

# Labor Relations/ Employee Issues

## SB 1661: California's Paid Family Care Leave Law — In effect this summer...what you should know

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Effective July 1, 2004, virtually all California employees will be eligible to apply for (and receive) temporary disability insurance benefits to supplement lost income while taking time off to care for a sick family member. This article will describe the rights and obligations of California employers under the new law, including strategies for developing a paid family leave policy which all employers should have in place before July 1, 2004.

With the signing of SB 1661 by Governor Davis on September 23, 2002, California has become the first state to enact a Paid Family Care Leave law. SB 1661 provides family temporary disability insurance ("FTDI") benefits to eligible employees beginning on July 1, 2004, with notification obligations imposed upon employers beginning on January 1, 2004. FTDI broadens the scope of current state disability insurance ("SDI"), and will function as a component of the SDI program. The new FTDI rules will apply to all California employers who are subject to the SDI provisions of the Unemployment Insurance Code, regardless of the size of the employer or the number of employees it employs. Further, unlike other leave laws (such as the California Family Rights Act ("CFRA") or the federal Family and Medical Leave Act ("FMLA")), there are no hours or service requirements for employees to be eligible.

### What Benefits to Employees Does SB 1661 Provide?

Prior to the enactment of SB 1661, California's state disability insurance program only covered employees when they missed work for non-occupational personal illnesses or injuries. SB 1661 broadens the scope of the SDI program,

providing an eligible employee partial wage replacement when he or she must miss work to address specified family responsibilities or emergencies.

Eligible employees will be entitled to approximately 55% of their salary for up to 6 weeks within a rolling 12-month period, with specified caps on such benefits. The FTDI

program will not impose any direct costs upon employers; instead, FTDI will be financed entirely by increased mandatory employee payroll taxes, and will be administered under the California SDI program by the Employment Development Department ("EDD"). As with SDI, employers will, however, be responsible for administering mandatory payroll deductions, which went into effect January 1, 2004.

### Eligibility Requirements

Beginning July 1, 2004, an employee will be eligible for FTDI benefits on any day in which the employee must take time off of work for either of 2 reasons:

- ❖ First, an employee will be eligible for FTDI benefits when they must take time off of work to care for a seriously ill child, spouse, parent, domestic partner or child of a domestic partner.
- ❖ Second, an employee will also be eligible for FTDI benefits when they take time off of work to bond with a new child of the employee or the employee's spouse or domestic partner, whether by birth, adoption or foster care placement. The leave must be taken within 1 year of the birth, adoption or foster care placement.

As with FMLA and CFRA leaves, FTDI leave does not need to be taken in a single block of time. Intermittent leave is allowed; however, interruptions in the leave may necessitate the employee obtaining further documentation to support the need for the leave.



**The new FTDI rules will apply to all California employers who are subject to the SDI provisions of the Unemployment Insurance Code, regardless of the size of the employer or the number of employees it employs.**

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## Limitations on FTDI Leave

The following are limitations upon when FTDI benefits may be utilized:

1. FTDI benefits are unavailable on any day in which the employee is eligible to receive, or is receiving, unemployment or disability benefits from the State, such as state disability insurance, unemployment compensation insurance or workers' compensation.
2. In the case of the seriously ill family member, FTDI benefits are unavailable on any day in which another family member is willing, able and available for the same period of time to provide the required care.
3. As with SDI, employees must satisfy a waiting period of 7 calendar days before they can qualify to receive benefits for each family temporary disability benefit period. Therefore, an employee must be off at least 8 days in order to qualify to receive FTDI benefits. This 7-day waiting period effectively extends the amount of leave to a potential 7 weeks, only the last 6 weeks of which the employee would be eligible to receive wage replacement under SB 1661.
4. Employees must provide certification to the EDD of their need for FTDI leave.
5. Employers may require employees to use up to 2 weeks of earned but unused vacation leave prior to the employee's initial receipt of FTDI benefits, 1 week of which may be applied to the 7-day waiting period described above. For example, in the case of an employee who has at least 2 weeks of accrued vacation and whose employer mandates use of such accrued vacation prior to receipt of FTDI benefits, the employee could receive up to 8 weeks of leave, the first 2 of which would be paid as vacation leave by the employer, and the latter 6 of which would be covered by the provisions of SB 1661.

An employer may not, however, require an employee to use their accrued sick time prior to receipt of FTDI benefits. Moreover, collective bargaining agreements with respect to use of vacation and personal time are not affected by the new legislation and therefore employers are not relieved of any collective-bargaining duties they might have with respect to vacation/personal leave.



## Overlap With Family and Medical Leave Laws

SB 1661 does not expand or abridge employees' rights under other leave laws. It also does not give employees an independent legal right to take a leave of absence without their employer's consent. However, employers must be mindful to always view the provisions of SB 1661 in tandem with other laws granting family and medical leaves. For example, employers may still be required to grant eligible employees leave under other leave laws such as the CFRA, FMLA, and paid sick leave laws under the California Labor Code. Further, SB 1661 provides that employees who are entitled to leave under the CFRA or FMLA may be required to take such leave concurrently with their FTDI leave.

## Employee Right to Reinstatement?

SB 1661 does not provide for reinstatement guarantees or job protections upon an employee's return to work. However, other statutes which may concurrently provide protections to employees, such as FMLA, CFRA and pregnancy disability leave laws, may impose separate obligations to reinstate employees to their former or substantially similar

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positions. Thus, employers must be careful to analyze such return-to-work issues in conjunction with an employee's rights under other leave of absence and anti-discrimination laws.

## Employee Notice to Employers?

At the present time, the statute does not require employees to provide notice to their employers prior to taking FTDI leave. However, the statute does not prohibit employers from setting forth notice requirements for employees wishing to go out on FTDI leave. **Prudent employers should consider implementing a policy imposing notice requirements similar to those imposed under other leave laws, such as 30 day written notice when a leave is foreseeable, and notice as promptly as possible when the leave is unforeseeable.**

## Steps Employers Should Take To Prepare for SB 1661

### Distribute EDD Notices

As of January 1, 2004, SB 1661 imposes notification obligations upon employers. Employers must provide copies of EDD notices which describe employees' rights under SDI and FTDI to (1) all new employees who begin on or after January 1, 2004, and (2) all employees who leave work on or after July 1, 2004 due to an FTDI qualifying event as outlined above. With the exception of employees who go out on leave, the new law does not appear to contain an obligation to provide notice to existing employees.

### Conduct Policy Reviews

Employers need to promptly examine and update their policies and practices — including employee handbooks and personnel policy manuals — to ensure they are in compliance with the new law. First, employers should consider establishing FTDI policies to include provisions regarding the required concurrent use of FTDI leave with CFRA/FMLA leaves. Second, employers must decide whether they wish to require employees utilizing FTDI benefits to use up to 2 weeks of accrued vacation time prior to receipt of FTDI benefits and then modify their policies accordingly. Third, employers should consider establishing specific notice requirements that employees must satisfy before taking time off which parallel notice requirements of the CFRA/FMLA.

Other issues employers may wish to address in a FTDI policy are: 1) clarifying the often confusing point that the right to leave benefits from EDD does not guarantee the right to a leave of absence from the employer; 2) payroll tax deductions are imposed by the State, not the employer; 3) FTDI does not dispense with conditions for leave under other statutes (e.g., FMLA/CFRA); 4) that FMLA/CFRA leave must run concurrently with FTDI benefits; and 5) that EDD will require medical certifications as a condition of leave benefits.

Finally, employers must also ensure that the company's human resources, administrative and/or supervising personnel understand the above eligibility requirements and disqualifying circumstances, and how the new law interfaces with existing leave of absence laws. ♦

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