

Management Alert



Goodbye, FEHC; Welcome New Disability and Pregnancy Regulations

The Fair Employment and Housing Commission (FEHC), just prior to its demise, has approved amendments to the California FEHA disability and pregnancy regulations, which became effective December 30, 2012. The FEHC, as of January 1, 2013, has been replaced by a Fair Employment and Housing Council, a new part of the Department of Fair Employment and Housing (DFEH). The Council will assume the FEHC's former regulatory functions.

The comprehensive new disability and pregnancy regulations, over 40 pages in length, will prompt California employers to review their policies, handbooks, and practices for compliance. The avid reader can access the new disability regulations [here](#) and the new pregnancy regulations [here](#). This Alert, meanwhile, summarizes their highlights.

Disability Regulations (2 CCR §§ 7293.5-7294.4)

The modified disability regulations aim to comport with the federal ADAAA regulations, providing broad protections and preventing workplace discrimination against actual or perceived physical or mental disability or disabling or potentially disabling medical conditions. The regulations:

- Define *mental disability* and *physical disability* broadly to include any disorder that affects a person's mental or bodily functions and limits a major life activity. "Limiting" a major life activity merely means that the condition makes achieving a major life activity "difficult." The regulations list new examples of disabilities, including autism spectrum disorders, clinical depression, post-traumatic stress disorder, obsessive compulsive disorder, cerebral palsy, HIV/AIDS, seizure disorder, multiple sclerosis, and heart disease.
- Define and give extensive examples of *perceived disability* and *medical condition* (including genetic characteristics).
- Provide standards for determining when a job function is *essential*, and set out examples of potential *reasonable accommodations*, such as allowing employees to bring assistive animals to work, permitting an alteration of when and how essential functions are performed, making an exception to company policy, and permitting employees to work from home.
- Argue that plaintiffs can prove disability discrimination merely by showing that disability was **one** factor influencing the employer to deny a employment benefit, which was not justified by a permissible defense. This section will need revision if the California Supreme Court decides, in the pending case of *Harris v. City of Santa Monica*, that plaintiffs alleging employment discrimination must show that the individual's protected status was a determining factor (not simply a motivating factor) in the employer' decision-making.

Pregnancy Regulations (2 CCR §§ 7291.2-7291.16)

These regulations elaborate upon and seek to clarify the employer's obligation to reasonably accommodate employees affected by pregnancy or who are *perceived* to be affected by pregnancy. The amended regulations:

- Provide examples of reasonable accommodations, including modifying work practices, work duties, or work schedules, or acquiring or modifying necessary equipment.
- Specify that it is illegal for an employer to transfer an employee over her objections to a less strenuous or hazardous position because of pregnancy or perceived pregnancy.
- Require employers to maintain and pay for medical coverage for eligible employees who takes pregnancy disability leave, under the same terms and conditions that would have been provided if they had not taken leave.
- Provide that the unpaid "four month leave" of absence for the actual period of disability is to be calculated as the number of days the employee would normally work within the four calendar months (1/3 of a year, or 17.3 weeks, or 122 days) prior to commencement of taking the leave. Intermittent leaves may be accounted for in the same increments the employer uses to account for uses of other forms of leave, provided that the employer must account for pregnancy disability leave in increments no greater than one hour.
- Mandate that the employer provide written notice of the rights and obligations of pregnant employees, including specifics concerning reasonable accommodation, the taking of pregnancy disability leave, use of sick leave and vacation time, and the need for medical certification. Different forms of notice (Notice "A" for employers with fewer than 50 employees, and Notice "B" for larger employers) are suggested.
- Provide specifics concerning an employer's requirement of medical certification as a condition of granting a reasonable accommodation, transfer, or pregnancy disability leave, and provide a form of medical certification to use.

On **January 23, 2013**, Seyfarth Shaw LLP will host a 2013 California Legislative Update Webinar, which will include a 30-minute discussion of the amended FEHA pregnancy and disability regulations and their implications for California employers. Please [click here](#) to register.

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