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Calif. Pregnancy Rules Spur Workplace Accommodation Fights

By **Erin Coe**

Law360, San Diego (September 13, 2013, 10:38 PM ET) -- The California Fair Employment and Housing Commission's recent amendments to pregnancy disability leave regulations are beginning to trigger suits accusing employers of not properly accommodating workers with pregnancy- or childbirth-related medical conditions, and attorneys say more litigation over the rules could be on the horizon.

The amendments, which took effect on Dec. 30, are aimed at giving more guidance to California employers with five or more workers on how to respond to leave requests for workers disabled or affected by pregnancy, childbirth or related medical conditions. They expand when an employee may be considered "disabled" by pregnancy to include conditions such as severe morning sickness, gestational diabetes and post-partum depression, which could require companies to offer leave, a job transfer or a reasonable accommodation.

The new regulations also reconfirm the need to provide a reasonable accommodation to a pregnant worker if her doctor finds her condition warrants one. However, the duty to accommodate is now based on a "medically advisable" standard, which is murkier than the "medically necessary" standard familiar to employers in accommodating other types of disabilities.

Inconsistencies in the regulations have generated confusion for employers and led to lawsuits over accommodation requests, according to Clint Robison, a Hinshaw & Culbertson LLP partner. For example, the "interactive process" cited in the regulations has traditionally involved employers discussing alternative accommodations with the employee in light of the employee's medical necessities and the needs of the job. But that back-and-forth process is arguably inconsistent with the new "medically advisable" standard, and there is no guidance to account for reasonable business realities, he said.

"If every medical note can be deemed to mean that a stated accommodation is 'medically advisable,' how can an employer understand the interaction between the disabling condition and the employee's job duties, which is the point of an 'interactive process?'" he said. "Employees may assume their note is automatically sufficient under all circumstances, creating the potential for conflict with well-meaning employers focused on their 'interactive process' obligation."

Under the updated regulations, employers need to consider accommodations for employees who are disabled by an expanded list of medical conditions related to pregnancy, as well as for workers who are "affected" by conditions related to pregnancy. This provision exposes employers to potential legal risks, because while companies are accustomed to engaging with employees with disabling conditions, they are not used to dealing with employees affected by a medical condition, according to Jones Day partner Fred Alvarez.

"It's forcing conversations on sensitive subjects related to the effects of pregnancy that used to be off-limits," he said. "It puts obligations on employers that they have not been trained to deal with over the years, and it exposes them to liability if they do not delve into a topic correctly or if they do not apply this rarified form of reasonable accommodation with no undue hardship defense."

Janie Schulman, co-chair of Morrison & Foerster LLP's employment and labor group, said that because of gray areas created by the new rules, there will likely be an uptick in suits accusing employers of failing to provide transfers and other accommodations for medical conditions related to pregnancy.

"If employees have used up all of their leave, but they need one more week, and then they need another and another, at what point does it become unreasonable for the employer?" she said. "It's a difficult area because there is no hard-and-fast rule in making assessments as employers try to ask themselves what is reasonable."

The regulations' provisions allowing additional break time for lactation, along with a new state law barring sex discrimination against breastfeeding employees, could also lead to disputes, according to Schulman. A.B. 2386, which took effect in January, expanded the definition of "sex" under the state's Fair Employment and Housing Act to include breastfeeding or breastfeeding medical conditions.

In addition, litigation may arise from the regulations' additional protections for employees who are not pregnant, but who are subject to an adverse employment action based on the employer perceiving they are pregnant.

"The bright line test for coverage — that an employee is either pregnant or not pregnant — is now gone," Schulman said. "Now the fact finder has to decide whether a person is perceived to be pregnant or not, and that puts more risk into the employment management process."

In a major pregnancy leave ruling, a California appeals court handed another potential hurdle to employers in February, when it found that a former Swissport Inc. worker could sue the airport ground services company under FEHA — which bars discrimination on the basis of sex, disability and medical condition — even though she had exhausted the four-month leave of absence allowed by California's Pregnancy Disability Leave Law. The appeals court determined that the PDLL remedies augment, rather than supplant, the remedies governing pregnancy, childbirth and pregnancy-related medical conditions set forth in FEHA.

"The court looked to the new regulations in finding that they explicitly provide that the right to take pregnancy disability leave is separate and distinct from the right to take a leave as a form of reasonable accommodation," said Carol Freeman, a Morgan Lewis & Bockius LLP partner. "The key for employers here is to make sure to engage with pregnant employees and consider a leave longer than four months."

In light of the Swissport case and the pregnancy regulations, employers with workers who are disabled due to a pregnancy-related medical condition or who are returning from pregnancy leave will likely need to address each matter on a case-by-case basis, according to Schulman.

“It makes planning for employers more difficult in terms of scheduling employees to come back to work,” she said. “Employers are going to need to do a little more planning and talking to workers about their needs when they're off of work and when they come back to work.”

Still, some experts say the rules don't have to be a headache for employers. They help spell out what is required of employers and make it easier to comply with the law, according to Colleen Regan, a Seyfarth Shaw LLP partner, whose firm provided input on the regulations during the comment period.

“The impact of these new regulations is to raise the educational level of everybody involved,” she said. “They let employees know what they are entitled to and let employers know what the rules are.”

--Editing by Elizabeth Bowen.