

August 22, 2008

EMPLOYMENT DEVELOPMENT DEPARTMENT

**Amendment of Title 22, California Code of Regulations
Sections 2706-2, 3302-1, and 3303.1(c)-1**

FAMILY TEMPORARY DISABILITY INSURANCE BENEFITS

Notice of Regulation Change

Notice is hereby given pursuant to section 11346.8(c) of the Government Code and section 44 of Title 1 of the California Code of Regulations, that the Department has made changes to the text of the proposed amendments since they were made available for 45 days for public comment on June 6, 2008. Attached are the proposed amendments that were originally noticed, with changes shown in **bold type and underline** and **bold type and ~~strikeout~~**.

Any interested person, or his or her authorized representative, may submit written comments on the proposed action to Laura Colozzi via U.S. mail, e-mail, or fax (see U.S. mail address, e-mail address, and fax number indicated below). E-mail comments should include true name and mailing address of the commentor. **Written comments submitted via U.S. mail, e-mail, or fax, must be received by the Department no later than 5 p.m. on September 8, 2008, which is the close of the 15-day public comment period.** The Department may not include in the rulemaking file comments received after that date.

Please limit your comments to the changes shown in **bold type and underline** and **bold type and ~~strikeout~~** on the attached regulations. At this time the Department will not consider changes to any sections of the regulations other than those which have been modified since the original 45-day public notice.

Comments can be submitted to the Department as follows:

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This notice and the modified proposed amendments have been posted on the Department's Internet website "Proposed Regulations" at <http://www.edd.ca.gov>.

Please call Laura at (916) 654-7712 if you have any questions regarding this notice. If Laura is not available, call Penny Ayers at (916) 654-8410.

Enclosures

EMPLOYMENT DEVELOPMENT DEPARTMENT

Amendment of Title 22, California Code of Regulations, Sections 2706-2, 3302-1, and 3303.1(c)-1

FAMILY TEMPORARY DISABILITY INSURANCE BENEFITS

Text of Proposed Regulatory Changes

NOTE: Changes made in the regulation text after the 45-day public comment period are noted as follows: Language added is shown in **bold type and underline**; language deleted is shown in **bold type and strikeout**.

AMEND SECTION 2706-2 TO READ AS FOLLOWS:

§ 2706-2. Claim for Family Temporary Disability Insurance Benefits – Filing and Contents.

(a) “First claim” means the claim initially filed on a form prescribed by the department with respect to a 12-month period of family care leave. By filing the first claim, ~~¶~~the claimant establishes his or her 12-month period and the department computes the weekly benefit amount and maximum benefits potentially payable for the 12-month period.

(b) Any individual who has taken time off from his or her work for a period of eight days to care for a seriously ill child, spouse, parent, registered domestic partner, or to bond with a new ~~minor~~ child, as they are defined in section 3302 of the code, may file a claim for benefits.

(c) A “properly completed first or re-established claim” means a claim containing all the required items as prescribed in this section.

(d) The claimant shall file the first or re-established claim and shall provide his or her:

- (1) legal name, and any other last names by which the claimant is or was known.
- (2) social security account number.
- (3) date of birth.
- (4) gender.
- (5) mailing address.
- (6) last day worked at his or her last job.
- (7) reason why he or she is no longer working at his or her last job.
- (8) occupation.
- (9) name(s) and address(es) of his or her most recent employer(s).

(10) date on which he or she requests benefits to begin.

(11) care or bonding recipient's legal name.

(12) relationship to the care recipient. The claimant may be required to provide evidence of the relationship to the family member to support the claim such as a birth or marriage certificate or proof of a registered domestic partnership.

(13) statement attesting whether any other family member is ready, willing, able and available to provide care for the same period of time in a day.

(14) signature.

(15) authorization for the department to disclose the claimant's information as listed herein from (d)(1) to (d)(14) to the care recipient's treating physician or practitioner and to the care recipient.

(16) such other information as the department may require.

(e) The claimant shall complete the bonding certification if applying for benefits to bond with a new minor child and shall set forth the new minor child's:

(1) social security account number, if issued. Absence of child's social security account number shall not disqualify the claimant.

(2) relationship to the claimant.

(3) date of foster care or adoption placement of the new minor child with the claimant or family member.

(4) legal name.

(5) date of birth.

(6) gender.

(7) residence address.

(8) documentary evidence, pursuant to section 2708(c)-1 of these regulations.

(9) claimant's signature.

(10) such other information as the department may require.

(f) The claimant shall also provide the information as specified below about the following persons:

(1) for a care recipient, the claimant shall provide the care recipient's:

(A) legal name.

(B) social security account number, if issued. Absence of care recipient's social security account number shall not disqualify the claimant.

(C) date of birth.

(D) gender.

(E) residence address.

(F) signature or authorized representative's signature authorizing the treating physician or practitioner to release the care recipient's protected health information to the department and the claimant.

(2) The claimant shall gather from the treating physician or practitioner on the department's designated form:

(A) the name of the care recipient.

(B) the date of birth of the care recipient.

(C) a diagnosis and diagnostic code(s) prescribed in the International Classification of Diseases, or where no diagnosis has yet been obtained, a detailed statement of symptoms.

(D) the date, if known, on which the serious health condition of the care recipient commenced.

(E) the probable duration of the care recipient's serious health condition.

(F) an estimate of the duration of time that the care provider is needed to care for the care recipient.

(G) the number of hours per day that the care provider is needed to care for the care recipient.

(H) a statement that the care recipient's serious health condition warrants the participation of the care provider to provide care for the care recipient.

(I) a statement regarding whether disclosure of the doctor's certification would be medically or psychologically detrimental to the care recipient.

(J) the treating doctor's or practitioner's name and address.

(K) the treating doctor's or practitioner's license number.

(L) the treating doctor's or practitioner's signature.

(M) such other information as the department may require.

NOTE: Authority cited: Sections 305 and 306, Unemployment Insurance Code.
Reference: Sections 2701.5, 2706 and 3303.1, Unemployment Insurance Code.

AMEND SECTION 3302-1 TO READ AS FOLLOWS:

§ 3302-1. Family Temporary Disability Insurance Definitions.

Unless the context otherwise requires, the terms used in this part relative to Family Temporary Disability Insurance benefits shall have the following meaning:

(a) "Authorized representative" of a claimant or care recipient means one of the following individuals who:

(1) is the parent.

(2) is authorized by a power of attorney or other authorization satisfactory to the department to represent or act on behalf of a claimant or care recipient who is incapable of fulfilling the requirements of filing claims for Family Temporary Disability Insurance benefits.

(3) files with the department upon a prescribed form a duly sworn affidavit that the claimant, according to information received by the individual from the claimant's physician or practitioner, is incapable of making a claim for family temporary disability benefits, and that the authorized representative assumes the responsibility of acting on behalf of such claimant in accordance with the code and this part.

(4) files with the department upon a prescribed form a duly sworn affidavit that the care recipient, according to information received by the individual from the care recipient's physician or practitioner, is incapable of completing his or her portion of the claim for family temporary disability benefits, and that the authorized representative assumes the responsibility of acting on behalf of such care recipient in accordance with the code and this part.

(b) "Bond" or "bonding" with a new child means to develop a psychological and emotional attachment between a child and his or her primary care giver(s). This involves being in one another's physical presence.

(c) "Care provider" means the family member who is providing the required care. This term is used interchangeably with "claimant."

(d) "Care recipient" means either of the following:

(1) the family member as defined in section 3302 of the code who is receiving care for a serious health condition.

(2) the minor child with whom the claimant is bonding.

(e) "Certificate" means the signed statement of a physician, practitioner, or a registrar of a county hospital of this State, on a form prescribed by the department, containing elements described in Section 2706-2(f), except that a certificate signed by a physician licensed by and practicing in a state other than California or in a foreign country, or in a territory or possession of a country, except a duly authorized medical officer of any medical facility of the United States Government, shall be accompanied by a further certification that such physician holds a valid license in the state or foreign country, or in the territory or possession of the country, in which he or she is practicing.

(f) "Child" means a biological, adopted, or foster child, a stepchild, a legal ward, a son or daughter of a domestic partner, or a child of a person standing in loco parentis. This definition of a child is applicable regardless of age or dependency status.

(g) "Claimant" means an individual who has filed a claim for Family Temporary Disability Insurance benefits. This term is used interchangeably with "care provider."

(h) "Continued claim" means the claim, for the same care recipient within the same 12-month period, subsequent to the first or re-established claim where there is no interruption of the period for which benefits are claimed. A continued claim does not require a waiting period.

(i) "Disability benefits" wherever used in the code means benefits payable under Part 2 of Division 1 of the code, including Family Temporary Disability Insurance benefits.

(j) "Domestic partner" means a registered domestic partner as defined in California Family Code section 297.

(k) "Family member" means those individuals described in section 3302 of the code.

(l) "Family Temporary Disability Insurance" means the program established to provide up to six weeks of wage replacement benefits to workers who take time off to care for a seriously ill child, spouse, parent, registered domestic partner, or to bond with a new child as of July 1, 2004. Claims for benefits cannot begin prior to this date.

(m) "First claim" means the claim initially filed on a form prescribed by the department, containing elements described in Section 2706-2, with respect to a 12-month period of family care leave. The claimant establishes his or her 12-month period and the Department computes the weekly benefit amount and maximum benefits potentially payable.

(n) "Foster care" means 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.

(o) "In loco parentis" exists when a person undertakes care and control of a child in the absence of such supervision by the natural parents and in the absence of formal legal approval. This includes persons with day-to-day responsibilities to care for and financially support a child. It also includes the person who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(p) "New child" means a minor child for whom leave is taken for purposes of bonding within 12-months of the child's birth or placement with the claimant or the claimant's spouse or domestic partner.

(q) "Parent" means a biological, foster, or adoptive parent, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child. A biological or legal relationship is not necessary for a person to have stood in loco parentis to the employee as a child. This term does not include a parent-in-law.

(r) "Placement" means a change in physical custody of a child from a public agency or adoption agency into the custody of foster care or adoptive parents.

(s) "Re-established claim" means a claim filed subsequent to a first claim within the same 12-month period. A "re-established claim" occurs when there is one of the following:

(1) an interruption of the period for which benefits are claimed for the same care recipient for which a new waiting period is not required; or

(2) benefits are claimed for a new care recipient for which a new waiting period is required.

(t) "Regular wages" as used in section 2656 of the code means compensation paid entirely by an employer directly to his or her employee as a full or partial payment of his or her remuneration during a period of family care leave.

(u) "Stepparent" means a person who is a party to the marriage with respect to a ~~minor~~ child of the other party to the marriage.

(v) "Vacation leave" means vested vacation time which, upon termination of employment, must be paid to the employee as wages pursuant to Labor Code section 227.3 or the applicable collective bargaining agreement. An employer policy under which paid time off is vested under Labor Code section 227.3 is considered vacation leave pursuant to section 3303.1(c) of the code regardless of the name given the leave by the employer.

(w) "Week" means the seven consecutive day period beginning with the first day with respect to which a valid claim is filed for benefits and thereafter the seven consecutive day period commencing with the first day immediately following such week or subsequent continued weeks of family care leave.

(1) The term "week" for purposes of determining eligibility for Family Temporary Disability Insurance benefits when an individual's employer requires the use of earned, but unused vacation pay, shall consist of seven calendar days. If the pay period is not based on calendar days, a week shall consist of 168 consecutive hours. With respect to an individual whose wages are not paid on a weekly basis, a week shall consist of the seven-consecutive-day periods for an individual, as appropriate to the circumstances.

(x) "Weekly wage" as that term is used in section 2656 of the code means any remuneration earned, exclusive of wages paid for overtime work, during the last full week of work immediately preceding the claimant's first day of family care leave, except that for good cause the department may determine the "weekly wage" in any other equitable manner.

(y) For purposes of section 140.5 of the code no individual shall be deemed eligible for Family Temporary Disability Insurance benefits for any week of unemployment unless such unemployment is due to the need for family care leave.

(1) If an individual has been neither employed nor registered for work in any manner designated by the director for more than three months immediately preceding the beginning of a period of family care leave, he or she is not eligible for benefits unless the department finds that the unemployment for which he or she claims benefits is not due to his or her previous withdrawal from the labor market.

NOTE: Authority cited: Sections 305 and 306, Unemployment Insurance Code.
Reference: Sections 140.5, 1253, 2656, 3300 and 3302, Unemployment Insurance Code.

AMEND SECTION 3303.1(c)-1 TO READ AS FOLLOWS:

§3303.1(c)-1. Vacation Leave.

An individual eligible to receive Family Temporary Disability Insurance benefits who receives full or partial vacation leave pursuant to section 3303.1(c) of the code shall not be paid benefits during the same period. An individual may serve a waiting period during receipt of full or partial vacation leave.

EXAMPLE 1. One Week Vacation Leave. Claimant A establishes a claim for Family Temporary Disability Insurance benefits commencing July 1. Claimant A's employer requires the use of up to two weeks of earned but unused vacation leave prior to receipt of Family Temporary Disability Insurance benefits. Claimant A has one week of vacation leave available.

The vacation leave is allocated to the seven-day waiting period and Claimant A may receive full Family Temporary Disability Insurance benefits beginning on July 8, if otherwise eligible.

EXAMPLE 2. Two Weeks Vacation Leave. Claimant B establishes a claim for Family Temporary Disability Insurance benefits commencing July 1. Claimant B's employer requires the use of up to two weeks of earned but unused vacation leave prior to receipt of Family Temporary Disability Insurance benefits. Claimant B has two weeks of vacation leave available.

One week of vacation leave is allocated to Claimant B's seven-day waiting period July 1 through July 7. Claimant B is not eligible for Family Temporary Disability Insurance benefits for the period of July 8 through July 14 pursuant to section 3303.1(c) of the code. Claimant B may receive full Family Temporary Disability Insurance benefits beginning July 15, if otherwise eligible.

EXAMPLE 3. Three Weeks Vacation Leave. Claimant C establishes a claim for Family Temporary Disability Insurance benefits commencing July 1. Claimant C's employer requires the use of up to two weeks of earned but unused vacation leave prior to the receipt of Family Temporary Disability Insurance benefits. Claimant C has three weeks of vacation leave available.

One week of vacation leave is allocated to the seven-day waiting period July 1 through July 7. Claimant C is not eligible for Family Temporary Disability Insurance benefits for the period July 8 through July 14 pursuant to section 3303.1(c) of the code. Claimant C may receive full Family Temporary Disability Insurance benefits beginning July 15, if otherwise eligible, since the third week of vacation leave is not in conflict.

EXAMPLE 4. Vacation Leave Not Required. Claimant D establishes a claim for Family Temporary Disability Insurance benefits commencing July 1. Claimant D's employer does not require the use of up to two weeks of earned but unused vacation leave prior to the receipt of Family Temporary Disability Insurance benefits. Claimant D chooses to use three weeks of vacation leave available.

Claimant D may receive full Family Temporary Disability Insurance benefits, if otherwise eligible, beginning July 8, after serving a seven-day waiting period. Claimant D's vacation leave does not conflict with the receipt of Family Temporary Disability Insurance benefits since the employer did not require Claimant D to use the vacation leave.

EXAMPLE 5. Partial Week Vacation Leave. Claimant E establishes a claim for Family Temporary Disability Insurance benefits commencing Thursday, July 1, 2004.

Claimant E's employer requires the use of up to two weeks of earned but unused vacation leave prior to the receipt of Family Temporary Disability Insurance benefits. Claimant E normally works four ten-hour shifts, Monday through Thursday, and has 60 hours of vacation leave available.

Forty hours of vacation leave is allocated to the seven-day waiting period July 1 through July 7, 2004. The remaining 20 hours of vacation leave is allocated to July 8 and 12, his next scheduled workdays. Claimant E is not eligible for Family Temporary Disability Insurance benefits for the period July 8 through July 12, 2004, due to the receipt of vacation leave pursuant to section 3303.1(c) of the code. Claimant E may receive full Family Temporary Disability Insurance benefits beginning July 13, 2004, if otherwise eligible, because this is the first day for which he suffers a wage loss.

EXAMPLE 6. Paid Time Off. Claimant F establishes a claim for Family Temporary Disability Insurance benefits commencing July 18. Claimant F's employer grants paid leave, which is paid to the employee as wages pursuant to Labor Code section 227.3. Claimant F's employer requires the use of up to two weeks of this earned but unused leave prior to the receipt of Family Temporary Disability Insurance benefits. Claimant F, a part-time worker, normally works three eight-hour shifts per week and has 48 hours of this leave available.

Twenty-four hours are allocated to the seven-day waiting period July 18 through July 24. The remaining 24 hours are allocated to July 25 through July 31, his next scheduled workweek. Claimant F is not eligible for benefits July 25 through July 31 due to the receipt of leave pursuant to section 3303.1(c) of the code. Claimant F may receive full Family Temporary Disability Insurance benefits beginning August 1, if otherwise eligible, because this is the first day for which he suffers a wage loss.

EXAMPLE 7. Vacation Leave During Intermittent Family Care. Claimant G establishes a claim for Family Temporary Disability Insurance benefits commencing September 1, 2006. Claimant G plans to take every Friday off beginning September 1 to provide care for his seriously ill spouse. He also plans to provide care on Saturdays and Sundays. Claimant G normally works five eight-hour days, Monday through Friday. Claimant G's employer requires the use of up to two weeks of earned but unused vacation leave prior to the receipt of Family Temporary Disability Insurance benefits. Claimant G's employer reports that it paid him two weeks (80 hours) of vacation leave for ten successive Fridays falling on September 1, 8, 15, 22, 29, October 6, 13, 20, 27, and November 3.

Claimant G will serve the seven-day waiting period on September 1, 2, 3, 8, 9, 10, and 15. Vacation leave may only be allocated toward regularly scheduled work days. Twenty-four hours of required vacation leave is allocated toward the seven-day waiting period for September 1, 8 and 15; the remaining 56 hours will be allocated to September 22, 29, October 6, 13, 20, 27 and November 3. Vacation leave may not be allocated to September 2, 3, 9, and 10, as those days are not regularly scheduled workdays. Claimant G may receive Family Temporary Disability Insurance benefits beginning November 4, 2006, or the first day thereafter for which he suffers a wage loss, if otherwise eligible.

EXAMPLE 8. Vacation Leave During Middle of Claim. Claimant H establishes a claim for Family Temporary Disability Insurance benefits commencing September 13, 2006, to provide care for her seriously ill mother. Claimant H normally works five eight-hour days, Monday through Friday. Claimant H served the seven-day waiting period from September 13 through September 19 and received benefits from September 20

through October 31, 2006. The employer paid the claimant two weeks of vacation leave from October 9 through October 20.

The vacation leave under this circumstance would not be in conflict with the receipt of Family Temporary Disability Insurance benefits, as Claimant H suffered a full wage loss beginning September 13, and the vacation leave was paid two weeks after commencement of the claim.

EXAMPLE 9. Vacation Leave On A Re-Established Claim. Claimant I establishes an initial claim for Family Temporary Disability Insurance benefits commencing June 5, 2006 in order to provide care for her seriously ill father. Claimant I normally works five eight-hour days, Monday through Friday. Claimant I's employer requires the use of up to two weeks (ten days) of earned but unused vacation leave prior to the receipt of Family Temporary Disability Insurance benefits.

The claimant returned to work on June 14, 2006. The first week (five days) of required vacation leave is allocated to the seven-day waiting period from June 5 through June 11. Two days of the second week of required vacation leave are allocated to June 12 and June 13. The claimant has allocated seven out of ten days of required vacation leave for the period of June 5 through June 13. No benefits are paid since the claimant returned to work on June 14.

Claimant I submits a new claim to re-establish her initial claim with an effective date of October 2, 2006, to continue caring for her father. Since the employer requires the claimant to use ten days of earned but unused vacation leave, the three days of remaining leave from the initial claim are allocated to October 2, 3 and 4. Claimant I may receive Family Temporary Disability Insurance benefits beginning October 5, if otherwise eligible.

EXAMPLE 10. Partial Conflicting Vacation Leave After Claim Effective Date. Claimant J establishes a claim for Family Temporary Disability Insurance benefits commencing on July 10, 2006, to provide care for his seriously ill mother. Claimant J normally works five eight-hour days, Monday through Friday. Claimant J served the seven-day waiting period from July 10 through July 16.

Claimant J's employer paid him two weeks (ten days) of required vacation leave from July 12 through July 25. The first three days of required vacation leave are allocated to the waiting period of July 10 through July 16. The next five days of required vacation leave are allocated to the second week from July 17 through July 23. The final two days of required vacation leave fall into the third week of the benefit period and **are** not in conflict with the receipt of Family Temporary Disability Insurance benefits. Claimant J may receive Family Temporary Disability Insurance benefits beginning July 24, if otherwise eligible.

NOTE: Authority cited: Sections 305 and 306, Unemployment Insurance Code.
Reference: Sections 2656 and 3303.1, Unemployment Insurance Code.
