

DISABILITY AS A RESULT OF PREGNANCY~ CHILDBIRTH AND RELATED MEDICAL CONDITIONS¹

A. Eligibility for Disability Benefits

An attorney disabled due to pregnancy, childbirth and/or any complications arising from those conditions is treated in the same manner as attorneys who are disabled for any other medical reason and is eligible to receive disability benefits according to the terms of the disability income benefits program of the firm.

[Alternative A (For Firms with Limited or No Disability Benefits): Eligibility for Disability Leave. An attorney disabled due to pregnancy, childbirth and/or any complications arising from those conditions is entitled to a paid leave during the period of the disability.]

B. Commencement Date and Presumptive Time Period

Given the demands of the job and the high expectations for performance placed on all attorneys, the firm presumes disability for a period of twelve weeks following the birth of a child, and grants paid disability leave for this period, without the need for independent medical verification of disability.

In addition, a pregnant attorney may elect to leave work up to two weeks prior to the anticipated date of birth without medical certification of disability. These two weeks are in addition to the regular disability leave outlined above.

In either instance, the attorney must notify the firm's benefits coordinator of the date of commencement of her disability leave and the date of the birth of her child, so that adequate records can be maintained.

C. Disability Before or After the Presumptive Time Period

Regardless of when the attorney elects to commence her presumptive disability period, disability leave in excess of the allotted number of weeks is granted only in the event that the employee provides the firm's benefits coordinator with the appropriate medical certification as required for other disabilities covered under the disability policy.

D. Effect on Partnership or Salary Increase

The use of disability leave as a result of pregnancy, childbirth and related medical conditions shall not be a factor in or affect a partnership (or other promotional decision) or salary increase determination. Pregnancy, childbirth and related medical conditions are an integral part of human existence; they are not to be considered as voluntary and optional undertakings by the affected lawyers.

¹ This sample policy was copied from the Philadelphia Bar Association's Model Policies. See http://www.philabar.org/member/governance/mp_parent1.asp (accessed September 14, 2005).

The use of disability leave as a result of pregnancy, childbirth and related medical conditions may affect the timing of the partnership (or other promotional decision) or salary increase determination only to the extent that other medical disabilities affect the timing of the partnership or salary increase determination. For example, if the use of medical leave to recover from gall bladder surgery would not affect the timing of the determination, neither can the use of medical leave for pregnancy or childbirth.

E. Leave Options

At the attorney's option, the attorney may also apply for a leave of absence under the firm's childcare leave policy as set forth in Policy 2 below.

COMMENTS

1. *Definition and Eligibility (Section A)*

This policy was originally developed to comply with the requirements of Title VII of the Civil Rights Acts of 1964. It is applicable to the medical conditions experienced as a result of being pregnant, of bearing a child, and of recovering from childbirth. This type of leave is sometimes referred to as maternity leave, but it should not be confused with leave to parents (male and female) for the purpose of caring for an infant or child after its birth. Those leaves are covered under Model Policy 2: Childcare Leave.

The Pregnancy Discrimination Act of 1978 requires employers who are covered by Title VII to treat women affected by pregnancy, childbirth and related medical conditions the same as non-pregnant persons who are "similar in their ability or inability to work . . . for all employment-related purposes, including receipt of benefits under fringe benefit programs."

This policy therefore simply restates the effect of that law. Thus, if the law firm has a disability benefit program which permits paid or unpaid leaves to persons with non-pregnancy disabilities, it must offer the same paid or unpaid leaves to women affected by pregnancy, childbirth or related medical conditions.

2. *[Alternative Section A]: Firms and Organizations without Disability Benefits or with Limited Disability Benefits*

If a firm does not have a general disability benefits program as assumed in section A, such a firm may nevertheless wish to consider offering a paid or unpaid leave for pregnancy, childbirth or related medical conditions, to the extent this is economically feasible. Alternative A has been drafted to serve that purpose.

The Supreme Court has held in *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 107 S.Ct. 683, 93 LEd.2d 613 (1987) that the Pregnancy Discrimination Act was intended by Congress to be "a floor beneath which pregnancy disability benefits may not drop -- not a ceiling

above which they may not rise.” 107 S.Ct. at 692 (approving the language of the Court of Appeals at 758 F.2d 390, 396 (9th Cir. 1985)). In that case a California statute which required employers to provide leave and reinstatement to employees disabled by pregnancy, but not by other conditions, was found not to be a violation of Title VII because of its provisions favoring pregnant workers above other disabled workers.

3. *Commencement Date and Presumptive Period (Section B)*

Because the period of disability for a normal, uncomplicated pregnancy and delivery can be generally approximated, many firms prefer to establish a presumptive period of disability for which the disabled attorney need furnish no medical verification. Such a presumptive period eases the administrative burden on both the firm and the affected attorney.

This policy uses the presumptive period of 12 weeks for all childbirth under the assumption that the work of an attorney may be so demanding in terms of time, commitment, stamina and potential stress that optimal physical fitness is necessary for performance of the job. Some firms may opt for a shorter presumptive period.

The firm may wish to require the attorney to prepare, when practicable, a “departure memorandum,” which outlines the attorney’s ongoing responsibilities and a plan for meeting those responsibilities during the attorney’s leave.

4. *Resignation or Termination*

This policy does not include any provision regarding the effect of the employee’s resignation or termination of employment upon the use of disability leave. Resignation or termination of employment at the end of the disability period in no way affects the use of the disability benefits since the employee has earned the right to those benefits by her work preceding the disability period.

Some organizations specify that the right to take childbirth disability leave is contingent upon the attorney advising the firm in advance that she intends to return to work on some basis at the end of the leave period. Such a provision is not permitted, however, unless such a requirement is also imposed on the use of other types of medical disability leave.

5. *Reinstatement*

This policy has no provision about reinstatement upon completion of the leave. The lawyer, however, must be reinstated when the leave is completed. Some organizations, especially those with highly structured departments, may prefer to include a provision indicating whether the attorney, upon return to work, will be placed in the same or an equivalent position.

6. *Application to Attorneys With Alternative Work Schedules*

Attorneys working on a reduced or flextime schedule or using a telecommuting arrangement who

are affected by pregnancy, childbirth and related medical conditions receive the same disability benefits that such attorneys with non-pregnancy disabilities receive under the general disability policy.

Where attorneys with reduced work schedules are not covered by a disability leave program, the firm or organization may nevertheless opt to institute such a leave for personnel affected by pregnancy, childbirth or related medical conditions.