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California Requires Employers to Provide Leave for Reproductive Loss

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On October 11, 2023, California enacted [Senate Bill \(SB\) 848](#) which makes it an unlawful employment practice for an employer to refuse to grant requests for reproductive loss leave. Beginning January 1, 2024, employers will be required to grant a broadly defined group of eligible employees up to five days of reproductive loss leave, potentially *without* documentation verifying an employee's eligibility for leave.

What Employers Are Covered?

Like bereavement leave under FEHA, SB 848 applies to all private employers with five or more employees. The law prohibits retaliation for exercising rights related to reproductive loss leave, and requires that employers safeguard their employees' confidentiality regarding leave requests.

What Is a “Reproductive Loss”?

Under the new law, employees will be entitled to up to five days of leave following a “reproductive loss.” This includes a miscarriage, stillbirth, failed adoption, failed surrogacy, and an unsuccessful attempt at assisted reproduction. While employees do not have to take the allotted leave consecutively, they are required to take the leave within three months of the reproductive loss event. The three-month period begins on the day or, for a multiple-day event, the final day of the reproductive loss.

Who Is an Eligible Employee?

To be eligible for reproductive loss leave, an employee must have been employed for 30 days before the leave commences. Aside from that, any individual who would have been a parent of a child as a result of a pregnancy, adoption, or surrogacy that resulted in a reproductive loss is eligible for reproductive loss leave.

While the California Fair Employment and Housing Act (FEHA) presently requires employees seeking bereavement leave to provide documentation upon their employer's request, there is nothing in SB

848 that expressly permits employers to require documentation supporting an employee's request for leave. Therefore, it is unclear whether an employer may request medical or other documentation. In an apparent effort to assuage concerns that reproductive loss leave will be abused, the law limits an employee to 20 days of reproductive loss leave within a 12-month period, regardless of the amount of reproductive loss events an employee suffers.

Is Reproductive Loss Leave Paid or Unpaid?

Whether reproductive loss leave is paid or unpaid depends on the employer's current leave policy. If the employer does not have an existing leave policy, they may provide unpaid reproductive loss leave. Where the employer's leave policy provides for unpaid leave, or where the employer has no leave policy, employees must be permitted to use accrued vacation, personal leave, sick leave, or compensatory time off that would otherwise be available to the employee.

Takeaways

Before January 1, 2024, employers should determine whether they will have to provide paid reproductive loss leave, update their employee handbooks and/or leave policies to include reproductive loss leave, and train those who will be handling requests on how to comply with the confidentiality requirement.

Contact your Vorys attorney if you have any questions regarding SB 848 or for assistance reviewing your current leave policies.