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PREGNANCY DISABILITY LEAVE IN CALIFORNIA: WHAT SHOULD EMPLOYERS BE EXPECTING?

By Aurora Kaiser

Last year, the Department of Fair Employment and Housing ("DFEH") implemented new regulations interpreting the Pregnancy Disability Leave ("PDL") Law, California Government Code § 12945 (the "Pregnancy Disability Regulations"), and new regulations interpreting reasonable accommodation under the Fair Employment and Housing Act ("FEHA"), Gov. Code § 12900 et seq (the "Disability Discrimination Regulations").¹ The new regulations became effective on December 30, 2012, and together have the effect of eliminating any cap on the leave an employer must give to its employees with disabilities under a combination of the PDL Law, FEHA, or the California Family Rights Act ("CFRA"). A recent decision interpreting the FEHA cited the new PDL regulations and held that a disabled employee is eligible for disability leave under FEHA even after exhausting four months of PDL.

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A Quick Refresher: What Are the Maximum Disability Leave Entitlements?

How much leave an employer should grant an employee with a disability depends on which statutes apply. Some disabilities may come under the scope of more than one statute and that issue is addressed head-on by the new regulations and a recent court of appeal decision.

Statutory Schemes with Maximum Leave Entitlements

The California Family Rights Act, federal Family Medical Leave Act, and the California Pregnancy Disability Leave Law provide certain amounts of leave to employees for their own disabilities (among other things). The statutes purportedly place a limit on the *maximum* entitlement under the statutes as follows:

CFRA: Under CFRA an employer must allow an employee to “take up to a total of 12 workweeks in any 12-month period for family care and medical leave.” Gov. Code § 12945.2(a). CFRA leave can be used after the birth of a child for purposes of bonding; after placement of a child in the employee’s family for adoption or foster care; for the serious health condition of the employee’s child, parent, or spouse; or for the employee’s own serious health condition. § 12945.2(c). Although CFRA leave may be used for baby bonding or for the serious health condition of a newborn, CFRA leave cannot be used for the employee’s pregnancy-related or childbirth-related disabilities. (See PDL Law below.) The statute applies to employers with 50 or more employees. § 12945.2(b).

Family Medical Leave Act (“FMLA”): Under the federal FMLA, “an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period” for reasons similar to CFRA leave, but including the employee’s pregnancy-related or childbirth-related disabilities. § 103. The statute applies to employers with 50 or more employees. § 101.

PDL Law: Under this California statute, which is part of CFRA but applicable only to an employee’s pregnancy-related or childbirth-related disabilities, the employee must be permitted to take “leave for a reasonable period of time *not to exceed four months and thereafter return to work.*” Gov. Code § 12945(a) (1). The new regulations interpret four months as one-third of a year, or 17 $\frac{1}{3}$ weeks of leave (calculated to the hour). PDL is in addition to any leave available under CFRA, including 12 weeks of leave for baby bonding. The statute applies to employers with five or more employees.

These three statutes do not provide employers with an “undue burden” defense with regard to granting the

leave. An employee must make the requisite showing that he or she is disabled, if that is the basis of the entitlement, and then the employer must grant the leave.

Statutory Schemes Without Defined Leave Entitlements

Both the Americans with Disabilities Act and FEHA require an employer to provide reasonable accommodations to an employee with a disability, which could include a leave of absence. There is no specified period of time for disability leaves, but an employer generally has an “undue burden” defense. Thus, if the leave is so lengthy it would impose an undue burden on the employer, then it would not be a reasonable accommodation. FEHA applies to employers with five or more employees.

What Do These Maximums Mean?

Well, they don’t mean “maximum” according to the new regulations and a decision from a California Court of Appeal last month.

Let’s Combine CFRA, FMLA, and PDL

If the leave qualifies as both CFRA and FMLA leave, the statutes do not provide for cumulative rights. In other words, an employee may not take 12 weeks of CFRA and then take 12 weeks of FMLA leave if the leave qualifies under both statutes. Similarly, an employer may count an employee’s PDL leave “against her FMLA leave entitlement.” C.C.R. § 7291.12(a).

Since CFRA leave is FMLA leave and PDL is FMLA leave, is PDL also CFRA leave? Nope (though this is not new). A pregnant employee may take 17 $\frac{1}{3}$ weeks of PDL and *then* take 12 weeks of CFRA leave to bond with the baby. As the Pregnancy Disability Regulations explain, “At the end of the employee’s period(s) of pregnancy disability, or at the end of four months of pregnancy disability leave, whichever occurs first, a CFRA-eligible employee may request to take CFRA leave of up to 12 workweeks for the reason of the birth of her child, if the child has been born by this date” (e.g., baby bonding), whether or not the mother or child has a serious health condition or a disability. C.C.R. § 7291.13. Further, if a pregnant woman has used four months of pregnancy disability leave prior to the birth of her child, according to the Pregnancy Disability Regulations, “the employer may, as a reasonable accommodation, allow the employee to utilize CFRA leave prior to the birth of her child.” *Id.* But the employer will not be obligated to provide more CFRA leave than is otherwise required under CFRA. *Id.*

Now Let’s Add FEHA

New provisions of the Pregnancy Disability Regulations and the Disability Discrimination Regulations specify

that after leave under the PDL Law, CFRA, and/or FMLA is exhausted, the employee is entitled to *additional leave* if the additional leave would be a reasonable accommodation of a disability under the anti-discrimination provisions of FEHA.

Specifically, the new Disability Discrimination Regulations, interpreting disability discrimination provisions of FEHA, explain that a reasonable accommodation of a disability under FEHA can include “extending a leave provided by the CFRA, the FMLA, other leave laws, or an employer’s leave plan.” C.C.R. § 7293.9(c).

Similarly, the Pregnancy Disability Regulations state that the right to take PDL “is separate and distinct from the right to take a leave of absence as a form of reasonable accommodation under [FEHA’s anti-discrimination provision] Government Code section 12940.” C.C.R. § 7291.14. In other words, “[a]t the end or depletion of an employee’s pregnancy disability leave, an employee who has a physical or mental disability . . . may be entitled to reasonable accommodation.” *Id.*

Sanchez v. Swissport

This was the same issue before a California Court of Appeal in February in *Sanchez v. Swissport, Inc.*, 213 Cal. App. 4th 1331 (2013). The court considered—as a matter of first impression—the interplay between PDL and FEHA. Swissport employed Ana Sanchez as a cleaning agent from August 2007 through July 14, 2009. In February 2009, Ms. Sanchez was diagnosed with a high-risk pregnancy requiring bedrest. She then requested—and was granted—a temporary leave of absence. When Ms. Sanchez did not return after 19 weeks (which included accrued vacation and four months of PDL leave), Swissport terminated her. Ms. Sanchez brought suit alleging that she was discriminated against in violation of FEHA’s prohibition on disability discrimination (but did not bring any claims under the PDL Law). Ms. Sanchez argued that she requested the leave as an accommodation, which would not have caused an undue burden for Swissport, and that she would have been able to return to work shortly after the baby was born in October.

The superior court concluded that Ms. Sanchez failed to state a claim for discrimination because her employer terminated her after she exhausted her PDL. The court of appeal reversed.

The court of appeal held that under the FEHA an employer must provide reasonable accommodation (including leave) to an employee who is still disabled after exhausting PDL. In coming to this conclusion, the court cited sections of the PDL Law stating that its

“remedies *augment*, rather than supplant, those set forth elsewhere in the FEHA.” *Sanchez*, 213 Cal. App. 4th at 1338 (emphasis in original). The court cited the new Pregnancy Disability Regulations, stating that they “further buttressed” the conclusion. *Id.* at 1339 n. 6.

The court rejected Swissport’s argument that the PDL Law provides for leave “not to exceed four months” and thereafter contemplates that the employee will “return to work,” since it “merely defines an employer’s obligations under the [PDL Law], which are, by its terms, in *addition to* those provided elsewhere in FEHA.” *Id.* at 1339 (citing Gov. Code § 12945(a)(1)) (emphasis in original).

This is not the outcome where an employee brings claims based only on CFRA, where an employer’s duty to provide leave is fully satisfied by providing 12 weeks of leave. *Neisendorf v. Levi Strauss & Co.*, 143 Cal. App. 4th 480 (2006) (holding that a former employee did not state a claim under CFRA when the employer provided 12 weeks of leave). But the court in *Sanchez* rejected Swissport’s reliance on *Neisendorf*, since the court in *Neisendorf* analyzed duties only under CFRA and did not analyze the interplay between CFRA and disability leave under FEHA.

The Combined Effect of PDL, CFRA, and Disability Leave Under FEHA

If Ms. Sanchez was correct that the additional leave, through the birth of her child, would not cause an undue burden on Swissport, then her leave would have begun at the end of February 2009, and continued due to the combined effect of the PDL Law and disability leave under FEHA for seven months—through approximately October 19. According to the Disability Pregnancy Regulations, an employer “may” grant CFRA leave as an accommodation of continued disability prior to the birth of the child, thus the post-PDL leave may also be CFRA leave. If that is the case, assuming that the woman was not still disabled after the birth, she would not be entitled to additional leave under CFRA (if she exhausted her 12 weeks prior to the birth) or to additional disability leave under FEHA. If the post-PDL leave was not also CFRA leave (or not appropriately designated as CFRA leave), then the employee would also be entitled to 12 weeks of leave under CFRA for baby bonding, regardless of whether her disability continued. Further, if the woman was still disabled, then she may be entitled to additional leave as a reasonable accommodation of her disability under FEHA.

The fact that employers are required to provide up to 17 $\frac{1}{3}$ weeks of PDL during the time the woman is disabled due to pregnancy, regardless of the burden it imposes, may also make it more difficult to prove

that providing additional FEHA leave is unduly burdensome, either before or after the birth of the child. Burden or not, employees are likely to argue that the employer has already been providing leave in one way or another for an extended period without significant negative effect.

What about Benefits Continuation?

CFRA and the PDL Law both require benefits continuation under the same terms as would exist if the employee did not take leave. CFRA states that the maximum benefits continuation is 12 weeks. Consistent with its interpretation of “maximum,” the DFEH stated that the 17 $\frac{1}{3}$ weeks of benefits continuation under the PDL Law cannot be counted toward the 12 weeks of continuation under CFRA. Although this is an apparent conflict, under the logic of *Sanchez*, an employer should continue to provide benefits continuation for 29 $\frac{1}{3}$ weeks when a pregnant woman takes the full 17 $\frac{1}{3}$ weeks PDL and 12 weeks of CFRA leave for baby bonding (or if CFRA leave is granted as a “reasonable accommodation” under the Pregnancy Disability Regulations).

Conclusion

Whatever certainty employers thought they had on the amount of leave that must be provided to an employee with a disability, that certainty is gone now. After the expiration of the defined periods of leave, an employer will likely need to engage in the interactive process if the employee continues to be disabled and make a determination about whether additional leave will cause an undue burden.

Quick and Dirty: The New DFEH Regulations

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To view prior issues of the ELC, click [here](#).

1 The Pregnancy Disability Regulations are located at C.C.R. § 7291.2 *et seq.* The Disability Discrimination Regulations are located at C.C.R. § 7293.5 *et seq.*

2 Employers with five to 49 employees, should use “[Notice A](#),” and employers with 50 or more employees should use “[Notice B](#).”

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Quick and Dirty: The New DFEH Regulations

By Aurora Kaiser

Here is a quick rundown of the important changes to the regulations discussed in this Commentary:

Pregnancy Disability Regulations

- A perceived pregnancy is now protected under the PDL Law. § 7291.2.
- “Four months” is now defined as one-third of a year, or 17 $\frac{1}{3}$ weeks. § 7291.2.
- The definition of “disabled by pregnancy” is expanded to include, among other things, needing time off for prenatal or postnatal care, bed rest, or recovery from childbirth or loss or end of pregnancy. § 7291.2.
- The definition of a “health care provider” is expanded to include a “marriage and family therapist or acupuncturist,” clinical social worker, chiropractor, or others. § 7291.2.
- The regulations provide more specific rules on the medical certification, and a form that may be used. § 7291.2.
- A reasonable accommodation must be granted if the accommodation is “medically advisable” and “reasonable.” § 7291.7.
- Even if an accommodation is granted, it does not affect the “employee’s independent right to take up to four months for a pregnancy disability leave” unless the accommodation is a reduction in hours, in which case it may be deducted from the four-month leave entitlement. § 7291.7.
- PDL may be accounted for in increments of no greater than one hour and must be accounted for in the shortest increment that the employer uses to account for use of other forms of leave (if the same is less than one hour). § 7291.9.
- Clarification is provided that it is an unlawful practice to refuse to provide leave if two conditions are met: (1) timely notice and (2) the health care provider has advised that the employee is disabled by pregnancy. § 7291.9.
- If an employer has a more generous leave policy, it must be applied to pregnancy disability leave. § 7291.9.
- An employee can request, and the employer must provide, a written guarantee of reinstatement. § 7291.10.
- The only defense for denial of reinstatement is that the employee would not have been employed at the same position regardless of the leave (the DFEH deleted the defense that reinstating the employee “would substantially undermine the employer’s ability to operate the business safely and efficiently”). § 7291.10.
- Benefits must be continued during the leave on the same terms as if the employee were still working (and this doesn’t affect benefits continuation under CFRA). § 7291.11.
- There are new employee notices, and new rules regarding distribution of notice. Failure to provide notice precludes an employer from taking “any adverse action” against the employee. § 7291.16.²

Disability Discrimination Regulations

- The definition of “disability,” both mental and physical, is much expanded and the regulations indicate should be “broadly construed.” § 7293.6.
- “Perceived Potential Disability” is now a disability and is defined as being regarded as or perceived as having a disease, disorder, or condition “that has no present disability effect, but may become a mental or physical disability.” § 7293.6(d)(6).
- Examples are provided of what evidence may be used to show whether a particular function is essential, for example, the employer’s judgment; the amount of time spent on a function; or accurate, current job descriptions. § 7293.6.
- The definition of “health care provider” has been expanded similarly to the definition in the Pregnancy Disability Regulations. § 7293.6.
- The regulations also provide examples of what may be a reasonable accommodation, such as allowing the use of assistive animals (also newly defined), modifying an employer policy, permitting an employee to work from home, providing more leave than would otherwise be required by CFRA or FMLA, or a much expanded concept of reassignment to a vacant position. § 7293.9(c).
- The regulations lay out a lengthy illustration of the interactive process and the obligations of both employer and employee/applicant, including the employee/applicant duty to provide medical certification and the possible repercussions for failing to do so. § 7294.0.
- The regulations also provide more detail on medical and psychological inquiries and examinations, as well as qualification standards and tests. They clarify that (1) an employer may not ask for an examination or make any medical inquiry before a bona fide offer of employment is made, and (2) the bona fide offer of employment may be conditioned on completion of a fitness-for-duty exam (provided all employees in similar positions must take the exam). During employment or prior to employment, exams and inquiries are permissible only if they are “job-related and consistent with business necessity.” §§ 7294.2; 7294.3.
- Genetic testing is prohibited. § 7294.3.
- Finally, the regulations slightly expand privacy protections by clarifying that the protections apply to information collected during the interactive process as well as information collected as part of a medical exam or inquiry. §§ 7294.0(g); 7294.2(d)(4).