

New Paid Organ and Bone Marrow Donation

ACT: New entitlement is in addition to existing family and medical leave laws on the books.

A new law requiring paid leave went into effect on January 1. Under the Michelle Maykin Memorial Donation Protection Act, employers with fifteen or more employees must grant up to thirty days of paid leave within a one year period for employees serving as organ donors and up to five days of paid leave for employees donating bone marrow. (Labor Code Section 1508-1513.) The legislation is specifically intended to encourage participation in organ and bone marrow donation programs by easing the financial burden of missing work to undergo transplant procedures.

The new leave entitlement is separate from, and in addition to, employee leave entitlements under the already existing state and federal family and medical leave laws. Those laws apply to larger employers with 50 or more employees. Thus, for example, an employee could take 30 days of paid organ donation leave, followed by an unpaid medical leave (up to another twelve weeks) for any qualifying condition under the family and medical leave laws.

To qualify for the new paid leave, an employee must provide the employer with written verification of his or her status as an organ or bone marrow donor and the medical necessity for the donation. Other than the fact that the leave provided must be paid leave, employers' obligations are, for the most part, very similar to the rules for administering existing deferral and state family and medical leave, and include the following features.

Use of accrued vacation, sick leave or PTO. Unless otherwise provided by a collective bargaining agreement, an employer may require employees to use up to five days



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diminish the rights otherwise provided under the statute.

Intermittent leave. Organ donor leave need not be taken all at once. Rather, it may be taken in one or more periods (For example, an employee may need to take leave to participate in more than one medical procedure separated by several weeks of work.)

Health care benefits during leave. The employer must maintain the employee on any group health coverage it provides to employees during the time of the leave.

Job restoration. Upon returning from leave, an employee must be restored to the same position or to a position with equivalent status, pay and benefits. In most cases, the employer will have to hold the job open.

Benefits accrual or seniority. You must treat the employee as if they are working for benefit accrual and seniority. The leave taken cannot be treated as a break in continuous service for the purpose of salary adjustments, benefits accrual or seniority.

Interference with leave rights. Employers are prohibited from retaliating against an

employee for taking organ donation leave or for opposing an unlawful employment practice related to organ or bone marrow donation leave. Managers should not say or do things to discourage employees from utilizing this benefit. Nor should they take any adverse action against an employee because the employee took advantage of their rights under the new law. An aggrieved employee has a right to sue to enforce his or her rights under the new law. Employees terminated on the heels of asking for or taking leave under the new law may allege a wrongful termination.

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Unanswered questions. Some aspects of how the new law will operate are still unclear at this point, such as the amount of advance notice an employee must provide and the extent to which the employer may inquire into the specifics of the organ or bone marrow transplant under medical privacy laws.

What to do now. Planning is a key element of any risk management strategy. California employers covered by the law (those with more than 15 employees) who have not already done so should consider the following:

- Update leave policies to include this new leave right;
- Update leave request and medical verification forms;
- Educate managers and supervisors about the new requirements and employee rights. You don't want them saying or doing anything out of ignorance that can precipitate a legal claim or make one worse.

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