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RECENT DEVELOPMENT

California Will Require Small Businesses to Provide 12 Weeks of Unpaid, Protected Leave for Baby Bonding Purposes

BY ALEXIS SOHRAKOFF ON OCTOBER 13, 2017

On October 12, 2017, California Governor Jerry Brown signed the New Parent Leave Act (SB 63) ("the Act") into law, requiring employers with at least 20 employees to provide employees with 12 weeks of unpaid, job-protected parental bonding leave.

Last year Governor Brown vetoed a similar bill, SB 654, out of concern for the impact of civil litigation on small businesses and recommended that any future versions explore the possibility of requiring mediation before an employee could pursue civil action. As noted below, SB 63 tempers SB 654 by (a) including a two-year pilot mediation program; and (2) providing employers the ability to recover health benefit premiums paid for employees who do not return to work following a leave of absence under the Act.

This law will take effect on January 1, 2018.

Determining Coverage

The Act applies to private, state and municipal employers that directly employ 20 to 49 employees within 75 miles of each other. To be eligible, employees must have more than 12 months of service and at least 1,250 hours of service with the covered employer during the 12-month period prior to commencing leave. The Act does not apply to employees who are covered by both the federal Family and Medical Leave Act ("FMLA") and the Moore-Brown-Roberti Family Rights Act (aka, the California Family Rights Act or "CFRA"), both of which already provide 12 weeks of unpaid, protected leave for baby bonding purposes to eligible employees of employers with at least 50 employees. However, CFRA regulations apply to the Act to the extent they are within the scope of and not inconsistent with the Act.

Employers' Obligations Under The New Parent Leave Act

Under the Act, covered employers must provide 12 weeks of unpaid parental leave upon the request of eligible employees to bond with a new child within one year of the child's birth, adoption or foster care placement. Employees are entitled to utilize any type of accrued paid time off, such as paid vacation and sick leave, during the parental leave. In addition, the leave is job-protected, meaning employers must guarantee employment in the same or a comparable position upon an employee's return from leave.

In addition to providing 12 weeks of unpaid, protected parental leave, employers must maintain and pay for the employee's continued coverage under a group health plan at the level and under the same conditions that coverage would have been provided had the employee continued to work. However, under the Act, employers are entitled to recover their portion of the premium in the event the employee fails to return from the leave of absence *and* the failure to return is not due to the continuation, recurrence or onset of a serious health condition, or "other circumstances beyond the control of the employee."

Where both parents entitled to leave under the Act are employed by the same employer, they are entitled to a combined total of 12 weeks of unpaid parental leave. The employer may, but is not required to, grant simultaneous leave to both employees.

Finally, employers are prohibited from retaliating and/or discriminating against an individual for taking parental leave, and from interfering with, restraining or denying an employee his or her right to leave under the Act.

Mediation Pilot Program

Subject to the receipt of funding from the Legislature, the Act also provides for the creation of a two-year parental leave mediation pilot program. Under the pilot program, within 60 days of receipt of a right-to-sue notice, the employer has the option to request to participate in the Department of Fair Employment and Housing's Mediation Division Program. The employer's request temporarily tolls the employees' statute limitations and bars the employee from suing the employer until (a) mediation is completed; (b) either party notifies the Mediation Division Program and all other parties that they are electing not to participate in the mediation; or (c) the department notifies the parties that it believes further mediation would be fruitless.

Recommendations for Employers

Small businesses could be impacted significantly by the passage of the New Parent Leave Act. Steps employers can take before the law takes effect include:

- Determining whether they are covered under the Act;
- Drafting a compliant leave of absence policy;
- Developing leave of absence forms and procedures; and
- Training Human Resources, managers and supervisors about the requirements of the Act, especially with respect to the no-retaliation and no-discrimination provisions.

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