



SCHOOL & COLLEGE LEGAL SERVICES OF CALIFORNIA

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LEGAL UPDATE

November 12, 2015

To: Superintendents, Member School Districts (K-12)
From: Monica D. Batanero, Associate General Counsel *MDB*
Carl D. Corbin, General Counsel *CDC*
Subject: Differential Pay Will Now Be Available to Certificated School District Employees During Maternity and Paternity Leave Taken Pursuant to the California Family Rights Act – Ed. Code §44977.5 (AB 375)
Memo No. 31-2015

Effective January 1, 2016, pursuant to Education Code section 44977.5, certificated employees who are eligible for leave under the California Family Rights Act¹ (“CFRA”) and take CFRA “maternity or paternity leave” will be entitled to “differential pay” for up to 12 weeks *if they have exhausted all available sick leave, including accumulated sick leave, and continue to be absent on account of maternity or paternity leave.*² The 12-week period shall be reduced by any period of sick leave, including accrued sick leave, taken during a period of maternity or paternity leave pursuant to CFRA.³

The term “maternity or paternity leave” means leave for the birth of a child of the employee, adoption of a child by an employee, or foster care of a child by an employee.⁴ For an employee who has been disabled due to pregnancy, childbirth, or a related medical condition, CFRA “maternity leave” (also familiarly referred to as “baby bonding” leave) begins after exhaustion of California Pregnancy Disability Leave (“PDL”)⁵ or when the employee’s health care provider deems the employee able to return to work, whichever occurs first.⁶

¹ To be eligible, the employee must have worked at least 12 months for the district in a location where at least 50 employees are employed within a 75 mile radius, provided at least 1,250 hours of service in the 12-month period preceding leave, and not have taken 12 workweeks of CFRA leave in the 12-month period applicable in the district.

² Education Code §44977.5(a).

³ Education Code § 44977.5(b)(1).

⁴ Education Code § 44977.5(e).

⁵ PDL is up to four (4) months – the number of days the employee would normally work within four calendar months. (2 CCR §11035).



“Differential pay” is the difference between the employee’s regular salary and the sum actually paid, or that would have been paid, to a substitute employed to fill the absent employee’s position. A school district employer is required to “make every reasonable effort to secure the services of a substitute employee.”⁷

While receiving differential pay during a maternity or paternity leave, the employee would continue to be entitled to employer-paid contributions toward health and welfare benefits, and the employee would continue to be responsible for any employee-paid contributions toward such benefits.

The right to differential pay during maternity or paternity leave is in addition to the up to five school months of leave with differential pay available to certificated employees who exhaust all available sick leave, including accumulated sick leave, and continue to be absent on account of illness or accident.⁸ Thus, a certificated employee could receive five school months of differential pay due to pregnancy and related disabilities or illness or injury and, when released back to work, be eligible for up to an additional 12 weeks of differential pay during CFRA “baby bonding” leave. *Please see the attached Pregnancy Related Leaves chart as a visual reference.*

A certificated employee is not entitled to more than one 12-week differential pay period for maternity or paternity leave per school year. However, if a school year terminates before the 12-week period is exhausted; the employee may take the balance of the 12-week period in the subsequent school year.⁹

To the extent this change in the law conflicts with a provision of a collective bargaining agreement entered into by a public school employer and an exclusive bargaining representative before January 1, 2016, it shall not apply until expiration or renewal of that collective bargaining agreement.¹⁰

Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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⁶ A question arose whether AB 375 would change the CFRA definition of when the 12 weeks of differential pay began – at the birth of the baby or upon being cleared to return to work after recovery from the pregnancy (using PDL). Our office contacted the Department of Fair Employment and Housing (“DFEH”) and received confirmation that there is no change in law – the 12 weeks of CFRA leave begins following the exhaustion of PDL or when the employee is medically cleared to return to work, whichever event occurs first.

⁷ Education Code § 44977.5(a).

⁸ Education Code § 44977.

⁹ Education Code § 44977.5(b)(2).



PREGNANCY RELATED LEAVES

PDL (first day of pregnancy-related disability for up to 4 mos. = 17 1/3 weeks)



Up to 12 workweeks for baby bonding**

Effective 1/1/16, K-12 certificated employees are eligible for up to 12 weeks of “differential pay” ***



FMLA (up to 12 weeks for EE “serious health condition” and for birth/care of newborn)



Employee’s S/L + “Differential” Leave



+ FEHA Reasonable Accommodation —————?—————>

* (e.g., additional leave or other accommodation)

***If employee is disabled by pregnancy-related condition, CFRA (bonding leave) runs consecutively with PDL. Maximum entitlement to employer contribution for group health benefits = (PDL) 17 1/3 wks. + (CFRA Bonding) 12 wks = 29 1/3 wks. [2CCR§11046(d)]*

****The 12-weeks of differential pay is reduced to the extent employees use paid sick leave during the baby bonding leave. (Ed. Code §44977.5(b)(1))*

Revised October 2015