



BAY AREA  
**CANCER CONNECTIONS**  
*Breast & Ovarian Cancer Information & Support*

# Disability Benefits & Employment Leave Laws

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# Benefits Available to Employees

- California State Disability Insurance (SDI) (state government-provided short-term disability benefit)
- Social Security Disability Insurance (SSDI) (federal government-provided long-term disability benefit)
- Supplemental Security Income (SSI) (federal government-provided long-term disability benefit for low income citizens with insufficient work credits for SSDI)
- Workers' Compensation (temporary and permanent disability benefits for work-related injuries)
- Employee Retirement Income Security Act of 1974 (ERISA) (privately sponsored and funded short and long-term disability benefit programs)

# State Disability Insurance (SDI)

- Designed to protect unemployed and disabled persons against loss of wages when they are unable to perform their regular and customary work because of any illness or injury
- If you cannot work due to a non-work related injury, you may be eligible for SDI benefits
- Administered by EDD
- Funded through employee payroll deductions
- Covers virtually all workers in California

# Requirements for SDI

- You must be unable to do your regular or customary work for at least eight consecutive days.
- You must be employed or actively looking for work at the time you become disabled.
- You must have lost wages because of your disability or, if unemployed, have been actively looking for work.
- You must have earned at least \$300 from which SDI deductions were withheld during a previous period.

# Requirements for SDI

- Care and treatment of a licensed doctor during the first 8 days of disability.
- Submit a claim form within 49 days of the date of disability.
- Doctor must complete the medical certification of disability.
  - A nurse practitioner may certify to a disability within his/her scope of practice; however, he/she must perform a physical examination and collaborate with a physician or surgeon.
  - A licensed midwife, nurse-midwife, or nurse practitioner may complete the medical certification for disabilities related to normal pregnancy or childbirth.

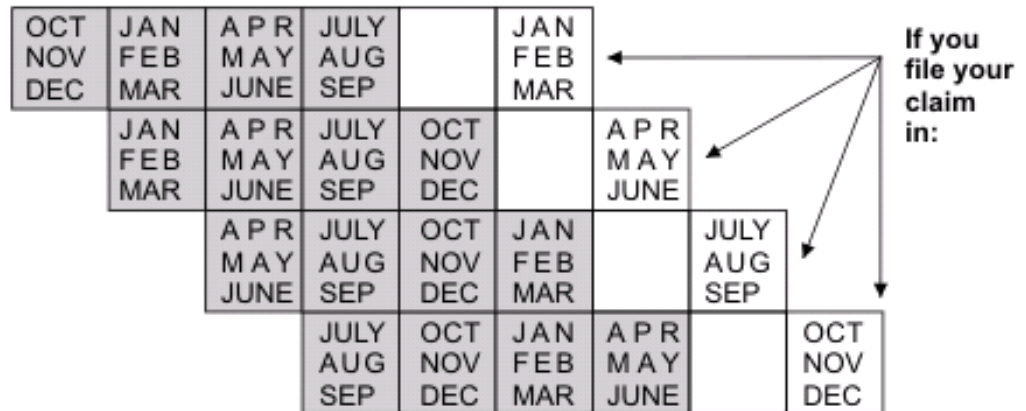
# The SDI Benefit

- Temporary – 52 weeks
- Claims beginning on or after Jan. 1, 2017 -  
Monthly payments range from \$50-  
\$1,173/week.
  - Benefits are approximately 55% of your earnings up to the \$1,173 weekly cap
- SDI coverage “travels” with the worker.
- SDI is non-exclusionary.

# Calculation of SDI Benefit

- Benefits calculated using base period determined by when claim begins

Base Period Example: Customer files for disability on 4/1/2017.



# Appeal Notice of Computation

- Notice of Computation tells claimant how benefit was calculated
- Notice of Computation mailed with the claimant's first check.
- Can appeal the Notice of Computation within 20 days from the date of mailing
- The 20 days may be extended for “good cause.”



# Social Security Disability Insurance

- Designed to assist workers who are forced to retire early due to disability
- Different from SDI because SSDI is
  - A long-term disability benefit
  - Paid by the federal government
  - Longer waiting period
- If you have a disability expected to last at least one year, you may be eligible for SSDI benefits
- Funded through Social Security payroll taxes (FICA)

# Requirements for SSDI

- Medical Eligibility
  - unable to engage in any substantial gainful activity for at least 12 months
- Five-step process for determining disability
  - earning less than \$1,170/month (SGA) and;
  - severe medical condition;
  - medical condition falls on List of Impairments in SSA's "blue book" or condition(s) is comparable in severity (if not, move on to Step 4).

# Requirements for SSDI

- Five-step test continued
  - Medical condition interferes with claimant's ability to do previous work (if yes, move to Step 5).
  - Medical condition must prevent claimant from adjusting to other work.

# Requirements for SSDI

- Claimant must have sufficient work credits.
- The amount of earnings has changed since 1978. In 2017, you must earn \$1,300 for one quarter (three months) earns one SSDI work credit.
  - Younger than 24: 6 credits within past three years
  - Ages 24 to 31: 12 credits within past six years
  - Age 31 or older: sliding scale but must have earned at least 20 of the credits within the last 10 years.

# Appealing an SSA Decision

- First Appeal Level (“Reconsideration”)
  - File within 60 days of denial
  - Process takes between 3 to 6 months and about 14% of cases are reversed
- Second Appeal Level (Hearing)
  - Appeal denial within 60 days
  - ALJ hearing

# Appealing an SSA Decision

- Third Appeal Level (Social Security Appeals Council)
  - File a Request for Review of Hearing Decision/Order within 60 days
- Appeals to Federal Court
  - File a writ of mandate in federal court within 60 days an adverse decision

# SSDI Work Rules

- “All or nothing” rule
- Trial Work Months
  - Any month in which gross earnings exceed \$840 (disability-related work expenses may be deducted).
  - Recipient can work nine months within five years.
  - Trial work period continues until worked 9 months in a 60-month period.

# ERISA

- Provides minimum standards for voluntarily established benefit plans in the private industry.
- In addition to pension plans, ERISA governs health and welfare benefit plans.
- Enacted in 1974 in response to wide-spread pension problems.
- Most workers are not covered by disability plans governed by ERISA.



# ERISA Requirements

- ERISA requires plans to provide participants with plan information. ERISA § 104(b)(4).
- ERISA provides fiduciary responsibilities for those who manage and control plan assets. ERISA § 404.
- ERISA requires plans to establish a grievance and appeals process for participants to get benefits. ERISA § 503.
- ERISA gives participants the right to sue for benefits and breaches of fiduciary duty. ERISA § 502(a).

# Short and Long-Term Disability Plans

- The eligibility requirements, waiting periods, benefit duration, and benefit amount will vary by employer.
- Short-term – generally up to 6 months of benefits.
- Long-term – generally provide benefits after 6 months of disability until retirement age.
  - Many have own and/or any occupation standard of disability.
- Almost all plans will offset other income or benefits including SDI, SSDI, SSI, and Workers' Comp.
- Almost all plans have a 2-year limitation for mental illnesses and certain other conditions.

# Insured Plans

- Employer purchases insurance policy from insurer to provide benefits to employees who become disabled from work.
- Often, the insurer who is responsible for paying the benefits also determines eligibility for benefits.
- The main insurers include Cigna (Life Insurance Company of North America), Aetna, Hartford, Unum, Sun Life, Standard, Reliance Standard, Lincoln National, MetLife, Liberty Life, and Principal.

# Self-Funded Plans

- Employer sets aside funds for qualified participants.
- Usually big employers like AT&T, Abbott Laboratories, and Johnson & Johnson.
- Many hire third-party administrators to determine eligibility for benefits (including Sedgwick, Reed Group, and Matrix).
- Not subject to California Insurance Code like insured plans.
  - Notice-Prejudice rule does not apply
  - Prohibition against discretionary clauses may not apply

# Are You Covered by ERISA?

- Does your employer offer a disability benefit plan?
  - If you don't know:
    - 1) Make a written request to benefit plan administrator in HR for the information and/or
    - 2) Check [www.freeerisa.com](http://www.freeerisa.com) (Form 5500).
  - If yes,
    - 1) Request application paperwork from HR
    - 2) Request all Plan documents for the Plan(s).
      - This information is important to have as the Plan document sets forth all terms and conditions for receipt of benefits AND you have a legal right to this information.

# Grievance and Appeals Process

- What if you applied for benefits and have been denied?
  - 1) Consult with an ERISA attorney.
  - 2) You must submit a written appeal within 180 days from the date of the letter notifying you of the denial.
- You must exhaust administrative procedures before filing suit in federal court.
  - 1) Check the plan for the deadline for filing a lawsuit.

# Grievance and Appeals Process

- Before you submit an appeal, request a copy of your claim file. It will contain all or some of the following:
  - Reasons for claim denial
  - Internal notes
  - Evidence of procedural irregularities/conflict of interest
  - Medical reviews
  - Vocational reviews
  - Surveillance reports and videos

# Grievance and Appeals Process

- What is involved in an appeal?
- 1) A statement that “I disagree with the decision” is NOT enough to win.
  - A reviewing court will generally be limited to the record before the plan administrator when it made a decision.
- 2) You must obtain and submit all available medical and other evidence that will support your claim of disability.



# ERISA Remedies

- No compensatory or punitive damages.
- Generally, only you can only get the unpaid benefits and prejudgment interest if you are successful in court.
- ERISA provides a fee shifting provision so that the winning party can get fees paid by the other side. Fees are not usually awarded against an unsuccessful disability claimant.

# The Maze of Leave Laws



# Overview

- Rights to Medical Leave from Your Job
  - Family and Medical Leave Act (Federal)
  - California Family Rights Act (State)
- Rights to Leave as a Reasonable Accommodation
  - Americans with Disabilities Act (Federal)
  - Fair Employment and Housing Act (State)

# Rights to Medical Leave: FMLA and CFRA

- Right to take up to 12 workweeks of leave per year for own or a family member's "serious health condition"
- FMLA/CFRA leave can run concurrently
- Applies to private employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year
- Applies to public employers
- Eligibility requirements for employees

# Am I eligible for leave under FMLA/CFRA?

- Employed at least one year
- Worked at least 1,250 hours during year immediately preceding leave
- Works at a location where employer employs at least 50 employees within 75 miles
- If private employer, employer must be large enough
- Smaller employers sometimes grant contract rights to FMLA/CFRA leave (e.g. in an employee handbook)

# Leave Entitlements Under FMLA/CFRA

- 12 workweeks of leave per year – intermittent leave permissible
- Right to reinstatement (but not absolute)
- Benefits continue
- Leave can be unpaid
  - PTO, vacation, sick days
  - Disability benefits

# How to Request FMLA/CFRA Leave

- Ask your supervisor and/or HR
- Ask as soon as possible
- Ask in writing!
- Doctor's note
- Keep detailed notes, including how employer is counting your weeks of leave against FMLA/CFRA
- Ask for written guarantee of reinstatement (required under CFRA if requested by employee)

# What to Do While On Leave

- Be mindful of return to work date
- Leave extensions
  - Have a discussion early with your doctor on whether your original leave needs to be extended
  - keep employer in the loop
- Pay attention to letters from employer
- Keep notes of any conversations with HR



# Returning To Work After FMLA/CFRA Leave

- Employers can require doctor's note clearing you to work
- Employers cannot discriminate or retaliate against employees for taking FMLA/CFRA leave
- If employee has not exhausted 12 weeks of leave, she is entitled to go back on a protected FMLA/CFRA in same year until exhausted
- If confused about how much leave employer is counting against FMLA/CFRA, ask HR (though HR is not always right!)

# Violations of FMLA/CFRA Rights

- Employees may sue if an employer violates their FMLA/CFRA rights & they have suffered damages caused by the violation
- Remedies:
  - Lost pay & other economic damages
  - Liquidated damages under FMLA
  - Emotional distress damages
  - Punitive damages
  - Attorney's fees

# A word on CA's "Kin Care" Law

- California Labor Code Sec. 233
- Requires employers who provide accrued sick leave to allow the employee to use up to half of his/her accrued sick leave to care for the employee's **current spouse, domestic partner, child, parent (including parent-in-law), sibling, grandparent or grandchild**
- Employees can sue for violations
- Remedies: reinstatement and actual damages or one day's pay, whichever is greater, "appropriate equitable relief"

# Leave Rights Beyond FMLA/CFRA: Disability Accommodations

- Once FMLA/CFRA leave expires, the employee may be entitled to additional leave as a form of reasonable accommodation for her disability
  - Americans with Disabilities Act (federal)
  - Fair Employment & Housing Act (state)
- Whether the employee is entitled to a leave accommodation is determined on a case-by-case basis

# Federal Americans with Disabilities Act (ADA)

- Federal law protecting disabled employees from employment discrimination
- Applies to employers with 15 or more employees
- Employees are eligible for ADA protections from day 1 of employment
- Employees may sue for violations
- Caps on monetary recovery, varies by employer size
- Attorney's fees for prevailing employees

# California Fair Employment & Housing Act (FEHA)

- State law that also protects employees from disability discrimination in employment
- More lenient standard of “disability”
- Applies to employers with 5 or more employees (religious employers exempt)
- Employees are eligible from day 1 of employment
- No caps on damages
- Attorney’s fees available for prevailing employees

# Job Protections for Disabled Employees

- \* No adverse treatment in the terms, conditions or privileges of employment **based on disabled status**
  - \* No discrimination
  - \* No harassment
  - \* No retaliation for requesting reasonable accommodations
- \* Reasonable Accommodations Unless Undue Hardship
- \* Interactive Process

# Who is a “Disabled” Employee

- Federal ADA
  - Physical or mental impairment that **substantially limits** a major life activity
- State FEHA
  - Impairment need only limit – more lenient standard



# Examples of Major Life Activities

- Walking
- Sleeping
- Eating
- Hearing
- Thinking
- Concentrating
- Lifting
- Bending
- Sitting
- Seeing
- Reading
- Breathing
- Caring for oneself
- Regulating emotions
- Includes operation of major bodily functions, including **normal cell growth**. See *Soria v. Univision Radio Los Angeles, Inc.*, 5 Cal. App. 5th 570, 586 (2016).

# Disability Includes Cancer

- Cancer is a disability under both ADA and FEHA
- Cancer *in remission* also qualifies as a disability
- Both ADA and FEHA prohibit employers from discriminating against an employee *perceived* as disabled
  - Combat stereotypes and assumptions about disabled workers
- **Associational** disability discrimination is unlawful

# Reasonable Accommodations

- A disabled employee has the right to reasonable accommodations to perform the essential functions of her job, unless undue hardship on employer
- One potential form of reasonable accommodation is a finite leave of absence
- This right is ***cumulative*** of the employee's rights to medical leave under under FMLA/CFRA
- No right to indefinite leave
- Many courts conclude one year of leave is reasonable and will not cause undue hardship on employer

# Interactive Process to Determine Reasonable Accommodations

- Both employee and employer have responsibility to communicate about what reasonable accommodations might be available to enable the disabled employee to perform essential functions
- An employer's failure to engage in the interactive process, in good faith, can give rise to a lawsuit
- Be sure to document interactive process

# Best Practices

- Request leave early, before performance and attendance issues can arise
- Keep lines of communication open with HR
  - Press HR if not getting straight answers
- Timely obtain doctor's notes
- While on leave, be mindful of return to work date
- If need to extend leave becomes apparent, request extension as soon as possible
- Document, document, document!



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**Questions?**



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