Law Offices of Mary L. Topliff
Workplace Wave

New California Regulations Provide Expanded Protections for Disabled Employees and Clarification for Pregnancy Disability Leaves of Absence

By Mary L. Topliff, Esq., and Allison Pitigoi, Esq.

Following lengthy public comment processes and various iterations, two sets of regulations in California have been adopted, effective December 30, 2012 – one regarding California's disability discrimination and accommodation law and the other regarding California's pregnancy disability discrimination and leave of absence law.

1. Highlights of the Disability Discrimination and Accommodation Regulations

California's disability discrimination law, part of the Fair Employment and Housing Act (FEHA), generally applies to private sector employers with five or more employees. Since the early 2000's, FEHA's protections were considerably broader in scope than the federal Americans with Disabilities Act (ADA), due primarily to court opinions. However, with the amendment to the ADA in 2008, the federal law became more closely aligned with California law.

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Speaking Events

On February 13, 2013, Ms. Topliff will be presenting a full-day workshop on All About Time Off and Leaves of Absence through NCHRA. Ms. Topliff will be a presenter on 3/19/13 for a BLR webinar entitled, "Comp 101 Bootcamp: Your Guide to Creating and Implementing a Competitive Pay Program." For more information, please email topliff@joblaw.com.

The new California regulations provide guidance on how the FEHA is to be interpreted and applied. The stated intent is to ensure discrimination-free access to employment opportunities without regard to an individual's actual or perceived disability or medical condition so as to strengthen the economy by keeping people working who would otherwise require public assistance. The regulations further provide that cases brought under FEHA should primarily focus on whether employers provided reasonable accommodation to employees/applicants with disabilities, whether all parties complied with their obligations to engage in the interactive process and whether discrimination occurred. Thus, the focus should not be on whether the individual met the definition of having a disability.

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Below are some highlights of the recent changes.

Expanded "Disability" Definitions. According to the regulations, the definition of "disability" shall be broadly construed, meaning that the courts (and by implication, employers) must not be overly restrictive when determining if an employee or applicant has a physiological or mental disorder or impairment that limits a major life activity. To this end, the definitions of mental and physical disability have been expanded. For instance, mental disabilities include, among others, autism spectrum disorders, schizophrenia, and chronic or episodic conditions such as clinical depression, bipolar disorder, posttraumatic stress disorder, and obsessive compulsive disorder. Physical disabilities include, among others, HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis and heart disease.

Major life activities are also to be construed broadly and include "physical, mental, and social activities, especially those life activities that affect employability or otherwise present a barrier to employment or advancement." An impairment limits a major life activity simply if it makes the achievement of the major life activity difficult.

The regulations continue to exclude certain conditions, such as the current unlawful use of controlled substances or other drugs – including medical marijuana. Notably, conditions that are mild and have little or no residual effects, which do not limit a major life activity, are to be determined on a case-by-case basis. Some examples are the common cold, seasonal flu, and non-migraine headaches. It remains to be seen whether the courts will take such a restrictive view of temporary conditions or conditions from which individuals make full recovery.

Guidance on Assistive Animals. Assistive animals (e.g., support dogs) are those that provide emotional or other support to a person with a disability, including, but not limited to, traumatic brain injuries or mental disabilities such as major depression. Employers may require that these animals in the workplace: (A) are free from offensive odors and displays habits appropriate to the work environment (i.e., are they house trained?); (B) do not endanger the health or safety of the disabled individual or others in the workplace; and (C) are trained to provide assistance for the employee's disability. Furthermore, employers may require the employee to submit medical certification from a health care provider and confirmation that the animal meets the minimum standards above. Employers may challenge whether the animal meets the minimum standards within the first two weeks it is in the work place based on objective evidence of offensive or disruptive behavior. Furthermore, an employer may require an annual recertification from the employee of the continued need for the animal.

Obligations during the Interactive Process. The new regulations provide a detailed description of the interactive process, in which the employer and employee exchange information so that a reasonable accommodation can be identified and implemented. According to the regulations, it is the employer's responsibility to initiate that process when an employee requests an accommodation or when it becomes aware that the employee needs an accommodation through a third party (e.g., a health care provider certification) or by observation. Notably, employers are to initiate the process when employees have exhausted their leave of absence entitlements under law or policy (e.g., FMLA) but require additional time off or other accommodation.

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Medical Certifications and Disability-Related Inquiries. As part of the interactive process, employers may require medical certifications (so long as the disability and need for accommodation is not obvious), and may require second opinions from other health care providers if the employee's documentation is insufficient. The regulations set forth detailed procedures that must be reviewed and followed. Employers must also exercise caution to make sure they do not run afoul of other employment laws and regulations during communications with employees, such as privacy laws protecting medical or personal information or other sections of the disability regulations prohibiting discrimination based on "perceived disability" or "perceived potential disability."

Questions often arise as to what type of medical professionals qualify as health care providers for this purpose. The new regulations confirm that a broad range of professionals who are capable of providing health care services qualify, including chiropractors, licensed marriage and family therapists, acupuncturists, nurse practitioners, among others.

The new regulations provide detailed guidance regarding acceptable disability-related inquiries, both pre-job offer and during employment, as well as examples of prohibited questions (e.g., "Have you ever taken medical leave?"). Voluntary wellness programs and pre-employment testing are also covered.

Reasonable Accommodation Obligations. A reasonable accommodation is a modification or adjustment to a job or work environment that enables a disabled individual to perform the essential functions of the job. The new regulations identify a number of potential accommodations, including reserved parking places, modifying supervisory methods (e.g., dividing complex tasks into smaller parts), modifying employer policies, permitting an employee to work from home, or allowing applicants or employees to bring "assistive" animals to the work site. Keep in mind that these are example of accommodations, not necessarily required.

2. Highlights of the Pregnancy Disability Discrimination and Leave of Absence Regulations

California's pregnancy disability discrimination and leave of absence law is also part of the Fair Employment and Housing Act (FEHA), covering private sector employers with five or more employees. The new regulations cover a wide range of subjects, including details of employers' obligations to continue group health insurance coverage and the use of paid time off during leaves of absence. The following are some of the highlights.

How Pregnancy Disability Leave is Calculated. As you know, covered employers must provide up to four (4) months of pregnancy disability leave. "Four months" is an ambiguous term, however, because not all the months in the calendar have the same number of days. This issue tends to come up when leave is taken sporadically or intermittently, and thus it is more useful to know the number of days in four months to calculate an employee's total leave. The new regulations clarify that "four months" leave is defined as the number of days or hours the employee would normally work within four calendar months (one-third of a year or 17⅓ weeks). If an employee's schedule varies from month to month, a monthly average of the hours worked over the four months prior to the beginning of the leave is used for calculating the employee's normal work month. Employees who work more or less than 40 hours per week, or who work on alternative variable work schedules, the number of working days that

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constitutes "four months" is calculated on a pro rata or proportional basis. The new regulations provide the following examples:

**Employees working 40 hours per week.* For an employee who works 40 hours per week, "four months" means 693 hours of leave entitlement, based on 40 hours times 17⅓ weeks.

**Employees working more or less than 40 hours per week or on alternative/variable schedules.* For an employee who works 20 hours per week, "four months" means 346.5 hours of leave entitlement, based on 20 hours times 17⅓ weeks. Likewise, for an employee who normally works 48 hours per week, "four months" means 832 hours of leave entitlement, based on 48 hours times 17⅓ weeks.

Intermittent Leave. Employers may account for increments of intermittent leave using an increment no greater than the shortest period of time that the employer uses to account for other forms of leave (e.g. sick leave or vacation), provided it is not greater than one hour. Furthermore, taking intermittent leave or working on a reduced work schedule throughout an employee's pregnancy will directly reduce the remaining pregnancy disability leave entitlement leading up to and after childbirth, depending on the employee's regular work schedule.

Transfers During Pregnancy Disability Leave. Employers must grant a pregnant employee's request to transfer to a less strenuous or hazardous position if it is based on the medical advice of the employee's healthcare provider and can be reasonably accommodated. Employers may also require an employee who medically needs to take intermittent leave or leave on a reduced work schedule to transfer temporarily to an available alternative position that meets the needs of the employee. The new regulations clarify that if an employer has a policy, practice or collective bargaining agreement authorizing or requiring transfer of employees with other disabilities (including on-the-job injuries), they must apply it on the same terms to employees with pregnancy disabilities.

A transfer does not mean creating a new position, violating the terms of a collective bargaining agreement, or placing the employee in a position for which she is not qualified. The alternative position must have the equivalent rate of pay and benefits, and must better accommodate the employee's leave requirements than her regular job, but does not have to have equivalent duties.

Reasonable Accommodations. Although pregnancy is clearly a temporary condition (in contrast to most conditions that qualify as disabilities described in the regulations described in the first part of this article), the new regulations refer to reasonable accommodation obligations for pregnancy disabilities, including modifying work duties, modifying equipment and providing break time for employees who are expressing milk (also covered independently by Cal. Labor Code Section 1030). Interactive process requirements are also detailed.

Notice Requirements. The regulations provide updated language for the notice to be posted in the workplace. Electronic posting, however, is sufficient as long as it otherwise meets the notice requirements. Either a copy of the notice, or the equivalent information, must be provided to employees when they notify their employer of their pregnancy, or upon their request for pregnancy disability leave or related accommodation. Employers are encouraged, but not required, to describe employees' rights and responsibilities regarding pregnancy disability in their employee handbooks.

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If ten percent or more employees at any one facility or establishment speak a primary language other than English, the employer must translate the notice into the language(s) spoken by this group or groups of employees. In addition, the employer must make a reasonable effort to give either verbal or written notice in the appropriate language to any employee who the employer knows is not proficient in English, and for whom written notice previously has not been given in her primary language, once the employer knows the employee is pregnant.

Medical Certifications. The new regulations clarify the contents of adequate medical certification and added a medical certification form that employers may, but are not required to, use. Importantly, the updated regulations provide a description of the consequences if the employee fails to provide adequate and timely medical certification. If the need is foreseeable, the employer may delay granting the request, until the required certification is provided. If the need is not foreseeable or recertification is required, the employee must provide certification (or recertification) within the time frame requested by the employer (which must be at least 15 days after the employer's request) or as soon as reasonably possible under the circumstances. The employer may delay the employee's continuation of the leave if an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances.

Practice Tips

- Review your Disability Accommodation policy and procedures with particular focus on the interactive process.
- Review your Pregnancy Disability policy and medical certification forms. Post required notices.
- Ensure compliance by reviewing the regulations and making necessary changes to policies and procedures – and have legal counsel provide advice in this regard.
- Communicate policy/procedure updates to all employees and provide additional education to front-line managers and supervisors.

This article presents highlights and a summary of significant changes. Employers should familiarize themselves with the regulations.

For more information on compliance with disability discrimination and leave of absence obligations or other employment law matters, please contact Ms. Topliff at topliff@joblaw.com.

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