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Pregnant Pause

by D. Gregory Valenza

Employees disabled by pregnancy are entitled to certain protections and benefits. The law in this area is not a model of clarity. To celebrate my law partner Jennifer Shaw's new baby, let us review California employment laws regarding pregnancy disability leave. (True, as a partner rather than an employee, Jennifer is entitled to virtually none of those rights. But as a fantastic rainmaker, lawyer, and person, she will probably be ok.)

Employers with five or more employees must grant up to four months of leave for disability due to pregnancy, including childbirth. The "up to" part can be confusing to employers. It means the small minority of employees disabled by pregnancy for four months will receive the entire four months of leave. But most employees are actually disabled for a shorter period and are entitled to leave only during the period of actual disability.

Employees are eligible without regard to length of service. The leave may be taken intermittently, as needed, even for short periods of disability, such as severe morning sickness.

Employers are obliged to provide written notice of leave rights to employees who inquire about pregnancy disability leave, or as soon as the employer learns of a worker's pregnancy.

At the end of the leave, the employee is entitled to reinstatement to her former job, subject to certain defenses. For example, the employee is entitled to reinstatement to her original job only if she would have had remained employed if she did not take the leave. So, if the employee's department shuts down while she's on pregnancy disability leave, the employee on leave is not exempt from the layoff.

Employers covered by the Family and Medical Leave Act and the California Family Rights Act generally must grant up to 12 weeks of leave to eligible employees, in addition to pregnancy disability leave. Because of a provision in the California Family Rights Act, employees disabled by pregnancy may receive up to approximately seven months of total leave time.

Here is the way it works: Leave under the federal Family and Medical Leave Act runs concurrently with pregnancy disability leave, because pregnancy disability is a "serious health condition" under federal law. Therefore, federal leave will be exhausted before the four-month (maximum) pregnancy disability leave.

But California Family Rights Act leave does not run concurrently with pregnancy disability leave. The Family Rights Act does not count pregnancy disability as a "serious health condition." Therefore, when the pregnancy disability ends (assuming the baby is born) the employee has up to twelve weeks of Family Rights Act leave remaining to "bond" with the baby. Therefore, California employees disabled by pregnancy for a full four months potentially may receive up to four months plus twelve weeks of job-protected leave.

One murky area is whether an employee disabled by pregnancy is entitled to leave as a "reasonable accommodation," over and above the statutorily guaranteed four months of pregnancy disability leave. Take, for example, an employee with a difficult pregnancy who is eligible for pregnancy disability leave, but ineligible for California or federal family and medical leave (because the employer is small or because she has not met the service or hours worked requirements). She begins a four-month pregnancy disability leave during her first trimester of pregnancy, which expires around month seven of her pregnancy.

At this point, the employee loses job protection under the pregnancy disability leave law. But she will not have her baby for two more months, and she cannot return to work. Can this employee now request extended leave as a form of "reasonable accommodation" for a disability under the anti-disability discrimination provisions of the Fair Employment and Housing Act?

Maybe. The employer must treat an employee disabled by pregnancy who seeks extended leave the same as other, temporarily disabled employees. Therefore, employers with leave policies more generous than the pregnancy disability leave law should apply them to pregnancy disability.

Policy aside, by prescribing a maximum leave period of four months, it seems the Legislature has spoken regarding what is a reasonable leave for a disability due to pregnancy. Additionally, employers, particularly small ones, may be able to claim "undue hardship" in having a worker out longer than four months.

On the other hand, although disability due to pregnancy is a temporary condition, the Fair Employment and Housing Act does not limit the definition of "disability" to permanent or long-term impairments. Even under the Americans with Disabilities Act, severe complications from pregnancy may be considered a disability, especially given the newly enacted ADA Amendments Act.

Moreover, Government Code Section 12945(b) specifically requires employers to grant "reasonable accommodations" to employees disabled by pregnancy. Given extended leave is included in the definition of "reasonable accommodation" for general disabilities, an employee may argue it is not a big leap to infer extended leave is required.

Finally, not every restriction caused by pregnancy will comfortably fall within the definition of "disability." Until there is some definitive case law or a statutory amendment, it is not safe to make any assumptions about whether leave beyond four months is required or not. In one unpublished decision, the Court of Appeal held that pregnancy disability could be covered by the general anti-disability discrimination provisions in the Fair Employment and Housing Act. *See Eroh v. M.T. Serv.*, 2006 Cal. App. Unpub. LEXIS 716 (Cal. App. 4th Dist. Jan. 26, 2006). There, though, the employer prevailed by adequately accommodating the employee.

Employers' obligations do not stop at granting a leave of absence. An employer must attempt to transfer an employee affected by pregnancy if medically advisable and reasonably feasible to do so. The employer is not required to create a new position or displace another worker to transfer the pregnant worker. Employers also may transfer to accommodate an intermittent or reduced schedule pregnancy disability leave, provided the new job has comparable pay and benefits.

Employer-paid leave, including pregnancy disability and family leave time, is not required by law. However, some employers have generous disability insurance programs and even paid time off for baby bonding. For those employees not lucky enough for work for one of those employers, there are certain government benefits available as well.

The Employment Development Department administers California's short-term disability insurance program, funded via payroll deductions. Employers with private short-term disability insurance that meets certain qualifications may "opt-out" of the state program.

Pregnancy disability precluding work qualifies the worker for state disability payments, which are calculated via a formula based on earnings history, and capped at $987 per week for 2010. No benefits are paid to employees receiving unemployment insurance or wage replacement from other sources, or for the first seven days of disability.

When pregnancy disability ends, so does SDI. But new mothers may claim "paid family leave" benefits to bond with or care for a new baby. Paid Family Leave is a state-run benefit program, not another type of guaranteed leave. After a waiting period, employees may receive up to six weeks of wage replacement benefits, calculated similarly to state disability.

The interaction between different types of leave, the notices and policies that must be maintained, and the various forms of paid leave available can be confusing even to employment lawyers and HR professionals. Employers and their lawyers should become familiar with the laws and regulations governing pregnancy disability leave laws, and should train leave administrators and line management how to handle requests for leave, transfer, and job reassignment.

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