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SB 299 PREGNANCY DISABILITY LEAVE (PDL) QUESTIONS AND ANSWERS

Question #1: Can PDL be used intermittently or does the employee qualify only for a one-time request?

While SB 299 does not mention this issue, under current PDL law a pregnant female employee may take the leave intermittently. Further, the employee can only be charged for the leave that is taken.

Question #2: How should we break down PDL hours when determining time-off?

For employees that are working five (5) days a week, eight (8) hours per day, the four (4) month leave would equal 88 working days, or 704 hours. If an employee works a part-time or alternate work schedule, the four (4) month leave should be calculated on a pro rata, or proportional basis. If an employee takes a small amount of leave, (for example, 4 hours due to severe morning sickness), then the leave should be broken down into hours, and as necessary, broken down into quarter hours.

Question #3: If an employee is FMLA qualified, and she is going to take PDL, is PDL required to run concurrently with FMLA?

If the employee is FMLA qualified, any unused FMLA time will run concurrently, assuming the County designates the time as FMLA leave and notifies the employee of this designation.

Question #4: Can PDL and CFRA time be taken concurrently?

No. PDL and CFRA are distinct and cannot be taken concurrently.

Question #5: Is the County required to pay for and maintain health insurance while an employee is taking CFRA leave?

Yes. CFRA says that an employer must maintain and pay its portion of health insurance premiums during the time that an employee is taking CFRA leave. There is, however, one important limit to this. Under CFRA, the employer's obligation to pay for health insurance ceases after the employee has taken 12 weeks of either CFRA or FMLA leave. That means that once the employee has taken 12 work-weeks of either FMLA leave and/or CFRA leave, there is then no longer any obligation under CFRA to pay for medical insurance, even if the employee has ample CFRA leave balances remaining.

Question #6 From a County perspective, what is the maximum length of time in a calendar year that a female can use the combination of all three leave provisions and what is the maximum length of time in a calendar year that the County is required to pay benefits in this case?

With one exception (explained below), the most leave a female employee may take, and have her insurance maintained during the leave, in a single calendar year is a combined 4 months (PDL) and 12 work-weeks (FMLA/CFRA).

We have identified two scenarios where the County could potentially have to pay its share of health insurance premiums for longer than the 4 months (in one calendar year) that is now required for pregnancy disability leave under SB 299:

- If the employee takes FMLA/CFRA leave early in the calendar year, prior to taking pregnancy disability leave
- If the employee becomes eligible for FMLA/CFRA leave after the employee has already taken (or started taking) pregnancy disability leave,

Under both of these scenarios, the County could potentially be responsible for maintaining the employee's health insurance up to as much as 4 months and 12 work-weeks. Or, at very least, more than the 4 months that is required under SB 299.

The exception to all of the above is when an employee is taking FMLA leave to assist a family member who is in the military and who has been seriously injured in the line of duty. In that situation, the employee could use up to 26 weeks of leave to care for the family member without using any of the employee's other FMLA leave, CFRA leave or PDL. The County is obligated to pay for and maintain health insurance during this type of FMLA leave.

Question 7#: Is the legislation based on the rolling 12 months or on a calendar year?

Under SB 299, a female employee is entitled to up to "four months of leave over the course of a 12-month period . . . "While there is some ambiguity in how this should be applied, and the new law does not talk specifically about using the calendar year method, County Counsel has concluded that it allows for the application of a calendar year. The County currently uses the calendar year for calculating FMLA leaves, and the same method should be used to calculate PDL. Therefore, a female employee is eligible for a new four-month PDL period every January 1st, and can use some time at the end of one year and still be eligible for four additional months at the start of the next year. There may be more guidance on this in the future.

Question #8: Like those out on FMLA, are we mandated to hold the job open for the employee upon return to work form PDL?

SB 299 changes only the County's obligation to maintain health insurance for employees on PDL, and does not discuss holding a job open. The County, however, is already obligated under current law to allow a pregnant female employee to take up to 4 months of leave "and thereafter return to work." SB

299 only adds to this law by obligating employers to maintain health insurance during that 4 month period.

Question #9: Will using PDL coding in VTI and CAPS+ reporting be a violation of HIPPA laws?

County Counsel does not see any HIPPA issues here. When an employer receives health information from an employee and is acting in its role as employer, HIPPA does not apply. Moreover, a good argument can be made that the designation of being on “pregnancy leave” is not protected health information.

Question #10: Does the County need to maintain and pay for health insurance for those female employees who went out on PDL prior to January 1, 2012, and continue to be out on PDL after January 1, 2012?

Yes. County Counsel indicates it does not matter when an employee begins her PDL. As of January 1, 2012, all female employees on PDL have the right to have their insurance maintained, regardless of whether they start their PDL after January 1, or are already on PDL when that date arrives. The County’s duty to maintain the insurance, however, is only triggered if the employee makes the request.

Question #11: Does the PDL coverage period include dental care and/or other supplemental benefits that would normally be covered under FMLA?

Under the new law, the County must maintain and pay for coverage under a “group health plan” during PDL. It can be unclear exactly what that includes, but what is clear is that SB 299 defines “group health plan” in an identical manner as FMLA. Therefore, an easy answer to this question is to maintain exactly the same coverage provided by the County under PDL as we have been maintaining under FMLA leave. *Note: the County only provides dental and supplemental benefits to selected bargaining units. Under FMLA, the County also maintains and pays for dental coverage for the selected bargaining units.*

Question #12: Is there any effect on Health & Welfare fringe benefits?

Same answer as above. If our policy and practice is to maintain a certain benefit when an employee takes FMLA leave, then we should also apply that policy and practice to PDL. SB 299 does not require the County to maintain a certain benefit for employees that is not part of the “group health plan” but has been negotiated into an MOU (e.g. Dental) As such, we will not generate the health and welfare fringe for employees on PDLV because the health and welfare fringe was a negotiated item specific to Family Leave and not PDL.

Question #13: If PDL goes beyond the FMLA period, is the County required to provide health insurance coverage in addition to time-off?

Yes. SB 299 creates a new and separate legal obligation for the County to maintain and pay for health insurance during PDL, which can last up to 4 months. Therefore, if PDL goes beyond the 12 work-week FMLA leave period, the County must nonetheless pay for and maintain benefits for the entire PDL leave period, up to 4 months.

Employee Benefits: Questions 14-17 are for information only and do not require action by the Departments' HR staff. The Departments' HR staff should update the CAPS+/HR System with the appropriate "F" status code in a timely manner. The status code change will initiate any necessary communication related to health plan coverage and billing. If employees have questions regarding their health plan coverage and/or billing, please refer them to the Benefits Center rather than trying to answer questions. Once the Benefits Center receives the County's status code change, they will be able to discuss the impact to the participants specific coverage situation.

Question #14: Is the eligibility requirement of the new-hire waiting period affected by PDL?

Newly hired employees' health plan coverage begins after they satisfy the plan waiting period. If a new employee goes out on unpaid leave before satisfying the waiting period, they are not able to enroll until they return to work. Once they return to work, the waiting period begins again regardless of how many days they worked prior to their leave.

Since the employee did not qualify for coverage by the beginning of her leave, County Counsel believes the employee would not be an "eligible employee" and the County would not be required to maintain coverage. Further, the bill language talks of *maintaining* coverage. Coverage could not be "maintained" because it had not yet been established. This may change in the future, however, as it becomes more clear how the new law should be properly applied.

Question #15: An employee with health plan coverage goes out on unpaid leave under PDL. Does the employee still have the choice to maintain or drop coverage? Under current enrollment requirements, the employee would not be eligible for enrollment until they satisfy the waiting period after their return from leave. Are the eligibility requirements, including the waiting period, affected by PDL?

The relevant part of the bill amends only Government Code Section 12945(b), which deals with coverage requirements when an employee is on a pregnancy leave. The bill does not address reinstatement of coverage and the County should continue to administer coverage issues as required under prior law. County Counsel believes we should treat such situations as they would be treated under the FMLA.

Employees on an unpaid FMLA may choose to drop their coverage while on leave. If they drop coverage they are subject to waiting period when they return from leave. The same should apply for PDL.

Question #16: An employee goes out on an unpaid leave (either FMLA or another type of leave other than PDL). The employee chooses to drop coverage. While out on leave without coverage, they subsequently meet the requirements of PDL. Under current enrollment requirements, the employee will not be eligible for enrollment until they satisfy the waiting period after their return from leave. Are the eligibility requirements including the waiting period affected by PDL?

Since the employee is no longer eligible for coverage County Counsel believes that the employee would need to return to a paid status with a 30 day waiting period. The employee would not be an "eligible employee" and the County would not be required to maintain coverage. Further, the bill language talks of *maintaining* coverage. Coverage would not be "maintained" because it has not been established. This may change in the future, however, as the proper application of this new law becomes more clear.

Question #17: If employee goes on unpaid leave, including FMLA and they do not pay the invoice for the employee portion of the coverage, they are cancelled for non-payment. They have not met the conditions for coverage that they would have met as an employee. They must pay by the end of each month or they will be cancelled (i.e., must pay by November 30th for November coverage). Does PDL affect the administration?

The bill language essentially mirrors that of FMLA and CFRA, but extends it for up to 4 months and to pregnancy. County Counsel believes that it would probably be lawful since we administer the FMLA in this manner. Note that under FMLA, the County must meet certain requirements before dropping coverage. There currently are not any such requirements under SB 299, but might be in the future.

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