

## MEMORANDUM 2012-1

### California SB 299 and Companion Legislation: A New Maternity Mandate

January 9, 2012

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#### The New Laws

As the cornerstone of four new laws (SB 299, AB 592, SB 222, and AB 210), the California legislature intends to assure health care coverage for pregnancy, childbirth, and related conditions. These new laws expand protection under California insurance policies and health care plans in a significant way:

- **SB 299 (eff. January 1, 2012)** requires employers with 5 or more employees to continue health care coverage for employees taking pregnancy-related leaves. It also requires that maternity benefits must be at the same level of insurance benefits during pregnancy-related leave as they would have been prior to taking leave;
- **AB 592 (eff. January 1, 2012)** makes it an unlawful employment practice to refuse to allow a female employee to take pregnancy leave;
- **SB 222 (eff. July 1, 2012)** amends the California Insurance Code to require individual insurance policies to include maternity benefits. The California Health and Safety Code (Knox Keen Act) already requires health care services plans to include maternity benefits. SB 222 also defines coverage for maternity services to include pre-natal care, ambulatory care, maternity services, involuntary complications of pregnancy, neonatal care, and in-hospital maternity care, including labor and delivery and post-partum care; and,
- **AB 210 (eff. July 1, 2012)** expands maternity coverage to all insureds under individual and group health policies.

#### Discussion

1. **Family and Medical Leave Act/California Family Rights Act.** Although these laws already require employers to provide leave and the availability of health care coverage for medical (including pregnancy) leaves, these laws only apply to employers who employ 50 or more employees (within a 75 mile radius). Employees must have been employed at least one year and have a minimum of 1,250 hours worked to qualify for FMLA leave. Under FMLA, the employer must allow the leave taker to continue group health coverage by making the same contribution he/she would have made as an active employee. The California Family Rights Act mirrors these same provisions. In brief, employers not subject to FMLA/CFRA had no obligation to continue health care benefits during pregnancy leave prior to the enactment of SB 299.
2. **California's Pregnancy Disability Law.** Historically, California's Pregnancy Disability Law (PDL) requires that an employer grant leave to female employees disabled by pregnancy, childbirth, or related conditions. The period of leave is up to four months and without pay. Additionally, the law requires employers to make reasonable accommodations upon request (e.g. less strenuous or hazardous position for the duration of the pregnancy). The law also permits an employee to use accrued vacation during the period of leave. Prior to the enactment of SB 299, the law did not include the coverage mandate.
3. **Maintaining Health Coverage.** The new California law requires employers to maintain coverage for individuals on pregnancy leave. Not only must the employer keep the individual on the group plan, but also requires that employers charge no more than the usual employee monthly contribution, if there is one. It's worth noting that employers may recover the full premium paid on behalf of the individual, if the employee fails to return to work once the four months has expired as long as the failure to return to work is not the result of additional leave being taken under FMLA, CFRA, or for circumstances not under the control of the employee (e.g. onset of another illness). Federal law permits California employees a total of seven months of leave for pregnancy-related conditions (12 weeks for FMLA and 16 weeks for California PDL).
4. **Maintaining Other Coverage.** AB 592 explicitly permits individuals on pregnancy-related leave to remain entitled to participate in life, AD&D, LTD, pension and retirement plans during the full period of leave to the same extent as available to active employees. Employers, however, may require the full amount of premiums due during the period of the leave.
5. **Employment Discrimination.** Pursuant to California Government Code Section 12940 et seq. (including Section 12945 as modified by the new laws), aka California's Fair Employment and Housing Act, an employer cannot refuse an employee disabled by pregnancy, childbirth, or related medical condition to take leave for a reasonable period of time not to exceed four months.
6. **Individual Policies.** SB 222 requires individual health insurance policies issued by California-licensed insurers to contain maternity services as a basic benefit.
7. **No Longer Employees Only.** AB 210, which becomes effective for California policies and health care service plans in effect on July 1, 2012 (and for all policies issued thereafter) requires coverage for maternity services for all insureds covered under the policy.
8. **Self-insured Plans.** SB 299 and AB 592 amend the California Government Code as it relates to employment practices. SB 222 and AB 210 amend the California Insurance Code and the Health Safety Code. Self-funded plans generally are exempt from Insurance Code requirements in California. However, SB 299 and AB 592 involve employment practices under the California Fair Employment and Housing Act, not insurance laws. Self-funded health plans sponsored by employers with 50 or more employees (in a 75 mile radius)

pursuant to FMLA for up to 12 weeks, must continue health care coverage for employees on pregnancy leave. Most self-funded health plans will cover more than 50 employees. To the extent that the California Government Code provisions expand those rights, California employers, in our view must comply, since these are not insurance laws.

9. **ERISA Pre-emption.** The Employee Retirement Income Security Act (ERISA) may pre-empt state laws under certain circumstances. Based on recent history, it may be difficult to make a pre-emption argument in the Ninth Circuit.



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