

Pregnancy Related Cases Continue to Rise in 2021

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By Eve Wagner

Pregnancy discrimination, harassment and retaliation cases have continued to rise steadily across the country from 2016 through the first half of 2021. In fact, now just six months in, the number of filings has already beat the number filed in the first half of 2020 and, if this trend continues, 2021 will set a new record.

So why the continuing rise in pregnancy-related cases?

Both federal and California law protect against pregnancy discrimination. In California, employees are given protections under a variety of laws, including the Fair Employment and Housing Act (FEHA), the California Family Rights Act (CFRA), the Pregnancy Disability Leave Law (PDLL), and the Labor Code which provides for lactation rights.

Effective Dec. 30, 2012, significant amendments were enacted further enhancing protections for pregnant employees. Then, effective April 2016, California imposed additional requirements on employers, mandating that they provide an employee with an updated “Your Rights and Obligations as a Pregnant

Employee” notice once an employee provides notice of pregnancy or the need for an accommodation.

Federal law likewise protects employees under the Pregnancy Discrimination Act of 1978 (PDA), an amendment to Title VII, and Family and Medical Leave Act (FMLA). In 2015, the United States Supreme Court held, among other things, that pregnant women must be given the same accommodations as nonpregnant workers, and any increased cost of adding pregnant workers to the accommodated groups is not a legitimate business reason for failing to accommodate. There is also a proposed bill, the Pregnant Workers Fairness Act, pending in Congress, which would provide greater coverage across the nation to pregnant employees.

The laws protecting pregnant women are complex, and many employers are unaware of or fail to follow them. Pregnancy discrimination and retaliation cases can arise from failure to hire, demotion, failure to promote, failure to reinstate after taking leave under the PDLL, termination, failure to



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Eve Wagner, a mediator and arbitrator with Signature Resolution.

accommodate, and other aspects of the employment relationship. Lactation rules have expanded in recent years in California.

Accommodations can take many forms, including transfers to a less strenuous position (if available), allowing more frequent breaks, modified equipment, modified duties and providing time off for medical appointments. PDLL not only covers traditionally thought of disabilities, but also morning sickness. Pregnant women with a disability may take up to four months of leave under the PDLL, plus an

additional 12 weeks for baby bonding. These leaves may be taken on an intermittent basis. As with other disabilities, employers are required to engage in an interactive process. Pregnancy harassment not only includes harassing or disparaging comments about pregnancy and related medical conditions, but also expressing resentment about accommodations and time off.

Following the “Me Too” movement, several articles have been published concerning the effects of perceived pregnancy discrimination. For example, in a study entitled “Examining the Effects of Perceived Pregnancy Discrimination on Mother and Baby Health,” published in the *Journal of Applied Psychology* in 2020, the researchers found this type of perceived discrimination indirectly links to lower birth weights, postpartum depressive symptoms and a greater number of doctor visits for the babies, among other things.

Some have attributed pregnancy discrimination to certain stereotypes, which unfortunately still persist today. These include the misguided notion that pregnant women will no longer perform as well as before, and mothers will not fully commit to their jobs because of their children. There remain employers who unlawfully ask female applicants if they plan to have children or tell current employees that they cannot accommodate them because the physical nature of the job will be bad for their health.

Women report being afraid to tell their supervisors they are pregnant out of fear that they will be passed

over for promotion or given less responsibility. Similarly, pregnant women fear retaliation if they report discrimination or harassment. Others believe pregnancy discrimination arises out of the perception that having a pregnant employee will create more of a burden in terms of costs and accommodations (including reduced duties or hours and significant time off). Others have observed that, with the pandemic, pregnant women were among the first to be laid off because employers were afraid that they were more at risk.

Others acknowledge that some employers simply do not understand their obligations under the law, even if well intentioned. The increase in cases may also be attributed to greater awareness of the issue, particularly following the “MeToo” movement.

On the more skeptical side, some believe the increase in pregnancy-related cases to be monetarily motivated. It is easier to invoke sympathy from a jury in these types of cases, when the plaintiff was looking forward to one of the more exciting times in her life, only to then lose her job and have to worry about financial security. If the plaintiff prevails, emotional distress and even punitive damage awards can be quite significant, plus an attorney fee award.

For example, in November 2014, a California jury hit AutoZone with a more than \$185 million verdict in a pregnancy discrimination case. The plaintiff claimed that she was treated differently after she told her manager that she was pregnant. She was then demoted and ultimately fired after

she filed a lawsuit challenging the demotion. The defendant claimed that she was fired over \$400 in misplaced cash.

Since the AutoZone verdict, there have been large class-action and individual settlements in pregnancy discrimination, harassment and retaliation cases. There have, of course, also been defense verdicts. In 2016, a jury returned a unanimous verdict in favor of the defendant in a case where the plaintiff was terminated two weeks after learning she was pregnant. Despite the timing, the jury concluded that performance issues pre-dating her pregnancy were the reason for the termination. Given the stakes, most of these cases are successfully resolved through mediation.

According to the Department of Labor, 85% of women will become mothers while working. COVID-19 has posed even greater burdens on working women. Pregnancy discrimination can derail a woman’s career and cause significant emotional, monetary and even physical harm. On the flip side, facing a pregnancy-related lawsuit can be costly, time-consuming and even damaging to an employer’s reputation. Steps to reverse the upward trend include education and training—not just about an employer’s legal obligations but also a fundamental understanding of what pregnancy discrimination is and the toll it takes.

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