Comparison Between New Family & Medical Leave Act (FMLA) & Ca. Family Rights Act (CFRA) Regulations

TERM	FMLA Regulations: (29 C.F.R. § 825.100, et seq.)	CFRA Regs (Cal. Code Regs., tit. 2, § 7297.0, et seq.)
	FOUR BIG DIFFERENCES	
Pregnancy as a "Serious Health Condition" (SHC)	Covered as a Family and Medical Leave Act (FMLA) serious health condition. No change with new regulations.	** Not covered under CFRA. Instead, in CA, a pregnant employee is entitled to a pregnancy disability leave (PDL) of up to 4 months. Employer need have only 5 or more employees & no eligibility period for employee. Eligible CFRA employee can then take a 12 week CFRA baby bonding leave. First 12 weeks of PDL can run concurrently with FMLA for eligible employees, and for that period, employer needs to maintain health benefits.
Registered Domestic Partners Equal Spouses	Not covered under FMLA. No change with new regulations.	** Covered under CFRA, just like spouses. (Fam. Code §297.5.) Note that this may give a domestic partner more family leave, as the domestic partner will not have exhausted his/her FMLA leave taking CFRA leave to care for a domestic partner.
"Qualifying Exigency" because of employee's or family member's active military duty	** Eligible FMLA employees are entitled to up to 12 weeks of leave for "any qualifying exigency" arising because the spouse, son, daughter or parent of the employee is on **active military duty**, or has been notified of an impending call to active duty status, in support of a contingency operation. Health benefits are included. The family member must be a member of the Guard, Reserve or be a retired member of the Armed Services. (825.126)	Not covered under CFRA. Thus, CFRA leave not exhausted when FMLA used. Note: under a 2007 California military spouse leave law (Mil. & Vet. Code § 395.10), an employee who works 20+ hours per week for an employer with 20+ employees can take an unpaid leave of up to 10 days while the military spouse is on leave from deployment. Some or all of this may run concurrently with exigency leave.
Care for Ill or Injured Service Member	** An employee who is the spouse, child, parent or **next of kin** of a covered service member may take a total of **26 weeks** of leave during a 12 month period to care for a covered service member who is ill or injured in the line of duty on active duty. Health benefits are included. (825.127)	Covered under CFRA if family member is a covered CFRA employee, i.e., a spouse, child or parent. (7297.0(h)(2).) If "next of kin" is not within these categories, CFRA leave would not be exhausted when FMLA used. Furthermore, CFRA leave is only 12 weeks, so last 14 weeks would be FMLA only.

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PREGNANCY & BABY BONDING: FMLA/CFRA DIFFERENCES		
Minimum Duration of Bonding Intermittent Leave	Eligible employees may work an intermittent or reduced schedule for baby bonding *only if the employer agrees.* (825.120(b) & 825.121(b)) No change with new regulations.	** No requirement that employer agrees. Basic minimum leave duration is two weeks for CFRA-only baby bonding leave. But, employer must grant a request for leave of less than two weeks' duration on any two occasions.
Reinstatement	Reinstatement required to the same or equivalent position. (825.214) No change with new regulations.	CFRA has same reinstatement rights as FMLA. (7297.2(a).) ** Pregnancy disability leave (PDL) requires reinstatement to same position (not just comparable). (7291.9(a).)
LIMITATIONS ON LEAVE FOR SPOUSES/PARENTS WORKING FOR SAME EMPLOYER		
Family leave to care for parent, for child's birth; to care for child after birth, or for placement of a child through foster care or adoption	If both *husband and wife* work for same employer, leave is limited to 12 weeks between the spouses: • to care for a parent's SHC (new regulations); • for child's birth; • to care for the child after birth; or • for placement of a child through adoption or foster care. Each spouse's unused portion of FMLA leave would still be available for other purposes, such as employee's or child's SHC. If one spouse employee is not FMLA-eligible, other eligible FMLA employee would have entire 12 weeks of leave. (825.120(a)(3); 825.201(b).) No change with new regulations. ** Unmarried parents (including same sex parents) are not subject to these restrictions.	Employer may limit leave to a combined total of 12 weeks if both *parents* work for the same employer and leave is for the birth, adoption or foster care placement of their child. The CFRA regulations specifically state, "The employer may not limit their entitlement to CFRA leave for *any other qualifying purpose.*" (7297.1(c).) ** No CFRA limitation on spouses caring for parents.

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ESTABLISHING COVERAGE

ESTABLISHING A SERIOUS HEALTH CONDITION (SHC)	No change under the new regulations except for the following clarifications (825.113 & 825.115): An employee establishes that he/she has a SHC by: • Visiting a Health Care Provider (HCP) on **2** occasions **&** having more than 3 days of incapacity associated with the condition. • The 1st visit establishing a SHC must occur in person within 7 days of the incapacity along with treatment (e.g., prescription medication). • The 2 visits must occur within a 30-day period from the onset of the initial incapacity; & • The HCP, not the employee, must determine if a 2nd visit is needed during the 30 day period. • New regulations: For purposes of establishing a chronic condition, "periodic" visits to a HCP means visiting a HCP twice or more per year for the same condition.	CFRA reference old FMLA regulations to establish a SHC. (7297.0(o)(2).) Note: CFRA does NOT include Pregnancy as a SHC (7297.6(b)) and that is why a disabled, pregnant woman in California is eligible for up to seven months of leave pregnancy disability leave (PDL)/FMLA (for own pregnancy-related disability) and then CFRA (bonding) (7297.6(d).)
ESTABLISHING NEED TO CARE FOR A FAMILY MEMBER WITH A SHC	New regulations: Clarify that "incapable of self-care because of a mental or physical disability" is determined at the time the FMLA leave commences, not later. As the ADA has been amended to make it easier to establish a disability, more conditions might be determined to be disabilities which would qualify employee to take FMLA leave. (825.122 & 825.124.)	CFRA regulations state that employee may take leave for a covered family member when the family member's SHC "warrants the participation of the employee." (7297.0(a)(1)(D)(1).) The definition of SHC does not reference the term disability, instead uses the terms "illness, injury, impairment, or physical or mental condition." (7297.0(o).)

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EMPLOYEE ELIGIBILITY FOR LEAVE		
Break in service	The new regulations clarify that an employee is eligible for FMLA leave so long as the employee has worked for an employer for a total of 12 months, even with a break in service. The break can be up to 7 years & even longer in certain circumstances, .e.g., where the break occurred because of military obligations. (825.110(b)(1).)	** Employee is eligible for leave so long as employee has worked for employer a total of 12 months (even if there's been a break in service) & worked 1250 hours in past year. (7297.0(e).)
Re-qualifying for leave	The new regulations clarify that an employee does not need to meet the eligibility tests again to requalify for extra intermittent leave within the 12-month period if the additional leave is requested for the same qualifying reason. (825.110(e).) No change from interpretation of old regulations.	Same. (7297.0(e)(1).)
Counting Leave as FMLA Leave When Eligibility Commences "Midstream"	If an employee is not eligible for FMLA leave at the start of a leave because the employee has not met the 12 month length-of-service requirement, the employee may nonetheless meet this requirement while on FMLA leave, because leave time counts toward length of service (although not for the 1,250 hour requirement). The employer should designate the portion of the leave where the employee has met the one year requirement as FMLA leave. (825.110.)	No comparable guidance in CFRA regulations.
COMPUTATION OF TIME PERIODS		
Treatment of Holidays	New regulations: When a holiday occurs during an employee's scheduled workweek and the employee is taking a full week of leave, the holiday counts against the employee's 12-week leave entitlement.	CFRA regulations have no similar provision for leave taken in less-than-a-week increments. CFRA regulations do follow the remaining part of this FMLA regulation, 825.200(h), which provides that if a

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	If the employee is taking FMLA leave in increments of less than a week, the time counts against the FMLA entitlement only if the employee was required to work on the holiday. (825.200(h).)	holiday falls within a CFRA leave week, the entire week is counted as CFRA leave. If however, the employer's business activity has temporarily ceased for some reason and the employees are not expected to report for work for 1 or more weeks (e.g., a two week holiday school closing, summer vacation or a plant retooling closing), the days the employer's activities have ceased do not count against the employee's CFRA entitlement. (7297.3(c)(3).)

INTERMITTENT LEAVE

SCHEDULING INTERMITTENT LEAVE	New regulations: Employees who need intermittent or reduced schedule leave for planned medical treatment must make a "reasonable effort" to schedule the treatment not to unduly disrupt their employer's operations. (825.202.)	** No comparable CFRA requirement.
INTERMITTENT LEAVE INCREMENTS	New regulations: Employer may use a time increment for absences or leave use no greater than the *shortest* time period that the employer uses for other forms of leave provided that it is not greater than 1 hour & that an employee's FMLA leave entitlement is not reduced by more than the leave amount actually taken. Limited exception where it is physically impossible for the employee to begin/end work mid-shift (e.g., flight attendant); then entire period that employee is forced to be absent is FMLA leave. (825.205.)	An employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave. (7297.3(e).)
CALCULATING INTERMITTENT LEAVE	New regulations: To calculate an employee's leave entitlement when an employee works a schedule that varies from week to week, employers are required to use a 12-month average of hours worked prior to the commencement of the employee's FMLA leave. (825.205(b).)	CFRA regulations: Employee is entitled to 12 of the employee's "normally scheduled workweeks" for intermittent leave with no guidance on how to average those hours to come up with a "normally scheduled workweek." (7297.3(c).)

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OVERTIME & INTERMITTENT LEAVE	New regulations: If an employee would have been required to work overtime hours but could not because of a FMLA-qualifying condition, the employee may be charged FMLA leave for the hours not worked. Employers cannot discriminate in the assignment of OT to deplete FMLA leave takers from their FMLA leave entitlement. (825.205(c).)	** No comparable CFRA requirement.
DOCKING PAY OF EXEMPT EMPLOYEES	Employers may dock exempt employees' pay for FMLA intermittent leave/reduced work schedule when paid leave exhausted. (825.206(a).)	** CFRA does not cover this issue. CA's DLSE has not provided guidance on this issue & Ca. employers dock exempt employees' pay at their own risk.

SUBSTITUTION OF PAID LEAVE FOR FMLA/CFRA

VACATION, PERSONAL TIME OFF (PTO), SICK LEAVE & DISABILITY BENEFITS	Employer has a paid leave policy: Employer may *require* that employees meet the terms & conditions (e.g., give requisite notice or use leave in certain increments) of using paid leave if they want to substitute it for unpaid FMLA leave (i.e., have the paid leave run concurrently). (825.207(a).) No paid leave policy: the *employee may elect* to use vacation or PTO at his/her option. (825.207(a).) Supplementing disability benefits: Employer & employee may agree (but can't require) that other forms of accrued time (sick leave, vacation & PTO) can augment paid disability payments while on FMLA. (825.207(d) & (e).)	** No distinction made in CFRA regulations between employers with/without paid leave policies. Employer or employee may *require* use of vacation, other PTO (7297.5(b)(1) & (b)(2)) or sick leave (for employee's own SHC). Employer or employee may mutually agree to use sick leave for any other reason. (7295.5(b)(3).) No regulation on supplementing disability benefits with other forms of paid leave. ** Employees can elect to use vacation/PTO during PDL; but employers cannot require it. Employers can require using sick leave. (Gov. Code §12945(a) & 7291.11(b)(2).) CA employers must give employees notice of SDI/PFL benefits at hire & when given notice of qualifying event.

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IF EMPLOYEE REQUESTS TIME OFF:		
No mention of qualifying leave reason	If employee does not give "sufficient information" for the employer to know requested leave is potentially FMLA-qualifying (whether paid or unpaid), the employee will not be entitled to have the leave designated as FMLA protected. New regulations clarify what is "sufficient information." (825.301(b).)	If an employee requests vacation or PTO without reference to a qualifying purpose, the employer may not ask whether the employee is taking the time off for a CFRA-qualifying purpose. (7297.5(b)(2)(A).)
Denied leave request, employee then gives family leave-qualifying reason	If the employer denies the employee's request, and the employee then provides information that the requested time off is (or may be) for FMLA leave, the employer may inquire further into the reasons for the absence. If it's a FMLA purpose, employer must grant leave but can then charge it against employee's vacation or PTO. (825.301(b).)	Same. (7297.5(b)(2)(A)(1).)
Sufficient Notice of Leave	Calling in sick in the case of unforeseeable leave is not enough to trigger an employer's obligation to determine if the leave is possibly FMLA-protected. When an employee seeks leave due to a FMLA-qualifying reason for which the employer has previously provided FMLA-protected leave, the *employee* must *specifically reference* the qualifying reason for leave in notifying the employer. (825.302(d).)	No comparable CFRA regulation.

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EMPLOYER NOTICE REQUIREMENTS		
For All Types of Leave	Employers must post a specific notice for employees explaining their leave rights. (825.300.) New regulations now clarify electronic posting is okay. • Notice must be posted in a conspicuous place where applicants and employees tend to congregate. (825.300(a)(1).) • If the employer publishes an employee handbook or other written guidance to employees on employee benefits or leave rights, employers must include all information contained in the poster in the handbook/guidance. If no written guidance exists, all of the poster's information must be distributed to employees upon hiring in writing or electronically. (825.300(a)(3).)	Same posting requirements. (7297.9.) In addition to the required notification, California's Department of Fair Employment and Housing (DFEH) provides informational brochures that may, but are not required, to be distributed to employees. A sample copy of the DFEH brochures, California Family Rights Act Brochure - English, or the California Family Rights Act Brochure - Spanish, may be viewed on DFEH's website, www.dfeh.ca.gov. This may be copied and distributed to employees.
Notice Req'ts: Employers Subject to PDL & Family Leave	Federal law requires posting WH 1420 (FMLA Poster) (App. C to Part 825.)	State law requires a combined **PDL/CFRA** notice. (7297.9(a) & (d).)
LEAVE DESIGNATION		
NOTIFYING EMPLOYEE LEAVE WAS APPROVED	** When the employee puts the employer on notice of the need for leave, the employer must provide employee with notice of their rights & responsibilities if leave taken should qualify for FMLA. When the employee has sufficient information to determine whether leave is FMLA protected (e.g., once medical certification is	CFRA regulations require 10 business days notice. (7297.4(a)(6).) CFRA regulations don't require employer to give reason for failure to grant CFRA leave nor to provide employee with a list of employee's essential job functions to give to the employee's health care provider.

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	returned), an employer must notify an employee within 5 business days (old regulations, 2 days) whether the employee is leave eligible and, if not, state at least one reason why not. If the employer wants a fitness for duty certification before employee can return to work, the designation notice must include this requirement and a statement of the employee's essential job functions. (825.300(d).)	
RETROACTIVE DESIGNATION	New regulations: Employers may retroactively designate leave as FMLA leave, so long as there is no individualized harm. If there is harm, employer may be liable. (825.301.)	CFRA regulations follow FMLA regulations: "Employers may not retroactively designate leave as 'CFRA leave' after the employee has returned to work, except under those same circumstances provided for in FMLA & its implementing regulations for retroactively counting leave as 'FMLA leave.'" (7297.4(a)(1)(B).)

MEDICAL CERTIFICATION

Identifying the employee's own serious health condition (SHC)	New regulations allow employers to ask for a diagnosis of what is the SHC. (825.306(a)(3).) If additional leave is requested at the end of the period that the health-care provider originally estimated the employee needed for family leave, the employer may require the employee to obtain recertification. (825.307.)	** CFRA regulations specify that an employer *cannot* ask for a diagnosis, but it may be provided at employee's option. (7297.4(b)(2).) Employees have provided sufficient information to make a determination under the CFRA if they provide: • The date, if known, on which the SHC began; • The probable duration of the condition; and • A statement that, due to the SHC, the employee is unable to work at all or is unable to perform any one or more of the essential functions of his/her position.

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		Employers can use CFRA regulations "Certification of Health Care Provider" form (at 7297.11) or its equivalent, such as the U.S. Dept. of Labor Form WH-380, revised Dec. 1994 ("Certification of Health Care Provider/Family & Medical Leave Act of 1993") provided that the provider does not disclose the underlying diagnosis of the employee's SHC without consent.
Second & Third Opinions for Employee's SHC	If the employer doubts the validity of the employee's medical certification, the employer may require a second health care opinion, designated & paid for by employer. If first & second opinions conflict, then require and pay for a third opinion (with a provider mutually selected by employer & employee). Third opinion is final & binding. (825.307(b).)	Same requirements.
Identifying the family member's serious health condition	Certification may identify the SHC involved. (825.306(a)(3).)	The certification need not but, at the employee's option, may identify the serious health condition involved. (7297.(b)(1).) Employees have provided sufficient information to make a CFRA eligibility determination if they provide: • The date, if known, on which the SHC came into existence • The probable duration of the condition • An estimate of the amount of time the health care provider believes the employee needs to care for the child, parent or spouse; and • A statement that the SHC warrants the participation of the employee to provide care during a period of

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		treatment or supervision of the child, parent or spouse, including providing psychological comfort and arranging "third party" care for the child, parent or spouse and directly providing, or participating in, the medical care. Employers may use same certification forms as described for employee's own SHC, see above.
Second Opinion to Care for Family Member	New FMLA regulations authorize employers to get second and third medical opinions regarding the serious health condition of a family member, same as for an employee. (825.307(b).)	** No such authorization is allowed under CFRA regulations. Even if the employer doubts the medical certification for an employee needed to care for a family member, the employer must accept the certification. (7297.4(b)(1).)
Background Information for Second & Third Opinion Providers	Employees (or family members) are required to authorize the release of relevant background medical information regarding the condition for which leave is sought from the employee's (or family member's) healthcare provider to the second or third opinion provider. (825.308.)	No comparable CFRA regulation.
Time Frame to Correct Deficient Certification	If certification is incomplete or insufficient, the employer must state in writing what additional info is necessary and allow the employee 7 calendar days to cure the deficiency. Employee can have extra time to fix medical certification if the employee notifies the employer within the 7 day period that she/he is unable to obtain the additional info despite diligent, good faith efforts. If the deficiencies are not fixed in the resubmitted certification, the employer may deny leave. (825.305(c).)	** No comparable provisions in CFRA regulations.

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Employer Contact with Health Care Provider	Employer representative (but not employee's direct supervisor) may contact the provider to authenticate a certification or to obtain clarification of the provided information after employer has given employee 7 days to fix deficiencies (or employee waives this period). Employee or family member must sign a HIPAA release for HCP to discuss employee's or family member's condition. If HIPAA release is not signed & employer does not have sufficient information to establish a SHC, leave can be denied. (825.307.)	** No comparable CFRA provisions.
Frequency of Recertification	New regulations: An employer may request recertification: • Every 30 days in connection with an absence unless the medical certification indicates that the minimum duration is more than 30 days. • If a longer period is provided, certification cannot occur before the time period expires, unless circumstances change, or an employer has reason to doubt the validity of the initial certification. • In all cases, employers will be able to request recertification every 6 months, even where the certification states a longer period. A certification which indicates a "lifetime" condition exists is info that indicates the condition will last more than 6 months. • Each new year gives the employer the opportunity to obtain a new "initial" certification, and thus obtain a second and third opinion if there's reason to doubt the validity of the certification. (825.308.)	** CFRA regulations provide that "Upon expiration of the time period which the health care provider originally estimated that the employee needed to take care of the employee's child, parent or spouse, the employer may require the employee to obtain recertification if additional leave is requested." (7297.4(b)(1).) ** No provision that a new year gives the employer the opportunity to start over with the certification process.

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Fitness for Duty Returning from Medical Leave for Employee's Own SHC	Intermittent Leave: Employer may require an employee to furnish a fitness-for-duty statement every 30 days if employee's has used intermittent leave & reasonable safety concerns to return exist, provided that the employer includes that requirement in its designation notice. Employer cannot terminate the employee's employment while awaiting the fitness for duty certification for an intermittent or reduced schedule leave of absence. Return from a Block of Leave: With new regulations, when an employer provides the employee with a list of the employee's essential job functions in its designation notice, and advises the employee that the certification must address the employee's ability to perform the essential functions of the job, the employer may require the employee's health care provider to certify the employee can perform those duties. (825.312.)	CFRA regulations are silent about fitness for duty statements for intermittent medical leave. CFRA regulations provide that as a condition of an employee's return from medical leave, the employer may require that the employee obtain a release to "return-to-work" from his/her health care provider stating that he/she is able to resume work only if the employer has a uniformly applied practice or policy of requiring such releases from other employees returning to work after illness, injury or disability. (7297.4(b)(2)(E).)

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OTHER FMLA CHANGES WITH NO COMPARABLE CFRA PROVISIONS

Note: CFRA regulation section 7297.10 provides:

> *To the extent that they are not inconsistent with this subchapter, other state law or the California Constitution, the Commission incorporates by reference the federal regulations interpreting FMLA issued January 6, 1995 (29 CFR 825), which governs any FMLA leave which is also a leave under this subchapter.*

TERM	FMLA REGULATION
Interplay of Information Required for Disability Plans or Workers' Compensation Benefits (825.207 & 825.306.)	If an employer's disability benefit plan or workers' compensation requires the employee to provide more or different medical information than that permitted under the FMLA's medical certification requirements, an employer can require an employee to provide such information as long as the employer makes clear that the failure to provide this additional information only jeopardizes receipt of disability benefits/workers' compensation, not the entitlement to unpaid FMLA leave. Note, the employer may use this additional information to determine whether the need for leave qualifies under FMLA.
Joint Employer Coverage (825.106.)	An individualized assessment is required to determine if joint employment status exists with a professional employer organization (PEO). If the PEO only performs administrative functions for an employer, such as providing payroll services, it is not a joint employer. If it has authority to hire or fire, it would be covered.
"Worksite" Definition (825.111.)	For an employee jointly employed by 2 or more employers, the employee's primary worksite is the primary office where the employee is assigned or reports except that after an employee is stationed at a fixed worksite for a period of at least one year, the employee's worksite for purposes of the employee's eligibility is the actual physical place where the employee works. Employees who work out of their home do not have their personal residence as their "worksite." Telecommuting employees are considered to work in the office to which they report and from which assignments are made.
Light Duty (825.220(d).)	If an employee accepts light duty assignment, this position does not count against the employee's FMLA entitlement. The right to restoration is held in abeyance during the

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		light duty period. But, if the employee uses the full FMLA allotment, and then accepts a light duty assignment because he/she is unable to resume working in the original position, that employee no longer has a FMLA right to restoration.
Enforcement of Employer Call-In Procedures (825.302(d).)		When leave in unforeseeable, providing notice "as soon as practicable" includes following the employer's usual call-in procedures for calling in absences and requesting leave absent "unusual circumstances" (e.g., no one answers the call-in number). Where an employee does not comply with the employer's usual procedure and no unusual circumstances justify that failure, the employer may delay or deny FMLA leave.
Perfect Attendance Awards (825.215(c)(2).)		Employers may disqualify an employee from a bonus or award predicated on the achievement of a specific goal (e.g., hours worked) where the employee fails to achieve that goal because of a FMLA absence, as long as the disqualification standards are not discriminating against FMLA uses. This includes attendance bonuses.
Waiver and Release of FMLA Claims (825.220(d).)		Employers and employees may voluntarily agree to a settlement of past claims without first having to obtain the permission or approval of the Department of Labor or a court.