

FAIR EMPLOYMENT & HOUSING COMMISSION

455 GOLDEN GATE AVENUE, SUITE 10600
SAN FRANCISCO, CA 94102-3660
TEL: (415) 557-2325 FAX: (415) 557-0855
www.fehc.ca.gov



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STATE OF CALIFORNIA
FAIR EMPLOYMENT AND HOUSING COMMISSION

FINAL STATEMENT OF REASONS
for
ADOPTION OF PREGNANCY REGULATIONS

October 16, 2012

On March 2, 2012, the Fair Employment and Housing Commission published a Notice of Proposed Rulemaking regarding amendment of its pregnancy regulations¹ under the Fair Employment and Housing Act, Government Code section 12900, et seq. which it had adopted at its November 1, 2011 Commission meeting.² The FEHC sent copies of the Notice, the text of the proposed regulations, and the Initial Statement of Reasons to its electronic regulations mailing list, and posted copies on its website at www.fehc.ca.gov.

The public comment period ran from March 2, 2012 to April 19, 2012. During this period, on April 17, 2012 and April 19, 2012, the Commission held two public hearings on the proposed regulations in Los Angeles and San Francisco, respectively, and received a total of 26 written and oral comments at the public hearings. The written comments are contained in Volume IV of the Rulemaking File and the oral comments are contained in the public hearing transcripts in Volumes V and VI of the Rulemaking File. A list of the written and oral commentators, identified by name and number, and the Commission's response to each comment is attached to the Final Statement of Reasons as Attachment A.

In response to the comments received on the original proposed regulations, the Commission decided to propose changes to its proposed regulations. On June 13, 2012, the Commission adopted modified pregnancy regulations. On June 18, 2012, the Commission issued a Notice of Changes to Proposed Adoption of Pregnancy Regulations, dated June 18, 2012, and the text of the proposed changes. It sent those proposed changes to everyone who had: 1) requested a copy of the original text and Initial Statement of Reasons; 2) testified or provided written comments at one of the public hearings; 3) provided written comments to the proposed regulations during the public comment period; 4) asked to receive copies of any revisions the Commission made to its proposed amendments; or 5) was on the Commission's regulations mailing list. In addition, on June 18, 2012, the Commission posted these changes on its website at www.fehc.ca.gov. The public comment period ran from June 18, 2012, to July 2, 2012.

1 The current pregnancy regulations are at California Code of Regulations, title 2, section 7291.2 to 7291.16.

2 All statutory references are to the Government Code unless otherwise indicated.

The Commission received four sets of written comments to the proposed changes during this public comment period. These comments are in Volume VII. A list of the commentators, identified by name and number, and the Commission's response to each comment on the changes is attached to the Final Statement of Reasons as Attachment B.

After considering the comments to the proposed changes, the Commission decided to propose additional changes to the proposed amendments. At its August 14, 2012 Commission meeting, the Commission adopted modified disability regulations. On August 15, 2012, the FEHC issued a Notice of Additional Changes to Proposed Adoption to Pregnancy Regulations, dated August 15, 2012, and the text of the additional proposed changes. It sent these additional proposed changes to the same group of persons identified above, as well as anyone else who had asked to receive the documents. In addition, on August 15, 2012, the Commission posted these changes on its website at www.fehc.ca.gov. The public comment period ran from August 15, 2012, to August 30, 2012.

The Commission received seven comments to the additional proposed changes during this public comment period, a fact noted in Attachment C.

After considering the comments to the proposed changes, the Commission decided to propose additional changes to the proposed amendments. At its September 14, 2012, Commission meeting, the Commission adopted modified pregnancy regulations. On September 14, 2012, the FEHC issued a Notice of Modifications to Text of Proposed Regulations, dated September 14, 2012, and the text of its August 14, 2012 regulations to the mailing list identified above. In addition, on September 14, 2012, the Commission posted these changes on its website at www.fehc.ca.gov. The public comment period ran from September 14, 2012 to October 1, 2012. The Commission received five comments during this period.

After considering the comment to the September 14, 2012 regulations, the Commission adopted the regulations at its October 2, 2012 Commission meeting. The minutes reflecting the adoption of the regulations is in Volume I, Tab M, of the Rulemaking File.³

The Commission did not rely on any document, report, data, technical, theoretical or empirical studies in proposing these amendments which are not identified in Volume II of the Rulemaking File. All of these documents were identified in the Initial Statement of Reasons (Volume I, Tab G of the Rulemaking File).

ALTERNATIVES DETERMINATION

The Commission has determined that no alternative would be more effective in carrying out the purpose for which the regulations are proposed or would be as effective and less burdensome to

3 These minutes have not yet been formally approved by the Commission as of the date of the submission of the Rulemaking File. The Commission will review and approve the minutes from the October 2, 2012 Commission meeting at its next regularly scheduled Commission meeting on November 15, 2012.

affected private persons than the proposed regulations.

LOCAL MANDATE DETERMINATION

The proposed regulations do not impose any additional mandate on local agencies or school districts not already mandated by the statute.

UPDATE OF INITIAL STATEMENT OF REASONS⁴

1. Section 7291.2(a) – “Affected by Pregnancy”

The Commission amended this subsection to provide a structure for defining the various obligations and rights of both an employer and employee consistent with the intent, language, and purpose of the Fair Employment and Housing Act, Government Code section 12900, et seq. (FEHA).

Numerous commentators objected to the inclusion of “lactation” as a “medical condition” related to pregnancy. Their primary concern was that inclusion of lactation as a “related medical condition” would allow employees to take pregnancy disability leave to breastfeed their newborn and/or to express breast milk for bottle feeding at another time.

The Commission therefore modified section 7291.2, subdivision (a) to delete reference to “a physical or mental condition related to pregnancy or childbirth,” and inserted “pregnancy, childbirth, or a related medical condition, or ‘a condition related to pregnancy, childbirth, or a related medical condition,’ as set forth in Government Code section 12945” in the definition of “Affected by pregnancy.” The Commission then included a new section 7291.2(d) defining a “condition related to pregnancy, childbirth, or a related medical condition, as set forth in Government Code section 12945.” These changes were adopted to remove lactation and other non-medical conditions related to pregnancy or childbirth from the definition of related medical conditions, and thereby established a framework in the regulations whereby distinctions could be made between which conditions require an employer to provide reasonable accommodation, transfer, and/or pregnancy disability leave, from those that merely required reasonable accommodation or transfer.

2. Section 7291.2(d) - “condition related to pregnancy, childbirth, or a related medical condition”.

The Commission used this term to provide a structure for defining the various obligations and rights of both an employer and employee consistent with the intent, language, and purpose of the

4 As noted above, there are four sets of comments to the various drafts of the Commission’s proposed regulations, summarized in Attachments A – D. These comments are labeled to refer to the month that the comments to the draft regulations were due (in order, the 45-day April 2012 comments, the 15-day June 2012 comments, the 15-day August 2012 comments, and 15-day October 2012 comments, followed by the commentator number and name. Thus, for example, “**Apr-26-California Chamber of Commerce**” refers to commentator number twenty-six, the California Chamber of Commerce, commenting about the original November 1, 2011 draft of the regulations, with comments due in April 2012.

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3. Section 7291.2(g) – “eligible female employee”

The Commission made minor, clarifying edits only.

4. Section 7291.2(i) – “Employment in the same position”

The Commission made minor, clarifying edits only.

5. Section 7291.2(j) – “Employment a comparable position”

The Commission made minor, clarifying edits only.

6. Section 7291.2(l) – “Four months”

The Commission amended the definition with several grammatical and language changes to make the subsection more accurate in its calculations and more readable so as to be more useful to employers, employees, and practitioners.

7. Section 7291.2(n) – “Health Care Provider”

The Commission amended the definition both in response to comments from the Legal Aid Society-Employment Law Center and to insure the regulations fully incorporated the intent, language, and purpose of the FEHA.

8. Section 7291.2(p) – “Medical certification”

The Commission made minor, clarifying edits only.

9. Section 7291.2(s) – “Reasonable accommodation”

The Commission amended this definition in response to comments from several commentators, including Legal Aid Society-Employment Law Center, California WIC, Littler Mendelson, P.C., and Breastfeeding Task Force of Greater Los Angeles to clarify an employer’s obligation to provide reasonable accommodation to employees affected by pregnancy. Also in response to these comments, the Commission added several examples of reasonable accommodation to provide employers, employees, and practitioners with additional guidance in this area.

The Commission also modified the language of the subsection to incorporate the new framework of the regulations regarding the distinction between an employer’s obligations of reasonable accommodation, transfer, and pregnancy disability leave.

10. Section 7291.2(u) – “Related medical condition”

At the suggestion of several commentators, including Wilson, Sonsini, Goodrich & Rosati, Littler Mendelson, P.C., and the California Chamber of Commerce, the Commission eliminated “lactation” as a medical condition related to pregnancy or childbirth. Instead, the Commission reworked the framework of the regulations to provide a clear distinction between conditions that trigger an employer’s obligations of reasonable accommodation, transfer, and/or pregnancy disability leave. This new framework more closely implements the intent, language, and purpose of the FEHA.

11. Section 7291.2(v) – “Transfer”

The Commission made minor, clarifying edits only.

12. Section 7291.3 – “Prohibition Against Harassment.”

The Commission eliminated specific FEHA Government Code subdivision references, at the suggestion of the DFEH, to avoid the need to amend the regulations every time that the Legislature amends the FEHA. The Commission made this same change, eliminating specific Government Code subdivision references, throughout these regulations.

13. Section 7291.5 – “Responsibilities of Covered Entities Other than Employers.”

The Commission eliminated specific FEHA Government Code subdivision references, at the suggestion of the DFEH, to avoid the need to amend the regulations every time that the Legislature amends the FEHA. The Commission made this same change, eliminating specific Government Code subdivision references, throughout these regulations.

14. Section 7291.6. – “Responsibilities of Employers”

The Commission amended this section in response to several commentators, including the Legal Aid Society-Employment Law Center and California WIC, suggesting that the section clarify that an employer is not allowed to require pregnant employees to take pregnancy disability leave or to transfer to other positions unless the employee so requests, and that a pregnancy employee may not be subject to retaliation because she asserted her rights under the FEHA.

Also, as part of the restructuring of the framework of the regulations regarding “related medical conditions” and “conditions related to pregnancy and childbirth” the Commission redrafted this section to clarify when an employer’s obligations are triggered by an employee who is “affected by pregnancy” or “because of pregnancy.”

15. Section 7291.7 – “Reasonable Accommodation”

The Commission amended this section to require an appropriate interactive process in response to several commentators, including Littler Mendelson, P.C. The Commission also made minor, clarifying edits.

16. Section 7291.9 – “Pregnancy Disability Leave”

In response to several commentators, including California WIC and Jackson Lewis LLP, the Commission made numerous grammatical and language changes to make the section more accurate in its calculations and more readable. In response to a comment by the Legal Aid Society-Employment Law Center, the Commission clarified that employees are eligible pregnancy disability leave per pregnancy, not per year.

17. Section 7291.10(b) – “Right to Reinstatement from Pregnancy Disability Leave. Refusal to Reinstatement.”

The Commission made certain grammatical changes, at the suggestion of the DFEH, to insure the regulations complied with the requirements of regulatory construction. The Commission made similar changes throughout these regulations.

18. Section 7291.10(c) – “Right to Reinstatement from Pregnancy Disability Leave. Permissible Defenses”

In response to comments from several commentators, including Wilson, Sonsini, Goodrich & Rosati, the Commission defined the rights of an employee during the 60 day period of section 7291.10, subdivision (c)(2)(B)(1). In response to several commentators, including the Legal Aid Society-Employment Law Center, Equal Rights Advocates, American Association of University Women-California, CELA, The Women’s Employment Rights Clinic of Golden Gate School of Law, and the California Women’s Law Center, the Commission concluded that the defenses provided by former section 7291.10, subdivisions (c)(1)(B) and (c)(2)(C) were not supported by the FEHA and eliminated them.

19. Section 7291.10(d) – “Right to Reinstatement from Pregnancy Disability Leave. Right to Reinstatement to Job if Additional Leave Taken Following End of Pregnancy Disability Leave; Equal Treatment”

The Commission made minor, clarifying edits only.

20. Section 7291.11(a) – “Terms of Pregnancy Disability Leave. Paid Leave”

The Commission made minor, clarifying edits only.

21. Section 7291.11(c) – “Terms of Pregnancy Disability Leave. Continuation of Group Health Coverage”

In response to concerns expressed by commentators, including Littler Mendelson, P.C., that an employee could manipulate the repayment provisions of section 7291.11, subdivision (c)(2)(B), the Commission amended this section to clarify that an employee is responsible for reimbursement of the cost of continued group health insurance coverage if she voluntarily chooses not to return to work following her pregnancy disability leave. The Commission also clarified that an employee’s right to employer-paid group health coverage during pregnancy disability leave and during CFRA are two separate and distinct entitlements.

22. Section 7291.12 – “Relationship Between Pregnancy Leave and FMLA Leave”

The Commission made minor, clarifying edits only.

23. Section 7291.14 – Relationship Between Pregnancy Disability Leave and Leave of Absence as Reasonable Accommodation for Physical or Mental Disability – Separate and Distinct Rights.”

The Commission made minor, clarifying edits. The Commission also eliminated specific FEHA Government Code subdivision references, at the suggestion of the DFEH, to avoid the need to amend the regulations every time that the Legislature amends the FEHA. The Commission made this same change, eliminating specific Government Code subdivision references, throughout these regulations.

24. Section 7291.16 – “Employer Notice to Employees of Rights and Obligations for Reasonable Accommodation, To Transfer and To Take Pregnancy Disability Leave.”

The Commission amended this section for clarity and readability to make it more useful to employers, employees, and practitioners. In response to comments by Equal Rights Advocates, the Commission amending this section to provide that employers give verbal or written notice to employees not proficient in English and who fall outside the existing ten percent threshold requiring notices translated into the employee’s native language. The Commission also concluded that these regulations would be more clear if “Notice A” and “Notice B” were included in their own section and therefore moved them to new section 7291.18.

25. Section 7291.17 – “Relationship Between Pregnancy Leave and FMLA Leave”

The Commission made minor, clarifying edits to make this section more useful for employers, employees, and practitioners.

26. Section 7291.18. – “Employer Notices.” (new section)

The Commission also concluded that these regulations would be more clear if “Notice A” and “Notice B” were included in their own section and therefore moved them to new section 7291.18.

The Commission also made minor, clarifying edits to make this section more useful for employers, employees, and practitioners.