California pregnancy disability leave regulation changes and clarifications

The California Department of Fair Employment and Housing Commission (DFEHC) has revised its pregnancy regulations according to the state code that became effective on December 31, 2012. The new regulations include important information regarding perceived pregnancy, calculation of leave time, reasonable accommodation, changes to required notifications, and reinstatement rights. California employers should review these regulations and make changes to their policies and procedures as appropriate.

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Background

The DFEHC has instituted the following regulatory changes primarily in an effort to conform to statutory changes enacted in 1999, 2004, and 2011. Pregnancy disability leave (PDL) obligations now align more closely with state and federal leave laws that help increase consistency for employers when administering such leaves. The changes also offer employers guidance on how to interpret and process certain leaves that were not clarified within the regulations in the past. The commission has also released an optional medical certification document that is compliant with California privacy laws and has modified some required notices. Further provisions consisted mainly of wording and formatting changes.

Perceived pregnancy

The new regulations state that harassment and/or discrimination against employees or applicants based on “perceived pregnancy” is unlawful. Perceived pregnancy is defined as being regarded or treated by an employer or other covered entity as being pregnant or having a related medical condition. The regulations do differentiate that leave, reasonable accommodation, transfers, and continuation of benefits are only obligatory for actual pregnancy. Medical certification may be required at the employer’s discretion.
Transfers

It is unlawful to deny a request for transfer due to pregnancy if the request is based on a recommendation of the employee’s health care provider, and the employer is able to reasonably accommodate. Such transfer does not mean that employers must create other positions, discharge other employees, or transfer any employees not qualified to perform the new jobs in an effort to provide reasonable accommodation.

Certification

An employer may ask for medical certification in order to support the request for transfer or reasonable accommodation, although it is not required by the regulation. The DFEHC has provided an optional medical certification form in the regulations to assist employers and employees in obtaining necessary information while still protecting employees’ privacy rights as required by California law. If the employer requires medical certification, notification to the employee is mandatory and must include the deadline, what constitutes sufficient medical certification, and the consequences associated with failing to submit such certification.

Calculating four months for PDL entitlement

The previous regulations defined four months as 88 paid, eight-hour days for full-time employees. The new regulations define four months as the time off for the number of days the employee would normally work during those four months (one-third of a year, or 17 1/3 weeks).

Example 1. For a full-time employee who works 40 hours per week, “four months” would constitute 693 hours of leave entitlement (40 hours X 17 1/3). For employees who work more or less than 40 hours a week, or have a variable work schedule, the number of working days that constitutes “four months” is calculated on a prorated basis.

Intermittent leave

The new PDL regulations now include a definition for intermittent leave, which is consistent with FMLA’s definition. It constitutes that the minimum increment for tracking intermittent leaves must be no greater than the shortest period of time that the employer uses to account for other forms of leave, provided it’s not greater than an hour.

Example 2. If the employer accounts for sick time in 30-minute increments and vacation in one-hour increments, intermittent time must be accounted for using 30 minutes or less.

Reasonable accommodation

Employers were previously required to reasonably accommodate temporary disability caused by pregnancy under the Americans with Disabilities Act (ADA). However, the new regulations specifically clarify that the right to take pregnancy disability leave is separate and distinct from the right to take leave of absence as a form of reasonable accommodation. An employee’s entitlement to an accommodation leave cannot be reduced due to her pregnancy disability leave.

The regulation changes are further aligned with the ADA by explicitly requiring employers to engage in an “interactive process” when dealing with accommodation requests. Medical certification can be requested by the
employer; however, it is not required by the new regulations. The optional medical certification form in the regulations can assist employers and employees in obtaining necessary information while still protecting employees’ privacy rights.

**Relationship between CFRA and pregnancy leaves**

The regulations reiterate that the right to take pregnancy disability leave is separate and distinct from the right to take leave under the California Family Rights Act (CFRA). The commission also clarifies that the maximum entitlement for California employees should be the working days in 29 1/3 workweeks, provided they qualify for both CFRA leave and pregnancy disability leave.

**Notices**

The new regulations include guidance on what information to include when providing employees with “reasonable advance notice” of their rights, including information about the right to request reasonable accommodation, transfer, or pregnancy disability leave. The notice should also include any medical certification requirements. In addition, the regulations specify that electronic posting is now an adequate means of distribution.

The regulations confirm that employers with fewer than 50 employees are still obligated to provide “Notice A,” and employers with 50 or more employees are still required to provide “Notice B.” However, the following changes have been made:

- The revised Notice A now includes information about reasonable accommodation and the employer’s obligations to give notice to employees about their rights to take leave, transfer, etc. It also specifies the employee’s responsibility with regard to reasonable notice.
- The revised Notice B now includes clarifications regarding specific time covered by four months and gives examples of specific medical conditions covered by childbirth, pregnancy, and other related medical conditions.

**Group health plans**

To be consistent with statutory regulation, the DFEHC also states that an employer must maintain coverage for an eligible female employee who takes pregnancy disability leave at the same level and under the same conditions that coverage would have been provided if the employee had remained employed continuously for the duration of the leave, not to exceed the four-month limit within a 12-month period. This requirement is separate and distinct from the employer’s obligation to maintain coverage for 12 weeks during leave taken under CFRA. For example, an employee who takes a four-month leave under PDL followed by a three-month leave for bonding should still receive benefit continuation throughout the CFRA leave.

**Reinstatement rights**

Previously, employers could be exempt from preserving an employee’s job if there was substantial proof that doing so would undermine the ability to operate business safely and efficiently, or that placing the returning employee in an open available position would somehow undermine the ability to operate business safely and efficiently. Under
the new regulations, if no comparable position is available upon her return, an employer has an affirmative duty to provide notice of available positions to the employee that she would be qualified for within 60 calendar days.

Next steps

As these regulations were effective December 31, 2012, affected employers should make the following changes as appropriate:

- Update Notices A and B
- Update all policies and procedures to comply with new regulations
- Update training tools and literature

Establish resources to provide assistance as new regulations are implemented

Authors

Fernanda Zendejas
Amy Dunn, JD
Ophelia Galindo

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