

# THE FUNDAMENTALS OF PREGNANCY LEAVE

by Jamie E. Wrage

Pregnancy and childrearing issues are coming up more and more in the practice of law as women make up a larger and more influential part of the workforce. Pregnancy discrimination lawsuits are on the rise. Law firms and attorneys need to be aware of and comply with the rules, not only to protect themselves, but also to create a more family-friendly environment so as to recruit and maintain their female workforce. In that connection, California law provides numerous protections to pregnant employees, including a guaranteed leave-of-absence period, after which the employee must, in almost every instance, be reinstated to her former or to a comparable position. Cal. Code Regs. tit. 2 § 7291.7(a).

Under the California Fair Employment and Housing Act (FEHA), all female employees, regardless of length of service, are eligible for pregnancy disability leave from an employer that has five or more employees. Cal. Code Regs. tit. 2 §§ 7291.2(h), 7291.7. Under the Pregnancy Disability Leave (PDL) law, generally, an employee is entitled to leave of a “reasonable period of time not to exceed four months” or 88 working days, for pregnancy, childbirth or any related condition. Cal. Gov’t Code § 12945(a).<sup>1</sup> In addition, an employer with 50 or more employees must also provide up to 12 weeks of leave under the California Family Rights Act (CFRA) after the child’s birth for bonding time.<sup>2</sup> In California, PDL and CFRA leave cannot be made to run concurrently. This means an eligible employee can take up to four months of PDL leave and up to three additional months of leave under CFRA.

Under the PDL law, if the employee is disabled by a pregnancy-related condition and a health-care professional gives the opinion that she is unable to work without risk to herself or the baby, all or some of the leave can be taken prior to the birth. Cal. Code Regs. tit. 2 § 7291.2(g).<sup>3</sup> The four-month period of leave does not have to be taken all at once. Intermittent leave periods may be added up in computing the four-month total. *Id.*, §§ 7291.7(a)(2)(B), (a)(3). For example, if an expectant mother has to take two days off due to severe morning sickness and then returns to work, that two days can count toward the 88 days. If the employee’s PDL takes longer than four months total, the employee loses the right to automatic reinstatement. *Id.*, § 7291.9(d).<sup>4</sup>

It is important to note that this does not mean that every pregnant employee is automatically entitled to 88 days of leave. A licensed health-care provider determines the existence and duration of the disability. If the health-care provider releases the employee for work prior to the end of the 88 days, her leave rights cease.

Leave taken for pregnancy does not have to be paid under the PDL law. However, if an employer provides compensation for employees temporarily disabled for other reasons, then an employee temporarily disabled due to pregnancy must be paid the same benefits. *Id.*, § 7291.9(d). If any portion is unpaid, an employer can require a pregnant employee to use accrued paid sick leave, although the possible discriminatory impact of such a requirement has not yet been tested in any published opinion. *Id.*, § 7291.11(b)(1). And if an employee wishes, she can use her accrued paid vacation or personal time to make up any lost income. *Id.*, § 7291.11(b)(2); Cal. Gov’t Code 12945(a). A similar rule applies to fringe benefits. The same benefits provided to temporarily disabled employees must be provided to employees disabled by pregnancy.

CFRA leave kicks in after the baby is born for the purpose of baby bonding (for both mothers and fathers), but applies only to employees who have worked for the employer at least 1,250 hours in the 12 months prior to the commencement of the leave. Cal. Gov’t Code § 12945.2(a); Cal. Code Regs. tit. 2 § 7297.9(e).<sup>5</sup> CFRA leave begins after the mother is released by her medical provider to return to work, whether or not that is before or after the expiration of the four-month maximum leave period for pregnancy disability leave. Eligible employees receive up to 12 workweeks of CFRA leave in a 12-month period.

All CFRA leave must be taken within the 12-month period following the child’s birth. Cal. Code Regs. tit. 2 § 7297.3(d). And while there is no right to paid leave under the CFRA, under certain circumstances employees may be required to or may elect to use accrued sick leave or vacation time during this period.

In almost every situation, an employee returning from pregnancy leave must be returned to her former position. An employer may be excused from reinstatement (1) if the employee would not have been in the same position

---

even if she had not taken leave (for instance, if there was a layoff under which she would have been terminated in any case) or (2) if preserving the employee's position would substantially undermine the business's ability to operate. *Id.*, § 7291.9(c)(1). The burden of proving these exceptions falls on the employer. Even if reinstatement is not an option, the employer is obligated, if possible, to move the employee to a comparable job if one is available and to do so would not substantially undermine its ability to operate. *Id.*, § 7291.9(c)(1).

Obviously, an employee's rights and an employer's obligations under the PDL law and CFRA are complicated and vary based upon facts such as the mother's health, the length of her employment and the size of the employer. But knowing that these issues exist is the first step in determining how to properly handle the situation to avoid everything from hurt feelings to large discrimination judgments.

---

*Ms. Jamie Wrage is Senior Counsel in the Employment and Litigation Departments of Gresham Savage Nolan & Tilden in Riverside.*



---

<sup>1</sup> An employee who works only part-time is entitled to a proportional amount of time off, so that an employee who works 30 hours a week, or three-quarters time, would be entitled to 66 full-time days

of leave (88 days at three-quarters time).

- <sup>2</sup> All laws that apply to pregnancy-related leave are interrelated. While this article focuses on California's PDL law and CFRA, all employers should also investigate fully the ramifications of the Family and Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA).
  - <sup>3</sup> The employer also has obligations to accommodate a pregnant employee's need for a less strenuous or hazardous position if she is able to work, but that aspect of the law is not covered by this article.
  - <sup>4</sup> Even if an employee loses the right to automatic reinstatement, the employer must still treat her in the same manner that it treats any other employee returning from a temporary disability with regard to reinstatement, or face possible claims of discrimination.
  - <sup>5</sup> CFRA leave is also available for bonding time for newly adopted children or newly placed foster children.
-