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Employment and Wage and Hour Law Newsletter™

A Newsletter by the Low, Ball & Lynch Employment Law Group

December 2011

In this issue:

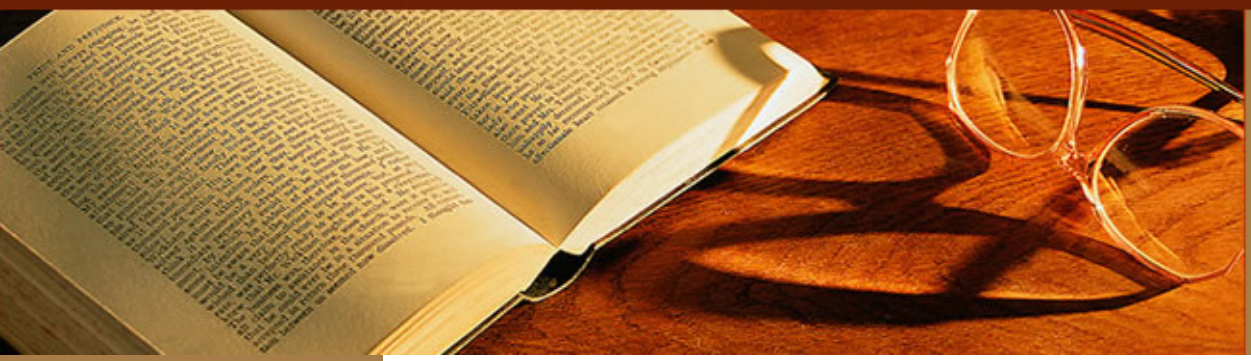
Next issue:

- The Supreme Court's Ruling in *Brinker*
- The Importance of Good Documentation
- Employee or Independent Contractor?

Notes from the Editor

We hope you enjoy the inaugural edition of Low, Ball & Lynch's Employment and Wage and Hour Law Newsletter. The quarterly Newsletter will contain practical advice for employers and human resource personnel with the goal of preventing employee claims. We will also provide advice regarding handling and resolving claims filed by employees. We know your time is precious. As a result, our articles will be brief and to the point. If you desire any additional information regarding a certain topic, we encourage you to contact any one of the attorneys in our practice group.

Our first edition discusses NEWLY ENACTED CALIFORNIA LAWS effective January 1, 2012, a summary of the EMPLOYMENT CASE LAW DECISIONS of 2011, and HYPOTHETICALS which illustrate the rights afforded to employees under the Family Medical Leave Act.



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Our March edition will discuss the Supreme Court's decision in *Brinker*, the importance of good documentation and the determination as to whether a person is an employee or an independent contractor. We hope you find this information useful and encourage any and all forms of feedback.

If you would like to subscribe, contact Tonya Makowski at TMAKOWSKI@LOWBALL.COM or by phone at 415.981.6630 x252.

Sincerely,

LAURA FLYNN
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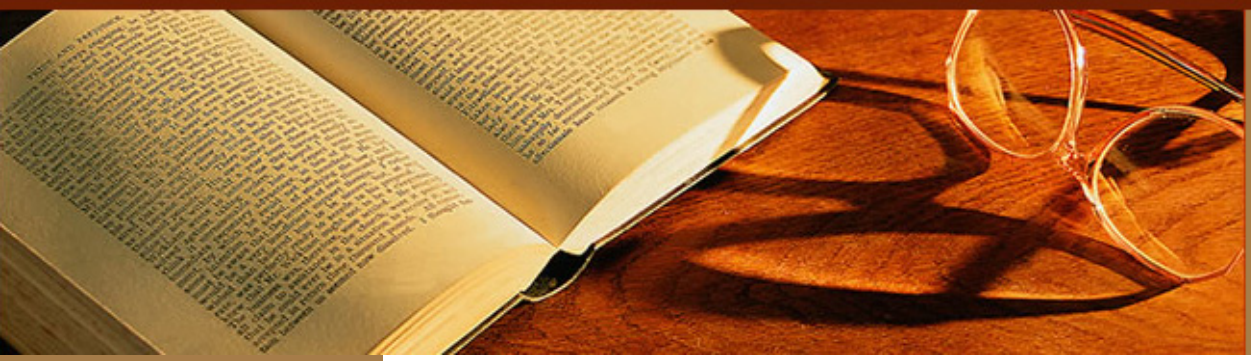
New California Employment Laws: Many Changes for 2012

by CHRISTINE BALBO REED

The recent session of the California Legislature produced a series of new laws that will impact the state's private sector employers in 2012. While few labor and employment bills escaped the veto pen of former Governor Schwarzenegger, Governor Jerry Brown has opened the legislative floodgates during his first year in office. The laws summarized below take effect on January 1, 2012, unless noted otherwise. These laws add substantial new workplace rights and obligations in areas such as background checks, leaves of absence, payment of wages, and discrimination.

AB 22 - Limitations on Use of Credit Reports. Under new Labor Code § 1024.5, employers may no longer obtain credit reports for employees or applicants unless the person falls within a limited exception and the employer provides written notice informing the person for whom the report is sought and the specific reason for requesting the report.

The positions or circumstances for which exceptions apply include: (1) managerial; (2) law enforcement; (3) report required by law; (4) access to bank or personal account information; (5) signatory on an employer bank or credit card account, or authorized to transfer money or to enter



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into financial contracts on behalf of the employer; (6) access to confidential or proprietary information; and (7) a position that involves regular access to cash totaling $10,000 or more.

Employers should no longer perform credit checks on applicants or employees unless the position of the person meets one of these exceptions. Employers who perform credit checks should revise their notice and disclosure forms to comply with the notice requirements of AB 22.

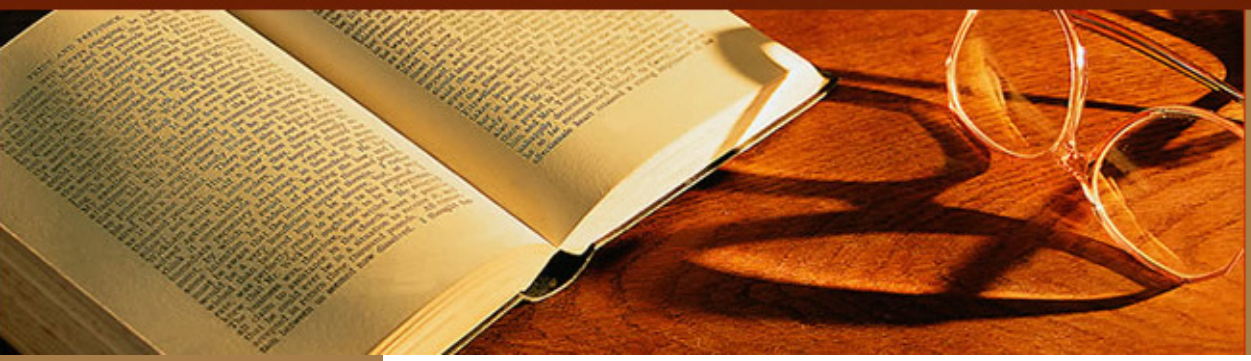
SB 459 - Independent Contractors. This bill adds new Labor Code §§ 226.8 and 2753 to impose new penalties on companies who engage in "willful" (i.e., knowing and voluntary) misclassification of workers as independent contractors. The law also imposes penalties on companies if they charge a misclassified worker a fee, or make deductions from the worker's compensation for any purpose. The penalties range from $5,000 to $15,000 per violation and more if a pattern and practice is established. In addition, a violating employer will be required to display prominently on its website a notice stating, among other things, that it has committed a serious violation of the law by engaging in the willful misclassification of employees and that it has changed its business practices to avoid committing further violations.

Employers who use independent contractors should carefully evaluate whether such workers are properly classified and, if not, modify their work terms and conditions or convert them to employees.

AB 1396 - Commission Agreements Must Be Written. This bill amends Labor Code § 2751. Whenever an employer enters into an employment contract with an employee for services to be performed in California, and the employee is to be paid commissions, the contract must be in writing and must set forth the method by which the commissions are to be computed and paid. Every employee is entitled to a signed copy of the contract and must provide a signed receipt to the employer. This law will take effect on January 1, 2013.

Employers should put all commission agreements in writing and sign them. Employers also should have employees sign and return an acknowledgement of receipt, which should be maintained in the employee's file.

AB 240 - Liquidated Damages for Minimum Wage Violations. This bill amends Labor Code § 98 and 1194.2. In any action to recover wages because of payment of less than the state minimum wage, an employee is now entitled to recover (in a claim before the Labor Commissioner as well as in a civil suit) liquidated damages equal to twice the wages unlawfully unpaid plus interest.



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AB 469 - Wage Information. This bill, known as the Wage Theft Prevention Act of 2011 and modeled after a similar New York law, adds a variety of new rules, procedures, and remedies to strengthen enforcement of the Labor Code's wage and hour requirements. Perhaps most significantly, the law adds Labor Code § 2810.5, which requires an employer to provide each non-exempt employee, at the time of hiring, a notice containing extensive and specific information about the employer and its worker's compensation insurance carrier.

The Labor Commissioner is directed to prepare a template notice that complies with these requirements. Employers should monitor the Department of Industrial Relations website for the template at www.dir.ca.gov.

AB 887 - Gender Identity and Gender Expression Protected. This bill expands the protections afforded employees and applicants under the Fair Employment and Housing Act (FEHA) and Unruh Civil Rights Act by adding "gender expression" and "gender identity" as protected classifications.

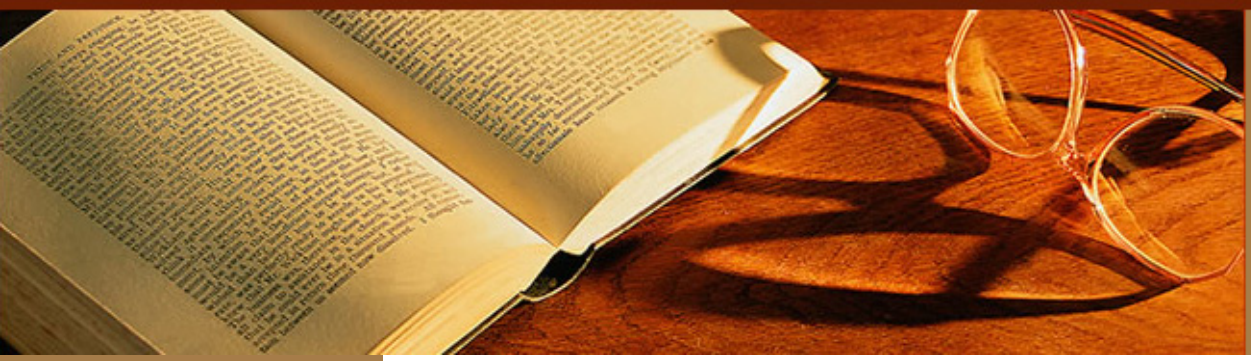
Employers should revise their EEO policies and training materials to include these new protected categories.

SB 559 – Prohibition on Genetic Information Discrimination. This bill expands the FEHA and Unruh Civil Rights Act to expressly prohibit discrimination based on genetic information. The law prohibits employers from taking adverse employment action against an applicant or employee based on genetic test results (of the individual or family member), manifestation of a disease or disorder in a family member, or a request for or receipt of genetic services (e.g., cancer screening).

Employers should: (1) update their EEO policies to include genetic information as a protected category; (2) review and edit job applications, medical leave forms, pre-employment physical forms, wellness program forms, and related documents to omit any requests for genetic information.

AB 592 - Adds Interference Claims to Leave Laws. This bill amends the California Family Rights Act and the California Pregnancy Disability Leave Act to expressly prohibit an employer from taking any action to "interfere with, restrain, or deny the exercise of" rights provided under these laws. The existing federal Family and Medical Leave Act contains similar language authorizing an interference claim.

SB 272 - Organ/Bone Marrow Donor Leave Clarified. A recently enacted law, the Michelle Maykin Memorial Donation Protection Act, grants employees leave of up to five days for a bone marrow



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donation, and up to 30 days for an organ donation, within a one-year period. Lab. Code § 1510. SB 272 clarifies the statute in several respects. First, the leave periods are "business days." Second, the one-year period is 12 consecutive months measured from the leave start date (i.e., a rolling 12-month period). Third, this leave does not amount to a break in service for purposes of any paid time off accrual. Finally, an employer can require the employee to use earned sick leave, vacation, or other paid time off during the leave in specified amounts: up to five days for bone marrow donor leave, and up to two weeks for organ donor leave.

Employers should revise their leave policies to incorporate these changes.

SB 299 - Paid Medical Benefits for Pregnancy Disability Leave. This bill requires the employer to maintain, and pay for, group health insurance coverage for an employee on pregnancy disability leave for the full duration of that leave (up to four months) on the same terms as existed before the leave. SB 299 authorizes an employer to recover the premium costs it paid from the employee if the employee fails to return to work after her leave expires *and* the failure to return is not due to: (1) the employee taking another leave under the California Family Rights Act (e.g., bonding leave), or (2) the continuation, recurrence, or onset of a health condition that entitles the employee to another pregnancy leave or other circumstances beyond the employee's control.

Employers should revise their pregnancy disability leave policies and related benefits procedures to comply with this new requirement.

Now is a good time to review policies, procedures, posters and manuals to ensure compliance with these laws and be ready for 2012!

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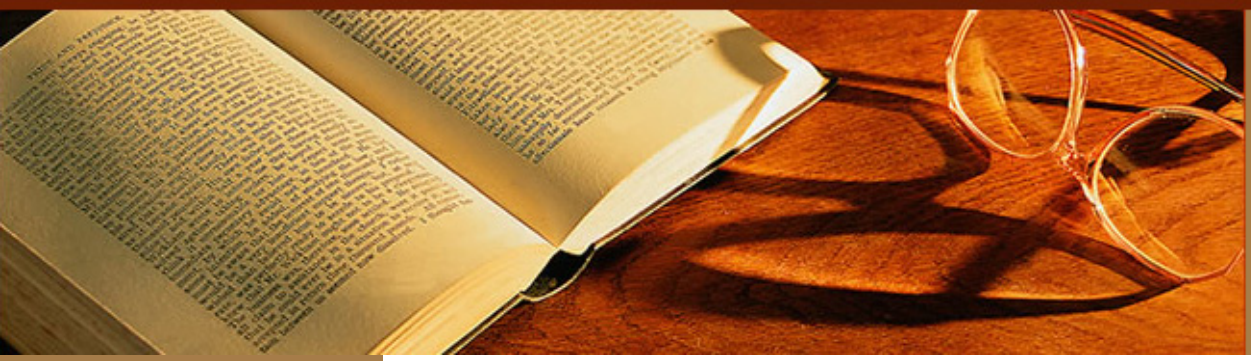
Employment Case Law Decisions of 2011

by LAURA FLYNN

***Kasten v. Saint-Gobain Performance Plastics Corp.* (2011) 131 S.Ct. 1325**

The United States Supreme Court held an employee was entitled to recover against a former employer under the Fair Labor Standards Act for retaliation based on a verbal complaint about the employer's employment practices. The Supreme Court held the phrase "any complaint" [29 U.S.C. §



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315(a)(3)] includes verbal complaints and does not require a formal written complaint to a judicial or administrative body.

***Staub v. Proctor Hospital* (2011) 131 S.Ct. 1186**

The United States Supreme Court ruled in favor of an employee who claimed he was fired because his supervisors were hostile to his military obligations. The plaintiff sued his employer under the Uniformed Services Employment and Reemployment Rights Act which prohibits an employer from denying "employment, reemployment, retention in employment promotion, or any benefit of employment" based on an employee's membership or obligation to perform service in a uniformed service. The Court held that liability under USERRA is established if the person's membership is a motivating factor in the employer's action.

***Nichols v. Dancer* (9th Cir. 2011) 657 F.3d 929**

The Ninth Circuit Court of Appeals held that a public employer may not interfere with an employee's First Amendment rights absent evidence the employee's conduct caused, or was reasonably likely to cause, disruption in the workplace.

***Holmes v. Petrovich Development Company, LLC* (2011) 191 Cal.App.4th 1047**

Typically, communications between a person and their attorney are protected by the attorney client privilege. However, the Third District of the California Court of Appeal held in this case that the privilege does not apply when an employee is using her employer's e-mail system to consult with her attorney. The employer's employee handbook stated that the company's computers were for company business only, that employees were prohibited from sending personal e-mails, that they had no right of privacy with regard to the communication system, and that the employer could inspect all files to confirm compliance and would periodically monitor the system and computers for compliance.

***Trovato v. Beckman Coulter, Inc.* (2011) 192 Cal.App.4th 319**

The California Court of Appeal Fourth District upheld the trial court's decision granting summary judgment in favor of an employer on the ground the one year statute of limitations had run against a former employee's claim of sexual harassment and retaliation. [Government Code § 12960(d).] The last act of harassment or retaliation occurred in January of 2007. The plaintiff did not file an administrative complaint with the Department of Fair Employment and Housing until May 2008, three months after the applicable statute ran.

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***Hall v. Goodwill Industries* (2011) 193 Cal.App.4th 718**

The California Court of Appeal Second District held that an employee's suit was barred based on the failure to file suit within a year after the Department of Fair Employment and Housing issued him a right-to-sue notice. The employee had used his attorney's address to receive mail from the DFEH. His attorney received the notice On December 31, 2004. However, he did not personally review the right-to-sue notice until December 2005. The Court of Appeal affirmed the decision of the trial court, which concluded that Government Code § 12965(b) requires a claimant bring a civil action within one year from the date the right-to-sue notice is *issued*.

***Wills v. Superior Court* (2011) 195 Cal.App.4th 143**

The California Court of Appeal held that an employer can legitimately terminate an employee who has a bipolar disorder and threatens violence against co-workers. The Court held that the California Fair Employment and Housing Act [Government Code § 12900 et seq.] authorizes an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against co-workers. Therefore, the employer had a legitimate, nondiscriminatory reason for terminating the employee after she sent threatening e-mail to other employees, in violation of the employer's written policy against threatening conduct in the workplace.

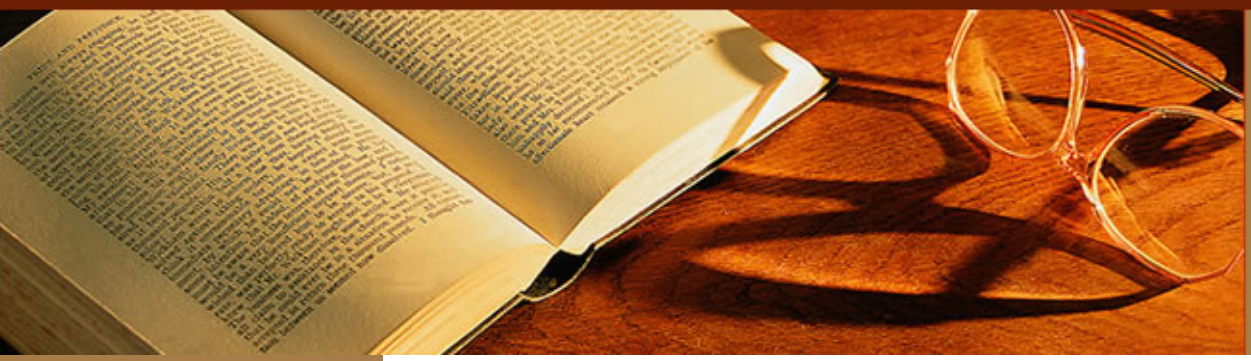
***Salas v. Sierra Chemical Co.* (2011) 198 Cal.App.4th 29**

The California Court of Appeal Third District barred the claim of an employee based on the theory of after-acquired evidence and unclean hands. The employee had provided a false Social Security number in his application documentation. When he sued for disability discrimination, the Court determined his claim was barred because the employer established it would not have hired him if it knew he was using a counterfeit Social Security card. [Petition for review granted by the California Supreme Court on November 16, 2011.]

***Pantoja v. Anton*(2011) 198 Cal.App.4th 87**

The California Court of Appeal Fifth District was asked to decide whether the trial court erred in not allowing the jury to hear "me too" evidence, i.e., evidence of the employer's alleged gender bias in the form of harassing activity against female employees other than the plaintiff. The Appellate Court determined the evidence should have been admitted as evidence of a discriminatory or biased intent or motive under Evidence Code § 1101(b) and reversed the judgment entered in favor of the employer.

***Plancich v. United Parcel Service, Inc.* (2011) 198 Cal.App.4th 308**



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The California Court of Appeal Fourth District determined California Code of Civil Procedure § 1032(b) entitled an employer to recover costs after prevailing on an employee's claim for alleged failure to pay overtime compensation [Labor Code § 1194].

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An Employee's Rights Under FMLA

by LAURA FLYNN

The Family and Medical Leave Act applies to employees with 12 months and 1,250 hours of service. It covers the birth or adoption of a child, an employee's own serious health condition, or serious health condition of an employee's spouse, child or parent. The Act entitles the employee up to 12 weeks of leave for the entire 12 weeks (birth/adoption) or for the duration of the serious health condition. The Act prohibits retaliation against any employee for: 1) requesting or taking FMLA leave; 2) opposing any unlawful FMLA practice on behalf of the employer; 3) filing an FMLA complaint; or 4) providing information or testimony in connection with any FMLA case. [29 U.S.C. § 2615.] If an employee is out for an FMLA-qualifying reason, the employer should designate the time off as FMLA leave, including: 1) workers' compensation leave; 2) disability leave; and 3) time off for medical treatment.

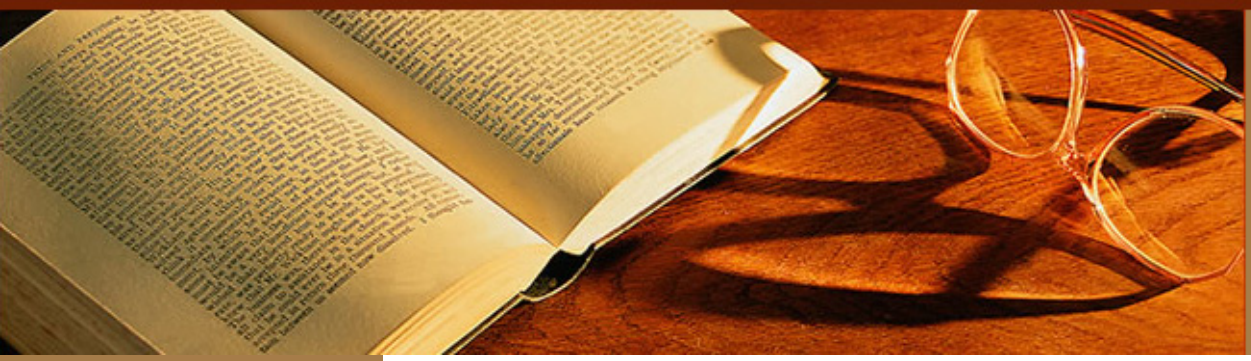
Hypothetical #1:

XYZ, Inc. has 35 employee. XYZ enters into a contract with Tempco, Inc. to provide XYZ with 20 temporary employees to work on a special project. At all time, the 25 temporary employees are on the payroll of Tempco and not XYZ. Is XYZ an employer covered by the FMLA? Must XYZ provide FMLA leave to its employees on payroll? Are the temporary employees entitled to take FMLA leave?

XYZ is covered by the FMLA. Even though XYZ has less than 50 employees, because XYZ exercises some control over all of the workers, the employees on payroll and the temporary employees are counted as employees of XYZ for purposes of the FMLA. [29 C.F.R. §825.106.] However, under these circumstances, it is Tempco's responsibility to administer the FMLA with respect to the temporary employees.

Hypothetical #2:

Fred and Ethel are married. They both work for the Great Guys, Inc. Ethel gives birth to their child. Fred and Ethel want to know how much leave the can take.



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Spouses who are employed by the same employer have to share the 12 week entitlement for the birth of a child. However, Ethel may be entitled to additional leave. For example, Ethel would be able to take four weeks of FMLA leave for her own "serious health condition", i.e., recovering from giving birth in addition to whatever she and Fred decide with respect to their joint 12 week leave. So Ethel might take four weeks and then eight weeks to care for the birth of their child. If Fred took the remaining four weeks to care for the child, he would still be able to take eight more weeks during the year if he or the child or his spouse develops a serious health condition.

Hypothetical #3:

Gertrude recently became pregnant and informed her employer. The employer understands that once Gertrude gives birth she will be entitled to take FMLA leave. However, since she informed her employer of her pregnancy, she has called in sick quite a bit. She hasn't been treated by a health care provider, but instead has just stayed home. The employer does not know what to do. Work is not getting done and Gertrude's co-workers are complaining. Can Gertrude's employer terminate her?

No. Gertrude's time off from work must be designated as FMLA leave because her illness is probably attributed to her pregnancy. Regardless of whether she has been admitted to a hospital or received continuing treatment from a health care provider, conditions related to pregnancy are automatically considered serious health conditions. [29 C.F.R. § 825.114(e).]

Hypothetical #4:

Sam's son has a severe asthma attack which requires he take his son to the emergency room. Sam's wife calls his employer to say he'll need time off to attend to their son. Is this sufficient notice under the FMLA?

Yes. This is considered sufficient notice under the circumstances. [29 C.F.R. §825.303.]
