

Can we change full-timer to part-time after maternity leave?

Q. We are a small company and have seven employees. One of our employees recently went out on a leave of absence for pregnancy. During that time, we hired a replacement worker to do the same job. The replacement only worked part time, but was still able to complete work that our employee did full time. When our employee returns to work, we would like to change her job status from full time to part time. Is this legal?

A. Since your company has seven employees, the law granting California workers pregnancy disability leave applies. (It covers all employers with five or more employees.) California law requires employers to provide up to four months disability leave to workers who are disabled due to pregnancy, childbirth or a related medical condition.

The law gives employees return rights as well. According to the Department of Fair Employment and Housing (DFEH), an employee who returns from pregnancy disability leave within the four-month period is guaranteed the right to return to her same position.

However, employers' obligations with regard to reinstatement have changed recently. In March 2012, the California Fair Employment and Housing Commission (FEHC) proposed new and amended regulations addressing employers' obligations and employees' rights and responsibilities regarding pregnancy under the California Fair Employment and Housing Act (FEHA).

After public comment and some revisions, the agency's regulations became effective on Dec. 30, 2012. They can be found at Title 2, California Code of Regulations, Sections 7291.2 *et seq.*

According to Section 7291.10(a) of the new regulations, the employer must reinstate the employee to the exact same position and the employer must guarantee reinstatement in writing if the employee asks for a written guarantee.

The employer is excused from reinstating the employee to the exact same position under Section 7291.10(c)(1) only if the employer can prove by a preponderance of the evidence that the employee would not have been employed for reasons unrelated to the leave, such as a layoff or plant closure.

(Employers should note that the new regulations eliminate a prior regulation that allowed an employer to refuse to reinstate an employee to the same position if the means of keeping the position open "would substantially undermine the employer's ability to operate the business safely and efficiently." This defense is no longer available.)

However, even if the employer can prove that it need not reinstate the employee to the same position, the employee may still be entitled to reinstatement to a comparable position under Section 7291.10(c)(2). A comparable position is one that is virtually identical to the employee's previously held position, including wages, benefits, working conditions and shift. Additionally, Section 7291.2 (j) requires the position to be at the same or

a “geographically proximate” work site.

According to Section 7291.10(c)(2), in order to be excused from this requirement to reinstate the returning employee to a comparable position, the employer must be able to show by a preponderance of the evidence that:

1. The employer would not otherwise have offered the employee a comparable position had she not taken leave, or
2. A position for which the employee is qualified is not available on the scheduled date of reinstatement or within 60 days thereafter.