California mandates paid leave for organ or bone marrow donation

By Paul R. Lynd and David A. Kolek

California law mandates many different protected absences, including for family and medical leave, jury duty, literacy training, school visits, volunteer firefighter service, and alcohol and drug rehabilitation. Effective January 1, 2011, California law added a new provision requiring certain private employers to provide paid leave for employees serving as organ or bone marrow donors. In mandating paid leave, this provision is a significant departure from other protected leaves. These new requirements warrant the attention of California employers.

Paid leave and other benefits

The new law, California Labor Code sections 1508 through 1512, applies to employers with 15 or more employees. An employee must have been employed for at least 90 days immediately preceding the commencement of leave. The law mandates up to 30 days of paid leave in any one-year period for employees donating an organ to another person. For employees serving as bone marrow donors, the law requires up to five days of paid leave in any one-year period. The law does not address whether the “one-year period” must correspond with the calendar year, a rolling 12-month period, or any other measurement. The leave may be taken in one or more periods.

In addition to paid leave, an employer “shall maintain and pay for coverage under a group health plan” during the employee’s full leave. While paid leave must be provided, an employer can require as a condition for an employee’s “initial receipt” of leave that the employee first use some accrued paid leave. Specifically, an employer can require that an employee use up to five days of earned but unused sick leave or vacation for bone marrow donation. The employer can mandate an employee use up to two weeks of such accrued paid leave for organ donation. Afterward, the employer must provide paid leave up to the limits provided.

Other protections for donors

An employer cannot treat the leave time taken as a break in continuous service for purposes of seniority, salary adjustments, and accrual of vacation, sick, or annual leave. Upon expiration of leave,
an employer must reinstate the employee to the same position held when leave began, or to a position “with equivalent seniority status, employee benefits, pay, and other terms and conditions of employment.” The law allows an employer to deny reinstatement “because of conditions unrelated” to the protected leave, which likely includes reasons such as job elimination unrelated to leave.

An employee is not required to provide any advance notice before taking leave. However, for an employee to receive a leave of absence, the law provides that an employee “shall provide written verification” to an employer that the employee is an organ or bone marrow donor and that there is “a medical necessity for the donation.”

The statute expressly provides that any protected organ or bone marrow donation leave shall not run concurrently with leave under the federal Family and Medical Leave Act (“FMLA”) or the California Family Rights Act (“CFRA”). As a result, employers should not count the portion of any organ and bone marrow leave protected by this new law against an employee’s available FMLA or CFRA leave. Nonetheless, if an employee is unable to return at the expiration of leave for health reasons, FMLA or CFRA leave obligations might apply.

The law prohibits any denial of this new leave, as well as any discrimination against any employee who exercises the right to take it. It creates a private right of action for an employee to enforce the new law, authorizing courts to issue injunctions and award “any equitable relief necessary and appropriate to redress” any violation. Such relief would include lost pay and benefits and reinstatement. The law is silent on whether a court could award attorney’s fees. As an alternative to suing in court, an employee also could file a discrimination or retaliation complaint with the Labor Commissioner.

Why this law?

This new law was enacted through Senate Bill 1304 is the Michelle Maykin Memorial Donation Protection Act. Her mother submitted the winning entry to a state senator’s “There Ought to be a Law” contest, leading him to introduce the bill. Maykin died after searching unsuccessfully for a donor for two years. The bill seeks to expand the availability of donors and their ability to donate. While organ and bone marrow donation are not frequent events, they may become more common as attention and medical advances increase. With this law, California joins eight other states in requiring private employers to provide such leave.

For further information and assistance, please contact your Nixon Peabody attorney or:

- Paul R. Lynd at 415-984-8235 or plynd@nixonpeabody.com
- David A. Kolek at 415-984-8348 or dkolek@nixonpeabody.com