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California's Paid Family Leave Act Is Less Onerous Than Predicted

By Jennifer Redmond and Evgenia Fkiaras

In 2002, Gov. Gray Davis signed into law the Paid Family Leave Act (PFL), providing insurance benefits for eligible employees on family leave. PFL is a form of coverage under California's State Disability Insurance (SDI) program, which originally covered only employees on leave for their own disability.

Under PFL, employees may get partial wage replacement if they take time off from work to care for a seriously ill family member or to bond with a new child.

As the first mandatory paid leave law in the country, PFL was met with alarm from employers across the state who feared that they would be forced to shoulder at least some of the cost and administrative burden of the program even though in theory these responsibilities were supposed to fall on the employees and the government, respectively. Employers also worried that PFL would expose them to liability.

PFL came into effect on July 1, 2004. More than five years later, employers' concerns have so far not been realized. This is not only because fewer employees than expected have taken advantage of PFL, but also because PFL does not create independent leave and reinstatement rights.

Employer Reactions

Riding on the back of increasingly onerous leave requirements, PFL raised employers' concerns about the effects it could have on their businesses and thus the efficacy of the law in helping employees. The burden of PFL, employers argued, could drive businesses to other states or lead to layoffs. Various employer groups, including the California Chamber of Commerce, opposed the law.

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Employers feared that PFL would do exactly what it was meant to do: encourage more employees to take time off from work.

Because PFL applies to almost all private employers, regardless of size, this would be particularly hard on small businesses struggling to ensure that the absent employee's work was getting done. Terminating an absent employee would force employers to rehire and train a replacement, and retaining the employee would require that a small workforce take on additional responsibilities and perhaps work overtime during the employee's leave.

The version of PFL that eventually became law provided that PFL was funded 100 percent by employee contributions. Nevertheless, employers feared that they would eventually be required to contribute to the fund because the anticipated upswing in use of leave would deplete it. In addition, administration of PFL falls on the Employment Development Department (EDD), but uncertainty about how this would translate in practice caused employers to worry about the administrative burden that could be passed off to them.

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The legal entanglements that could arise from PFL administration also worried employers. Although PFL does not require reinstatement, employers were concerned that disgruntled former employees would sue for termination in violation of a public policy that promotes access to leave in support of family obligations. Employers also worried that such lawsuits could include claims of retaliation for exercising a legal right or discrimination—if, for example, a company reinstated one employee after use of PFL but not another.

Actual Use Far Lower Than Projected

The number of employees who have applied for PFL appears to be smaller than predicted. The EDD had projected that up to 310,000 workers would use PFL benefits in the first 12 months, yet less than half that number of claims were filed. One notable study by Dr. Mark A. Schuster, a professor of pediatrics at Harvard Medical School, and others (Mark A. Schuster et al., "Awareness and Use of California's Paid Family Leave Insurance Among Parents of Chronically Ill Children," 300 *The Journal of the American Medical Association* 1047 (2008)) demonstrated that parents of chronically ill children did not take more leave after PFL became available: 81 percent of those questioned took one or more days of leave before PFL was an option and only 79 percent after.

Although this may not reflect all leave-takers—approximately 86 percent to 89 percent of filed claims are for baby bonding—the consensus among those studying PFL usage is that knowledge of PFL rights is low among eligible employees, particularly among those who are in most need of taking leave. Whereas over half of eligible California workers were aware of their federal Family and Medical Leave Act (FMLA) rights and over two-thirds knew of their general SDI rights, awareness of PFL had yet to reach 30 percent as of 2007. This may not be conclusive, but it does indicate that actual usage of PFL falls short of what employers had projected.

The relatively small volume of PFL usage is concentrated on larger employers. Statistics from 2006 show that individuals working for employers with fewer than 1,000 employees accounted for only half of PFL claims even though these individuals make up close to 86 percent of the workforce. This may be partly because unlike employees of large employers, who are covered by the FMLA and the California Family Rights Act (CFRA), employees of small employers have no reinstatement rights.

In addition, larger employers are probably better at communicating leave rights and options to their employees due to their more sophisticated human resource functions and the requirements of the FMLA and the CFRA. For these reasons, small businesses will probably continue to have a disproportionately small burden of total PFL usage relative to the percentage of workers they actually employ.

Even if overall awareness of PFL increases, the mechanics of the law may still prevent its widespread use. At about 55 percent wage replacement—money that is still subject to federal, although not state, income tax—many employees still cannot afford to take the time off. Employees are required to wait seven days before being eligible for benefits, and employers may require that employees use up to two weeks of vacation leave or other paid time off before becoming eligible for PFL benefits. Put together, all of this may deter employees from taking advantage of PFL.

No Employer Bailout Yet

Also contrary to some predictions is the fact that the PFL fund has not yet needed an employer bailout through a legislative "fix." The EDD tracks the balance of its fund, which

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California Paid Family Leave In Context

> Even older than the unpaid leave laws is California's State Disability Insurance (SDI) program, which dates back to 1946.

The Paid Family Leave Act (PFL) is a child of the trend toward accommodating employees in the modern workforce who need to take time off from work for various family or medical reasons. Current laws covering these employees fall under two general categories: laws that require employers to provide unpaid leave to their employees, and programs that provide partial wage replacement for employees on leave.

By the time PFL was enacted, California employers were already subject to both federal and state leave laws mandating unpaid leave for family and medical reasons. Although they vary in detail, both the federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) require employers with 50 or more employees within a 75-mile radius to provide eligible employees with up to 12 weeks of unpaid leave for an employee's serious health condition, for an employee to care for a qualifying family member with a serious health condition, or for an employee to bond with a newborn or newly adopted/fostered child. The FMLA recently was expanded to include leave rights for qualifying family members of military personnel.

California's Fair Employment and Housing Act (FEHA), which partially overlaps with the FMLA, provides that employers with at least five employees must provide up to four months of unpaid leave to employees with a disability due to pregnancy or childbirth or a related medical condition. California has several other laws that provide employees with leave rights for other family-related reasons, such as to spend time with a military service-member spouse or to participate in a child's school activities. Employers manage and administer these leaves. Crucial to these leave laws is an employee's right, with limited exceptions, to be reinstated at work.

California's SDI Program

Even older than the unpaid leave laws is California's State Disability Insurance (SDI) program, which dates back to 1946. Eligible employees may receive up to 52 weeks of partial wage replacement in a calendar year from a fund administered by the state when a non-work-related illness or injury renders them unable to perform their job. Employees may receive 55 percent of their regular wages, up to a cap of $987 per week in 2010.

Currently, an estimated 13 million employees pay into this fund through mandatory payroll deductions and are eligible to receive its benefits. Employees seeking SDI benefits apply for these benefits through the Employment Development Department (EDD), the agency in charge of administering the program. Unlike unpaid leave laws, SDI does not mandate that an employer provide leave nor that it reinstate an employee at the conclusion of the employee's leave period. Instead, it gives eligible employees who take disability leave and would otherwise suffer a loss of wages the opportunity to receive at least partial pay during their time off from work.

Extension of Program

PFL is an extension of the SDI program. Recognizing that a majority of workers were unable to take advantage of mandatory leave laws because of the financial difficulty in taking unpaid time off (according to a U.S. Department of Labor survey in 2000, 78 percent of respondents stated they needed leave under the FMLA, but they could not afford to take it), California decided to broaden SDI coverage to include employees who need time off for family reasons. Eligible employees who are on leave may receive up to six weeks of benefits to care for a seriously ill child, spouse, parent or registered domestic partner, or to bond with a new minor child.

Like the original SDI program, it is administered by the EDD and funded by mandatory employee contributions. Again like the SDI program, PFL provides approximately 55 percent wage replacement benefits (up to a cap of $987 per week in 2010) and no job protection.

Notice Requirements, Clarifying Employee Misunderstandings Are Main Burdens

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is the amount that remains after all SDI and PFL benefits have been paid out for the month. It generally considers a balance between 25 percent and 50 percent of the previous 12 months of disbursements to be adequate. At the end of 2007, this percentage was at 36.4. This figure dipped to 18.9 percent at the end of 2008, an initial decline that the EDD had anticipated. In May 2009—when the country and the state were already in the throes of their economic woes—the EDD nevertheless projected its balance to be at 27 percent at the end of 2009 and 43.7 percent at the end of 2010. Unlike claims for unemployment insurance—which are understandably skyrocketing—the total number of claims for PFL in 2009 through July actually decreased from the total number of claims at the same time for the previous year. This is the first such decrease since the law became effective.

The decline in claims could indicate employees' reluctance to take time off when job uncertainty is a widespread concern. Whatever the actual cause, it bodes well for the solvency of the program during these hard times.

Nor should employers worry about the cost of defending lawsuits brought on by PFL. The extensive certification requirements of the CFRA indicate that any documentation an employer may require that is similar to CFRA certification (and, realistically, most employers will require a simpler form) to support the need for time off would not violate privacy rights. In addition, it is well-established that employers may discharge employees who take more leave than authorized under leave laws such as the FMLA or who take leave unprotected by any law, even if the leave is to care for a sick loved one.

None of this may deter plaintiffs from suing employers, especially in light of the fact that many employees mistakenly believe that they have reinstatement rights under PFL. Nevertheless, although it may be too early to gauge the real effect of PFL on litigation, PFL does not provide any additional legal excuse or incentive for plaintiffs to pursue claims that they did not already have prior to its implementation. Consultation with legal counsel likely reveals this reality to many employees who try to go down that path.

Few New Requirements

Which brings us to employers' biggest trump card: PFL adds relatively few burdens on employers that did not already exist. Employers that are covered by the FMLA and CFRA are already required to have an extensive system in place to certify and provide leave and reinstate eligible employees. Because PFL claims are administered by the EDD, even small businesses that do not have such systems are not required to educate themselves extensively about PFL. All employers are required to post a notice in the workplace and provide a brochure created by the EDD to new employees and to employees taking qualifying leave, but the EDD reviews claims and certification forms, processes benefits, and even provides employees with the appropriate 1099G tax form. Apart from providing notice and having to deal with demanding employees who do not understand that PFL does not provide them with a right to leave or reinstatement, employers have few headaches involving the administration of PFL.

Status Quo Could Change

No law comes without its costs, and there is no question that given the myriad other disclosures employers are required to make, one more brochure to hand out imposes a burden on employers that are already overwhelmed by California's employee-friendly labor laws. Nor is the current status quo guaranteed: Although California's recent attempts at balancing the budget did not affect PFL benefits, the economy could still impact this program. The onset of the new federal administration and the very symbolism of PFL reflect an atmosphere ripe for change that is moving toward supporting employees, often at employers' cost. Yet, delicate as the balance may be, PFL as currently written, implemented and reasonably projected does not pose as many burdens as employers feared it would.

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