

# Domestic Violence, Sexual Assault & Employment: Taking Leave for Your Own Health Condition or To Care for a Family Member

## YOUR LEGAL RIGHTS

*Domestic violence and sexual assault survivors often need time off from work to care for their own or a family member's serious health condition (whether mental or physical) that is caused or made worse by domestic violence or sexual assault. Under the federal Family and Medical Leave Act and the California Family Rights Act, survivors may be able to take up to twelve weeks of job protected (but unpaid) time off from work each year for their own serious health condition or to care for a child, parent, spouse or registered domestic partner with a serious health condition. California state law provides strong privacy protections for survivors that may allow an employee to take time off from work without disclosing the domestic violence or sexual assault situation or the underlying diagnosis of the survivor to their employer.*

### 1. What rights do family/medical leave laws provide?

Federal and state law provide certain employees with the right to take an unpaid leave from work for a serious health condition or to care for a family member who has a serious health condition. The federal law is the **Family and Medical Leave Act (FMLA)**; the state law is the **California Family Rights Act (CFRA)**.

If you qualify for an unpaid family/medical leave under these laws, your employer:

- may not fire you for taking up to 12 weeks of leave;
- must give you back the same or equivalent job after your leave (same pay, benefits, and working conditions); and
- must continue to pay for your health insurance benefits—if you have them—during your leave.

Family/medical leave laws also make it illegal for your employer to interfere with your right to take a family/medical leave, to harass you for taking a family/medical leave, to deny a valid leave request, or to refuse to hire or promote you because you will take or have taken a family/medical leave. It is also illegal for your employer to retaliate against you for requesting a family/medical leave or for complaining about a violation of family/medical leave laws.

Other laws also prohibit your employer from discriminating against you because your employer believes you will have to miss work to care for a family member with a disability.

## 2. Are you covered under family/medical leave laws?

You must meet all of the following conditions to be covered by the family/medical leave laws:

- you have worked for your employer for at least 12 months (even on a part-time or temporary basis);
- you have worked at least 1,250 hours (an average of 25 hours per week) during the 12 months before the leave;
- your employer employs at least 50 people within a 75-mile radius of your worksite; and
- you have a *serious health condition* OR you need time off from work to care for a parent, child, spouse or registered domestic partner who has a *serious health condition*. (Time off from work for pregnancy or prenatal care, or for the birth, placement or adoption of a child is also covered by family and medical leave laws.).

## 3. What do the terms in family/medical leave laws mean?

### “serious health condition”

Under the family/medical leave laws, a *serious health condition* is an illness, injury, impairment, physical condition, or mental condition that causes a period of incapacity (meaning inability to work, attend school or perform other regular daily activities) and requires at least one of the following:

- an overnight stay in a hospital, hospice, or residential medical-care facility (any incapacity or subsequent treatment in connection with the inpatient care is also covered); or
- continuing treatment by a health care provider.

### “continuing treatment”

Under family/medical leave laws, the *continuing treatment* provision requires one of the following:

- a condition causing incapacity for more than three days that requires: (1) two or more visits to a health care provider, or (2) one visit with a regimen of continuing treatment and supervision;
- a chronic condition continuing over an extended period of time and requiring periodic doctor visits, and which may cause episodic rather than continuous incapacity;

- permanent or long-term absences due to a condition for which treatment may not be effective (such as terminal cancer) where the employee is under the supervision of, but not necessarily being actively treated by, a health care provider;
- absences to receive multiple treatments for (1) restorative surgery, or (2) a condition which would likely cause a period of incapacity of more than three days if not treated; or
- pregnancy and prenatal care.

Ordinarily, unless complications arise, cosmetic treatments or surgery, and treatments for routine conditions, such as the flu, generally are *not* considered serious health conditions.

### **“treatment”**

*Treatment* under the family/medical leave laws includes examinations to determine if a serious health condition exists and evaluation of that condition. Treatment does not include routine physical, eye or dental exams.

### **“health care provider”**

The term health care provider includes:

- licensed medical doctors;
- clinical psychologists;
- optometrists, dentists, podiatrists;
- licensed nurse practitioners and nurse-midwives;
- clinical social workers; and
- chiropractors (in limited circumstances, depending on the treatment they provide).

If your employer’s health care plan accepts certification from your doctor of the existence of a serious health condition to substantiate a claim for benefits, your doctor probably counts as a health care provider under the family/medical leave laws.

### **“family member”**

You may take time off to care for your parent, child, spouse or registered domestic partner with a serious health condition. *Parent* means a biological parent or an individual who cared for you as a parent when you were a child. Parents-in-law are not included. *Spouse* means a husband or wife as recognized by the state in which you live. *Registered domestic partner* means partners of the same sex who have filed a Declaration of Domestic Partnership with the Secretary of State.

*Child* means a biological, adopted or foster child, a legal ward, or a child for whom you act as a parent even if you have not formally adopted the child. A child must be either (1) under the age of 18, or (2) 18 or older and incapable of self-care because of a mental or physical disability.

#### 4. What types of care are covered under family/medical leave laws?

Family/medical leave laws recognize that you may be needed to provide physical or psychological care, or both. So, for example, you may take a family/medical leave when you are needed to provide physical care for a family member with a serious health condition (such as bathing, administering medication, feeding, or transporting to the doctor where the family member is unable to take care of these needs by himself/herself) or if a doctor determines that your providing psychological comfort or reassurance to a family member would be beneficial (staying with a family member who is undergoing surgery, for example). You may also take leave when you are needed to arrange changes in care or to fill in for others who are caring for the family member.

#### 5. What are your employer's obligations in notifying you of your family/medical leave rights?

An employer that is covered by the family/medical leave laws (employs 50 or more employees) must do the following:

- post a notice explaining rights and responsibilities under the family/medical leave laws;
- provide detailed, written information about these rights and responsibilities to any eligible employee who gives notice of the need for family/medical leave;
- include employees' rights and responsibilities under the family/medical leave laws in the employee handbook, if the employer has one; and
- designate a leave, whether the employee is paid or unpaid, as one covered by the family/ medical leave laws and notify the employee of this designation.

If your employer has not notified you of your leave rights and you believe your employer is covered under the family/medical leave laws, ask your employer for information about these rights.

#### 6. What are the terms of a family/medical leave?

- Leave covered under the family/medical leave laws is unpaid unless another form of paid leave is used in conjunction with the leave (for example, sick or vacation time, Workers' Compensation, state disability insurance).

- In most cases, you must be reinstated to the same or equivalent position after your leave. You are *not* entitled to be reinstated if your job was eliminated for legitimate business reasons unrelated to your taking leave.
- Your employer must continue to pay for your health insurance benefits, if you have them, during your leave. This provision includes any benefits you receive for your dependents or family members.
- If you do not return from leave, your employer may recover from you the cost of continuing your health care benefits during your leave, unless the reason you cannot return is beyond your control (your health condition continues to prevent you from working, for example).

## 7. Are you required to notify your employer that you need to take family/medical leave?

You must give your employer notice 30 days before taking a family/medical leave that is foreseeable, such as for major surgery scheduled in advance. If you need leave suddenly or if there is a medical emergency, you or a family member must tell your employer as soon as possible, usually within a couple of days. You should notify your employer in writing of your need for a family/ medical leave, and make sure to have documentation of your employer's response.

You do not have to disclose your or your family member's diagnosis to your employer, but you must give your employer enough information to understand you have a serious health condition that prevents you from doing your job, or that you are needed to care for a family member who has a serious health condition.

Be sure that you understand your employer's rules for family/medical leave before you take leave. Ask your employer for a written description of your rights and responsibilities for family/medical leave.

## 8. What information may your employer request about your leave?

If you take a family/medical leave, your employer is allowed to request from you:

- medical certification from a health care provider (such as a doctor's note) regarding your or your family member's serious health condition;
- second and third opinions, at the employer's expense, for your own serious health condition (but your employer may not demand a second or third opinion for your family member's serious health condition);

- confirmation of your relationship to a family member needing your care, such as a birth or marriage certificate;
- periodic recertification if the original certification expires, you request an extension of leave, or circumstances change; and
- periodic reports during the leave about your status and intent to return to work.

Your employer may request a medical “fitness for duty” certification before you return to work as long as the certification is job-related, consistent with business necessity, and applies to all employees, regardless of their reason for taking family/medical leave.

## 9. What information should medical certification have?

A request from your employer for medical certification showing your need for leave (such as a doctor’s note) must be in writing. Certification does not have to disclose your or your family member’s diagnosis, but it must provide enough information for your employer to verify your need for leave. It should include:

- the date your or your family member’s serious health condition began;
- the probable duration of the condition;
- for your own condition: a statement that your condition makes you *temporarily* unable to work at all or perform one or more of the functions of your job (you should discuss the functions of your job with your doctor, and the doctor’s statement should reflect that discussion);
- for your family member’s condition: a statement that the serious health condition warrants your participation to provide care during a period of treatment or supervision of your family member; and
- the probable duration of your need for leave; and
- a statement verifying your need for intermittent leave or a reduced schedule, if applicable.

In most cases, your employer cannot ask your doctor for more than this basic information about your own serious health condition. Your employer may not contact your doctor directly without your permission. If a family/medical leave is also a workers’ compensation leave, however, your employer may follow workers’ compensation provisions regarding certification. If the certification for your family member’s serious health condition meets these requirements, your employer must accept it as sufficient. Your employer may not demand a second or third opinion for certification of a family member’s serious health condition. **Your employer must keep any medical information in a certification confidential.**

## 10. Can you take intermittent or part-time leave?

In some cases, you may use family/medical leave to work part time, or on an intermittent schedule. For example, after recovering from surgery, you may not be strong enough to work full time and may need a part-time schedule. To qualify for intermittent leave, you must show that intermittent leave is medically necessary and your or your family member's serious health condition is best accommodated through an intermittent or reduced work schedule. You may take intermittent leave not only where the family member's need for care is intermittent (for monthly counseling, for example), but also where you are needed only intermittently (such as when sharing care responsibilities with others).

You must attempt to arrange a schedule with your employer that minimizes disruption of your employer's operations, but still meets your or your family member's medical needs, as determined by the health care provider. Your employer may temporarily transfer you to a position with equal pay and benefits if that position better accommodates your need for intermittent leave.

Your employer may not make you take more leave than is medically necessary for your or your family member's condition, nor transfer you as punishment for taking leave (transfer you from the day shift to the late night shift, for example). Once you no longer need a reduced schedule, your employer must reinstate you to the same or equivalent position that you held before taking intermittent leave.

## 11. How does family/medical leave relate to other kinds of leave?

### **Vacation/Personal Leave/Sick Time**

Either you or your employer may choose to apply any accrued paid vacation or personal leave during your leave for your own serious health condition or to care for a family member. Either you or your employer may choose to apply any accrued sick leave during your leave for your own serious health condition; however, your employer may not designate sick leave as family/medical leave unless you have a health condition that is covered under the family/medical leave laws. In addition, if your employer's sick leave policy covers time to care for family members, you or your employer may choose to apply your accrued sick time during your leave to care for a family member.

If you take another form of paid leave, such as paid disability leave or Workers' Compensation leave, your employer cannot require you to also use sick or vacation time during the paid leave if that time off is also designated as family/medical leave. Your employer may not retroactively designate paid time off as a family/medical leave after you return to work.

If paid leave of any type is applied during a family/medical leave and your employer's requirements for using that paid leave are less stringent than those in the family/medical leave laws, only those less-stringent requirements may be imposed. (For example, if you do not need to submit a doctor's note to verify your need for personal leave, then your employer cannot ask you to submit a doctor's note to verify your need for family/medical leave.)

### **Disability Leave**

In certain cases, a health condition that is covered by the family/medical leave laws, if permanent, may also be a "disability" as defined by the Americans with Disabilities Act (ADA) or the California Fair Employment and Housing Act (FEHA). Unpaid leave may be a reasonable accommodation of a disability in some circumstances. In addition, your employer may offer paid temporary disability leave, or you may be eligible for State Disability Insurance (call the California Employment Development Department for more information).

A disability leave may run concurrently with a family/medical leave. In taking leave, you should make clear that your disability only temporarily prevents you from working. If claiming temporary disability benefits during a family/medical leave, you should make clear on your medical certification for disability benefits that your inability to work is temporary, even if the serious health condition is permanent. Then, upon returning from family/medical leave, you may seek any other reasonable accommodation for the disability that may be necessary under the ADA or FEHA.

### **Paid Family Leave**

Paid Family Leave entitles employees who participate in the State Disability Insurance system to receive a maximum of six weeks of partial pay each year when they take off work to care for a family member with a serious health condition. An employee can receive Paid Family Leave benefits while taking family/medical leave.

Employees who are not eligible for job-protected family/medical leave may still be eligible to receive Paid Family Leave benefits if they pay into State Disability Insurance, and must miss work to care for a family member. All employees who pay into SDI are eligible to receive Paid Family Leave benefits, regardless of the size of the employer or length of employment.

### **Kin Care**

Employers who provide sick leave must allow employees to use at least half of their annual sick leave time to care for a child, spouse, domestic partner or parent. If you qualify for sick leave, you can use this time to care for these family members (including domestic violence and sexual assault survivors) and your employer cannot discipline you for taking this time off.

### **Compensatory (“Comp”) Time**

Your employer may not require you to substitute compensatory time off for unpaid family/medical leave.

### **Workers’ Compensation Leave**

A serious health condition that is covered under Workers’ Compensation may also be covered under the family/medical leave laws. In such a case, an employee’s Workers’ Compensation leave may also be applied toward the 12 weeks of leave allowed for a family/medical leave. If you have a health condition that is covered under Workers’ Compensation and that qualifies you for family/medical leave, your employer may not force you to accept light duty instead of taking a family/medical leave. Although your Workers’ Compensation eligibility and payments may end if you are offered light duty and you refuse it, you may still take an unpaid family/medical leave for your serious health condition.

### **Leave Specified by Contract**

Family/medical leave laws establish minimum family/medical leave rights. If your employer provides greater family/medical leave benefits under a union contract, other contract, policy or practice, you are entitled to the more generous benefits.

## **12. Where can you get help regarding your family/medical leave rights?**

For information about the application of family and medical leave rights to your particular situation, contact the **Domestic Violence and Employment Project** of the Legal Aid Society – Employment Law Center **toll-free at (888) 864-8335**. The Project can help you to understand what your rights are, how to exercise your rights, and what to do if your rights are violated.

If you think your employer has violated family/medical leave laws, you can file a complaint with your local office of the United States Department of Labor, Wage and Hour Division no later than two years after the earliest discriminatory act (check the U.S. Government listing at the front of your local telephone directory) or with the California Department of Fair Employment and Housing no later than one year after the first discriminatory act (for information, call 1.800.884.1684).

If you sue your employer for violating family/medical leave laws, the court may reinstate you to your job and award you wages you should have been paid or a promotion you should have received, as well as reimbursement for legal costs.

Time limits apply. You should take action immediately if you think your rights have been violated.

**This fact sheet is intended to provide accurate, general information regarding legal rights relating to employment in California. Yet because laws and legal procedures are subject to frequent change and differing interpretations, the Legal Aid Society - Employment Law Center cannot ensure the information in this fact sheet is current nor be responsible for any use to which it is put. Do not rely on this information without consulting an attorney or the appropriate agency about your rights in your particular situation.**

*This project was supported by Grant No. 2005-WL-AX-0013 awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.*

For further information about your employment rights, call:

## **The SURVIVE Project**

**(888) 864-8335** Toll-free in California **(415) 593-0033** Outside California

The SURVIVE Project is a Project of the Legal Aid Society – Employment Law Center, a non-profit organization focusing on the employment-related legal rights of low-income workers and providing free legal information on a wide range of employment-related problems.

