

Unmarried employee couple is expecting: Can both take FMLA leave?

Q. A while ago two of our employees developed a romantic relationship. They are now expecting a baby and both workers put in a request for family leave to bond with their newborn. Are we required to give both workers leave for the birth of their child—even if they are not married?

A. As usual, federal and California laws differ on the issue of how to treat two employees of a single employer who both request leave for the birth of a child.

The FMLA entitles employees to take up to 12 weeks of unpaid, job-protected leave each year for certain family and medical reasons, including the birth or adoption of a child, or placement of foster children. The FMLA, however, permits employers to limit the leaves of parent/co-workers if they are married. The law states: "In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period."

The California Family Rights Act (CFRA) also provides leave for employees for the birth of a child for purposes of bonding or for the placement of a child for adoption or foster care. The CFRA also permits employers to limit the leave of employees who work for the same employer.

The CFRA differs from the FMLA in that it does not require that the two employees be married to permit an employer to limit their leave. According to the California Department of Fair Employment and Housing, "If both parents are eligible for CFRA leave but are employed by the same employer, that employer may limit leave for the birth, adoption, or foster-care placement of their child to 12 workweeks in a 12-month period between the two parents."

So under the FMLA, employers would not be able to limit the bonding leave of unmarried employees. However, the CFRA's limitation permits employers to limit employees' leave, regardless of their marital status. Of course, if you are covered by the FMLA, you may have to provide the time.