How do California and federal laws treat surrogate motherhood?

Q. One of our employees announced that she has agreed to become a surrogate mother. What, if any, kind of leave are we required to provide to her?

A. California law requires that employers provide up to four months of leave for the period of time that the employee is “actually disabled” by her pregnancy. There is no eligibility requirement in terms of a particular length of time that the worker must be employed by the company to be entitled to this leave. Further, eligibility does not depend on the reason for the pregnancy. Thus a worker who is a surrogate mother is entitled to leave.

The interesting issue arises in the context of additional leave. Employers with 50 or more workers are required to provide an additional 12 weeks’ unpaid leave under the FMLA and the California Family Rights Act (CFRA) to those who have been employed by the company for 12 months and who have worked at least 1,250 hours. An employer may count a worker’s pregnancy disability leave (up to 12 weeks) against her entitlement to FMLA leave based on her own “serious health condition.” That is, the leaves may run concurrently.

However, California law provides that a worker’s entitlement to CFRA leave is “separate and distinct” from her entitlement to pregnancy disability leave. Thus, at the end of a worker’s pregnancy disability leave, she can request up to 12 weeks’ CFRA leave “for reason of the birth of her child.” This time off often is referred to as “bonding” leave.

Assuming the surrogate mother plans to give up the child immediately after birth, she would not be eligible for bonding leave under the CFRA. However, if you do not provide proper notification that you intend to run FMLA leave concurrently with her pregnancy disability leave, she may be entitled to an additional 12 weeks’ leave if she exhausts the four-month pregnancy disability leave and still suffers from a serious health condition.