California Insights: FMLA Retaliation

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This State Insights Article addresses Family and Medical Leave Act (FMLA) retaliation as analyzed by the US Court of Appeals for the Ninth Circuit and California federal courts. The article also discusses the California Family Rights Act (CFRA). This Insights Article discusses covered employees, covered employers, the elements of a retaliation claim, employer defenses and employee remedies under each law. It is intended as a guide for private employers in California. Local or municipal laws may impose different or additional requirements.

In California, employers are subject to both the federal Family and Medical Leave Act of 1993 (FMLA) and the California Family Rights Act (CFRA), also known as the Moore-Brown-Roberti Family Rights Act. Federal courts interpret the FMLA as prohibiting California employers from retaliating against employees for either:

- Opposing the employer's actions in violation of the FMLA (*29 U.S.C. § 2615(a)(2)*; *29 C.F.R. § 825.220(a)(2)*; *Liu v. Amway Corp., 347 F.3d 1125, 1133 n.7 (9th Cir. 2003)* and *Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112, 1124-25 (9th Cir. 2001)*).
- Giving information, testifying or preparing to testify, or filing a charge or claim about an FMLA violation (*29 U.S.C. § 2615(b)*; *29 C.F.R. § 825.220(a)(3)*; *Liu, 347 F.3d at 1133 n.7* and *Bachelder, 259 F.3d at 1124-25*).

Unlike other US courts of appeals, the Ninth Circuit analyzes adverse employment actions against employees for taking leave under the FMLA as prohibited interference with employees' exercise of FMLA rights rather than retaliation (*29 U.S.C. § 2615(a)(1)* and *29 C.F.R. § 825.220(c)*; compare *Liu, 347 F.3d at 1133 n.7* and *Bachelder, 259 F.3d at 1124-25* with *Burnett v. LFW Inc., 472 F.3d 471, 481-82 (7th Cir. 2006)*).

The CFRA prohibits employers from taking adverse employment actions against employees for taking or attempting to take CFRA-protected leave and analyzes these actions as retaliation (*Cal. Gov't Code §§ 12940(h) and 12945(l)*; *Cal. Code Regs. tit. 2, § 11094* and *Dudley v. Dep't of Transp., 108 Cal. Rptr. 2d 739 (Ct. App. 2001)*).

The FMLA permits employees who suffer prohibited interference or retaliation to recover various types of damages and equitable relief (*29 U.S.C. §§ 2615(a)(2)*; *29 U.S.C. §§ 2617(a)(1) and (a)(3)*; *29 C.F.R. §§ 825.220(b) and (c)*; *29 C.F.R. § 825.400(c)(2)* and see *Employee Remedies under the FMLA*). Similarly, the CFRA permits employees who suffer prohibited retaliation, including adverse employment actions for using or attempting to use CFRA leave, to recover various forms of damages and relief (see *Employee Remedies under the CFRA*).

For more on California leave laws, see *State Q&A, Leave Laws: California (http://us.practicallaw.com/1-506-5986)*.

FEDERAL LAW: FMLA

The FMLA is a federal statute that requires covered employers to offer unpaid family or medical leave to eligible employees for certain qualifying reasons. For most purposes, FMLA leave extends up to 12 weeks during an employer-specified 12-month period, but up to 26 weeks of leave are available to care for a military family member. For more information on the FMLA generally, see *Practice Note, Family and Medical Leave Act (FMLA) Basics: What is the FMLA? (http://us.practicallaw.com/9-505-1339)*.

COVERED EMPLOYERS

An employer is covered under the FMLA if it has 50 or more employees on its payroll for 20 or more calendar workweeks (which do not need to be consecutive) in either the current or preceding calendar year (*29 U.S.C. § 2611(4)(A)(i)* and *29 C.F.R. § 825.104(a)*). For more information, see *FMLA Employer Coverage, Employee Eligibility and Qualifying Reason Checklist (http://us.practicallaw.com/1-503-9025)*.

COVERED EMPLOYEES

The term "employee" under the FMLA has the same meaning as it has under the Fair Labor Standards Act of 1938 (FLSA), which defines

"employee" broadly as any individual employed by an employer. To be eligible for leave under the FMLA, an employee must have worked:

- For a covered employer for at least 12 months (which need not be consecutive).
- At least 1,250 hours during the 12 months before the first day of the requested leave.

The FMLA does **not** apply, however, to an otherwise eligible employee if both:

- The employee works at a facility with fewer than 50 employees.
- The employer has fewer than 50 employees within 75 road miles of that facility.

(*29 U.S.C. § 2611(2)*.)

Certain airline flight crew employees have different eligibility requirements (*29 C.F.R. § 825.801* and see *Practice Note, Family and Medical Leave Act (FMLA) Basics: Special Rules for Airline Flight Crew Employees (http://us.practicallaw.com/9-505-1339)*).

For more information about covered employees, see *Practice Note, Family and Medical Leave Act (FMLA) Basics: Coverage of Employees (http://us.practicallaw.com/9-505-1339)*.

FMLA RETALIATION

Retaliation Defined

In the Ninth Circuit FMLA retaliation is taking an adverse employment action against an employee for:

- Opposing employment practices that violate the FMLA (*29 U.S.C. § 2615(a)(2)*; *29 C.F.R. § 825.220(a)(2)*; *Liu, 347 F.3d at 1133 n.7* and *Bachelder, 259 F.3d at 1124-25*).
- Filing a charge or claim, giving information, testifying or preparing to testify about an FMLA violation (*29 U.S.C. § 2615(b)*; *29 C.F.R. § 825.220(a)(3)*; *Liu, 347 F.3d at 1133 n.7* and *Bachelder, 259 F.3d at 1124-25*).

Interference differs from retaliation. An interference claim under the FMLA requires that the employer interfere with the employee's exercise of FMLA rights, by, for example:

- Refusing to authorize leave the employee is entitled to under the FMLA.
- Discouraging the employee from taking FMLA leave.
- Discriminating against employees who have taken FMLA leave in, for example, promotion or disciplinary decisions.

(See *Liu, 347 F.3d at 1133 n.7* and *Bachelder, 259 F.3d at 1124*.)

Elements of an FMLA Retaliation Claim

The Ninth Circuit has not expressly set out the required elements of an FMLA retaliation claim (see *Bachelder, 259 F.3d at 1125, n.11*). However, according to district courts within the Ninth Circuit, borrowing from analysis of Title VII of the Civil Rights Act of 1964 etaliation claims for opposing prohibited employment practices, a case for retaliation under the FMLA requires a showing that:

- The employee engaged in activity protected by the FMLA (see *29 U.S.C. §§ 2615(a)(2), (b)*; *Liu, 347 F.3d at 1133 n.7* and *Bachelder, 259 F.3d at 1124*).
- The employer subjected the employee to adverse employment action.
- There is a causal connection between the protected activity and the adverse action.

(*Jadwin v. Cnty. of Kern, 610 F. Supp. 2d 1129, 1170-74 (E.D. Cal. 2009)*.)

To prove a causal connection, the employee must show evidence that the employer was aware that the employee engaged in the protected activity (*Jadwin, 610 F. Supp. 2d at 1173*).

The Ninth Circuit has not ruled whether several factors considered critical to FMLA retaliation claims in other circuits are material to FMLA retaliation claims including whether:

- There is a threshold for evaluating if a complained of adverse employment action is sufficiently "material" (*Metzler v. Fed. Home Loan Bank of Topeka, 464 F.3d 1164, 1171 (10th Cir. 2006)*).
- Or to what degree a plaintiff must show that the protected activity influenced the employer's decision to take an adverse action, such as whether it was a substantial or motivating factor for the employer's action (see, for example, *Goelzer v. Sheboygan Cnty., 604 F.3d 987, 995 (7th Cir. 2010)*).

In other circuits, where FMLA retaliation is defined differently, when employers take adverse employment actions against employees who use or attempt to use FMLA leave, employees must prove retaliation was a substantial or motivating factor for the employer's actions (for example, see *Goelzer, 604 F.3d at 995*). In the Ninth Circuit, an employee subject to the same employer actions would need to prove an interference claim by showing that:

- He took FMLA-protected leave.
- The employer considered the leave "a negative factor" for an adverse employment decision (*Bachelder, 259 F.3d at 1125*).

Burden-shifting Framework for Proof

For retaliation claims under other federal employment laws, the Ninth Circuit uses the *McDonnell Douglas* burden shifting framework (*Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1064 (9th Cir. 2002)*). Under the *McDonnell Douglas* framework:

- The plaintiff must make a prima facie case that the employer's action was unlawful by showing that:
  - he engaged in a statutorily protected act;
  - the employer took an adverse employment action against him; and
  - there is a causal connection between the employee's protected activity and the employer's adverse action.
- The defendant employer then must produce evidence showing it had a legitimate, non-retaliatory reason for its employment action.
- The plaintiff then must show that the reasons offered by the employer are pretextual and that the actual reasons for its action are retaliatory.

(*McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)*.)

The Ninth Circuit has not decided whether to use this framework in FMLA retaliation lawsuits used for employment retaliation claims under other statutes (see *Bachelder, 259 F.3d at 1132, n.11*). Other circuit

courts have applied that analysis to FMLA retaliation cases (see, for example, *Potenza v. New York, 365 F.3d 165, 168 (2d Cir. 2004)*).

In an FMLA interference claim, such as a claim that an employer took an adverse employment action against an employee for taking FMLA leave, the Ninth Circuit does not apply a burden-shifting scheme that other circuit courts would in similar cases. Instead, a plaintiff must prove by a preponderance of the evidence that an employer considered use of FMLA leave to which he was entitled as a negative factor for an adverse employment decision. A plaintiff can make this case by using either direct or circumstantial evidence, or both. (*Bachelder, 259 F.3d at 1125*.)

Employer Defenses to FMLA Retaliation Claims

Employers defending FMLA retaliation or interference claims may, among other things, show that:

- The plaintiff cannot establish the elements of his FMLA claim (see *Retaliation Defined* and *Elements of an FMLA Retaliation Claim*).
- The employee would have taken the challenged adverse employment action for reasons unrelated to FMLA protected activity (*29 C.F.R. § 825.216(a)* and *Sanders v. City of Newport, 657 F.3d 772, 780-81 (9th Cir. 2011)*).

In FMLA interference cases, employers can defend decisions not to restore employees who take FMLA protected leave to their prior positions, where they can prove that the employee on FMLA leave:

- Originally worked a shift or overtime hours that have been eliminated (*29 C.F.R. § 825.216(a)(2)*).
- Was hired for a specific duration or only to perform work on a particular project, and that employment duration or project is over (*29 C.F.R. § 825.216(a)(3)*).
- Is a highly compensated or "key" employee whose return would cause substantial and grievous economic injury to the employer. However, the employer must provide notice to the employee that he is a "key" employee and if the determination is made when the employee is on leave the employer must provide a reasonable time to return from leave. (*29 C.F.R. § 825.216(b)*.)
- Failed to provide a fitness-for-duty certificate to return to work (under the conditions described in *29 C.F.R. § 825.312*), justifying the employer's delay in restoring the employee to his prior position (*29 C.F.R. § 825.216(b)*).
- Fraudulently obtained the FMLA leave (*29 C.F.R. § 825.216(d)*).

Employee Remedies under the FMLA

Employees who are harmed by employer violations of the FMLA, including employees who suffer prohibited forms of retaliation, may recover in private civil actions:

- Damages for:
  - lost compensation;
  - lost employee benefits; and
  - other related monetary losses.
- Interest on any damages.
- Liquidated damages equal to any compensation or employee benefits losses or other related monetary losses with interest, unless the employer can show it:
  - acted in good faith; and
  - reasonably believed that its conduct did not violate the FMLA.
- Equitable relief, including:
  - employment;
  - reinstatement; and
  - promotion.
- Fees and costs.

(*29 U.S.C. §§ 2615(a)(2), (b); 29 U.S.C. §§ 2617(a)(1), (a)(3); 29 C.F.R. §§ 825.220(a)(2), (3), (c)* and *29 C.F.R. § 825.400(c)*.)

The damages recoverable under the FMLA are defined and measured by actual monetary losses. The accrual period for backpay is limited by the FMLA's two-year statute of limitations, which may be extended to three years for willful violations. (*29 U.S.C. §§ 2617(a)(1)(A)(i)-(iii), (c)(1), (2)* and *Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 739-40 (2003)*).

Similarly, although the Ninth Circuit has not directly addressed the issue, the US Court of Appeals for the Fifth Circuit has held that a plaintiff cannot recover the lost potential value of benefits such as insurance. Instead, the measure of damages for lost insurance benefits in FMLA cases is either:

- Actual replacement cost for the insurance.
- Expenses actually incurred that would have been covered under a former insurance plan.

(*Lubke v. City of Arlington, 455 F.3d 489, 498-99 (5th Cir. 2006)*.)

The US Secretary of Labor may bring a civil action under the FMLA to:

- Recover damages on behalf of an employee.
- Seek injunctive relief to stop any withholding of wages, salary, employment benefits or other compensation, plus interest.

(*29 U.S.C. §§ 2617(b)(2), (d)*.)

CALIFORNIA STATE LAW: CFRA

The CFRA requires covered employers to offer unpaid family or medical leave to eligible employees for certain qualifying reasons. Eligible employees are entitled to up to 12 weeks of CFRA leave in a 12-month period (*Cal. Gov't Code § 12945.2(a)*).

For more information on the CFRA, see *State Q&A, Leave Laws: California (http://us.practicallaw.com/1-506-5986)*.

COVERED EMPLOYERS

All California employers with 50 or more employees are covered by this law (*Cal. Gov't Code § 12945.2(c)(2)(A)*).

COVERED EMPLOYEES

All California employees are eligible to take leave, if they:

- Have more than 12 months of service with their employer.
- Have worked at least 1,250 hours in the 12-month period before the date of the requested leave.
- Work at a location for an employer who has 50 or more employees working within a 75-mile radius of that location.

(*Cal. Gov't Code § 12945.2*.)

CFRA RETALIATION

Retaliation Defined

The CFRA defines retaliation as any of the following employer actions for an employee's exercise of rights under the CFRA:

- Discrimination.
- Discharge.
- Expulsion.
- Fine.
- Refusal to hire.

(*Cal. Gov't Code §§ 12940(h), 12945.2(l)* and *Cal. Code Regs. tit. 2, § 11094*.)

Elements of a CFRA Retaliation Claim

A retaliation claim under the CFRA requires that:

- The employer is covered by the CFRA.
- The employee is eligible for leave under CFRA.
- The employee exercised the right to take leave.
- The employee suffered an adverse employment action as a result.

(*Dudley v. Dep't of Transp., 108 Cal. Rptr. 2d 739, 744 (Ct. App. 2001)*).

The employee must timely file a complaint with the California Department of Fair Employment and Housing (DFEH) and exhaust administrative remedies before filing suit in civil court (*Cal. Gov't Code § 12965(b)*; *Mora v. Chem-Tronics, Inc., 16 F. Supp. 2d 1192, 1201 (S.D. Cal. 1998)* and *Okoli v. Lockheed Technical Operations Co., 36 Cal. App. 4th 1607, 1613 (Ct. App. 1995)*.)

Burden-shifting Framework for Proof

In construing the CFRA, California courts look to the federal courts' interpretation of the FMLA (see *Neisendorf v. Levi Strauss & Co., 49 Cal. Rptr. 3d 216, 219 n.1 (Ct. App. 2006)*). Similar to the federal procedure in retaliation cases, California courts employ a burden-shifting framework.

After the employee establishes a prima facie case for retaliation under the CFRA, the employer must show a legitimate reason for the adverse employment actions. If the employer does so, the burden then shifts to the employee to prove the employer intentionally retaliated against the employee for taking leave. (*Faust v. Cal. Portland Cement Co., 58 Cal. Rptr. 3d 729, 735-36 (Ct. App. 2007)*.)

Employee Remedies under the CFRA

Until June 27, 2012, an employee subject to CFRA retaliation could obtain equitable relief, such as an order of reinstatement, hiring, promotion or transfer, and an award of back pay, front pay and other compensatory damages, including emotional distress, punitive damages, and reasonable costs and attorney fees (*Cal. Gov't Code § 12970*). However, California Government Code Section 12970 was repealed as part of Senate Bill No. 1038. As of the date of this publication, the California legislature has not passed a bill to replace the repealed provision. However, courts have broad discretion in selecting remedies for CFRA violations (*Cal. Gov't Code § 12965(c)*).

An employee also has a potential common law claim for wrongful discharge in violation of California public policy (*Nelson v. United Techs., 88 Cal. Rptr. 2d 239, 245-48 (Ct. App. 1999)* and *Liu, 347 F. 3d at 1137-38*).

There are limitations on employee remedies under the CFRA. A "key" employee need not be reinstated after medical leave if the refusal to reinstate is necessary because the reinstatement would cause substantial and grievous economic injury to the operations of the employer (*Cal. Code Regs. tit. 2, § 11094*).

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