

# MATERNITY & PREGNANCY LEAVE GUIDE

A Comprehensive Overview for Dental Office Managers

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## AN OVERVIEW FOR DENTAL OFFICE MANAGERS

One of the most difficult areas of managing a workforce concerns how to properly handle pregnancy and maternity leave. Any time employees need to be absent for an extended length of time, it taxes a company's resources. Implementing a compliant leave policy must be done in a way that balances the employee's right to fair and nondiscriminatory treatment with the needs of the business to stay adequately and competently staffed.

Adding to the challenge of this careful balancing act is the increasing incidence of pregnancy discrimination claims. **Monetary damages from such claims reported by the EEOC have tripled in the last ten years.** More than ever before, employees are informed of their legal rights and will not hesitate to assert them. It's up to the management team of each business to ensure its practices and policies are compliant with the laws and fairly implemented, and that any legitimate performance issues are well documented. Consistency is the key here. How you apply your policies to individual employees is as important as how that policy is written.

Most lawyers will advise employers not to take any action (demotion, termination, pay cut, or layoff) against a pregnant employee, even where their performance warrants it! Though this is NOT what the law requires, this is often the reality to avoid defending even a baseless lawsuit.

This guide is designed to help you avoid such claims from arising while also holding employees accountable, and help you make informed and fair decisions about working with employees who are pregnant or who need maternity leave.

### ▶▶ PREGNANCY CAN BE PERILOUS FOR EMPLOYERS

The Equal Employment Opportunity Commission (EEOC) has recently released [new reminders and enforcement guidance](#) on the topic of pregnancy discrimination, and all employers must take note.

And this new guidance comes just in time! In recent years, pregnancy discrimination claims have been on the rise across the nation, and the issues involved are often confusing. Pregnancy discrimination is a more complex topic than it sounds, as you'll soon see, and there are a myriad of related issues that blindside many employers, including those surrounding intended pregnancy and post-pregnancy, light duty, parental leave, and even the right of new mothers in the workplace. All in all, this issue is packed with policy points you have to get right, because you don't want to risk the wrath of the EEOC! Here are just a few things to remember:

## PREGNANCY DISCRIMINATION: DON'T GIVE BIRTH TO A LAWSUIT

The road to court is often paved with good intentions—especially when it comes to unintentional pregnancy discrimination. This guide is designed to help you avoid such claims and make fair and informed decisions when it comes to your pregnant employees.

## Did you know...?

- Pregnancy discrimination protections apply even before pregnancy (when an employee is trying to become pregnant).
- These same protections also apply after pregnancy, for conditions or situations related to the pregnancy.
- Small employers may also be subject to these rules. Even states with fewer pregnancy protection requirements for small employers (those with fewer than 15 employees) usually look to federal rulings for interpretive guidance. Additional state and municipal laws may also apply.
- Parental leave is another growing area of state and local legislation in recent years, and these laws kick in for employers of varying sizes. It's critical to know if anything extra is required in your area.
- Finally, pregnancy and maternity aren't the only gender-specific reproductive issues that require employer caution—there's also contraception. While the provision of contraceptive coverage can't be specifically required of employers under the Religious Freedom Restoration Act (RFRA), a refusal to provide contraceptive coverage may still constitute sex discrimination under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act.



Again, these are just a few of the areas you need to be careful of, so when it comes to your protections against pregnancy discrimination claims, please find out if you're getting things right before you learn the hard way that you've gotten them wrong. And make sure to check out the [EEOC's own Pregnancy Discrimination Fact Sheet](#).

## ▶▶ 10 THINGS TO KNOW ABOUT MATERNITY LEAVE

Maternity leave of absences aren't just about the time away. Here are 10 things you need to remember:

1. You CANNOT ask an employee to give you a note from her physician certifying it's OK for her to continue working, but you CAN require certification of the need for leave. In addition, you CAN require certification that she is OK to return to her duties after the LOA.
2. No federal law requires an employer with less than 50 employees to grant a LOA. However, anti-discrimination laws in almost every state do require you treat a pregnant employee like any other temporary medical disability. NOTE: There are a few states and municipalities that have stricter rules, and once you get to 50 employees, the FMLA kicks in, requiring 12 weeks of leave.
3. When you don't create a LOA policy for your office, you will generally be held to a "default" standard based on your past habits and practices instead. This means you lose the significant protections that a properly written policy can provide you.

4. You should have a general statement in your employee handbook informing all employees of any potential dangers or toxins in the workplace, and that they must determine, together with their physician, whether or not they should continue to work. If working around any potential dangerous substance is required for the position, be sure this is included in an updated job description.
5. You should include a policy that says if the employee plans to return to work from maternity LOA, she must let you know the date she plans to return, and to keep you informed of any changes.
6. Your policy should address what happens if the employee fails to come back on the date she says she will. You should also address under what conditions the employee can ask for an extension.
7. You need to cover what happens if you downsize the company and her position becomes unavailable. This is treacherous ground, so don't try it alone.
8. You need to address the accrual of benefits, bonuses, etc., while the employee is out.
9. You should never force a pregnant employee to take off early out of a sense of paternalism, protection, or thinking you are doing a good deed. The old adage about "no good deed goes unpunished" applies here.
10. Finally, there are correct methods for addressing employees who are not performing up to expectations, including employees who are pregnant. Never guess at this one.

## ▶▶ AMOUNT OF LEAVE

Many employees incorrectly believe they are entitled to 12 weeks of family or maternity leave. This is true only for employers who have 50 or more employees under the FMLA. In contrast, smaller businesses are generally permitted to set their own reasonable leave policies, as long as leaves for temporary disabilities and pregnancies are treated the same. Employers in California, Louisiana, Massachusetts, Montana, Washington, Oregon and Iowa need to be aware of some special laws that require a certain amount of leave and other protections.

## ▶▶ LIGHT DUTY

Light duty or part time work leading up to birth is often permitted. However, offering this option is not necessarily required if the business cannot accommodate this need. If your practice cannot accommodate light duty, or allow employees to avoid certain tasks, you need to make sure you have an accurate job description in place that lists the essential functions of the job. This would include lifting requirements, exposure to toxic substances, and the like.

For example, a small dental practice with only 2 employees may have only one person qualified and able to be present during the use of nitrous oxide. Being chairside to monitor the patient during the administration of sedation would need to be listed on the job description as an essential function. Then, if that employee is restricted from that activity by her physician, she would not be able to

perform the essential functions of her job, and the employer would not be required to accommodate her restriction. Other accommodations should be considered. For example, the employee may be permitted to go on leave early, or if it's reasonable, to be offered an alternate non-clinical position.

Ultimately, there may be no reasonable accommodation that makes it possible for the employee to perform her job duties, and in that case, with the proper documentation, separation with eligibility for re-hire may be the only option.

We caution you, however, about just simply saying, "We can't accommodate" and then thinking you are in no danger. The argument over what is a reasonable accommodation is the very essence of many disability lawsuits, and the employee often wins this argument. Whether you need to provide an accommodation depends on state law, your number of employees, your past practice, and the specifics of the employee's situation. So, it needs to be addressed on a case-by-case basis. You can call the CEDR Solution Center at (866) 414-6056 for specific guidance.



### ▶▶ REINSTATEMENT FROM LEAVE

Leave starts from the last day of work, not from the date of birth. Employees on leave should be reinstated to their prior position whenever possible, and as long as they comply with the company's written leave policy. A written leave policy should require employees to provide a fixed return to work date, and to submit to management a written notice of any necessary changes to this date with a request for approval.

Note that employers are not necessarily free to fire an employee who is unable to return from leave on the approved day. If her inability to return is due to medical complications, employers are still required to engage with the employee to consider whether any reasonable accommodation could be made, such as an extension or part-time status for a temporary period.

Reinstatement may not be required if there are significant changes to the business, such as a need arising for layoffs, as an employee on leave has no greater right to employment than if they had continued working. However, termination during a leave of absence is not advised without careful consideration of all the risks and specific circumstances, and after consultation with an expert employment advisor or local attorney.

### ▶▶ BENEFITS

Employers with fewer than 50 employees are not required to provide health insurance benefits, paid vacation or paid disability benefits (with a few state exceptions, e.g. California). However, if you do provide such benefits, you will need to specify how benefits will be handled during an unpaid leave. Most employers who do sponsor a health benefit will continue to pay that benefit until at least the end of the month in which leave begins. Many require employees to pay for continuation of benefits for the remainder of any leave after the first month. This can be hard on an employee who is not receiving any income while on leave, but it is legal, with proper notification.

Many insurance plans require premium payments to be made only through the employer, so arrangements for payment through advance payroll deduction prior to leave, or direct payment by the employee to the employer, will need to be made. As for vacation and sick leave, most commonly employers require employees to use any available accrued paid time off concurrently with their leave of absence, but not to extend it.

## ▶▶ PROCESS

Employees needing to go on leave should be directed to your employment handbook for additional information. Your reaction to being informed of the pregnancy should be measured, positive, and encouraging. Bear in mind that eye rolling and offhand comments have been used as support in pregnancy discrimination claims. **And remember that any leeway you give one employee may set a precedent that must be followed with other employees.** Use discretion and document your reasons for granting exceptions or extensions to your written policies. Document as much as you can of any interactions regarding leave or accommodations for pregnant employees.

## ▶▶ NEVER DO THE FOLLOWING

- X** Never approach a pregnant employee and tell her you've noticed she's having trouble and you are reassigning her to light duty, or suggest that it is time for a pregnant employee to go on leave. **These are her decisions.** Your suggestions, no matter how well intended, are expressly forbidden.
- X** Never require or suggest that a pregnant employee provide certification of her ability and fitness to continue to work just because she is pregnant. If it's obvious the employee is having trouble performing their job duties, focus on performance, and go from there.

## ▶▶ SUGGESTED ACTIONS

- ✓ Have a signed accurate job description in place for all employees, preferably at the time of hire. Be clear about essential job functions such as taking x-rays, lifting, etc., especially if you cannot offer light duty accommodations due to the small size of your practice.
- ✓ Make sure benefits available for group healthcare for pregnant employees are equal to benefits for employees who are temporarily disabled for other medical reasons.
- ✓ Don't require, encourage, or pressure an employee to go on leave or light duty if she is willing and able to continue her job.
- ✓ Treat pregnancy leave the same as any other disability leave of absence.
- ✓ Have employees make a written request for a leave of absence, with a fixed return to work date. Use the same form for all types of leaves of absence.
- ✓ Approve leave based on your written policies; make exceptions consistently, wisely, and carefully.

- ✓ Have employees sign off an acknowledgment that they have reviewed the employee handbook's applicable policies on leaves of absence, and any notices of potential toxic exposures or hazards in the work place.
- ✓ Hold them to the return to work date, or to any approved extensions.
- ✓ Upon timely return from leave, reinstate them to the same job, or to one of same pay and status.
- ✓ Require a release to work certification by a physician upon return from leave, but only if you also require it for employees on leave due to other medical disabilities.
- ✓ Continue to document any performance issues for pregnant employees prior to leave, along with all other employees.



## ▶▶ FEDERAL LAWS AFFECTING PREGNANT WORKERS

The Pregnancy Discrimination Act (“PDA”) amended [Title VII of the Civil Rights Act of 1964](#) by making discrimination on the basis of pregnancy, childbirth, or related medical conditions a form of unlawful sex discrimination. This law applies to all employers with 15 or more employees. The essence of this law is that women who are pregnant or affected by pregnancy-related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations, such as a medical disability. Yes, we know, treating pregnancy like a disability sounds a bit archaic, but the type of accommodations needed are similar. Even if the PDA does not apply to you, state laws often apply similar protections to smaller employers, so be sure to call CEDR for your specific state’s rules, which can vary quite a bit from the federal rule outlined below.

### Essential Facts about the PDA:

- ✗ The PDA does not require employers to provide a set amount of pregnancy leave, as long as it’s reasonable. Only large employers with 50 or more employees are required to provide 12 weeks of leave under the Family Medical Leave Act.
- ✗ The PDA does not require leave to be paid.
- ✗ Employers may not require a pregnant employee to go on leave if she can perform essential functions of her job.
- ✓ You must treat pregnancy-related conditions the same way you treat any other temporary medical disability, including the amount of leave, how benefits are handled, and whether doctor’s certifications are required to return to work.

## ▶▶ THANK YOU FOR DOWNLOADING THIS WHITEPAPER

Remember, pregnancy discrimination claims lead the pack when it comes to EEOC complaints investigated. Employers are incredibly and increasingly vulnerable to lawsuits and settlements in this area.

For more employer training on this issue, including additional guidance on typical leave policies for small practices, the danger of setting accidental employee precedents, and what to do if you don't already have a leave policy in place, please, please visit our [maternity leave podcast](#), on [Live from HR Base Camp](#).

Or, visit my blog, [HR Base Camp](#), where I turn need-to-know information into fun-to-read articles for practice owners and managers. We have more information on pregnancy discrimination available [here](#) and [here](#).

## Questions?

If you have any questions, or if you'd like help with an issue of this category in your office, call a CEDR expert for support—we'll always help solve one ongoing issue for free for AADOM members. You can reach us Monday-Friday at **(866) 414-6056** or via email at [info@cedrsolutions.com](mailto:info@cedrsolutions.com).

## ABOUT CEDR HR SOLUTIONS

CEDR HR Solutions empowers independent healthcare employers to solve workforce problems by creating individually customized employee handbooks and providing unlimited, live HR support. CEDR is the nation's #1 provider of medical and dental employee handbooks that are 100% compliant with all federal and state employment laws. The CEDR team is comprised of attorneys, researchers, and master's-level HR experts.

## ABOUT PAUL EDWARDS

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