse*, child or parent with a serious health condition. The regulations implementing the FMLA define *spouse* as:

> [A] husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

Thus, leave taken to care for a domestic partner would count as FMLA leave only if California law defines or recognizes domestic partners as spouses. California's Defense of Marriage Act states that "only marriage between a man and a woman is valid or recognized in California." Moreover, the one court that has addressed this issue has held that a domestic partnership recognized under the DPRRA does not constitute a marriage. *Knight v. Schwarzenegger.* According to the court:

> Simply because the Legislature deemed it to be in the best interest of the State of California to give domestic partners rights that are substantially the same as those enjoyed by persons who are married, does not change the definition of marriage contained in Proposition 22.

Although the Superior Court's decision in *Knight* is not precedential, the current state of the law strongly suggests that, at least technically speaking, leave taken under the CFRA to care for a registered domestic partner would not count towards an employee's FMLA entitlement.

The issue is further complicated when one considers the impact of the domestic partner statute on an employee's right to continued health benefits during a family or medical leave. Both the FMLA and the CFRA require employers to maintain coverage under any group health plan during a qualifying leave of absence for up to twelve workweeks at the level and under the conditions of coverage as if the employee had not taken the leave. This means the employer must continue to pay health insurance premiums as though the employee had continued working. The question becomes whether domestic partners are not only entitled to two installments of family leave, but also to two installments of leave with continued health benefits.

In a closely related situation, the California Department of Fair Employment and Housing (DFEH) has taken the position that continued health care coverage must be provided for a maximum of twelve workweeks. Unlike the FMLA, the CFRA excludes pregnancy, childbirth and related medical conditions from the definition of serious health condition. Therefore, leave taken due to the employee's pregnancy or related medical conditions counts towards an employee's leave entitlement under the FMLA but not under the CFRA. Nevertheless the DFEH has issued regulations clearly stating that an employer's obligation to continue providing health benefits during a CFRA leave, FMLA leave, or both "continues for … a maximum of 12 workweeks in a 12-month period." It is unclear whether the United States Department of Labor or the courts would apply a similar reasoning when an employee takes CFRA leave to care for a registered domestic partner and subsequently takes a leave under the FMLA.

Another unanswered question is whether the use of CFRA leave on an intermittent basis to care for a registered domestic partner will jeopardize an employee's exempt (i.e., overtime-ineligible) status under the federal Fair Labor Standards Act (FLSA). The FLSA requires that exempt employees be paid on a "salary basis." A "salary" is defined as a fixed sum for all of an employee's hours of work in a week, irrespective of the number of such hours. This means that an exempt employee is generally entitled to receive his or her entire salary for any week in which he or she performs *any* work. The one exception to this rule is that an exempt employee's salary can be reduced on an hour-by-hour basis for intermittent or reduced-schedule leaves taken pursuant to the FMLA. Because intermittent or reduced-scheduled leave taken to care for a registered domestic partner does not constitute a leave taken pursuant to the FMLA, reducing an exempt employee's salary in that situation may jeopardize the employee's exempt status under the FLSA

Reducing an exempt employee's salary in the above situation is less likely to jeopardize an employee's exempt status under California law than it is under federal law. In a March 1, 2002, opinion letter, then-Labor Commissioner Arthur S. Lujan opined that although employees normally must receive their full salary for any week in which they perform any work, "adjustments in compensation … are permissible where other statutory requirements are met, such as the family and medical leave rules that provide eligible employees the flexibility they need to take leaves on a 'reduced leave' or 'intermittent leave' basis." Because the CFRA permits employees to take leave on a reduced or intermittent basis, and the Department of Labor Standards Enforcement (DLSE) did not limit its opinion to leaves taken under the FMLA, the DLSE is likely to take the position that reducing an exempt employee's salary on an hour by hour basis for leave taken under the CFRA, including leave taken to care for a registered domestic partner, does not jeopardize the employee's exempt status. Obviously, this issue has not yet been judicially determined. It also is important to remember that an employer subject to both the federal and state overtime requirements, still must pay overtime in accordance with the FLSA to an employee who is overtime exempt under state but not federal wage and hour law.

Recommendations for Employers

In light of the expansion of the CFRA to include domestic partners, employers should carefully review their family leave policies to ensure that policy terms are clearly defined and are consistent with statutory requirements. For example, it is crucial that an employer's personnel policies:

- Accurately define the circumstances under which employees are eligible to take family or medical leave. (For further information on this topic, please refer to Littler's ASAP newsletter, *Recent Cases Underscore the Need to Avoid Hasty Decisions About an Employee's Eligibility for FMLA Leave* [www.littler.com/nwsltr/asap_fmla_eligib.html]).
- Limit the amount of time off available to employees, where lawful to do so. For example, in certain circumstances employers may require employees to use accrued sick leave and/or vacation during a family or medical leave. Adopting such a policy, where permissible, will help avoid situations where employees exhaust their FMLA and CFRA entitlements and then take additional time off as paid vacation.
- Indicate whether employees will be required to verify their status as registered domestic partners.
- Establish procedures for tracking the use of family and medical leaves by employees.

Experienced employment counsel can help employers develop personnel policies consistent with DPRRA and can monitor continuing developments in this area.

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