

Pregnancy Disability Leave in California

By James W. Johnston, Esq.

One of the most complex areas of employment law in California is pregnancy disability leave. Overlapping state and federal statutes governing this leave have led to a great deal of confusion over just what rights an employee has to take leave if she becomes disabled by her pregnancy.

California Pregnancy Disability Leave Law (“PDLL”)

The PDLL is part of the California Fair Employment and Housing Act, and requires employers who employ 5 or more employees to provide employees who are disabled by their pregnancy a reasonable period of leave, not to exceed four months.¹ (Note, however, that employees of nonprofit religious associations are not eligible.²) An employee who is disabled by her pregnancy and entitled to PDLL leave may take the leave all at once, or in increments. An employer is not required to pay wages to an employee taking PDLL leave, unless it has a policy of continuing the payment of wages for other types of temporary disability leaves. However, the employer may require the pregnant employee to use, or the employee may elect to use, any accrued sick leave during the period of leave.³ For most purposes, employees who are on pregnancy disability leave must be treated the same as employees on other types of disability leave in terms of pay, benefits and other terms and conditions of employment.⁴ There is no length of service requirement, so even recently hired employees are eligible for this leave.⁵

Effect on Seniority and Benefits: An employee who takes PDLL leave retains the status of employee during the period of the leave.⁶ Furthermore, the leave does not constitute a break in service for purposes of longevity and/or seniority under any collective bargaining agreement or under any employee benefit plan. Benefits must be resumed upon the employee's reinstatement in the same manner and at the same levels as provided when the leave began, without any new qualification period or physical exam.⁷

Required Notices under the PDLL

Under the PDLL, employers are required to notify employees of their right to take pregnancy disability both by posting a notice in a conspicuous place, and also by providing a pregnant employee with a copy of the notice as soon as possible after becoming aware of the pregnancy. Furthermore, the employer is required to include a

¹ Government Code §12945(b)(2); 2 Cal. Regs 7291.7(a)

² Government code §12945(b)(2)

³ Government Code §12945(b)(1); 2 Cal. Regs 7291.11(b)(1)(2)

⁴ 2 Cal. Regs 7291.7(b)

⁵ 2 Cal. Regs 7291.7(c)

⁶ 2 Cal. Regs 7291.7(d)

⁷ 2 Cal. Regs 7291.11(d)

description of pregnancy disability leave in its employee handbook if it has one.⁸ An employee seeking to take PDDL leave also has a duty to notify her employer of her intention to take this leave.⁹ If the need for taking leave is foreseeable, the employee is required to give her employer 30 days notice.¹⁰ However, if the need for leave arises suddenly, and without enough time to give the 30 days notice, then the employee is only obligated to give notice to the employer as soon as practicable.¹¹

Right to Reinstatement

Same Position: Under the PDDL, an employee returning from leave generally has the right to be reinstated to the same position she held before taking her leave unless 1) the job no longer exists due to legitimate business reasons unrelated to the employee taking a pregnancy disability leave (such as a layoff pursuant to a plant closure); or 2) each means of preserving the job or duties for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently.¹²

Comparable Position: If the employer is excused from reinstating the employee to her same position, or with the same duties, it must then reinstate the employee to a comparable position unless the employer proves, by a preponderance of the evidence, either of the following 1) that there is no comparable position available. A position is "available" if there is a position open on the employee's scheduled date of reinstatement or within 10 working days thereafter for which the employee is qualified, or to which the employee is entitled by company policy, contract, or collective bargaining agreement; or 2) a comparable position exists, but filling it with the returning employee would substantially undermine the employer's ability to operate the business safely and efficiently.¹³

Family Medical Leave Act ("FMLA")

Employees may be eligible to take up to twelve weeks of leave under FMLA if they have worked for their employer for at least 12 months, and have worked for at least 1,250 hours over the previous 12 months, at a location where at least 50 employees are employed by the employer within 75 miles.¹⁴ FMLA allows family leave for a period of up to 12 weeks for the birth of a child of the employee, and also allows a pregnant employee to take leave before the actual date of birth of the child for prenatal care if the employee's condition makes her disabled and unable to work.¹⁵ However, FMLA leave runs concurrently with PDDL leave, so an employee taking PDDL leave also would use

⁸ 2 Cal. Regs 7291.16(a)

⁹ 2 Cal. Regs 7291.10(a)(1)

¹⁰ 2 Cal. Regs 7291.10(a)(2)

¹¹ 2 Cal. Regs 7291.10(a)(3)

¹² 2 Cal. Regs 7291.9(c)(1)

¹³ 2 Cal. Regs 7291.9(c)(2)

¹⁴ 29 U.S.C. §2611(2)

¹⁵ 29 C.F.R. §825.112(c)

up her FMLA leave at the same time.¹⁶ Therefore, if an employee who takes 4 months leave under the PDLL, would not be entitled to an additional 12 weeks leave under FMLA.

California Family Rights Act (“CFRA”)

Like the FMLA, employees may be eligible to take up to twelve weeks of leave under CFRA if they have worked for their employer for at least 12 months, and have worked for at least 1,250 hours over the previous 12 months, at a location where at least 50 employees are employed by the employer within 75 miles.¹⁷ However, unlike the FMLA, an employee who has taken 4 months of PDLL leave may be entitled to take an additional leave up to 12 weeks under CFRA for reason of the birth of her child, if the child has been born by this date.¹⁸ There is no requirement that either the employee or child have a serious health condition in order for the employee to take CFRA leave. There is also no requirement that the employee no longer be disabled by her pregnancy, childbirth or related medical conditions before taking CFRA leave for reason of the birth of her child.¹⁹ Additionally, where an employee has utilized four months of pregnancy disability leave prior to the birth of her child, and her health care provider determines that a continuation of the leave is medically necessary, an employer may, but is not required to, allow an eligible employee to utilize CFRA leave prior to the birth of her child. No employer shall, however, be required to provide more CFRA leave than the amount to which the employee is otherwise entitled.²⁰ Unlike PDLL, CFRA leave is available to employees of nonprofit religious organizations.²¹

Conclusion

Determining pregnancy leave issues in California can be daunting task. However, mastering the specific provisions of the PDLL, FMLA and CFRA can go a long way to minimizing the headaches associated with this area of law.

¹⁶ 2 Cal. Regs 7291.12(a)

¹⁷ Government Code §12945.2(a)(b); 2 Cal. Regs 7297.0(e)

¹⁸ 2 Cal. Regs 7297.6(c)

¹⁹ 2 Cal. Regs 7297.6(c)

²⁰ 2 Cal. Regs 7297.6(c)(1)

²¹ Government Code §12945.2(c)(2)(A); 2 Cal. Regs 7297.0(d)