

BACK FROM BABY: NEW MOMS RETURNING TO WORK

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LAWS RELATING TO NEW MOMS RETURNING TO WORK

- ▶ Federal Family & Medical Leave Act
- ▶ Pregnancy Disability Leave Law
- ▶ Americans with Disabilities Act
- ▶ Pregnancy Discrimination Act
- ▶ Title VII
- ▶ Lactation Accommodation



LAWS
you need to
KNOW

NEW MOM CHALLENGES

- ▶ Disabilities related to pregnancies
- ▶ Designating leaves of absences
- ▶ Child care issues
- ▶ Post-partum medical conditions
- ▶ Medical issues involving newborns
- ▶ Lactation accommodation



EMPLOYER ISSUES

- ▶ Performance issues
- ▶ Work schedules
- ▶ Lactation accommodation requests
- ▶ Complying with the laws
 - ▶ FMLA
 - ▶ ADA
 - ▶ PDL



LEAVE UNDER THE FAMILY AND MEDICAL LEAVE ACT

- ▶ FMLA allows an eligible employee up to 12 workweeks in each 12-month period for:
 - ▶ Birth of son or daughter
 - ▶ Care for birth of child
 - ▶ Placement of child for adoption or foster care
 - ▶ Address medical issues associated with pregnancy

LEAVE UNDER FAMILY AND MEDICAL LEAVE ACT

- ▶ Rights of Reinstatement and Benefits
- ▶ Reinstatement
 - ▶ Employee must be reinstated to the same or equivalent job unless he/she is a key employee
- ▶ Benefits
 - ▶ Employer must maintain health plan benefits for employee on FMLA on same basis as if employee were actively employed



CONTINUED ABSENCES UPON RETURN TO WORK DUE TO PREGNANCY RELATED CONDITIONS

- ▶ Family and Medical Leave Act
- ▶ California Pregnancy Disability Leave Law
 - ▶ Disabled by Pregnancy
 - ▶ Disabled by Childbirth and
 - ▶ Medical conditions related to pregnancy
 - ▶ Severe morning sickness
 - ▶ Gestational diabetes
 - ▶ Pregnancy induced hypertension
 - ▶ Preeclampsia
 - ▶ Depression
 - ▶ Postpartum depression

PREGNANCY DISABILITY LEAVE

- ▶ PDL is part of Fair Employment and Housing Act
- ▶ Covered employers required to provide up to four months of leave per pregnancy
 - ▶ Leave can be taken on a continual basis or in smaller increments as needed
 - ▶ Eligibility for PDL leave:
 - ▶ Employees that worked for covered employer are eligible for PDL upon hire
 - ▶ Four months defined:
 - ▶ One third of a year or 17 1/3 weeks (or 693 hours of leave for full time employee working 40 hours per week)
 - ▶ After PDL, employers should consider ADA issues for employees that need a continued leave of absence as a reasonable accommodation for physical or mental disability



PREGNANCY DISABILITY LEAVE

- ▶ PDL also obligates the ER to provide reasonable accommodation or transfer of an employee affected by pregnancy – *not disabled by pregnancy*
- ▶ What does it mean to be “affected by pregnancy”?
 - ▶ Definition: If, because of pregnancy, childbirth or related medical condition, it is medically advisable for an employee to transfer or otherwise be reasonably accommodated by the ER
- ▶ Reasonable Accommodation: What is reasonable is determined on a case by case basis.
 - ▶ Factors: Employee’s medical needs, duration of the requested accommodation, ER’s past practices

PREGNANCY DISABILITY LEAVE

- ▶ Request for transfers under PDL
- ▶ Employee may request and ER must grant request for transfer affected by pregnancy if the health care provider advises transfer is medically advisable and if the transfer can be reasonably accommodated
 - ▶ ER may be required to transfer to a light duty position if ER has a policy/practice/CBA that transfers with temporarily disabled employees to “light duty” for duration of disability
- ▶ ER may transfer *another employee* to accommodate the employee but not obligated to do so
- ▶ What ER is NOT required to do:
 - ▶ Create additional employment
 - ▶ Discharge another employee
 - ▶ Violate a union contract
 - ▶ Transfer someone else with more seniority
 - ▶ Promote or transfer any employee not qualified to do the job

PREGNANCY DISABILITY LEAVE

- ▶ May the Employer Choose to Transfer a Pregnant Employee? – YES
- ▶ If it is medically advisable for employee to take intermittent leave or leave on a reduced work schedule, Employer may transfer temporarily to an available alternative position that meets the Employer's needs
- ▶ Alternative position must have equivalent rate of pay and benefits
- ▶ Employee is qualified for the transferred position
- ▶ The transferred position accommodates the leave requirements

PREGNANCY DISABILITY LEAVE LAW

- ▶ PDL is unpaid
 - ▶ Unless: ER pays other temporary disability leaves for similarly situated employees
- ▶ Substitution of paid leaves of absences
 - ▶ ER may require, or EE may choose, to use sick leave
 - ▶ EE may use vacation time or PTO at her discretion
- ▶ Reinstatement rights – must be reinstated to the same position
 - ▶ Exception:
 - ▶ Position no longer available
 - ▶ Employer can show that holding position open would substantially undermine employer's ability to operate the business safely and efficiently
 - ▶ In this situation, employer must reinstate employee to any available comparable position



PREGNANCY DISABILITY LEAVE LAW

▶ Employee Notice Requirements

- ▶ 30 days' notice if leave, need for transfer or accommodation is foreseeable
 - ▶ EE must consult with ER and make a reasonable effort to schedule any planned medical treatment to minimize disruption to operations
- ▶ If 30 days' notice is not possible, EE must notify ER as soon as possible as to the need for leave, accommodation or transfer

▶ Responding to Request for Leave, Transfer or Accommodation

- ▶ ER must respond as soon as possible but no later than 10 calendar days
- ▶ If the leave also qualifies for leave under FMLA, respond in 5 business days

PREGNANCY DISABILITY LEAVE

- ▶ Medical Certifications
- ▶ ER may request medical certification as a condition of granting leave, transfer, or accommodation
- ▶ ER must advise EE of the following:
 - ▶ Need for certification
 - ▶ The deadline for providing certification
 - ▶ What constitutes medical certification
 - ▶ Consequences for failing to provide certification



PREGNANCY DISABILITY LEAVE

- ▶ Medical certification for reasonable accommodation or transfer is sufficient if it includes the following:
 - ▶ Description of the requested accommodation or transfer
 - ▶ A statement that describes the medical advisability of the reasonable accommodation or transfer because of pregnancy
 - ▶ The date on which the need for reasonable accommodation became or will be medically advisable and the estimated duration of the reasonable accommodation or transfer

PREGNANCY DISABILITY LEAVE

- ▶ Medical Certification for Pregnancy Disability Leave is sufficient if it includes the following:
 - ▶ Employee needs to take pregnancy disability leave because employee is disabled by pregnancy, childbirth, or a related medical condition
 - ▶ The date on which employee became disabled because of pregnancy and the estimated duration of the leave

PREGNANCY DISABILITY LEAVE

- ▶ Issues regarding medical certification
- ▶ Employee needs additional time beyond the date stated in the certification
 - ▶ If employee asks for more time, ER may require recertification for need for leave, accommodation or transfer
- ▶ Employee requests to substitute sick, vacation, FMLA, personal time along with PDL
 - ▶ If ER's leave policies or other medical leave certification requirements are less stringent than PDL, ER may only require the less stringent leave certification requirements

PREGNANCY DISABILITY LEAVE

- ▶ Timeline to respond to request for PDL
- ▶ ER has two business days after the request for leave, accommodation or transfer to ask employee to provide medical certification
 - ▶ If leave is foreseeable and at least 30 days' notice is provided for foreseeable leave, employee must provide certification before the leave begins, unless it is not practicable
 - ▶ If not practicable, the employee must provide the certification within the deadline ER provides, which must be at least 15 calendar days after ER makes the request
 - ▶ ER must still provide additional time if employee needs additional time

CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

- ▶ Bonding leave for New Parents
- ▶ Parental leave must be taken and concluded within one year of birth or placement of child
- ▶ Minimum duration of leave is 2 weeks
 - ▶ Except: employee may have shorter leaves on any two occasions and employer must grant the request (ex: one day leave)

BONDING LEAVE – INTERMITTENT/REDUCED

- ▶ Mandatory Intermittent/reduced schedule leave
 - ▶ Leave is “medically necessary”
 - ▶ Medical need is such that it can be best accommodated through an intermittent or reduced leave schedule in the opinion of the health care provider
- ▶ Permissive – With Employer’s consent
 - ▶ Care for newborn child
 - ▶ Care for newly-placed adopted or foster care child
 - ▶ Employer may transfer temporarily to an alternative position
 - ▶ NO retaliatory transfers!
 - ▶ Still comply with CBA



RIGHTS OF NEW MOMS RETURNING TO WORK

- ▶ Pregnancy Discrimination Act
- ▶ PDA prohibits discrimination on the basis of pregnancy and related medical conditions
- ▶ PDA does not require leave for lactation
- ▶ PDA does not require leave for childcare purposes such as bonding leave or leave for a sick child



AMERICANS WITH DISABILITIES ACT/FAIR EMPLOYMENT AND HOUSING ACT

- ▶ The ADA also requires an employer to reasonably accommodate qualified individuals with disabilities
- ▶ Medical conditions due to pregnancy may be considered disabilities
- ▶ Employer may need to consider a leave of absence after FMLA/CFRA is exhausted as a reasonable accommodation

Carefully Analyze Pregnant or New Mom's Request for Leave beyond FMLA/CFRA as a request for Reasonable Accommodation

AMERICANS WITH DISABILITIES ACT/FEHA

- ▶ Examples of accommodations:
 - ▶ Transfers
 - ▶ If intermittent/reduced schedule taken, can temporarily transfer employee
 - ▶ Only if employee is qualified for position
 - ▶ Position better accommodates the intermittent/reduced schedule leave
 - ▶ Job modification
 - ▶ Telecommuting
 - ▶ Flexible scheduling
 - ▶ Adjustments to work station



CAREGIVER DISCRIMINATION

- ▶ Title VII and ADA
- ▶ Caregivers are not a protected category – not yet
- ▶ Per EEOC:
 - ▶ May have circumstances where discrimination against caregivers is a form of unlawful disparate treatment
- ▶ Women more likely to be primary caregiver
 - ▶ Could be a form of sex discrimination
 - ▶ Could violate ADA if newborn has a disability



CAREGIVER DISCRIMINATION

- ▶ Landmines to avoid
- ▶ Treating new mom less favorably upon return to work
- ▶ Treating female employees with no children better
- ▶ Directing new moms to lower paying or less desirable assignments
- ▶ Making comments about caregivers being unreliable
- ▶ Deviating from company policy in treating new moms
- ▶ Gender stereotyping against new moms



PERFORMANCE AND ATTENDANCE ISSUES/NEW MOMS RETURNING TO WORK

- ▶ Family & Medical Leave Act/Pregnancy Disability Leave
 - ▶ During pregnancy, designate time off as FMLA/PDL
 - ▶ Double check if new mom still has remaining FMLA/PDL time after she returns to work
 - ▶ Require advance notice of intermittent/reduced schedule for bonding leave
 - ▶ Be wary of the “my babysitter is sick” explanation
 - ▶ Vacation leave/PTO
 - ▶ FMLA/CFRA if newborn is sick



PERFORMANCE AND ATTENDANCE ISSUES/NEW MOMS RETURNING TO WORK

- ▶ Complying with ADA/PDA
 - ▶ Check if employee has a disability covered under ADA/FEHA
 - ▶ Analyze how employer treated other employees seeking a leave of absence
 - ▶ For example: how did employer treat other employees requesting an unpaid leave of absence for other reasons?
 - ▶ Educational leave
 - ▶ Disability leave
 - ▶ Sabbatical



PREGNANCY DISCRIMINATION

- ▶ It is unlawful to discriminate against or harass employees because of pregnancy, perceived pregnancy, childbirth, breastfeeding or any related medical condition
- ▶ Prohibit negative comments about pregnant job applicants or employees such as:
 - ▶ “If I knew she was pregnant, I wouldn’t have hired her”
 - ▶ “You’re too pregnant to be working”
 - ▶ “When are you going to stop having more kids?”

LACTATION ACCOMMODATION

▶ Labor Code Section 1030

- ▶ Break time should, if possible, coincide with employee's regular break time
 - ▶ EE may use her lunch time but ER still obligated to provide reasonable break times
- ▶ If lactation cannot coincide with regular break time, lactation break need not be paid
- ▶ Employer must provide a private place in close proximity to EE's work area, shielded from view and free from intrusion (no bathrooms/toilet stalls)
 - ▶ Safe, clean, and free of toxic or hazardous materials
 - ▶ Contain a surface to place breast pump and personal items
 - ▶ Contains seating
 - ▶ Access to electricity or devices (i.e., extension cords/charging stations) allowing operation of an electric or battery-powered breast pump
- ▶ Can be employee's own work area if it allows EE to express milk in private and otherwise complies with lactation accommodation statute



LACTATION ACCOMMODATION

- ▶ No requirement to provide a permanent location solely for lactation
- ▶ Temporary location is sufficient but subject to the following:
 - ▶ ER unable to provide permanent lactation location because of operational, financial or space limitations
 - ▶ Temporary location must be near the EE's work area
 - ▶ Temporary location is private, shielded from view and free from intrusion
 - ▶ Temporary location must satisfy all other requirements

LACTATION ACCOMMODATION

- ▶ Must provide EE access to sink with running water and refrigerator for storing breast milk close to EE's workspace.
- ▶ If a refrigerator cannot be provided, ER must provide a cooling device for storing milk (i.e. cooler).
- ▶ Statute requires lactation accommodation policy to include:
 - ▶ EE's right to request lactation accommodation
 - ▶ Process for requesting lactation accommodation
 - ▶ ER's obligation to respond to a request
 - ▶ A statement about EE's right to file complaint with Labor Commissioner
 - ▶ Must provide policy upon hire and when EE asks about or requests parental leave

LACTATION ACCOMMODATION

- ▶ Be aware – under the Fair Employment & Housing Act, sex discrimination includes “breastfeeding and medical conditions related to breastfeeding”
- ▶ Employers prohibited from discriminating against EES or job applicants because of breastfeeding and related medical conditions



**thank
you!**