

Amended Pregnancy Regulations Expand Protections for Employees Disabled by Pregnancy or Perceived as Pregnant

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All California employers with five or more full- or part-time employees must comply with the California Fair Employment and Housing Commission's ("FEHC") amended pregnancy regulations that went into effect December 30, 2012. Moreover, there is no eligibility requirement, such as minimum hours worked or length of service, before an employee disabled by pregnancy is eligible for reasonable accommodation, transfer, or disability leave.

The regulations state that it is unlawful for any employer to take any adverse action against an employee who is disabled by pregnancy or is perceived as pregnant. Examples of prohibited conduct include discrimination, retaliation, refusal to hire, refusal to train, a forced transfer to another position or harassment.

Further, an employer may not refuse to provide or maintain health benefits, provide a reasonable accommodation, or grant a leave or a transfer. An employer also may not interfere with the employee's rights.

The following important changes went into effect as a result of the amended regulations and are elaborated upon below: (i) employees "perceived as" pregnant are protected, (ii) specific examples of "disabled by pregnancy" are provided in the regulations, (iii) employers who pay for any portion of health care coverage must continue to pay these benefits during a pregnancy leave for up to four months, (iv) the calculation of the four month maximum period of pregnancy disability leave is redefined, (v) employers are required to provide reasonable accommodations, including transfers to employees who are disabled by pregnancy, (vi) the reinstatement process is stated in detail, and (vii) there are new notice requirements to employees.

I. Perceived Pregnancy

The amended regulations define "perceived pregnancy" as being regarded or treated by an employer as being pregnant or having a related medical condition. This precludes any employer from harassing any employee or discriminating against any employee on the basis that the employer perceives the employee as being pregnant. There is no requirement that an employer accommodate an employee on the basis of perceived (as opposed to actual) pregnancy.

II. Who May Be "Disabled by Pregnancy"

An employee is "disabled by pregnancy" when the employee's health care provider opines that she is unable to perform any one or more of the "essential functions" of her job or is unable to perform any of these functions without undue risk to herself, to her pregnancy's successful completion, or to other persons. The amended regulations set forth an illustrative (but not exhaustive) list stating that an employee may also be considered to be "disabled by pregnancy" if, according to her doctor, she is suffering from "severe morning sickness," or needs to take time off for prenatal or postnatal care, bed rest, gestational diabetes, pregnancy-induced hypertension, preeclampsia, post-partum depression, childbirth, loss or end of pregnancy, or recovery from childbirth, loss or end of pregnancy.

III. Health Care Coverage for Eligible Female Employee

The amended regulations impose an additional obligation on California employers to maintain and pay for coverage for an eligible female employee who takes pregnancy disability leave for the duration of the leave, not to exceed four months over the course of a 12-month period, beginning on the date the pregnancy disability leave begins. The coverage must be at the level and under the conditions that coverage would have been provided if the employee had continued in employment without interruption for the duration of the leave.

Further, the time employers maintain and pay for health coverage during pregnancy disability does not run concurrently with the time employees are allowed to take off for leave under the California Family Rights Act ("CFRA"). As such, employers may be required to maintain the employee's healthcare coverage for a period of up to 29½ weeks if the employee takes her maximum pregnancy-disability leave in addition to maximum CFRA leave for baby-bonding (or for any other CFRA-qualifying reason).

The amended regulations, however, do provide for cost recovery. In other words, an employer may recover from the employee the premiums paid while the employee was on pregnancy disability leave if both of the following conditions occur: (1) the employee fails to return at the end of her pregnancy disability leave, and (2) the employee's failure to return is not due to her taking a CFRA leave or the continuation,

recurrence or onset of a health condition (including non-pregnancy medical conditions).

IV. Four-Month Leave Redefined

The regulations clarify that a leave is to be provided on a per-pregnancy basis, not per year. A four-month leave means time off for the number of hours the employee would normally work within the four calendar months. For a full time employee who works five eight-hour days per week, "four months" means 693 hours of leave entitlement, based on an average 17 1/3 weeks in four months times 40 hours per week. For employees who work more or less than five days per week, or on variable work schedules, the number of working days that constitute "four months" is calculated on a pro-rata or proportional basis. An employee may also take leave on an intermittent basis, and an employer may account for that leave using either the shortest period of time the employer uses to account for any leave, or one hour, whichever is shorter.

V. Reasonable Accommodation and Transfer

A California employer must engage in an interactive process to determine whether any reasonable accommodation is available to an employee who is disabled by pregnancy. "Reasonable accommodation" is defined as any objectively feasible change in the work environment or in the way that a job is customarily done that is effective in enabling an employee to perform the essential functions of a job. The amended regulations specify that reasonable accommodation may include, but is not limited to an employer: (i) modifying work practices, (ii) modifying work duties, (iii) modifying work schedules to permit earlier or later hours, (iv) acquiring or modifying equipment or devices, and other "similar actions."

It is unlawful for an employer to deny the employee's request for a reasonable accommodation if: (i) the request is based on the advice of her doctor that reasonable accommodation is medically advisable, and (ii) the requested accommodation is reasonable. Whether an accommodation is reasonable is a factual determination to be made on a case-by-case basis, taking into consideration such factors as, the employee's medical needs, the duration of the needed accommodation, the legally permissible past and current practices of the employer, and other such factors, under the totality of the circumstances. Therefore, unlike accommodation requests for other disabilities, in which the employer may suggest a reasonable accommodation of its own choosing, it appears that the employer must implement the reasonable accommodation requested by the pregnant employee. As long as the requested

accommodation is "medically advisable" and reasonable, an employer must provide the accommodation.

Further, the regulations do not appear to take into account the employer's business realities or provide for any undue hardship defense that would allow an employer to reject a requested reasonable accommodation.

A reasonable accommodation does not affect the right of the employee to take up to four months of leave unless the accommodation is a reduction of hours worked, such as a reduced work schedule or intermittent leave. Such accommodations are a form of leave and the employer may credit the hours taken for such time off against the employee's four-month leave entitlement.

An employer who allows job transferring for other types of disabilities must equally provide for the transfer of employees who have pregnancy-related disabilities. An employer need not create a position that would not otherwise have been created, discharge another employee, transfer another employee with greater seniority, or promote or transfer a pregnant employee who is not qualified to perform the new job. An employer may accommodate a pregnant employee's transfer request by transferring another employee, but there is no obligation to do so. Once the employee's health care provider certifies that a transfer is no longer advisable, the employer must reinstate the employee to the same job the employee held prior to the transfer, or to a comparable job.

An employer must respond to the reasonable accommodation, transfer or pregnancy disability leave request as soon as practicable, and no later than 10 calendar days after receiving the request.

VI. Reinstatement Explained

An employee who takes pregnancy disability leave is guaranteed the return to the same position. If the employee would not otherwise have been employed in the same position at the time of reinstatement because of a legitimate business reason (e.g. mass layoff), or if the employee's ability to operate the business safely and efficiently would be substantially undermined, the employer must place the employee in a comparable position. An employer must provide the reinstatement guarantee in writing upon the request of the employee.

The right to reinstatement to a comparable position is excused where there is no comparable position available or where it would substantially undermine the employer's ability to operate the business safely and efficiently. (A position is available if

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there is a position open on the employee's scheduled date of reinstatement or within 60 calendar days thereafter.) Employment in a "comparable position" means a position virtually identical to the position the employee held prior to reasonable accommodation, transfer or pregnancy disability leave.

An employer has an affirmative duty to provide notice of available positions either in person, by letter, telephone or email, or by listing available jobs on the company's website.

VII. Notices

An employer must give its employees reasonable advance notice of employees' rights and obligations regarding pregnancy, childbirth or related medical conditions. The FEHC has authored two different notices that can be used. The regulations require three methods of distributing the notice: (i) posting it in a conspicuous place where employees congregate, (ii) including the notice in a revised version of any employee handbook implemented after December 30, 2012, and (iii) provide a copy to an employee as soon as practicable after the employee tells the employer of her pregnancy, or sooner if the employee requests an accommodation.

An employer may require an employee to provide a medical certification of the need for leave. A medical certification requesting a reasonable accommodation or transfer will be "sufficient" if it contains the following information:

- A description of the requested reasonable accommodation or transfer;
- A statement describing the medical advisability of the reasonable accommodation or transfer because of pregnancy; and
- The date on which the need for reasonable accommodation or transfer became or will become medically advisable and the estimated duration of the reasonable accommodation or transfer.

Please contact counsel with questions about how these regulations may affect your Company and whether revisions are required to your written policies and procedures.



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