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HR411® Tip of the Week

## Employees Who Are Expecting: 'Do I Need to Provide Leave?' and Other FAQs

It is important for employers to understand the requirements and best practices related to employees who are expecting and childbirth. In this Tip, we address frequently asked questions like leave requirements, discrimination, pay, and other rights and protections available to pregnant applicants and employees and new parents.

### **Q: Is my company required to provide leave when an employee is pregnant or has just given birth?**

**A:** It depends on a variety of factors, including the size of the employer, the state, and how the employer treats employees with other short-term disabilities.

#### *FMLA*

Under the Family and Medical Leave Act (FMLA) an employer with 50 or more employees must allow female employees to take job protected leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Eligible employees may also use all or part of their FMLA leave entitlement to bond with their baby after childbirth or for a child's serious health condition. While FMLA applies to employers with 50 or more employees, some states have family and medical leave laws that cover smaller employers.

#### *State Leave Requirements*

A number of states require employers to grant leave for pregnancy, childbirth, or pregnancy-related medical conditions. In some of these states, leave entitlement is limited to those who are disabled by pregnancy. Check your state law to ensure compliance.

#### *Treatment of Other Employees with Temporary Disabilities*

Absent any specific federal or state leave requirement, an employer is generally required to treat pregnancy as it does any other temporary disability. For example, the employer may be required to provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant employees if it does so for other temporarily disabled (and similarly situated)

employees. Employers must also hold open a job for a pregnancy-related absence the same length of time that jobs are held open for employees on sick or temporary disability leave.

### **Q: Is pregnancy-related leave paid or unpaid?**

**A:** Federal and state family and medical leave laws typically require unpaid leave only, but employers may allow employees to substitute accrued paid time off. There are a handful of states that provide compensation to women who have to take leave due to a pregnancy-related disability through state disability insurance. These states include California, Hawaii, New Jersey, New York, and Rhode Island. Employers also have the option of obtaining short-term disability insurance through private carriers as a benefit to employees. These insurance plans typically provide partial wage replacement for a period of 4, 6, or 8 weeks.

### **Q: We just interviewed an applicant who is pregnant. Can my company refuse to hire her because we are concerned about the impact on the company?**

**A:** No, the Pregnancy Discrimination Act (PDA) prohibits an employer from refusing to hire an applicant because of her pregnancy-related condition as long as she is able to perform the essential functions of the job. The law also forbids pregnancy-related discrimination when it comes to any other aspect of employment, including pay, job assignments, promotions, layoffs, training, fringe benefits, termination, and any other term or condition of employment. Note: Some states also offer protection from discrimination on the basis of family status.



**Q: Can I transfer a client-facing employee who is pregnant once she starts to show? Can I require pregnant employees to take leave at a certain point in their pregnancies?**

**A:** An involuntary transfer because of an employee's pregnancy may violate federal and state non-discrimination laws. Pregnant employees must be permitted to work as long as they are able to perform their jobs. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, her employer may not require her to remain on leave until she gives birth. Nor may an employer have a rule that requires the employee to take leave once she reaches a certain point in her pregnancy. Additionally, employers may not prohibit an employee from returning to work for a predetermined length of time after childbirth.

**Q: Am I required to provide reasonable accommodations to pregnant employees?**

**A:** It depends on several factors, including the state and whether the employee's condition would qualify as a disability under the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act (ADAAA).

*State Law*

Some states have enacted laws that require employers to provide reasonable accommodations for pregnancy and childbirth. For example, New Jersey recently enacted a law that requires employers to provide reasonable accommodations to women who are affected by pregnancy or childbirth, unless the employer can demonstrate that it would impose an undue hardship. Reasonable accommodations may include, but are not necessarily limited to, bathroom breaks, breaks for increased water intake, periodic rest, and assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work.

*ADA*

A pregnancy in itself is not considered a disability under federal law, but some impairments resulting from pregnancy (for example, gestational diabetes) may be considered qualified disabilities under the ADA, as amended by the ADAAA. In these situations, employers may be required to provide a reasonable accommodation for a disability related to pregnancy (such as modifications that enable an employee to perform her job or a leave of absence to recover), absent undue hardship (significant difficulty or expense).

In the absence of a federal or state requirement, it is a best practice to provide reasonable accommodations for pregnancy and childbirth. Accommodations may include those mentioned above, as well as allowing flexible work schedules and telecommuting.

Visit the Job Accommodation Network (JAN) website for more information on workplace accommodations.

**Q: An employee asked for break time to express breast milk for her newborn. Am I required to provide breaks for this purpose? Am I required to provide a space as well?**

**A:** Under federal law, employers must provide nursing mothers with reasonable break time to express breast milk at work for up to one year after giving birth. Breaks must be provided each time the employee has a need to express the milk. Additionally, a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public must be provided. Affording privacy may be as simple as installing a lock on the new mother's office door, or designating a private space in which new mothers may express milk for their newborns. Communicate with the new mother to identify her needs in this regard, and prepare to accommodate within reason. Note: Some states offer additional protections for nursing mothers, such as extending a mother's right to pump into her child's toddler years.

**Q: What are some strategies for managing the workload when the employee is on leave?**

**A:** Employers have several options when an employee is on leave, such as transferring some job responsibilities to other employees, authorizing those employees to work overtime, and hiring temporary help. Once notified of the employee's intention to take leave, the employer should prioritize job duties and determine how best to handle them.

**Q: We planned on giving a promotion to an employee who just informed us that she is pregnant. The position would require more travel and I assume the employee wouldn't want to travel more, especially after the birth of the child. Can I give the promotion to someone else?**

**A:** The PDA prohibits employers from denying a promotion to an employee because of pregnancy or childbirth. Employers should never assume that parents will not be interested in positions that require significant travel or working long or unusual hours.

**Q: What are an employer's responsibilities when the employee reports that she is ready to return to work after childbirth? What if I hired somebody to handle the workload during the employee's absence?**

**A:** In general, employees should be reinstated promptly upon indicating they are able to return to work. The employer may not subject an employee to more rigorous return-to-work requirements than it does other employees with temporary medical conditions. If the employee is covered by federal and/or a state leave law, she generally will have specific reinstatement rights, so be sure your return-to-work practices comply. In the absence of specific reinstatement requirement, employers must hold open a job for a pregnancy-related absence the same length of time jobs are held open for employees on sick or disability leave. If an employer hires temporary help to assist with the workload while an employee is on leave, the employer should be upfront with the temporary hire that the job is temporary.

**Conclusion:**

It is important for employers to understand federal and state laws that apply to expecting employees and parents, draft policies and training in accordance with those laws, and communicate those policies clearly to employees. Supervisors should also be trained on how to handle requests for leave and reasonable accommodations.



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