



# How to Choose? The Interplay Between the FMLA, CFRA, and ADA

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**It's Friday morning** and Bob walks into your office explaining that he's going to need to take time off work because of an upcoming back surgery and attendant recovery. Now you're left with the task of figuring out what law – or laws – cover his leave, which is certainly not something you want to do with the weekend on the horizon. Here are some steps for you to follow so that you can get back to enjoying your Saturday and Sunday:

(1) This scenario implicates at least four laws: the Family Medical Leave Act (“FMLA”), the California Family Rights Act (“CFRA”), the Americans with Disabilities Act (“ADA”), and the California Fair Employment & Housing Act (“FEHA”). The first thing you want to do is analyze and evaluate the employee's circumstances under each law separately. In order to do so, you need to understand the purpose and applicability of each law:

- The FMLA is a federal law designed to help employees balance their work and family responsibilities by offering unpaid leave applies to an employer with at least 50 employees working within 75 miles of the employee's worksite. The employee must have worked for the employer for at least 12 months and 1,250 hours to be FMLA-eligible.
- The CFRA is California's equivalent of the FMLA. Like the FMLA, the CFRA offers unpaid leave applies to an employer who does business in California with at least 50 employees working within 75 miles of the employee's worksite. The employee must have worked for the employer for at least 12 months and 1,250 hours to be FMLA-eligible.
- The ADA is designed to make the workplace more accessible and prohibits discrimination against a qualified individual with a disability who, with or without reasonable accommodation, can perform the essential functions of a job. Unlike the FMLA and CFRA, for an employer to be subject to the ADA, it need only have 15 employees. The employee does not have to meet a minimum length of service to qualify for the protections of the ADA.
- The FEHA is designed protect employees from discrimination, harassment, and retaliation because of his/her disability or perceived disability. The FEHA applies to employers with at least 5 employees. The employee does not have to meet a minimum length of service to qualify for the protections of the FEHA. Under the FEHA, employers are expected to engage in a timely, good faith interactive process with employees in need of reasonable accommodation which could include providing an employee with leave from work.

(2) You want to determine if the employee's condition is protected under each or any of these laws:

- The FMLA and CFRA protect an employee with a serious health condition. A serious health condition includes an illness, injury, impairment, or physical or mental condition that involves either inpatient care in a hospital, hospice or residential medical care facility or continuing treatment by a health care provider.
  - The notable difference between the two pertains to pregnancy: pregnancy is a serious health condition under the FMLA, but not under the CFRA. Rather, California affords pregnant employees with Pregnancy Disability Leave (“PDL”) of up to 16 weeks. An employer need only have 5 employees for them to be subject to the PDL. Another notable difference is that the first 12 weeks of PDL can run concurrently with the FMLA, while the PDL runs consecutively with the CFRA (i.e., an employee can take 16 weeks of PDL and then 12 weeks of CFRA).
- The ADA protects “qualified individuals with a disability.” A “qualified individual” is a person with a disability who, with or without accommodation, can perform the essential functions of the job in question. This includes a person who (i) has a physical or mental impairment that sustainably limits one or more major life activities, (ii) has a history or record of such an impairment; or (iii) is perceived by others as having such an impairment.
- The FEHA protects employees who (i) have a physical or mental disability that limits (i.e., it makes the achievement of the major life activity difficult) one or more major life activities (construed broadly to include physical, mental, and social activities and working); (ii) has a history of such an impairment known to the employer; (iii) is incorrectly regarded or treated as having or having had such an impairment; or (iv) is regarded or treated as having or having such an impairment that has no presently disabling effects but may become a qualifying impairment in the future.
- Some examples of a conditions that would qualify as a disability include: diabetes, chronic asthma, anxiety/depression, back problems, fertility issues, migraines, cancer, deafness, epilepsy, mobility impairments, HIV / AIDS, and PTSD.
- Some examples of conditions that would not qualify as a disability include: current illegal drug use, sexual behavior disorders, compulsive gambling, pyromania, kleptomania, and vision impairment that can be corrected with eyeglasses or contacts.

(3) Understand what each law requires including leave rights, reinstatement rights, and medical documentation.

- Leave rights: The FMLA provides an employee with up to 12 weeks of unpaid leave for an employee’s own or a family member’s serious health condition, for the birth or adoption of a child, and for military exigencies. The law also provides for 26 weeks for military caregiver leave. The CFRA provides an employee with up to 12 weeks of unpaid leave for an employee’s own or a family member’s serious health condition, for the birth or adoption of a child. Unlike the FMLA, the CFRA does not, however, provide the same coverage for active military due or to care for service member. The ADA does not require employers to provide a specific amount of leave, although providing “indefinite leave” is not be required. The ADA does require that employers make “reasonable accommodations” for employees with disabilities unless doing so would create an undue hardship on the company.

- **Reinstatement:** Under both the FMLA and CFRA, the employee is required to be reinstated to the same or an equivalent job. There is no undue hardship exception. Under the ADA, the employee should be reinstated to his or her previous job unless doing so would create an undue hardship on the company. Under FEHA the employee is required to be reinstated to the same or an equivalent job, unless doing so would create an undue hardship on the company.
- **Medical documentation:** Under the FMLA and CFRA, a medical certification should demonstrate the need for leave. Under the ADA and FEHA, medical examinations should be limited to determining an employee's ability to perform the job and whether an accommodation is needed and would be effective.

(4) Apply the law that provides the most benefits to the employee. Some things to consider are:

- Has the employee exhausted his FMLA or CFRA? If the employee has used up his FMLA and/or CFRA but is still unable to return to work, the employer may be required to provide leave under the ADA and FEHA as a reasonable accommodation.
- Is the employee's condition temporary? Temporary conditions may entitle an employee to leave under the FMLA or CFRA but not be considered a disability under the ADA.
- If the employee qualifies as an individual with a disability, is there an accommodation that would allow the employee to perform the position? Would additional leave time – even if the employee has exhausted FMLA or CFRA entitlement – allow the employee to return to full duty?

(5) When in doubt, contact an attorney who specializes in employment law.

Now back to your almost-weekend-ruiner from the opening paragraph. Bob is one of 100 employees at your company's office in Culver City. You look at Bob's personnel file and find that he has been a full-time employee for the past 5 years. Before heading out for the day, you call Bob back to your office and explain that under the CFRA he's entitled to 12 weeks of unpaid leave, but that he'll need to have his doctor complete the appropriate medical certification. Now time to enjoy your weekend!

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