A Timely Analysis of Legal Developments

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The Stork Has Landed: California Employers Must Maintain and Insurers Must Provide Pregnancy Benefits

By Helene Wasserman and Michelle Barrett

California Governor Jerry Brown recently signed sweeping legislation aimed at affording pregnant women certain employment and insurance protections. Two sets of companion legislation, SB 299 and AB 592, along with SB 222 and AB 210, attempt to ensure that all pregnant women maintain their insurance benefits while on pregnancy-related leaves. The new laws may significantly impact small and large employers alike. Small employers may be impacted by potential increased costs under their health care plans. Larger employers may also be impacted due to the increased period of time that health benefits must be provided to an employee on pregnancy-related leave.

SB 299 and AB 592

Previously, California law only mandated that an employer maintain health benefits for an employee while on a pregnancy disability leave ("PDL") to the same extent health benefits were maintained for employees on other medical or disability-related leaves. Now, SB 299 and AB 592 have amended the California Fair Employment and Housing Act's pregnancy disability provisions to mandate that employers provide pregnant employees the same level of insurance benefits during their pregnancy-related leave as they were provided prior to taking the leave. Under the law, the employer may provide greater benefits, for example, providing benefits for more than the four-month period of time the employee is allowed leave under the Act. However, in no event may the employer maintain the health benefits for a period of time less than the four-month period. The amendments take effect January 1, 2012.

At first blush, this may not appear to be that significant of a change in the law. Specifically, if an employer is covered by the federal Family and Medical Leave Act (FMLA) and the employee is eligible for such leave, then the first 12 weeks of insurance benefits must already be afforded at the pre-leave level under that law. However, the expanse of the new law is much greater.

First, an employee who begins a PDL, but does not become eligible for leave under the FMLA and/or the California Family Rights Act (CFRA) sometime after the PDL has begun, may nevertheless be eligible to receive continued health benefits coverage for a maximum period of seven months - up to four months under the new law and up to 12 weeks under the FMLA and/or the CFRA. This situation could happen when the employee receives health benefits coverage under the new law, then becomes eligible for FMLA, which requires that leave (and related benefits) start when one becomes eligible for FMLA no matter whether the employer voluntarily or under state law provided leave to the employee in question prior to that time.

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Second, California's pregnancy disability leave law applies to employers with five or more employees. Hence, this amendment requires small employers to provide continued health benefits to individuals on pregnancy-related disability leave. This is significantly different from the FMLA, which only requires that such benefits be provided by employers with 50 or more employees within a 75-mile radius of where the employee requesting the leave works.

Third, California's pregnancy disability leave laws apply to all employees, regardless of tenure with the employer. Again, this is significantly different from the reach of the FMLA, which requires at least one year of employment and 1,250 hours of work within that year for an employee to be eligible for the benefit.

Equally disconcerting, especially for small employers that may not believe they can afford health benefits coverage including maternity-related benefits, is the apparent mandate that the employer *maintain* the insurance coverage. While the amended statute contains language that the employer must afford the benefit at the same level as was provided prior to the leave, it is clear that the intent of the legislation is to ensure that all employees have medical insurance benefits that cover maternity-related events. Hence, this statute is mandating that ***all*** employers that offer health insurance to their employees, including small employers with five or more employees, maintain and pay for medical insurance for pregnant employees who have elected coverage under their employer's health plan.

Under certain circumstances, the employer may recover the amounts paid for the benefits now required under the amendments. First, the employer may recover the amounts paid if the employee fails to return to work for reasons ***other than*** taking additional leave afforded under the CFRA. For better or worse, however, in most circumstances, the additional leave taken by an employee will be "bonding leave" after recovery from the pregnancy-related disability, and thus afforded under the CFRA. In that situation, the employer would not be able to recover the amounts paid for benefits. Second, if the employee does not return to work for reasons other than taking protected leave, and the reason for not returning was within the employee's control (such as finding another job or electing not to retun to the workforce), the employer may recover the amounts paid.

From the legislative history, it is evident that the amendments were proposed, in part, to alleviate the concern that pregnancy-related medical costs can be expensive, and should be insured. In order to "guarantee" this, additional legislation was also enacted related to insurance companies.

SB 222 and AB 210

Signed at the same time as SB 299/AB592, SB 222 and AB 210 became law. These two bills amend the California Insurance Code to mandate that all individual health insurance policies must provide coverage for maternity services for all insureds covered under the policy. Under existing law, if a health insurer provides maternity coverage, it may not restrict inpatient hospital benefits. The change in law, however, actually mandates that the maternity coverage be provided. This law takes effect July 1, 2012.

Read together, the new laws mandate that insurance companies provide maternity/pregnancy benefits and employers, in turn, maintain that insurance for their employees who have chosen coverage under their employer's health plan.

This "one-two" punch change in law is akin to the changes made in 2005 regarding domestic partnerships. Then-California Governor Arnold Schwarzenegger signed into law the California Insurance Equality Act and the California Domestic Partner Rights and Responsibilities Act. Read together, those laws mandated that insurance companies that offer to employers insurance policies containing spousal benefits provide the same level of coverage to registered domestic partners and their children. Because employers could not, by law, find an insurance policy that would not cover domestic partners, if an employer chose to provide insurance benefits to its employees' spouses, it would have to cover domestic partners. Similarly, under SB 222 and AB 210, all California employers who provide health insurance to employees must, by law, cover maternity/pregnancy benefits under that health insurance plan.

Significance to Employers

The passage of these pregnancy-related insurance coverage amendments will have a significant impact on employers, particularly employers with fewer than 50 employees, especially in these troubling economic times. Employers should discuss with counsel the impact of these new

laws and educate HR and benefits professionals on the way that the laws will be applied. Employers also may wish to discuss with their insurance brokers the new legal requirements that apply to insurance companies and the effect of those requirements on the employers themselves.

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