



October 19, 2015

### NEW LAW PROVIDES LEAVE WITH DIFFERENTIAL PAY TO CERTIFICATED EMPLOYEES ON OTHERWISE UNPAID MATERNITY OR PATERNITY LEAVE

Governor Brown signed Assembly Bill 375 (“AB 375”) into law on October 1, 2015. AB 375 will add Section 44977.5 to the Education Code effective January 1, 2016. The new Education Code provision will extend the differential pay (or sub-dock) benefit provided currently to certificated employees on extended illness leave for their own illness or injury to certificated employees on normally unpaid maternity or paternity leave.

According to the author of AB 375, certificated school employees are currently only permitted six or eight weeks of paid leave when they have a baby. “Six or eight weeks is insufficient time for a new parent to care for and bond with their child. If a certificated employee wants to take off more time to spend with their newborn, then they must take *unpaid* leave.” The California Teachers Association supported AB 375, commenting that “[m]aternity leave is essential, not only for a mother’s full recovery from childbirth, but also to facilitate a stronger mother-child bond.... Overall, paid family leave helps keep people in the workforce after they have children.”

Under current law, when a certificated employee presents a medical note indicating she is unable to work due to pregnancy or a pregnancy related condition, several leave of absence entitlements may be applicable. The employee is entitled to (1) unpaid pregnancy disability leave under California’s Pregnancy Disability Law for up to five school months,<sup>1</sup> (2) sick leave, including accumulated sick leave, at full pay, and (3) extended sick leave at differential pay for up to five school months. If eligible, the employee may also be entitled to up to 12 workweeks of unpaid leave for her own serious health condition (pregnancy) under the federal Family and Medical Leave Act (“FMLA”).<sup>2</sup> Once the employee is released back to work by her medical provider, usually six to eight weeks postpartum, if eligible, she is entitled to an additional 12 workweeks of child bonding leave under the California Family Rights Act (“CFRA”). This leave is normally an unpaid leave with health and welfare benefits.

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<sup>1</sup> Normally, an employee in California is entitled to a maximum of four calendar months or 17 1/3 weeks of leave per pregnancy for pregnancy disability. However, if an employer has a more generous leave policy for other temporarily disabled employees, the employer must provide that leave entitlement to employees temporarily disabled by pregnancy. (2 C.C.R. § 11042(b).) Since certificated employees are normally entitled to up to five school months of leave for temporary disabilities, a pregnant employee would also be entitled to that length of leave if needed for pregnancy or a pregnancy related condition.

<sup>2</sup> Each of these leaves of absence entitlements are exhausted concurrently (meaning at the same time), except that sick leave, accumulated sick leave, and extended sick leave are exhausted consecutively to each other.

AB 375 extends the differential pay benefit under Education Code section 44977 for extended sick leave to a certificated employee on otherwise unpaid FMLA/CFRA child bonding leave after the birth of the employee's baby or the placement of a child with the employee for adoption or foster care. The new law provides that after a certificated employee has exhausted all available sick leave, including all accumulated sick leave, and continues to be absent on maternity or paternity leave for a period of up to 12 school weeks, the absent employee will receive salary in the amount of the difference between his or her regular salary and that of a substitute hired to replace him or her during the period of absence. The amount deducted from the absent employee's salary for the purpose of the substitute must be less than the absent employee's regular salary. If a substitute is not hired, the absent employee will be deducted the amount that would have been paid to the substitute had he or she been employed. An employee cannot be provided more than one 12-week period per maternity or paternity leave. If a school year ends before the 12-week period is exhausted, the employee may take the balance of the 12 weeks in a subsequent school year.

As noted above, AB 375 takes effect on January 1, 2016. However, if a school district's collective bargaining agreement with its certificated unit is entered into before January 1, 2016 and AB 375 conflicts with any provision of the agreement, this new law will not apply until the expiration or renewal of the collective bargaining agreement. Schools Legal Service advises that its clients consult their labor lawyers to discuss the implications of this provision in the new law.

AB 375 does not grant a new leave of absence to school employees. But, it does ensure that the 12-week period of child bonding leave under CFRA for certificated mothers and fathers will no longer be an unpaid leave with health and welfare benefits.<sup>3</sup> It remains to be seen how this new law will impact the numbers of employees electing to take extended leaves of absences for the purposes of child bonding.

Please contact our office with any questions regarding this topic or any other recently enacted legislation.

– Melissa H. Brown

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<sup>3</sup> AB 375 does not address the limitation in the regulations implementing CFRA for mothers and fathers who work for the same employer. (See 2 C.C.R. § 11088(c).) It is unclear whether this limitation would still apply to school employees once AB 375 takes effect so as to limit mothers and fathers who work for the same employer to a **total** of up to 12 workweeks for child bonding leave.