

Maternity leave: How long must we hold job open?

Q. How long do we have to hold a position for an employee on maternity leave if we employ fewer than 50 people? Our company policy says eight weeks, but what I have found ranges from six to eight weeks from birth. The FMLA says 12, but we do not seem to qualify for that due to our size. — Ed, New York

A. If you have fewer than 50 employees, you are most likely not covered by the federal FMLA and it is unnecessary to decide whether the employee is eligible. (New York law doesn't provide a minimum guaranteed maternity leave, either.)

However, when you refer to your company policy and "what you have found," I wonder if your company offers short-term disability insurance to disabled individuals. Typically, after a woman gives birth, a physician will deem her "disabled" for a period of six to eight weeks afterward, depending upon the difficulty of the birth, and the insurer will authorize benefits for these weeks.

Although you are not obligated to hold a job open for an individual receiving short-term disability benefits, if in fact it has been your practice to hold positions for people who are receiving disability benefits for some period of time, then you should treat women who miss work due to giving birth the same as individuals who must miss work for other covered reasons. Failure to treat employees alike in this regard can lead to a gender discrimination claim under federal and state laws.

Of course, you may also have an obligation to hold jobs open for a period of time because employees are "disabled" within the meaning of the ADA and state law, but that discussion is beyond the scope of your question.