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What California Retail Employers Need to Know About Accommodating Pregnancy

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Navigating the California laws on discrimination and accommodation of pregnant employees is a significant challenge for retail employers. The Golden State's protections for pregnant employees are many and they differ from those of federal law and of other states.

Pregnancy Disability Leave Law

Under the Pregnancy Disability Leave Law, which applies to employers with at least five employees in California, an employer must provide up to four months unpaid disability leave to a woman who is disabled due to pregnancy, childbirth, or a related medical condition. Cal. Gov. Code § 12945(a).

However, if an employer provides more than four months of leave for other types of temporary disabilities, the same amount of leave must be made available to women who are disabled due to pregnancy, childbirth, or a related medical condition.

Leave time may be used for prenatal care, severe morning sickness, doctor-ordered bed rest, childbirth, recovery from childbirth, and any related medical condition. (In a normal pregnancy, health care providers typically certify that a woman is disabled beginning four weeks before her due date through six weeks following vaginal delivery, or eight weeks following a C-section.)

A woman can take PDL leave before or after giving birth, any time the woman is physically unable to work because of pregnancy or pregnancy-related condition. PDL does not need to be taken in one continuous period of time, but may be taken intermittently on an as-needed basis or as on a reduced work schedule. Cal. Code Regs., tit. 2, § 7291.7(a).

After PDL, employees are guaranteed a return to the same position, unless the employee would have lost her position because of legitimate business reasons and no comparable position is available (*e.g.,* layoff).

During PDL, the employer does not have to maintain health insurance for the employee, unless it does so for other employees on temporary unpaid disability leaves.

Fair Employment and Housing Law

The California Fair Employment and Housing Act prohibits an employer from discriminating against an employee on the basis of sex, physical disability, or medical conditions, among other things. Cal. Gov. Code § 12940(a). “Sex” is defined to include “[p]regnancy or medical conditions related to pregnancy.” Cal. Gov. Code § 12926(q)(1). This means employers cannot discriminate against pregnant women in terms of hiring, firing, terms and conditions of employment, discipline or employment opportunities.

The FEHA also requires an employer to provide reasonable accommodation for an employee’s known disability, unless the employer demonstrates that the accommodation would produce “undue hardship…to its operation.” Cal. Gov. Code § 12940(m). This means employers must accommodate pregnancy and related medical conditions to the same extent they would accommodate other disabilities. As with any other reasonable accommodation request, the employer must explore all possible means of reasonably accommodating the employee.

Reasonable accommodations for pregnancy and related conditions can include:

- changing job duties or work hours,
- providing leave,
- relocating the work area, and
- providing mechanical or electrical aids.

On her physician recommendation, an employee may request as an accommodation a transfer to a less strenuous or hazardous position for the duration of her pregnancy. Cal. Gov. Code § 12945(b)(3); Cal. Code Regs., tit. 2, §7291.6(a). The employer may require the employee to obtain certification from a health care provider of the medical advisability of any reasonable accommodation.

California Family Rights Law

The California Family Rights Act covers employers with at least 50 full-time employees within 75 miles of the employee’s worksite, and protects their employees with more than 12 months of service (working at least 1,250 hours in a 12-month period), requiring such employers to provide a 12-week unpaid leave to an eligible employee for the birth of a child for “baby bonding.” Cal. Gov. Code § 12945.2(a). While CFRA baby-bonding leave may be taken intermittently, it generally must be taken for a minimum of two weeks and must be concluded within one year of the child’s birth.

If an employee is eligible for CFRA leave, she may take both PDL and CFRA leave consecutively for the birth of her child. For example, an employee may take four months of PDL for her disability during pregnancy, and then take 12 weeks of CFRA leave to bond with her baby following birth.

The employer must maintain health insurance benefits for the employee during CFRA baby-bonding leave.

The employee must be reinstated to the same or a comparable position upon returning from CFRA leave, unless the employer can demonstrate the employee would not have been employed at the end

of the leave period.

What This Means for Retail Employers

Retail employers must remain vigilant against potential pregnancy discrimination in their operations (particularly since more than 65 percent of women work while pregnant and women make up 49 percent of the retail workforce). This includes ensuring required leaves of absence and other accommodations are provided to pregnant employees. Local managers must be trained on how to recognize their employees' accommodation requests for pregnancy and related conditions, and how to respond appropriately to such requests.

Employers also must assess possible accommodations for pregnant employees on a case-by-case basis, apart from leave. For retail employers, accommodations may include:

- providing stools or other seating;
- additional food, water, and restroom breaks;
- relief from heavy lifting; and
- flexible scheduling to accommodate morning sickness or prenatal appointments.

Employers should consider a variety of factors to determine the most practical way to make these accommodations, including the number of sales associates on duty, the types of positions and duties involved, and the size and shape of the store.

Retail employers also must keep in mind that they cannot force a pregnant employee to go on leave if she does not request one — provided that the employee can perform the essential functions of her position with a reasonable accommodation, she cannot be made to go on a leave on account of her pregnancy.

Further, they should bear in mind that accommodation for childbirth and related conditions includes lactation accommodations for nursing mothers. California requires that nursing women be provided a private space, such as a private office, lounge, or private break room, to express breast milk.

Moreover, even upon expiration of the employee's PDL and CFRA baby-bonding leave, an employee may be entitled to additional leave under the FEHA for a disability.

Employers should regularly review their policies and practices with employment counsel to ensure they address specific organizational needs effectively and comply with applicable law.

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