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Paid Family Leave: Security For Employees Means Confusion For Employers

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The growing number of families with two working parents or one single working parent has created a national trend toward considering paid family and medical leave. While 27 states and the federal government have considered or are considering enacting paid leave laws, on September 23, 2002, California became the first state in the nation to do so. The new law provides up to six weeks of paid family and medical leave in the form of "Family Temporary Disability Insurance" ("FTDI"). Approximately 13,000 California businesses, the California Chamber of Commerce, the California Manufacturers and Technology Association and the California Small Business Association opposed the legislation in part because it creates significant compliance challenges for covered employees and for legal departments and human resource professionals.

While the legislation identifies the new leave as a benefit, as a practical matter, it may be helpful for employers to think of FTDI as a separate leave running concurrently with the California Family Rights Act ("CFRA") and the federal Family and Medical Leave Act ("FMLA"). FTDI will be administered through California's disability insurance plan and will be funded through mandatory employee contributions in an amount estimated at $27 (.08% of wages) per year for the average worker in California. FTDI provides for up to six weeks of paid leave within any 12-month period, replacing approximately 55% of an employee's wages while he or she is on leave, up to a maximum of $728 per week in 2004 (when the new law takes effect) and up to $840 per week in 2005. Thereafter, required employee contributions can be administratively adjusted up to a maximum of 1.5% as provided for in the Unemployment Insurance Code. No employee can receive more benefits than he or she earned in wages during the base period for calculating benefits (generally, the 12 months prior to the quarter in which the claim is made). The California Chamber of Commerce estimates the annual costs of the new legislation at $700 million.

FTDI applies to every employer covered by California State Disability Insurance ("SDI"). Eligibility for FTDI is based on the employee's past contributions to the disability insurance fund. Unlike the FMLA and CFRA, FTDI does not require minimum required hours worked (1,250 under the CFRA and the FMLA), minimum length of service (12 months under the CFRA and the FMLA), or a minimum number of employees at the work site (50 or more employees under the CFRA and the FMLA) before the employee qualifies for the benefit. Furthermore, FTDI extends the wage replacement benefit to workers who need leave to care for a child, parent, spouse or domestic partner experiencing medical problems or for the birth or adoption of a child.

Absenteeism, Decreased Productivity And Increased Training Costs

Estimates show that a large percentage of workers nationwide cannot afford to take unpaid leave or do not have paid vacation or sick days to rely on in the case of a family emergency. It is highly likely that the new paid leave available in California will be highly used by employees, leading to major problems for employers such as increased absenteeism, decreased productivity and increased training costs for temporary replacement employees.

Absenteeism is a major concern employers have about the Act. The Act envisions that the paid leave period will be preceded by a seven day unpaid leave period. During the unpaid leave period, the employer can require the employee to use accrued vacation of up to two weeks. If the employer requires the employee to use the full two weeks of paid time off, the employer will effectively convert the leave time for an employee not otherwise covered by the CFRA or the FMLA to an eight-week leave. If employers want to avoid extending leave time and disruptions to the workplace, they should require the use of only one week of paid time off in order to receive the FTDI benefit or require the employee to apply for the benefit immediately upon commencing a leave.

Employers will face a Hobson's choice about the vacation requirement. Most employees do not want to use vacation for purposes other than vacation. If used for family care, it is likely that very little true vacation time will remain. Accordingly, requiring use of two weeks of vacation will potentially reduce the use of FTDI leave and workplace disruptions. On the other hand, an employer who implements a requirement of using two weeks of vacation leave is likely to face issues of employee satisfaction, productivity, and potential for union organization. A likely compromise for many employers may be to require one week of vacation to cover the seven-day waiting period. This provides some disincentive to take FTDI, but clearly makes it accessible to employees who need it.

Compliance with the new law will be difficult in light of its ambiguities and particularly burdensome on small employers. For example, the law does not address whether FTDI benefits may be used for intermittent leave. While the CFRA and FMLA both allow for intermittent leave, the FTDI is silent on this issue. If the courts construe the law to allow intermittent leave, employers may be forced to hire and train temporary replacement workers on an intermittent basis, especially because an employee seeking to use the FTDI benefit is not required to provide minimum advance notice to the employer. Thus, disruptions from absenteeism at the workplace will be difficult to forecast. These burdens on small employers are exactly what the Legislature was trying to avoid by exempting smaller employees from coverage under the CFRA.

Another ambiguity in the law is its interaction with California's "kin care" statute (Labor Code § 233), which provides that employers who have a policy of providing paid sick leave must allow employees to use up to half of their annually accrued sick leave to care for a sick family member or domestic partner. While the kin care statute expressly states that it does not extend the leave time period granted to employees under the CFRA, the FTDI law is silent on its relationship with the kin care statute. It is unclear whether the employee can run the paid kin care sick leave concurrently with the paid FTDI leave, thereby supplementing FTDI income for a fully compensated leave. It is also unclear whether the employee can take the kin care leave consecutively with the FTDI leave, thereby extending the total leave time to six weeks of FTDI leave plus the accrued kin care time.

Risk Of Underfunded Program Means Employer May Be Asked To Contribute If Leave Is Heavily Used

The new law may result in a direct fiscal burden on employers. The current amount of employee contribution of an average of $27 per worker is based on very conservative estimates of use of the leave. The current funding scheme contemplates that for every one employee who uses FTDI leave, 83 employees will continue to work (representing 1.2% usage). This may be an unrealistic estimate. For example, when paid family leave was introduced in Norway, the percentage of men using paid leaves related to the birth of a child increased from 1.2% in 1990 to 25% in 1995 and 27% in 1996.

In the event the leave benefit is heavily used and exceeds projected contributions, the legislature may be forced to amend the statute to require employer contributions to sustain the fund. Furthermore, employers who choose to run a voluntary program will also stand the risk of having to pay deficits if the leave is more heavily used than anticipated.

Risk Of Legal Liability To Employers

Additionally, the new law will have substantial hidden costs in the form of administrative, training and litigation costs. The obligation of employers not covered by the CFRA to rehire employees upon conclusion of the paid leave is a likely source of litigation. Unlike the CFRA or FMLA, the FTDI does not contain an express mandatory rehire provision. However, if a smaller employer prohibits the taking of FTDI leave or terminates an employee who wants to access this state benefit, the employee may sue for wrongful termination in violation of public policy. While the employer may argue that the public policy termination claim fails because the same Legislature that passed the CFRA made a legislative policy-decision not to require rehiring of FTDI recipients, the employee will counter that the Legislative declaration in support of the bill states that it was to be broadly construed to effectuate its purpose. Whether this employee has a public policy termination claim is a matter the courts will have to determine in the future. Worse yet, from a compliance perspective, employers faced with this situation will either have to grant the leave or risk a lawsuit.

This situation is even worse with key employees within a small business. For example, to avoid a lawsuit, a small employer dependent on the services of a key employee might be forced to hire a full-time replacement for someone gone for up to six weeks using FTDI. Under the CFRA, an employer in this predicament can refuse to rehire the employee if doing so would create an undue hardship on the employer. The FTDI does not expressly contain a comparable "undue hardship" defense, making it unclear whether such an argument exists for employees seeking FTDI leave who are not covered by the CFRA. The right to reemployment comes from the CFRA, FMLA, other applicable statues, or public policy. In any event, employers must recognize that the mere absence of a rehire provision does not give the employer a veto right over the taking of FTDI leave.

Another risk of legal liability is the intersection of the FTDI with California's Fair Employment and Housing Act ("FEHA"). Unlike the CFRA and FMLA, the new FTDI benefit is available to employees with domestic partners. The FEHA bans discrimination based on actual or perceived sexual orientation. Any adverse action taken against a homosexual employee to care for a domestic partner might also violate the FEHA.

The Act's requirement that the leave is not available if another family member is ready and available to render care is perhaps its greatest source of confusion. First, the law provides no guidance for an employer or a court to determine when another family member is ready or available. Second, at a practical level, how are employers to determine if another family member is ready and available? Inquiring into the activities of a family implicates potential privacy concerns. Further adding to the confusion, the law states that providing "psychological comfort" is an acceptable basis for warranting care. It will be difficult for employers, and ultimately the courts, to decide whether another family member would have been able to offer the same or comparable psychological comfort to a sick family member without probing deeply into private and personal affairs. The nebulous concept of providing psychological comfort may also lead to misuse of the fund.

Clash With Labor Unions

Another significant problem employers face is complying with the law's new requirements without offending contractual obligations under a collective bargaining agreement ("CBA") or the non-union employer's written policies. For example, because the new law allows the employer to require the employee to exhaust up to two weeks of paid time off before receiving the state benefit. An employee's CBA may prohibit precisely the same conduct that the law allows, as might the non-union employer's written policies. In the non-union setting, the employer should immediately revise its written policies to reflect this and other changes required by the new law. In the union context, however, compliance with the conflicting demands will be much more complicated because the employer cannot unilaterally change the terms of the negotiated CBA. Additionally, the vacation use issue may be used as an effective tool for union organization at non-unionized workplaces. In unionized workplaces, the union will likely argue that vacation use must be collectively bargained.

To avoid these pitfalls and ensure compliance, employers should consult with experienced labor and employment counsel well in advance of the January 1, 2004 effective date.