



## Laboring over Pregnancy?

*Just breathe,  
breathe, breathe*

By Rebecca Boartfield and Tim Twigg

When an employee tells you she's pregnant, ideally your first response is: "Congratulations!" It's a happy time for the mother-to-be even though you may be thinking: "What do I do now? What if she gets sick? What if she refuses to do her job and won't take x-rays? She'll want a leave of absence? Am I required to provide a leave of absence? If so, for how long? Do I have to hold her job? How do I fill her position? How do I manage overall staffing?" YIKES!

In an ideal situation, you, your pregnant employee, and the rest of your team would be able to successfully work through all of these issues. Yes, she will want a leave. Yes, you will provide the leave and cover her leave time with temporary help. Yes, she will return with no problems, no issues. All would be right in the world if, and when, it worked out that way.

While it may be impossible to anticipate all possible iterations, we do know how an employer "should" handle each situation for a safe and positive outcome. Failure to do so can have big, screaming, not-so-good consequences.

### The Laws in Play

The federal law is called the Family and Medical Leave Act (FMLA). This law applies to employers with 50 or more employees within a 75-mile radius. Many states have laws that are similar to FMLA but with lower employee thresholds. In addition, many states implement Pregnancy Disability Leave laws that apply to small employers (i.e. typically less than 50 employees). These Pregnancy Disability Leave laws specify the length of leave available, any eligibility criteria, as well as many other aspects to the leave. Currently, California, Connecticut, Hawaii, Iowa, Louisiana, Massachusetts, Maryland, Ohio, and

Washington have such Pregnancy Disability Leave laws in place.

With both federal and state laws, the allocated leave can be taken all in one chunk or intermittently during and/or after pregnancy depending on the health of the employee.

When required, the leave that is mandated is job-protected. This means that you are required to hold the employee's position, or one that is comparable in terms of status, pay, benefits, hours, working conditions, etc. during the entire leave of absence, in anticipation of the employee's return. These laws also dictate how salary, benefits, and seniority are to be handled while the employee is on leave.

### STEP ONE: Notification of Pregnancy

It is important to recognize that no law requires an employee to inform the employer of pregnancy whether during the recruiting process or after. At some point, though, the information does have to get out to the employer and, when it does, there are administrative aspects that should be completed:

- Ask the employee to read the policy applicable to pregnancy-related leaves from your Personnel Policy Manual to establish expectations and outline certain parameters of the upcoming leave.
- For planning and scheduling purposes, determine the following: estimated date of delivery to help pinpoint when leave will begin and the employee's intentions following the leave, i.e. return to work or not.
- Give the employee a copy of the Leave of Absence Application Form for her to complete.

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Once the above has been done, you and your employee can continue to work together provided there are no further job-related bumps in the road that impede you in some way.

### **STEP TWO (maybe): Employee Refuses a Job Duty**

The desire to remove certain job duties from pregnant employees is not driven solely by employees. We get calls from employers all the time asking how they should modify the employee's job to accommodate the pregnancy. Although it is natural to want to protect the mother and baby and, therefore, want to volunteer to change the employee's job or move her to a less risky position in the practice, you should not do this unless specifically requested. **This act of compassion can carry legal ramifications.**

When the employee states she does not want to perform certain duties (i.e. heavy lifting, x-rays, etc.), you will, under certain conditions, have the burden of attempting to accommodate such requests. Here is the process for determining accommodation:

- When the employee states she cannot or will not perform certain duties, the employer is not under an obligation to immediately do as the employee asks. The employer should express a desire to accommodate such requests and, in doing so, must also consider the needs of the practice. Then the employer should inform the employee that she must obtain written documentation from her treating physician about any restrictions s/he has placed on her due to the pregnancy or pregnancy-related conditions. Without the documentation, the employee should be treated normally to avoid issues of discrimination.
- The employee should be provided with her up-to-date job description that is compliant with the Americans with Disabilities Act (i.e. specifically lists the "essential functions" of her job) for her treating physician to use as guidance for determining whether or not restrictions should be placed on her. This way the physician can use objective criteria based on real facts about the employee's job and not have to rely on just her word when making this decision.
- Once an employer has been provided with written documentation of the restrictions, s/he must begin what is called a "good faith interactive process" with the pregnant employee. This is essentially an exchange between the employer and the employee about the restrictions and how to best accommodate them. Possible types of accommodation include, but are not limited to, shorter work hours, fewer days, elimination of specific duties, lifting or reaching requirements, voluntary transfer to another position, etc. NOTE: All decisions about restrictions, the employee's job, and/or accommodations must be based on essential job functions only.
- It's possible that the only accommodations available would result in "undue hardship" for the employer and, therefore, cannot be provided. "Undue hardship" means an action requiring significant difficulty or expense. Although this

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is a valid, legal concept, it is often difficult to prove if challenged, so be very cautious if you are going to apply this to your situation.

- Options for when accommodation cannot be met include termination of employment or putting the employee on an unpaid leave of absence for the duration of her pregnancy until she is able to return after the birth. Both are fraught with potential legal consequences; only proceed in this direction after consulting with professionals on your specific situation.

### **STEP THREE: Employee Takes Leave**

As the birth of the baby approaches, the employee should have completed the Leave of Absence Application Form establishing the approximate start and end dates for the leave. Be aware Mother Nature may have other ideas for the start and end dates of the leave, so these dates are only approximations. A lot will depend on when the baby is actually born, the complications (if any) during the birth, the health of the mother, etc.

Be sure the employee is informed of the following:

- The designated times (i.e. every 30 days) she is to check in regarding her intention to return to work
- That she must provide notification immediately if she decides not to return to work
- The conditions upon which she can request an extension with the understanding that approval may be at your discretion
- That if she does not return at the designated time and has not requested and been approved for an extension, it will be determined that she resigned from her position
- How her health insurance, if applicable, will be handled during the leave. NOTE: Federal and/or state applicability may require health insurance to be continued, so be sure you are compliant with your requirements.

### **STEP FOUR: Employee Returns to Work**

Assuming nothing has occurred during the leave that prevents the employee from returning to work, the employee should return on the day that was planned. At that time, she should present a Medical Release to Work Form, or one that is the equivalent, that has been completed by her treating physician before resuming her job duties.

## Conclusion

In the workplace, women who are pregnant constitute a highly protected class of individuals. As such, improper handling of pregnancy can lead to Labor Board complaints and/or lawsuits, which, in turn, can be financially detrimental to the practice and stressful for everyone involved. Therefore, it is important to know what laws and requirements apply to you and successfully manage your obligations.



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## QUOTE-WORTHY

*“I’ve been giving back since I was a teen, handing out turkeys at Thanksgiving and handing out toys at toy drives for Christmas. It’s very important to give back as a youth. It’s as simple as helping an old lady across the street or giving up your seat on the bus for someone who is pregnant.”*

*— Queen Latifah*