A Timely Analysis of Legal Developments

ASAP®

January 4, 2013

Lost in Translation: California's New Pregnancy Disability Leave Regulations and Their New, Contradictory Obligations

By Michelle Barrett

In regulations that became effective December 30, 2012, California employers received additional guidance on how to handle leaves of absence for employees disabled by pregnancy, childbirth, or a related medical condition. This guidance comes in the form of amended pregnancy disability leave (PDL) regulations applicable to all California employers that employ five or more employees. According to the newly formed Fair Employment and Housing Council, these amended regulations are necessary to, among other things:

- Conform to statutory changes in the PDL law enacted in 1999, 2004, and 2011;[1]
- Be as consistent as possible with the new interactive process provisions in California's also newly revised disability regulations and the current federal Family and Medical Leave Act (FMLA) regulations; and
- Provide greater guidance to employers and employees on notice requirements and other obligations under the law.[2]

While the regulations do provide additional clarity and guidance on notice and related obligations,[3] the new regulations also appear to create conflicts with existing law. These conflicts are likely to create even more confusion for employers who may already struggle with leaves of absence and disability accommodation issues.

Disabling Conditions Considered to Be a "Pregnancy, Childbirth or a Related Medical Condition"

The new regulations expand the circumstances under which a woman may be viewed as "disabled by pregnancy." In essence, the regulations now list as "disabilities" that may require employers to provide leave, a job transfer, or reasonable accommodation certain medical conditions related

1 For more information on changes to the law that occurred in 2011, please see Helene Wasserman and Michelle Barrett, The Stork Has Landed: California Employers Must Maintain and Insurers Must Provide Pregnancy Benefits, Littler ASAP (Oct. 19, 2011).

2 California Fair Employment and Housing Council, *Initial Statement of Reasons*.

3 The new regulations provide new proposed notices for an employer to post in the workplace and/or include in its handbook, as well as a suggested medical certification form for an employer to use.

to pregnancy, that could be temporary in nature. These conditions include: severe morning sickness; gestational diabetes; pregnancy-induced hypertension; preeclampsia; and post-partum depression. The new regulations also clarify that a woman may be disabled by pregnancy if she needs time off for: prenatal or postnatal care; bed rest; childbirth; loss or end of pregnancy; or recovery from childbirth or loss or end of pregnancy.[4]

At first glance, the list of potentially *per se* disabling conditions may not appear to expand employee rights. However, employers should be aware that the inclusion of post-partum depression and loss or end of pregnancy may expand the circumstances under which leave, a job transfer, or other reasonable accommodation must be provided. For example, an employee who may end her pregnancy may be eligible for time off for the procedure, as well as for time off to recover, or a transfer or other reasonable accommodation while she recovers. Likewise, if an employee suffers post-partum depression after delivering a child or due to the loss or end of a pregnancy, she may need leave or may request a job transfer or other reasonable accommodation while she copes with the depression. Based on the expansion of circumstances that may be considered pregnancy-related disabilities and related medical conditions, employers must keep in mind that such less-common conditions may entitle the employee to leave, a job transfer, or reasonable accommodation.

Moreover, employers should be aware that the regulations include lactation as a potentially disabling "related medical condition." The regulations recognize that lactation without medical complications is generally not "disabling" and would not necessarily require a leave of absence. Nevertheless, they also state that lactation may require a job transfer or other reasonable accommodation. In discussing lactation, the regulations reference California Labor Code sections 1030 *et seq*. These Labor Code sections require that an employer provide employees with a reasonable amount of break time to express breast milk for the employee's infant child. They also provide employers with the ability to deny this break time if it would seriously disrupt the employer's operations. However, as discussed in more detail below, the new regulations do not permit an employer to deny requests for a job transfer or reasonable accommodation based on an "undue hardship" defense. As such, the reference to the Labor Code section providing an undue hardship defense to lactation break time appears to create a conflict between lactation-related accommodation requests and requests for other pregnancy-related accommodations.

Reasonable Accommodation and the "Interactive Process"

The new regulations repeatedly refer to the concept of "reasonable accommodation," which is by now a familiar concept to employers who must comply with federal and state law requiring reasonable accommodation for qualified individuals with a physical or mental disability. However, employers that have established interactive process procedures for dealing with physical or mental disabilities should not be lulled into a false sense of security. Specifically, the new regulations impose a virtually unconditional duty to provide an accommodation to a pregnant employee, so long as her health care provider[5] characterizes the accommodation as "medically advisable." This "medically advisable" standard is different from the "medically necessary" standard utilized in accommodating other physical or mental disabilities and also in the family and medical leave context.

Whether an accommodation is reasonable depends on each situation's facts and how those play out when looking at "the totality of the circumstances." Factors that may be considered include, but are not necessarily limited to, the employee's medical needs, the duration of the requested accommodation, the employer's past and current practices, and other factors.

While the regulations refer to an "interactive process," the regulations themselves do not actually provide for the back and forth process used to discuss alternative accommodations. None of the regulations appear to take into account the employer's business realities or require the employee to interact with the employer to select an accommodation that meets everyone's needs. Unlike existing disability law that allows an employer to argue that a particular accommodation is unreasonable or that it creates an undue hardship, the new pregnancy disability regulations do not provide for any undue hardship defense that would allow an employer to reject a requested accommodation.

The regulations do not provide the employer with the ability to propose alternative accommodations or to choose among accommodations that may be effective. Likewise, the regulations do not offer the employer the option of obtaining a second opinion, as is available in the family

4 Likewise, the regulations also make clear that the protection for individuals "perceived" to fall within a protected category also extends to those who are perceived to be pregnant.

5 Health care providers who can now opine on the need for leave, transfer, or reasonable accommodation due to pregnancy, childbirth, or related medical conditions include, among others, marriage and family therapists, acupuncturists, midwives, chiropractors, and clinical social workers.

and medical leave context. Under the new regulations, so long as the requested accommodation is "medically advisable" and reasonable, an employer must provide the accommodation. Thus, employers must understand that the accommodation process for pregnancy, childbirth, and related medical conditions does not provide the same options or defenses that exist for other disabilities and in the family and medical leave context.

Length of Leave and Reinstatement Requirements

When addressing leave situations, California employers have historically measured family and medical leaves in weeks and pregnancy disability leaves in months or working days. The new regulations address these disparate terms by explaining that four months under the PDL law is equivalent to 17-1/3 weeks. Employers who have used 16 weeks as a rule of thumb for estimating or measuring the time an employee may have for pregnancy disability leave should be aware that 17-1/3, not 16, weeks is the magic number for measuring leave in weeks.

Similarly, employers should also note that the new regulations provide a means to address the amount of leave available in an intermittent or reduced schedule situation. Specifically, the regulations explain that an employee who normally works 40 hours per week will be eligible for a total of 693 hours of pregnancy disability leave. Someone who normally works more or fewer hours per week will receive a pro rata or proportional amount of leave. Moreover, if an employee's schedule varies from month to month, the employer should use the monthly average hours worked for the four months prior to the employee's leave to determine the total number of hours available for pregnancy disability leave.

As has always been the case, the regulations require an employer to reinstate an employee to the same position, or a comparable position if the employer can show the employee would not have been otherwise entitled to reinstatement to the same position. The new regulations, however, include two notable differences with regard to reinstatement. First, the regulations remove the employer's ability to deny reinstatement when the employer can show that preserving the job or duties for the employee would substantially undermine the employer's ability to operate the business safely and efficiently.

Second, the regulations impose job search obligations on the employer in situations where reinstatement may be denied to a comparable job. Under the regulations, if the employee cannot be returned to her original position, she must be given a comparable position for which she is qualified on her scheduled reinstatement date or within 60 calendar days of that scheduled reinstatement date. During this 60-calendar day period, the employer has an affirmative obligation to provide notice to the employee of available positions in person, by letter, telephone or email, or by links to postings on the employer's website if there is a section devoted to job openings. It will not be enough simply to give the employee the option of searching for comparable jobs; the employer will now have the obligation to notify the employee of potential comparable positions.

Benefits Continuation

California's pregnancy disability law was amended in 2011 to require an employer to continue an employee's group health coverage while the employee is on a pregnancy disability leave for up to four months. The amendment took effect on January 1, 2012,[6] and the new regulations were intended to address this change in the law. While the new regulations do in fact include provisions to clarify the obligation to continue group health care coverage for the maximum duration of a pregnancy disability leave, the regulations go a step further and attempt to include a change in the law that is not supported by statute.

Specifically, the new regulations state that the time an employer maintains and pays for group health coverage during a pregnancy disability leave cannot be used to meet an employer's obligation to continue and pay for 12 weeks of group health coverage under the FMLA and the Moore-Brown Roberti Family Rights Act (aka the California Family Rights Act or CFRA). The regulations also state that: "This shall be true even where an employer designates pregnancy disability leave as family and medical leave under FMLA. The entitlements to employer-paid group health insurance coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements."[7] The regulations effectively creates an obligation to continue group health coverage for up to a maximum of 7 months for a woman who takes both a PDL and leave protected by the FMLA or CFRA.

6 Cal. Gov't Code § 12945(a)(2)(A).

7 Cal. Code Regs. tit. 2, § 7291.11(c)(2).

However, this newly approved regulation conflicts with the CFRA's existing statutory and regulatory language. Specifically, the CFRA states that an employer must only provide continued health care coverage for a maximum of 12 workweeks in a 12-month period regardless of whether the leave is a CFRA leave only or a FMLA/CFRA leave.[8] Likewise, the CFRA regulations say the same thing.[9] When interpreting the law, the U.S. Supreme Court has explained that courts must presume that the unambiguous language of a statute means what it says and that other interpretations should not be given to the law.[10] Here, it appears clear from the face of the CFRA statute that an employer's obligation to continue group health care coverage under the CFRA was intended to be satisfied when an employer provides coverage when only FMLA applies, when only CFRA applies, or when FMLA and CFRA apply to a leave of absence. Thus, the new pregnancy disability regulation that would require an additional 12 weeks of continued group health care coverage under CFRA beyond the 4 months that might be covered by both the PDL law and FMLA appears to be in direct conflict with existing statutory law.

At present, there is no guidance on how such a conflict should be handled.[11] If the Fair Employment and Housing Council does not address the inconsistency, employers who fall under not only the PDL law, but also under the FMLA and CFRA, will be forced to wait until an employee challenges an employer's benefits continuation policy and a court resolves the issue. In the meantime, employers must decide whether to follow: (a) the pregnancy disability leave statute and regulations (resulting in a maximum of four months plus 12 weeks of continued group health coverage, e.g., 29-1/3 weeks); or (b) the CFRA's statutory and regulatory requirements layered over the pregnancy disability statute and regulations (resulting in the maximum of 12 weeks under FMLA and/or CFRA benefits continuation running concurrently with the four months of pregnancy disability leave benefits coverage, *e.g.*, 17-1/3 weeks).

Recommended Employer Action Items

- Decide whether to extend continued group health care coverage for pregnancy disability leave and leave that may also fall under the FMLA and CFRA for up to a total maximum of 29-1/3 weeks or up to a total maximum of 17-1/3 weeks.
- Review and revise leave of absence policies to ensure they comply with both the latest PDL law requirements and the new regulations.
- Review and revise any reasonable accommodation policies and processes to reflect requirements for accommodating pregnancy, childbirth, and related medical conditions.
- Consider including "perceived pregnancy" as a protected category in any equal employment opportunity, discrimination, or harassment policies.
- Train HR, managers, and supervisors on the differences between reasonable accommodation and the interactive process for pregnancy, childbirth and related medical conditions, and other physical and mental disabilities.
- Review and revise any leave of absence forms or paperwork to ensure they comply with the PDL law and the new regulations.
- Ensure all employer-required postings are current and up to date.

Michelle Barrett, Co-Chair of Littler Mendelson's Leaves of Absence and Disability Accommodation Practice Group, is a Shareholder in the San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Barrett at mbarrett@littler.com.

8 Cal. Gov't Code § 12945.2(f)(1).

9 Cal. Code Regs. tit. 2, § 7297.5(c)(2), (4).

10 *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

11 Interestingly, the proposed notices set forth as Notice A (for employers covered by only the PDL law) and Notice B (for employers covered by the PDL law, as well as the FMLA and CFRA) differ with regard to benefits continuation. Notice A explains benefits coverage will run for the duration of a pregnancy disability leave. Notice B mentions only that taking a family care or pregnancy disability leave may impact an employee's benefits and that employees should contact their employers.