

California Creates Bereavement Leave Requirement

By Kyra A. Buch and Michelle Barrett Falconer on October 10, 2022

On September 29, 2022, Governor Newsom signed AB 1949, which creates protected bereavement leave under the California Family Rights Act (CFRA). As of January 1, 2023, AB 1949 makes it unlawful for an employer to refuse to grant an eligible employee the opportunity to take up to five days of bereavement leave upon the death of a family member. As does CFRA, this new requirement applies to employers with five or more employees.

What Are The Basics of AB 1949?

AB 1949 provides eligible employees with up to five days of bereavement leave upon the death of a qualifying family member. The five days of bereavement leave provided under AB 1949 are separate and distinct from the 12 weeks of leave permitted under CFRA – it is an *additional* form of protected leave.

Eligible Employees and Qualifying Family Members

An employee is eligible for bereavement leave once they have been employed for at least 30 days prior to the commencement of leave. A qualifying family member includes a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law as defined in CFRA. The employee can use bereavement leave under AB 1949 for each qualifying occurrence, meaning each death of a qualifying member. There does not appear to be a limit for how many times an employee can be eligible for AB 1949 bereavement leave.

When and how must the bereavement leave be taken?

The five days of bereavement leave do not need to be taken consecutively; they can be intermittent. The employee must *complete* the bereavement leave within three months of the family member's date of death, however. Whether the five days of bereavement leave are to be paid or unpaid depends on the employer's existing bereavement leave policy, discussed further below.

Can the employer require documentation?

The employer may require that the employee provide documentation of the death of the family member including a death certificate, published obituary, or written verification of death, burial, or memorial services from a mortuary, funeral home, burial society, crematorium, religious institution, or governmental agency. The documentation, if requested by the employer, must be provided within 30 days of the first day of bereavement leave. The employer must maintain the confidentiality of an employee who requests bereavement leave under AB 1949 and all related documentation must be maintained as confidential, disclosed only as required by law.

What employer actions are made unlawful by AB 1949?

As with CFRA, it is unlawful for the employer to refuse to hire, discharge, demote, fine, suspend, expel, or discriminate against an employee who exercises their right to bereavement leave or an employee who gives information or testimony as to their own bereavement leave or another person's bereavement leave, in any inquiry or proceeding related to the rights granted under AB 1949. Additionally, it is unlawful for an employer to interfere with, restrain, or deny the exercise of, or attempt to exercise an employee's rights under AB 1949.

What If We Already Have A Bereavement Leave Policy?

AB 1949 requires that bereavement leave be taken pursuant to an employer's existing bereavement leave policy. If an employer does not have an existing bereavement leave policy, the five days of leave permitted under AB 1949 may be unpaid; however, the employee may use accrued paid leave to which they are otherwise entitled to provide pay during the bereavement leave.

If the employer's existing leave policy provides for less than five days of *paid* bereavement leave, the employee is entitled to receive pay for the number of days provided in the existing policy. The remaining days – up to a five day maximum per leave event – do not need to be paid; however, the employee may use accrued paid leave otherwise available to the employee for the unpaid days. For example, if the employer's existing bereavement policy allows for three days of paid leave, the employee is entitled to use three days of paid leave and also is entitled to two additional days of unpaid bereavement leave.

If the employer's existing leave policy provides for less five days of *unpaid* bereavement leave, the employee is entitled to at least five days of unpaid leave; however, the employee may use accrued paid leave otherwise available to the employee for the unpaid days.

Additional Information

Employees covered by a valid collective bargaining agreement will not be covered by AB 1949 if the agreement expressly provides for: (1) bereavement leave equivalent to AB 1949's requirements; (2) the wages, hours of work, and working conditions of the employees; (3) premium wage rates for all overtime hours worked; and (4) a regular hourly rate of pay for those employees that is at least 30 percent above the state minimum wage.

Employers with 5-19 employees are subject to the California Civil Rights Department's (formerly DFEH) mediation pilot program, just as they would be for an alleged violation of CFRA.

Current law already permits certain state employees up to three days of paid bereavement leave, with an additional two days permitted if the death is out of state. These two additional days are either unpaid or may be charged against an accrued sick leave credit, at the employee's option. AB 1949 amends this provision to clarify that three days of paid bereavement leave is provided for each "occurrence." Further, the two additional days, granted at the employee's option, apply to any bereavement situation, not just those occurring outside the state. Just as before, the two additional days may be unpaid or the employee can use accrued paid leave that is otherwise available to the employee for the unpaid days.

Practice Pointer

Employers should promptly take a look at their existing bereavement leave policies, if any, and take steps to ensure compliance with AB 1949. Alternatively, if there currently is no leave policy that addresses bereavement leave, now is a good time for employers to consider if they wish to adopt such a policy.

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