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# California Employers Must Comply with New, Confusing, and Stricter Pregnancy Disability Leave Regulations

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Effective December 30, 2012, the new pregnancy disability leave ("PDL") regulations were intended to provide employers with more guidance regarding their obligations under the law. Although the new regulations do in large part accomplish this goal, some of them appear to conflict with existing law, resulting in more, not less, confusion.

## Expanded Protected Category

Previously, employees protected by PDL statutes were those who are pregnant or have a related medical condition. The new regulations expand the protected category to include those who are perceived to be pregnant or have a related medical condition. (Cal. Code Regs. tit. 2, § 7291.11(q).)

## Expanded Definition of "Disabled by Pregnancy, Childbirth, or a Related Medical Condition"

The new regulations expand the medical conditions that may qualify for the need for leave, an accommodation, or transfer. For example, an employee may be considered to be disabled by pregnancy if, in the opinion of her health care provider, she is suffering from severe morning sickness, is experiencing lactation with medical complications, or needs to take time off for the following: 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 or the loss or end of pregnancy. (Cal. Code Regs. tit. 2, § 7291.11(d), (f).)

## Higher Burden for Interactive Process

Employers are now subject to a heightened interactive process compared to the standard they might be used to in other contexts. It is now unlawful for an employer to deny a request for reasonable accommodation made by an employee affected by pregnancy if (1) the employee's request is based on the advice of her health care provider that the reasonable accommodation is medically advisable and (2) the requested accommodation is reasonable. The "medically advisable" standard is more stringent than the "medically necessary" standard used with accommodations for physical and mental disabilities. When determining whether a requested accommodation is reasonable, employers must look at the totality of the circumstances and consider various factors, including, but not limited to, the following: the employee's medical needs, the duration of the needed accommodation, and the employer's legally permissible past and current practices. (Cal. Code Regs. tit. 2, § 7291.7(a).)

The regulations appear to lack the "interactive" component of the process, such as a dialogue regarding alternative accommodations or the employer's undue hardship defense. It appears that if the employee's request is medically advisable and reasonable, the employer is obligated to provide it.

## Calculation of Leave

The new regulations clarify that four months of PDL means time off for the number of days or hours the employee would normally

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work within four calendar months (one-third of a year or  $17\frac{1}{3}$  weeks, not 16 weeks as many employers previously calculated). For a full-time employee who works 40 hours per week, “four months” equates to 693 hours of leave entitlement, based on 40 hours per week multiplied by  $17\frac{1}{3}$  weeks. (Cal. Code Regs. tit. 2, § 7291.9(a).)

### Right to Reinstatement

As has always been the law, an employer must reinstate an employee to the same position or a comparable position if the employer can show that the employee would not have been otherwise entitled to reinstatement if continuously employed.

However, under the new regulations, an employer is no longer permitted to deny reinstatement to the same position when the employer can show that holding open the position would substantially undermine the employer’s ability to operate the business safely and efficiently. An employer must now only rely on legitimate business reasons unrelated to the PDL (such as layoff or site closure) to support denial of reinstatement to the same position. (Cal. Code Regs. tit. 2, § 7291.10(c)(1).)

Furthermore, if the employer denies reinstatement to a comparable position, the new regulations impose a job search requirement. The employer must show that no comparable position is available, which is defined as an open position within 60 calendar days of the employee’s reinstatement date. The employer has an affirmative duty to provide notice (via telephone, e-mail, in person, or any other reasonable method) of available positions to the employee during this 60-day period. (Cal. Code Regs. tit. 2, § 7291.10(c)(2).)

### Benefits Coverage

On January 1, 2012, PDL statutes were amended to require employers to provide continued health benefits to pregnancy-disabled employees as if they were continuously employed during their four months of leave. This year, the new regulations attempt to address last year’s change. However, the resulting regulations appear to conflict with existing law.

Specifically, the new regulations state that an employer’s continuation of health benefits for an employee on PDL cannot be used to meet the employer’s similar obligation to provide coverage during an employee’s 12 weeks of family and medical leave (as is typical practice, most employers run FMLA concurrently with PDL). Under the regulations, “[t]he entitlements to employer-paid group health insurance coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements.” (Cal. Code Regs. tit. 2, § 7291.11(c)(2).) Thus, the new regulations purport to create an obligation to continue coverage for  $29\frac{1}{3}$  weeks for an employee who takes both PDL and family and medical leave.

However, the California Family Rights Act (“CFRA”) and supporting regulations expressly state that an employer is only obligated to provide continued health coverage for a maximum of 12 weeks in a 12-month period, regardless of whether the leave is CFRA only or FMLA/CFRA. (Cal. Gov’t Code § 12945.2(f)(1); Cal. Code Regs. tit. 2, § 7297.5(c)(2), (4).) Thus, employers who run FMLA concurrently with PDL will have to make a choice. If the employer relies on the CFRA statutes and not the newly promulgated PDL regulations, then the obligation is only to provide 12 weeks of coverage. Employers must decide whether they will offer health coverage for 12 weeks or  $29\frac{1}{3}$  weeks and must be aware of the risks associated with only offering 12 weeks of coverage.

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*Annie Macaleer represents employers in federal and state courts against a broad variety of claims, including discrimination, harassment, retaliation, wrongful termination, unfair competition, breach of contract, wage and hour, and other statutory claims. In addition to defending employment litigation matters, Ms. Macaleer counsels employers on effective ways to reduce the risk of litigation by advising on employment policies, employee handbooks, employment agreements, and other human resource issues and strategies.*