UPDATED

June 2, 2014

Fair Employment and Housing Council
c/o Phyllis W. Cheng, Director
Department of Fair Employment and Housing
2218 Kausen Drive, Suite 100
Elk Grove, CA 95758

SUBMITTED VIA EMAIL TO: FEHCouncil@dfeh.ca.gov

SUBJECT: Comments on Proposed Amendments to the California Family Rights Act Regulations

Dear Ms. Cheng:

The California Chamber of Commerce and the organizations listed below appreciate the opportunity to comment on the amendments proposed by the Fair Employment and Housing Council (FEHC or the Council) to the regulations under the California Family Rights Act (CFRA).

As a general point, we believe that the interpretation and implementation of CFRA should mirror and conform to interpretations and the implementation of the federal Family and Medical Leave Act (FMLA) as much as possible. While we appreciate there are isolated distinctions between the two acts based upon statutory language, consistency between the two Acts eases the administrative burden on California employers.

Comments on Section 11087(d) "Covered Employer:"

The proposed amendments to this definition seek to include an additional requirement that a "covered employer" have 50 or more employees within 75 miles of the worksite of the employee requesting a leave. While the 75-mile requirement has always been a requirement for an "eligible employee," it has never been a part of the requirement for a "covered employer" under CFRA or FMLA. Although this proposed amendment may be more limiting as to employers that are covered, it will create an administrative burden for California employers due to lack of conformity with FMLA as to the definition of "covered employer." Accordingly, we respectfully request the FEHC to delete the phrase "within 75 miles of the worksite where the employee requesting the leave is employed."

Comments on Section 11087(e) "Eligible Employee:"

We propose that this section include the word "worked" to qualify the term "1,250 hours." The term "hours worked" is defined by statute at both the state and federal levels and is a recognized phrase in employment law. Adding this word is consistent with how this requirement has been interpreted under CFRA and FLMA, and it would provide clarity to this section as well as other areas referenced below.

Comments on Section 11087(e)(2):

For purposes of clarity, we request the term "employers" be deleted and replaced with "an employer." Also, in the fifth line of the section, we request the words "they do" be deleted and replaced it with "the employer does." These changes are also consistent with the language of FMLA.

Comments on Section 11087(e)(5):

For purposes of clarity, we request the phrase "one-year" be deleted in the fifth line and replaced with the term "12-month."

Comments on Section 11087 (r)(1) "Inpatient Care" and A(1) of the Certification Form:

This section proposes to delete "overnight" from the description of the type of stay in a hospital, hospice, or residential care facility that qualifies as "inpatient care." This proposed deletion would significantly expand the application of "inpatient care" as any length of time spent at a heath care facility, no matter how minimal, would qualify as "inpatient care." This expansion would create an increased administrative burden on California employers who would need to determine whether the illness or injury qualified as a "serious health condition," as well as track the limited amount of leave allowed/required. Moreover, this change would create a significant lack of conformity with FMLA as to the definition of "inpatient care" for purposes of a serious health condition, which term a court recently defined as "an 'overnight' stay . . . from sunset on one day to sunrise the next day." *See Bonkowski v. Oberg Industries, Inc*., 2014 WL 199790 (W.D. Pa 2014).

Comments on Section 11089 (a)(1)-(b)(2):

The substance of this section is similar to that under FMLA regulations, specifically 29 CFR 825.214-825.215. However, the language is not identical. To eliminate any confusion regarding conformity between the two Acts, we request these sections be deleted and instead simply reference the federal law on this issue. This will ease the interpretation and application of the two Acts and also eliminate the need to amend the regulations if the federal regulations were to change.

Comments on Section 11089 (d)(2)(C):

This section defines the term "substantial and grievous economic injury" in a manner that is generally consistent with FMLA. However, a significant section of the FMLA definition is missing and should be included. Specifically, the following provision of 29 CFR 825.818(c) should be included:
"A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a key employee threatens the economic viability of the firm, that would constitute substantial and grievous economic injury. A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute substantial and grievous economic injury."

Comments on Section 11089 (d)(3) "Fraudulently-obtained CFRA leave:"

This proposed section states that an employee is not entitled to any of the job protections of CFRA if the CFRA leave was "fraudulently obtained." If an employee has fraudulently obtained CFRA leave, the employee should not be entitled to any of the benefits or protections of CFRA, not just the "job protections." This section also appears to shift the burden of proof to establish fraud on the employer. We believe this unfairly shifts the burden, as the employee is the one who carries the burden of proof to establish that he/she was entitled to CFRA leave, not the employer. *Stevens v. California Dept. of Corrections*, 107 Cal.App.4th 285, 290 (2003) (stating the elements an employee must prove to establish

a claim for denial of CFRA leave for an ailing parent). Accordingly, we request deletion of the last sentence of this section.

Comments on Section 11090 (e)(1) "equivalent:"

This section deletes the term "equivalent" and inserts the word "same" to describe the pay an employee must receive upon return from leave. Although the words appear synonymous, we believe changing these terms will create confusion. Using the term "equivalent" is also consistent with FMLA. Accordingly, we request the Council keep the word "equivalent."

Comments on Section 11090(e)(4):

This section specifies that an employer may reduce an exempt employee's pay for CFRA intermittent leave or a reduced work schedule, as permitted by the California Labor Code or Industrial Welfare Commission (IWC) Wage Orders. Neither the Labor Code nor the IWC Wage Orders specify that an employer may reduce an exempt employee's pay. However, California Government Code 12945.2(d) provides that "an employer shall not be required to pay an employee" for CFRA leave. The Labor Commissioner has twice opined that California law allows an employer to reduce an exempt employee's salary for intermittent CFRA leave, consistent with similar deductions for FMLA leave permitted under federal law. (3/1/02 and 11/23/09 Opinion letters) In order to avoid any confusion, we request deletion of the following language of this section "only as permitted by the California Labor Code and Industrial Welfare Commission Wage Orders."

Comments on Section 11091 (a)(1)(B):

This section states that an employer may not retroactively designate leave as CFRA leave after the employee has returned from work unless the employee consents to the designation. This is a significantly higher standard than current law and is inconsistent with FMLA. Specifically, as set forth in 29 CFR 825.301(d), an employer must provide the employee with adequate notice before retroactively designating the leave, but does not have to obtain the employee's consent. Additionally, Section 825.301(d) also allows the employee and employer to *mutually* agree to retroactively designate the leave as FMLA. Accordingly, we request the deletion of the proposed phrase "without the employee's consent," and instead request the Council to conform the regulation to federal law interpreting FMLA on this issue.

Comments on Section 11091 (b)(2)(A):

This section significantly increases the standard by which an employer may require the employee to obtain the opinion of a second health care provider for the employee's own serious health condition. Currently, an employer may require a second opinion whenever the employer has a reason to doubt the validity of the certification provided by the employee. Under the proposed language, the employer must first "establish" a reason to doubt the validity of the original certification before requiring a second opinion. The term "establish" is undefined, which leaves ambiguity as to how much or what evidence an employer needs to provide in order to justify a second opinion. Additionally, it is unclear as to whom the employer must "establish" doubt regarding the validity of the certification, whether such evidence must be documented, and who ultimately determines whether the employer has "established" doubt. This standard is also inconsistent with FMLA and, therefore, will create two different standards for health conditions that trigger leave under CFRA and FMLA. See 29 CFR Section 825.307. Accordingly, we request the term "establishes a" be deleted and the word "has" retained.

Comments on Section 11092(b)(1)-(2):

These paragraphs reference when an employer may require an employee to use paid time off or vacation time while on unpaid CFRA leave. A recent case interpreting FMLA regulations has stated that an

employee receiving disability payments is not on "unpaid leave" and, therefore, an employer may not require the employee to use paid time off, sick leave, or accrued vacation. *Repa v. Roadway Express*, 477 F.3d 938, 941 (7th Cir. 2007). To eliminate any confusion on this issue with regard to CFRA, we request the Council define whether unpaid leave includes or excludes disability payments.

Comments on Section 11092 (c)(3):

This section proposes to eliminate the definition of "group health plan" in accordance with the definition set forth in Internal Revenue Code (IRC) Section 5000(b)(1). Elimination of this reference to the IRC creates significant ambiguity as to what qualifies as a group health plan and what coverage is included. The deletion of this reference is also inconsistent with FMLA. See 29 CFR Section 825.209. To prevent this confusion, we request the Council maintain the existing definition: "group health plan is as defined in section 5000(b)(1) of the Internal Revenue Code 1986."

Comments on Section 11092 (c)(6)):

This section provides that group health plan coverage must be maintained for an employee on CFRA leave. We propose adding two qualifications, namely COBRA and key-employee status. Thus, the sentence should be revised as follows: "Group health plan coverage must be maintained for an employee on CFRA leave, except as provided by COBRA or key-employee status, until:"

Comments on Section 11092 (c)(6)(C):

This section requires "unequivocal" notice of an employee's intent not to return to work for an employer to terminate group health plan coverage for the employee on CFRA leave. Qualifying the notice requirement with the term "unequivocal" significantly increases an employer's obligation under this section and will cause ambiguity with regard to when this standard has been achieved. For example, if an employee sends an electronic message that the employee "does not plan" to return, would this be unequivocal? Would the employer have to wait several days or weeks to determine whether the employee changes his/her mind? Would the employer have to follow-up with the employee to determine what the employee meant by "does not plan?" This qualification is also inconsistent with FMLA and would cause a lack of conformity for employers on this issue. Accordingly, we request the deletion of the term "unequivocal."

Comments on Section 11092 (d)(3):

This section sets forth the conditions under which an employer may terminate an employee's health insurance coverage. Within this section, it references an employer's obligation to provide "notice" to the employee before the coverage ceases. We request the Council include the term "written" prior to "notice", in order to instruct employers that written notice is necessary to satisfy this obligation.

Comments on Section 11092 (e):

Given the recent additions and amendments to Section 11092, it is unclear as to what this section is referencing. Specifically, what does it mean to be on CFRA leave but not covered by Section 11092(c)? We request the Council review this section to determine whether it is still necessary given recent amendments and, if so, clarify what this section is referencing.

Comments on Proposed Certification:

Question No. 2: We request the Council to also require the patient to identify the relationship to the employee and, if the individual is a child of the employee, the age of the child, so that the employer may determine whether the employee is entitled to CFRA leave.

We appreciate your consideration of our comments regarding the proposed amendments to the regulations and your continued efforts to clarify the rights and responsibilities of employees and employers on these issues.

Sincerely,

California Chamber of Commerce
California Farm Bureau Federation
California Grocers Association
California Hospital Association