

FAQ's – Implementation of New Maternity/Paternity Leave Law

Assembly Bill (AB) 375 added section 44977.5 to the Education Code, effective January 1, 2016, to provide differential pay to certificated employees who are absent due to maternity or paternity leave under the California Family Rights Act (CFRA; Gov. Code, § 12945.2). (Campos; Stats. 2015, ch. 400.)

AB 375 allows a certificated employee who has exhausted all available sick leave and continues to be absent while taking a CFRA maternity/paternity leave to receive differential pay for up to 12 school weeks. A maternity or paternity leave under AB 375, commonly referred to as "bonding leave," means leave occasioned by the birth of the employee's child, or the placement of a child with the employee in connection with the employee's adoption or foster care of the child as provided by CFRA.

This FAQ addresses the implementation of AB 375 and questions of interpretation that have arisen since its adoption.

1. Did AB 375 amend CFRA, Pregnancy Disability Leave (PDL), and/or the federal Family and Medical Leave Act (FMLA), in addition to the California Education Code?

AB 375 amended **only** the Education Code by adding new section 44977.5. This is purely a new leave/pay benefit under the Education Code. All statutes, rules, regulations and understandings regarding CFRA, FMLA, and PDL therefore remain unchanged.

2. Which employees are eligible for AB 375 benefits?

AB 375 applies only to certificated employees (not classified) who wish to take a maternity or paternity leave and are eligible for leave under CFRA. It applies equally to male and female certificated employees. In order for a certificated employee to utilize the benefits available under AB 375, s/he must qualify for leave under CFRA.

In order to qualify for leave under CFRA, the employee must have at least 1,250 hours of service with the employer during the previous 12-month period. If an employee does not qualify for CFRA leave, then s/he cannot be absent "on account of maternity or paternity leave" under CFRA as required by AB 375, and is therefore ineligible for the differential pay benefit afforded under AB 375.

In addition, under CFRA, an employer may refuse to grant an employee's request for leave if the employer employs less than 50 employees within 75 miles of the worksite where the employee works.

3. Must the AB 375 benefit be extended to probationary certificated employees?

Under CFRA regulations, full-time teachers are presumed to work 1,250 hours per year. A first year certificated employee, therefore, would not qualify for AB 375 differential pay because s/he has not accumulated at least 1,250 hours of service.

4. When and how does the AB 375 differential benefit kick in?

Under AB 375, an employee who qualifies for a CFRA leave may take a maternity or paternity bonding leave of up to 12 school weeks during which time the employee receives differential pay. The employee must, however, first

exhaust all available sick leave, including all accumulated sick leave, and continue to be absent from duties on account of the maternity/paternity leave in order to gain access to differential leave.

The 12-week differential period is reduced by any period of sick leave, including accumulated sick leave, taken during the maternity/paternity leave. For example, an employee who uses 7 weeks of sick leave and accumulated sick leave during his/her bonding leave – assuming this exhausts all such available leave – is then eligible under AB 375 to receive differential pay for the remaining balance of the 12-week period – an additional 5 weeks of leave. An employee who elects not to exhaust his/her sick leave during the maternity/paternity leave is ineligible for and cannot access differential pay under AB 375.

5. Does AB 375 grant employees a new reason or basis for using their accumulated sick leave?

Yes. The exhaustion requirement explained above is a major departure from current CFRA law and most collective bargaining agreements which do not allow sick leave to be used for the purpose of bonding leave (except perhaps through negotiated personal necessity leave).

The general intent of AB 375 is to allow access to differential pay by all new parents for child bonding leave. As a result, the law provides for a fundamental change by permitting certificated employees to unilaterally elect to utilize their accumulated sick leave for child bonding purposes, and, once exhausted, to receive differential pay for the balance of the 12-week period. If an employee chooses not to exhaust accumulated sick leave for child bonding, or chooses to use some but not all accumulated sick leave, s/he will not qualify for any differential leave under AB 375.

6. What salary does an employee receive under AB 375?

During the period of leave (up to 12 work weeks), the employee is entitled to differential pay, defined as his/her salary minus the sum that is actually paid a substitute employee employed to fill his/her position during the absence, or the amount that would have been paid to a substitute if no substitute was actually employed. Districts are required to make every reasonable effort to hire a substitute employee during the leave period. This parallels the language for the “normal” five month differential leave under Education Code section 44977 (but see question 7 below regarding the “50% pay rule”).

If an employee has already exhausted his/her “normal” five months of differential pay for a personal injury or illness under preexisting Education Code provisions, including a leave for pregnancy disability, the employee is nevertheless entitled to up to 12 weeks of differential pay for bonding purposes under AB 375. Although the new law is not entirely clear, we believe the legislative intent was to provide a separate and distinct 12-week entitlement in conjunction with CFRA leave under AB 375 in addition to any other differential pay allotment already provided under preexisting statutes.

While out on an AB 375 leave, the employee is also entitled to receive any applicable health benefits the employee was receiving immediately before the commencement of the leave.

7. Our district uses the “50% pay rule” as provided in our collective bargaining agreement or district policy. How should we calculate differential pay under AB 375?

The new law does not address the situation in which a district has adopted the “50% pay rule” under Education Code section 44983. Under this rule, a teacher entitled to differential pay receives at least 50% of his/her salary,

rather than the difference between his/her salary and the amount that would have been or was actually paid a substitute.

We believe the specific language of Education Code section 44977.5, added by AB 375, prevails over the more general language of section 44983. Therefore, districts that have adopted the “50% pay rule” should nevertheless calculate differential pay using the “normal” calculation method in 44977.5. In other words, in all cases we advise that an employee on AB 375 maternity/paternity leave should be paid the difference between his/her salary and that of a substitute, whether or not the substitute was actually hired, and not be paid according to any “50% pay rule” that may have been adopted.

8. What if an employee does not use the entire 12 weeks of AB 375 leave in one school year?

An employee is only provided one 12-week differential pay period per maternity/paternity leave. However, if a school year ends before the 12-week period is exhausted, the employee may take the balance of the 12-week period in the subsequent school year. For instance, if a certificated employee who has been on a pregnancy disability leave during her pregnancy returns to work on June 1 of the current school year after giving birth, and then requests to be out on a bonding leave under CFRA, she would be entitled to a total of 12 weeks of bonding leave under AB 375 that would begin on the first day of the leave in the current year and continue for the remainder of the 12-weeks in the subsequent school year. As discussed above, in order to be eligible to receive differential pay during the 12-week period she would have to first exhaust all accumulated sick leave.

9. Can AB 375 benefits be used intermittently, or must they be used in one continuous period?

A bonding leave under AB 375 does not have to be taken in one continuous period of time, subject to some limitations. Under CFRA regulations, the minimum duration of the leave shall be two weeks, except that employers must grant a request for a leave of less than two weeks’ duration on any two occasions and may grant requests for additional occasions of leave lasting less than two weeks. Any leave taken must be concluded within one year of the birth or placement of the child with the employee.

CFRA regulations provide that under certain circumstances an employee who has been granted an intermittent or reduced schedule leave for bonding purposes may be required to transfer temporarily to an available alternative position. Any such transfer must comply with applicable collective bargaining agreements, law and district policy. We recommend contacting legal counsel if a transfer is contemplated to assist in addressing all legal issues involved.

10. Does AB 375 apply if bonding leave is addressed in an existing collective bargaining agreement?

The new law states: “To the extent that this section conflicts with a provision of a collective bargaining agreement entered into by a public school employer and an exclusive representative before January 1, 2016 . . . this section shall not apply until expiration or renewal of that collective bargaining agreement.” (Ed. Code, § 44977.5(d).)

According to this provision, AB 375 does not take effect until expiration of a collective bargaining agreement which contains a “conflicting” provision. The new law is not clear as to what constitutes a conflict; however, we believe any provision of an existing collective bargaining agreement addressing bonding leave for certificated employees that provides for an unpaid leave, or for a different method of calculating pay during a bonding leave, is in “conflict” with the new law and prevails until such time as the contract expires.

11. Should districts update collective bargaining agreements to include AB 375's requirements?

To the extent the CBA provides conflicting language, the district should update the language when the agreement expires or is renewed. If the agreement is silent on maternity and paternity leave, it is unnecessary to update the CBA as the district will automatically be required to comply with the new law.

Of course, even if a "conflicting" CBA will not expire for a year or more, the district is free to voluntarily extend the new benefit prior to that event. While we are not recommending or advocating this action, districts should anticipate the possibility of such a bargaining proposal from the association, e.g., during reopener negotiations.

Please do not hesitate to contact any of our DWK LEAP attorneys with any questions or concerns regarding implementation of AB 375.

Practice Areas

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