



California's organ and bone-marrow donation law gives employees a new right

The last thing a California employee should be worried about is taking time off work to give the gift of life

BY ELNAZ MASOOM

California employees have a new recognized right — they can take *paid* time off for donating their organs or bone marrow. Last year, California Senator Mark DeSaulnier (D-Concord) authored Senate Bill 1304 (SB 1304), the Michelle Maykin Memorial Donation Protection Act, which provides private sector employees with paid leave to donate an organ or bone marrow. This law, which went into effect as of January 1, 2011, was enacted to encourage employees to save lives by providing them with generous leave options. The law was a byproduct of Senator DeSaulnier's "There Ought To Be A Law" contest, which invites constituents to submit ideas for a new law, or to take an existing law off the books.

SB 1304 provides that employers with 15 or more employees are required to grant as much as 30 days of paid leave, within a one-year period, for employees serving as organ donors; and up to five days of paid leave within a one-year period for employees donating bone marrow. The Michelle Maykin Memorial Donation Protection Act was the first state law to require private employers to provide *paid* leave of absences to employees. (Lab.Code, §§ 1508-1513)

Since the passage of SB 1304, however, supporters of the bill have argued that, while the law's intent may be clear, additional clarification would provide certainty for businesses seeking to comply with the law. In August 1, 2011, Governor Brown

signed Senate Bill No. 272 (SB 272) into law which amended Labor Code Section 1510 and clarified the previous legislation. SB 272 seeks to clarify the Legislature's original intent with SB 1304 in an attempt to help both employers and employees in the implementation of California's bone marrow and organ donation leave law.

Employees *must* be paid for their leave after using their earned time off

California employers are required to provide *paid* leave to organ and bone marrow donors. Previously, however, the law did not specifically permit employers to require employees to use any paid time off they may have had coming to them. Under the new law, as a condition of an employee's initial receipt of bone marrow or organ donation leave, employers may require that an employee take earned but unused sick or vacation leave (up to five days for bone marrow donation and up to two weeks for organ donation), unless doing so would violate the provisions of any applicable collective bargaining agreement.

Additionally, the new law establishes that the leave taken cannot be treated as a break in continuous service for the purpose of salary adjustments, sick leave, vacation, annual leave, seniority or paid time off.

• **Not Calendar Days, Not a Calendar Year:** The new legislation further clarifies that the 30 days of paid leave for organ donors and the five days of paid

leave for bone marrow donors are to be counted as business days, not calendar days. Further, the one-year period is measured from the date the employee's leave begins, not a calendar year, and consists of 12 consecutive months.

• **Interplay with FMLA and State Leave Laws:** Remarkably, the Organ and Bone Marrow Donation Leave should be considered a separate leave from the Family Medical and Leave Act (FMLA) and California Family Rights Act (CFRA). Employees seeking a leave for organ or bone marrow donation are entitled to provisions under both laws and therefore the leaves should be separate from, and in addition to, employee leave entitlements under FMLA and CFRA. As a result, an employee could be eligible for both paid organ/bone marrow donation leave and another 12 weeks of unpaid FMLA/CFRA leave for a serious medical condition related to the donation, if the employee is otherwise eligible for FMLA/CFRA leave.

To qualify, an employee must provide the employer with written verification of his or her status as an organ or bone marrow donor and the medical necessity for the donation. Other than the fact that the leave provided must be paid leave, employers' obligations are, for the most part, very similar to the rules for administering FMLA/CFRA leave.

• **The Employer *must* Maintain Health Benefits During Leave:** The employer must maintain the employee



on any group health coverage it provides to employees during the time of the leave and must continue to make its normal premium contributions towards the employee's health care coverage as if the employee is actively at work during the leave period.

• **Employee's Reinstatement and Enforcement Rights:** Upon returning from leave, the employee must be restored to the same position or to a position with equivalent status, pay and benefits. Furthermore, under the new law, employers are prohibited from retaliating against an employee for taking organ or bone marrow donation leave or for opposing an unlawful employment practice related to organ or bone marrow donation leave. An aggrieved employee has a right to sue to enforce his or her rights under the new law.

Employers' response to the new leave law

It is highly anticipated that when requiring medical certifications in connection with organ and bone marrow leave,

employers will likely include the safe harbor language contained in the Equal Employment Opportunity Commission regulations on the Genetic Information Nondiscrimination Act ("GINA"). GINA prohibits the use of genetic information in employment decisions and restricts employers from requesting, acquiring or purchasing genetic information. It also requires that genetic information be maintained in confidence, if acquired. The "safe harbor" language regarding the inadvertent receipt of genetic information provides that whenever an employer requests medical information for Family Medical Leave Act certification, fitness-for-duty examinations, requests for accommodation under the Americans with Disabilities Act, or other proper purposes, the request should include a language, stating that the employer does not want genetic information.

Fewer obstacles, more lives saved

The number of people who die every year because of organ failure is astonishing.

One could not help but think that fewer obstacles for California employees could possibly mean more donors and more lives saved. With the pace Californians are moving, it is not hard to envision a day when employers may even offer perks to their conscientious employees for donating a part of their being. So the work is not done. While the law is a great start, it could be improved with a little work and ingenuity. Plus, when it comes to costs and money, you can't put a price tag on a human life.



Masoom

Elnaz Masoom is an attorney in San Jose, California practicing employment and business litigation. Ms. Masoom previously practiced personal injury and employment litigation at a prominent plaintiffs' firm in San Francisco. For more information please e-mail emasoom@masoomlaw.com or visit www.masoomlaw.com.

