What kind of pregnancy and family leave rights do gestational surrogates have in California?

Q. One of our employees is a gestational surrogate for a woman who cannot carry a child. Is our employee entitled to pregnancy disability, FMLA or CFRA leave as a surrogate?

A. California law is generally protective of surrogacy arrangements. It requires all public employers and private employers with five or more employees to provide up to four months of job-protected pregnancy disability leave if a woman is "actually disabled" by her pregnancy.

A woman qualifies if "in the opinion of her health care provider, she is unable because of pregnancy to work at all or is unable to perform any one or more of the essential functions of her job or to perform these functions without undue risk to herself, the successful completion of her pregnancy, or to other persons."

Examples of such conditions include severe morning sickness, bed rest, preeclampsia, childbirth and recovery from childbirth.

Eligibility does not depend on the reason for the pregnancy. Thus, a worker who is a surrogate mother would be entitled to pregnancy leave if she were disabled by her pregnancy.

Employers with 50 or more workers are required to provide 12 weeks of leave under the federal FMLA and the California Family Rights Act (CFRA) to those who have been employed by the company for 12 months and who have worked at least 1,250 hours.

The FMLA provides that leave for pregnancy disability leave under the FMLA may run concurrently with California pregnancy disability leave, enabling the four months of pregnancy disability leave and 12 weeks of FMLA leave to be used simultaneously. However, if an employer fails to provide notification that it intends to run FMLA and pregnancy disability leave concurrently, the employee may be entitled to additional FMLA leave if she exhausts pregnancy disability leave and still suffers from a serious condition.

Like the FMLA, the CFRA also provides for leave that many people take when they have a child. However, unlike the FMLA, CFRA and pregnancy disability leave do not run concurrently. California law provides that a worker's entitlement to CFRA is "separate and distinct" from her entitlement to pregnancy disability leave. Thus, at the end of her pregnancy disability leave, a new mother can generally request up to 12 weeks of CFRA leave "for reason of the birth of her child" (which is often referred to as "bonding" leave).

However, as a surrogate generally gives the child to its legal parents at birth and the child is not hers, a surrogate would likely not be eligible for bonding leave under the CFRA. An exception to this occurs if the surrogate stands *in loco parentis* to the child.

Mothers using surrogates

A related question concerns employees who are using a gestational surrogate to have a child. Are they entitled to pregnancy leave or bonding leave? No and yes.

Since a woman using a gestational surrogate would not be pregnant, she would not be entitled to pregnancy disability leave. However, she would be entitled to 12 weeks of leave under the FMLA and CFRA to bond with her child (if the employer were covered by the FMLA or CFRA).

Though CFRA does not mention surrogacy, it does provide for leave to bond with the new child in the first year after his or her birth or placement with the family—be it an adopted or biological child. A child born with the help of a gestational surrogate is not likely to be an exception, as CFRA covers several types of families. It is important to note that FMLA and CFRA leave run concurrently, so a woman who used a gestational surrogate would not be entitled to 24 weeks of bonding leave.

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