

CALIFORNIA'S PREGNANCY DISABILITY LEAVE LAW AMENDED IN RELATION TO THE CONTINUATION OF BENEFITS

California's Pregnancy Disability Leave Law (PDL) (Government Code § 12945) was amended, effective January 1, 2012, to make it an unlawful employment practice for an employer to refuse to maintain and pay for continuation coverage of group health plan benefits for a female employee while she is on a leave of absence caused by a disability due to pregnancy, childbirth, or a related medical condition. PDL continuation coverage applies for the duration of the leave but not to exceed four months over the course of a 12-month period unless the employer has a more generous policy with respect to other disability leaves of absence.

Previously, there was no legal requirement to continue group health plan coverage when an individual was on a leave of absence due to disability caused by pregnancy. However, pregnancy disability had to be treated the same as any other disability. This means that if health coverage continued for other disabilities, it also had to continue for pregnancy disability. Under the new law, pregnancy disability may be treated better than other disabilities with respect to those employers who do not continue coverage for certain employees not actively at work due to a disability. Unlike the Family and Medical Leave Act, new employees and all part-time employees are eligible for PDL.

ELIGIBILITY

Employees disabled by a pregnancy or pregnancy-related issue are eligible for PDL regardless of their length of employment or hours worked. However, proposed regulations indicate that an employee should provide 30 days advanced notice if the absence is foreseeable and the employer may require medical certification as a condition of the leave.

LEVEL OF COVERAGE

PDL continuation coverage begins on the first date that the employee is absent from work due to pregnancy disability. The level and conditions of coverage must be the same as would have been provided had the employee remained in active employment.

PERIOD OF COVERAGE

PDL may be taken as one continuous leave or intermittently. For intermittent leave, absences may occur for separate periods from one hour to several weeks. Until regulations are issued for applying these rules to group health plan continuation coverage, a reasoned approach should be taken with respect to alignment of the periods of absence for PDL to continued coverage under a group health plan.

PAYMENT FOR COVERAGE

Guidance has not been issued regarding responsibility for payment of an employee's portion of the premium. Until regulations are issued, we believe it is reasonable for an employer to require employees to pay for the employee's portion of the premium as a deduction from pay while the employee remains in pay status. Notably,

employers may require employees to use accrued sick leave during the otherwise unpaid portion of the PDL but employees have the option of choosing whether or not they wish to use accrued vacation for this purpose. For a period of unpaid PDL, we recommend using rules similar to those found within the Family and Medical Leave Act (FMLA) with respect to employee payment of premiums.

The employer may recover amounts it paid for PDL continuation coverage if the employee fails to return to work after the period of leave, unless the failure to return is the result of continued disability or other circumstance beyond the control of the employee, or the employee takes leave under the California Family Rights Act or FMLA.

INTEGRATION WITH FMLA AND CFRA

Employers may require that group health plan continuation coverage under PDL run concurrently with coverage under FMLA. In this case, an employee on PDL would receive an additional four weeks of coverage that would be added to the twelve weeks of FMLA coverage. Keep in mind that PDL coverage must be made available whether or not an employee is eligible for FMLA leave. As a result, part-time employees and recent hires remain eligible for sixteen weeks of continued group health plan coverage while on PDL.

Unlike FMLA leave, CFRA leave may not run concurrently with PDL.

PROPOSED REGULATIONS

We anticipate that regulations will be issued before the end of 2012. In the meantime, employers should make a reasonable, good faith effort to comply with the new amendment and to borrow methods used to administer similar laws.

NEXT STEPS

Employers with 50 or more employees should revise their PDL “Notice B” to comply with their obligation to inform pregnant employees of their rights under CFRA and the PDL law. (A sample Notice B is attached to this Briefing).

Sponsors should amend their group health plans to provide for continued PDL coverage, including concurrent coverage with respect to FMLA leave, and, if self-insured, inform their stop-loss carriers of this change. Although there is uncertainty about whether plans subject to ERISA need comply with this coverage mandate, we recommend compliance because California has made this change in a way that makes it appear more as an employment practice and less like a benefits mandate which typically flows through its Insurance Code. We anticipate that this question will be answered in the courts.

Keenan & Associates is not a law firm and no opinion, suggestion, or recommendation of the firm or its employees shall constitute legal advice. Clients are advised to consult with their own attorney for a determination of their legal rights, responsibilities and liabilities, including the interpretation of any statute or regulation, or its application to the clients’ business activities.

“Notice B”

FAMILY CARE AND MEDICAL LEAVE AND PREGNANCY DISABILITY LEAVE

Under the California Family Rights Act of 1993 (CFRA), if you have more than 12 months of service with us and have worked at least 1,250 hours in the 12-month period before the date you want to begin your leave, you may have a right to an unpaid family care or medical leave (CFRA leave). This leave may be up to 12 workweeks in a 12-month period for the birth, adoption, or foster care placement of your child or for your own serious health condition or that of your child, parent or spouse.

Even if you are not eligible for CFRA leave, if disabled by pregnancy, childbirth or related medical conditions, you are entitled to take a pregnancy disability leave (PDL) of up to four months, or the working days in one-third of a year or 17.3 weeks, depending on your period(s) of actual disability. Time off needed for prenatal or postnatal care, childbirth, and recovery from childbirth, stillbirth, miscarriage or postpartum depression would all be covered by your PDL.

If you are CFRA-eligible, you have certain rights to take BOTH a PDL and a CFRA leave for reason of the birth of your child. Both leaves contain a guarantee of reinstatement to the same or a comparable position at the end of the leave, subject to any defense allowed under law.

If possible, you must provide at least 30 days advance notice for foreseeable events (such as the expected birth of a child or a planned medical treatment for yourself or of a family member). For events which are unforeseeable, we need you to notify us, at least verbally, as soon as you learn of the need for the leave.

Failure to comply with these notice rules is grounds for, and may result in, deferral of the requested leave until you comply with the notice policy.

We may require medical certification from your health care provider before allowing you a leave for:

- your pregnancy;
- your own serious health condition; or
- to care for your child, parent, or spouse who has a serious health condition.

We may have a medical certification form that you can take to your health care provider to fill out and return to us. When medically necessary, leave may be taken on an intermittent or a reduced work schedule.

If you are taking leave for the birth, adoption or foster care placement of a child, the basic minimum duration of the leave is two weeks and you must conclude the leave within one year of the birth or place for adoption or foster care.

Taking a family care or pregnancy disability leave may impact certain benefits and your seniority date. However, you may have the right to continuation of group health plan coverage of up to four months while on pregnancy disability leave. If you want more information regarding your eligibility for a leave and/or the impact of the leave on your seniority and benefits, please contact **[insert contact information]**.

For more information about your rights and obligations, contact your employer, look at the Department of Fair Employment and Housing’s website at www.dfeh.ca.gov, or contact the Department at (800) 884-1684.