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Entrepreneurial Parole for Foreign Entrepreneurs

The Biden Administration has recently revived the entrepreneur parole program as a part of its efforts to expand immigration options for promising foreign entrepreneurs. This announcement is welcome news for foreign entrepreneurs with startup businesses in the US who do not otherwise qualify for nonimmigrant work visa categories.

To qualify, foreign entrepreneurs must demonstrate several criteria, including:

1. The applicant must have established a US startup business within 5 years before the application for parole;

2. The applicant must hold an ownership interest in the startup of at least 10%, play an active and central role within the business, and cannot merely serve as an investor; and

3. The startup must have received a capital investment of at least $250,000 from qualified US investors or at least $100,000 in grants or awards from qualifying US government entities.

Foreign entrepreneurs who only partially satisfy the funding criteria have the opportunity to provide additional compelling evidence of the startup's substantial potential for rapid growth and job creation. No more than three foreign entrepreneurs may be granted parole per startup entity.

While the entrepreneur parole program does provide some benefits to foreign entrepreneurs, it is important to highlight its limitations. The program does not provide immigration status to approved applicants. Rather the qualifying entrepreneur will receive "parole" – a discretionary and temporary permission to enter and remain in the US for 5 years. This parole admission does not constitute a formal immigration status. As a result, approved foreign national applicants will not have a direct pathway to obtaining permanent residence in the US through the entrepreneur parole program. If the foreign entrepreneur is interested in obtaining permanent residence, they may consider another nonimmigrant visa category or obtaining sponsorship for an employment-based green card category.

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Your Employee Returns From Extended Medical/Disability Leave, But You Have Filled Their Position: Now What?

As California continues to expand employee rights to take leave for medical reasons – most recently in the wake of the COVID-19 pandemic – more employees are taking extended time off to address medical and other personal issues. As a result, employers find themselves having to hire someone else to do that job in the meantime. These employers may potentially find themselves in a vexing scenario which involves the original employee returning from disability leave to find that their employer has filled their position.

The scenario typically begins when an employee seeks and takes leave under the federal Family and Medical Leave Act ("FMLA") and/or the California Family Rights Act ("CFRA"). While CFRA is much more expansive regarding when leave may be taken, CFRA and FMLA generally entitle employees to 12 weeks of job-protected leave – meaning employers must permit the employee to resume their job as usual when they return to work. If the employee returns before or upon the expiration of their 12 weeks of leave, then they are entitled to the same or substantially similar position. California and Federal courts have narrowly construed this to mean the job must have similar duties, location, seniority, promotion eligibility, pay, and benefits.

However, an employer's obligation to provide leave to an employee does not expire with the 12 weeks of leave. Assuming the employee took CFRA/FMLA leave for their own medical condition, that employer may be on notice of a potential disability that will have to be properly evaluated and accommodated. Under the Americans with Disabilities Act ("ADA") and California's Fair Employment Housing Act ("FEHA"), employers must engage in the interactive process (a two-way dialogue with the employee) and provide that employee with reasonable accommodations, which may include providing an employee leave beyond what is covered by CFRA or FMLA. Because of this obligation, employers often accommodate such employees by providing them with extended leave; however, their position is no longer protected under CFRA or FMLA. In short, the employer is obligated to provide leave beyond the 12 weeks but may not be obligated to provide the employee with the same or substantially similar position after that 12-week period.

In an ideal world, employers would know precisely how long the employee will be out, and a temporary employee could complete the work in the interim. Unfortunately, this is often not the case. Many individuals on disability leave do not know when they will recover or if they will be restricted in their duties when they are released to return to work. Further, some positions are mission-critical for the company. As such, if the work cannot be done in-house, an employer may need to hire and train another employee to fill that position. The problem then arises when the original employee obtains a release to work from their doctor with no restrictions, and you have no position for them.

Employers should attempt to avoid this scenario as it may result in a dispute or, worse – a lawsuit. As the Karate Kid's Mr. Miyagi aptly counseled, the "best defense is no [sic] be there." Pragmatically, employers should first have procedures that raise awareness of this potential issue with company management when employees take FMLA or CFRA leave. Further, when an employee takes FMLA or CFRA leave, the employer should consider what steps they will need to take for that position should the employee need leave beyond 12 weeks. Ideally, that employee's duties and responsibilities would be assumed internally or by a temporary employee. But some positions cannot be subsumed in-house for any significant length of time and/or require training and experience that temporary employees cannot fulfill.

One of the few defenses California has recognized as a defense to FEHA claims in these circumstances is if the employer can establish that the decision to replace the employee was one of a business necessity. Thus, in cases where the employer must hire someone to replace the employee on leave, they should work with counsel to extensively analyze and document how it decided that it was necessary to make that hire. Once that hire has been made, the employer should prepare for the inevitability of the employee's return from leave. Upon initial return, the employer must get a full release to work. In the event the employee does not provide a full release but is permitted to return to work with disability-related restrictions, the employer must enter the interactive process with the employee and identify reasonable accommodations. The interactive process contemplates that the disabled employee and the employer will communicate directly with one another.

FEHA requires employers to make reasonable accommodations for the known disabilities of employees and applicants to enable them to perform the essential functions of a position unless doing so would produce undue hardship to the employer's operations. A reasonable accommodation is a modification or adjustment to the work environment that enables the employee to perform the essential functions of the job they hold or desire. Examples of reasonable accommodations include: transferring an employee to a more accessible worksite; job restructuring; providing a part-time or modified work schedule; providing additional training; providing paid or unpaid leave for treatment and recovery, and reassigning them to a vacant position.

While employers are not required to provide employees returning from unprotected leave with the same or similar position as they would be under FMLA and CFRA, employers should work to identify and offer to the employee any similar, open jobs for which the employee may be qualified. This does two things. First, it is less likely to create conflict with an employee who just returned from medical or disability leave – assuming the offer is comparable and respectful of the employee's prior role, tenure and contributions. Second, if the employee declines the offer and sues for discrimination based on disability or for taking disability leave, that offer of employment may mitigate the employer's exposure to liability and potential damages.

While the risk of employment lawsuits can never be entirely eliminated, California employers can mitigate and manage their risk by contacting their counsel and ensuring they have a plan and procedures in place to address this circumstance. If you have any questions or concerns regarding compliance, the attorneys at Ferruzzo & Ferruzzo, LLP can provide such guidance.

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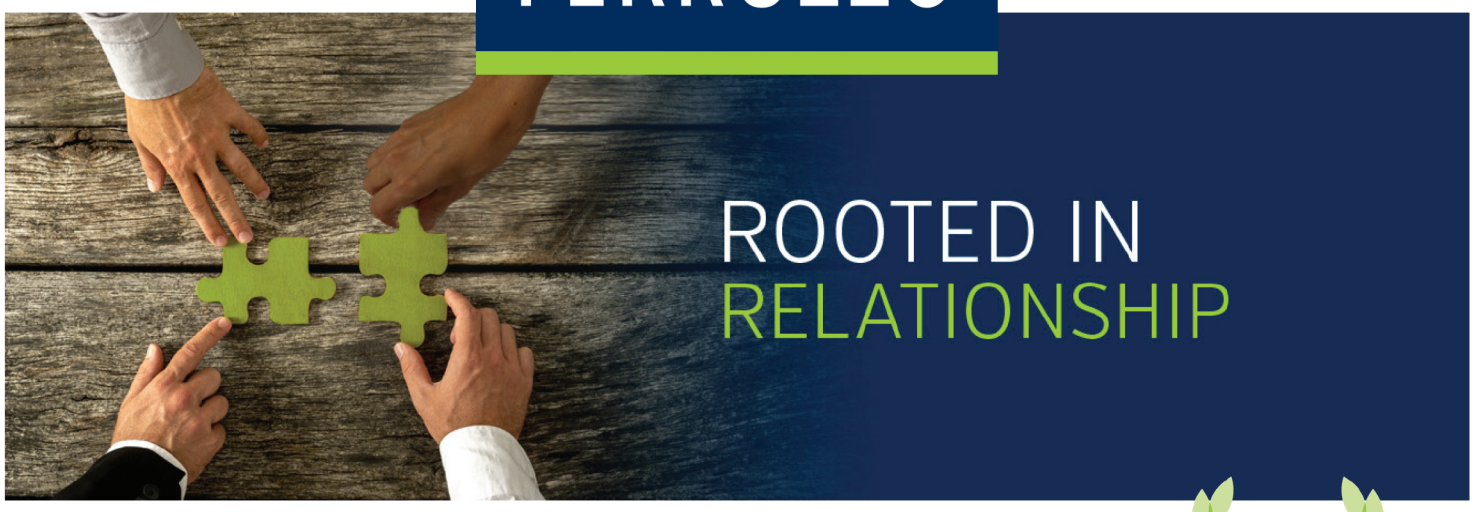

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42 YEARS

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