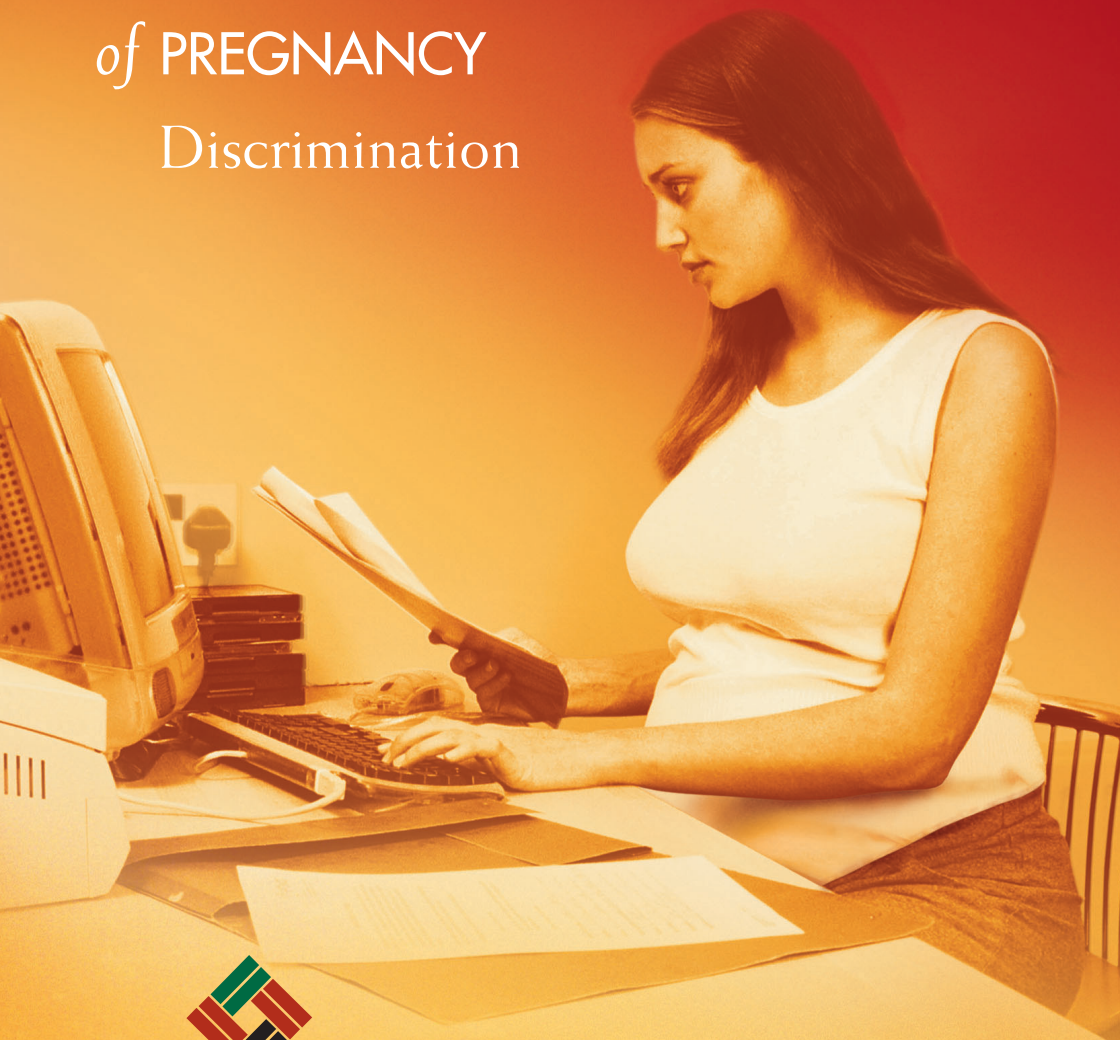


EMPLOYERS' GUIDELINES for the Prevention *of* PREGNANCY Discrimination



Human Rights
COMMISSION

Te Kāhui Tika Tangata



Incorporating

Race Relations

Published by the



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Employers' guidelines for the prevention of pregnancy discrimination

Foreword

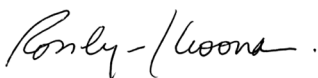
Pregnancy is a normal, healthy and exciting part of many women's lives. Today more than half of all pregnant women in New Zealand are in paid work during their pregnancies.

For nearly 15 years, the Human Rights Commission has been receiving complaints from workers claiming they have been treated unfairly because of their pregnancies. Over that time, thousands of enquiries and requests for information about how to best deal with or avoid problems of pregnancy discrimination at work have come to the Commission from workers, unions, employers, human resources specialists, and other groups.

Recently, there has been an increase in the number of these enquiries. Far from viewing this increase as negative, the Commission has been heartened that employers are, more than ever, wanting to provide fair working environments for all staff, while women are becoming more aware of their right to be treated without discrimination during all stages of their working lives.

The Commission's hope is that these guidelines will assist employers to provide a supportive and discrimination-free workplace, one that will benefit their business as much as their staff.

The Commission is very appreciative of the organisations, agencies and individuals who contributed their knowledge and experience during the development of these guidelines. In particular we want to record our thanks to Business New Zealand, Employment Relations Service, CTU and EEO Trust. The guidelines have benefited enormously from their contributions. We also wish to acknowledge the advice received from the Ministry of Women's Affairs, National Council of Women, ACC, Occupational Health and Safety, Pacific Island Health Project, Women's Health Action and National Women's Hospital, Health Information Unit for Women.



Rosslyn Noonan
Chief Commissioner
Kaikomihana Matua

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How to use the guidelines

These guidelines are intended for use by employers, human resources advisers, trade union representatives and delegates, employers' groups, and others interested in providing a supportive work environment for pregnant workers and preventing complaints of pregnancy discrimination at work.

There are five chapters in this booklet, four of which represent a period in the employment relationship during which pregnancy issues might arise. Chapter 1 is an introductory chapter providing an overview of pregnancy discrimination. The remaining chapters address discrimination during the pre-employment stage, while working, while preparing for leave and on returning to work.

Pregnancy discrimination is prohibited under a number of New Zealand laws, including the Human Rights Act 1993, the New Zealand Bill of Rights Act 1990, the Parental Leave and Employment Protection Act 1987, and the Employment Relations Act 2000. To demonstrate an employer's statutory obligation under one of these laws, these guidelines either quote the relevant law or section, or use terms such as "employers must" or "employers are obliged to."

The guidelines also recommend a number of best practice suggestions that encourage a positive work environment for pregnant workers. These ideas, which are not required by law but which are complementary to it, are indicated by such terms as "employers should" or "employers might consider."

Throughout the guidelines we have tried to provide examples or scenarios that demonstrate a principle or action. Where possible, we have used real examples based on complaints to the Commission, enquiries, or anecdotal information provided to the Commission.

Disclaimer

The purpose of these guidelines is to provide practical assistance to employers in complying with the Human Rights Act and the other relevant legislation referred to in relation to pregnancy. The guidelines are not legal advice nor are they a set of rules. In event of a discrepancy between the legislation and the guidelines, the legislation will prevail.

Chapter 1: Introduction - What is pregnancy discrimination?

Pregnancy discrimination is a form of sex discrimination. The Human Rights Act 1993 (HRA) provides that it may be unlawful for an employer to discriminate against an employee or a job applicant because she is pregnant or because it is assumed she may become pregnant. The Employment Relations Act 2000 (ERA) contains similar protections for pregnant workers. The Parental Leave and Employment Protection Act 1987 (PLEPA) prohibits dismissal because of pregnancy or parental leave.

Pregnancy discrimination can be direct or indirect. Direct discrimination occurs when a woman is treated less favourably than another person because of her pregnancy.

EXAMPLE: If a woman was not given the same training opportunities or opportunities for promotion as other workers because she was pregnant, she has been directly discriminated against.

Indirect discrimination occurs when a condition, requirement or workplace practice that is imposed on everyone, disadvantages a woman because she is pregnant. Indirect discrimination often appears to be fair to everyone, but the condition or practice has an adverse effect on pregnant women and there is no good reason for it.

EXAMPLE: If everyone in the workplace is expected to do a small number of heavy lifting jobs occasionally and a woman is unable to because of her pregnancy, insisting that the pregnant worker continue to do the lifting in order to keep her job may indirectly discriminate against her.

Pregnancy refers to the time when a woman is carrying a baby, as well as physical characteristics of pregnancy such as having nausea or a large abdomen. Pregnancy discrimination can also include women who are perceived as likely to become, or want to become, pregnant, for example, where a woman has expressed a desire to have children.

PUT SIMPLY: Treating a woman unfairly in employment because she is pregnant or may become pregnant is unlawful.

Pregnant workers may be unlawfully discriminated against when, because of their pregnancy, they are:

- Refused employment, promotion, or the opportunity to apply for a position
- Dismissed or made redundant
- Subjected to derogatory or insulting remarks which have a negative impact on them
- Excluded from training, work functions or other benefits
- Transferred to other jobs without consultation or their agreement (unless there are good reasons for the transfer)
- Demoted or have their seniority reduced or their continuity of service cancelled.

CASE NOTE: H V H - CONCILIATION

A woman, who worked in a shop, told her employer that she was pregnant. She took half a day off as sick leave. Her employer then began to pressure her to transfer to another area of work. Her employer said he didn't think she should work in the shop while pregnant. The woman resisted the move because she enjoyed the work and was able to manage all her duties. Also, she was able to walk to work.

Before her pregnancy the woman had been told her performance was good enough for her to become a manager in the company.

After her baby was born she took three months unpaid leave. The woman then told her employers she was able to return to work. However, her employers would not give her work.

The woman complained to the Human Rights Commission and her complaint of discrimination was found to be substantiated. She was awarded \$3,500 for loss of wages, distress and loss of dignity.

Chapter 2: Pre-employment

The HRA protects women from pregnancy discrimination during the recruitment process of employment. Pregnant or potentially pregnant women must therefore be treated the same as any other prospective employee during advertising, in application forms, during short-listing, interview and final selection stages of recruitment.

Employers, whether recruiting externally or internally, should seek the best applicant for the job based on skills, experience, qualifications and aptitude. Employers should recognise that filling the role with the right person is more important than the short-term implications of hiring a pregnant or potentially pregnant worker. This includes the expectation that she will be on leave for a period of time following the birth, if she is eligible for leave. (For example, if the recruitment involves an internal candidate who has been employed by the same employer for more than a year.)

PUT SIMPLY: Selection of a job candidate should be based on a person's skills and experience and not on her pregnancy or desire to become pregnant.

THE RIGHT MOVES: "Janet was clearly our top candidate for the new role, but one of the key sales conferences was planned for a few weeks after her baby's due date. We talked to her about our concerns that she might miss the conference and we agreed with her that another staff person would attend to represent our business and meet with her after the conference to brief her on any potential new business. After she returned from leave, we won a lot of business from leads at the conference. We knew that we had hired the right person for the job."

Advertising

The HRA makes it unlawful to advertise in a way that indicates an intention to discriminate against a pregnant or potentially pregnant woman.

Only skills and experience that are relevant to the job should be advertised. The impression that the advertisement gives, not the actual intention of the advertiser, is what is important.

Liability for discriminatory advertising rests both with the person or organisation placing the advertisement and the person or organisation publishing the advertisement. Employers as well as advertising forums (such as newspapers, magazines, websites or radio stations) can be held accountable for writing or displaying advertising that directly or indirectly discriminates against pregnant women.

EXAMPLE: ADVERTISEMENTS

DON'T: Sales rep, preferably single, required for women's shoe company.

DO: Sales rep involving extensive domestic travel required for women's shoe company.

Application forms

Recruitment forms should not require an applicant to provide information on her age, marital status, pregnancy or desire to become pregnant when applying for a job. If such information is provided, employers should not use it to measure the applicant's ability to do the job.

EXAMPLE: APPLICATION FORMS

Questions such as "Are you pregnant or do you currently have childcare responsibilities at home?" are unlawful under the HRA.

Interviewing

Employers should ask only those questions directly relevant to the skills and experience required for the job. A set of questions that can be asked of all applicants, whether female or male, young or old, should be prepared before the interview.

Interviewers should avoid making assumptions about pregnant or potentially pregnant applicants. Pregnancy is different for every woman, so assumptions about the amount of leave required, conditions of her health, competencies and commitment to work and the ability to travel are often unfounded and unfair.

Selection of applicants

Hiring the best candidate for a job is an important decision with long-term implications. Pregnancy is a temporary physical condition, it is good recruitment practice to select the best candidate even if that candidate is or may become pregnant. In most cases, a woman's pregnancy does not substantially affect her overall performance, especially when simple measures are put into place to reasonably accommodate a pregnant worker. (See Chapter 3).

Hiring for fixed-term or time-bound projects

Where an employee is required for a time-bound project or fixed-term contract, such as implementing a new software system by the end of the year, or meeting a temporarily-high customer demand, non-discriminatory selection processes are nonetheless important.

NB. There is no New Zealand case law to clarify when it may be considered lawful NOT to employ a pregnant worker due to her inability to fulfil the terms of a time-bound project. However, in some overseas jurisdictions, courts have considered that it may be discriminatory not to employ a pregnant worker due to her inability to fulfil the terms of a time-bound project.

To avoid discrimination, employers should not make presumptions about a pregnant worker's ability to do the job in the required timeframe. For example, by making assumptions about the amount of time she intends to take for parental leave.

Chapter 3: **At work**

Pregnant employees are entitled to the same conditions and benefits of work as when they are not pregnant. Dismissal, unnecessary re-assignment of responsibilities, changes to workplace opportunities, and working in an unsafe work environment may constitute unlawful discrimination.

Some examples of pregnancy discrimination may include:

- Transferring a pregnant worker to another role because of her pregnancy, or her appearance because of her pregnancy, without good reason for it (see “Temporary transfers” section on pg. 9)
- Dismissing a worker because of her pregnancy (see “Dismissal” section on pg. 33)
- Relegating less substantive work to a pregnant employee where there is no good reason for it. For example, because of perceptions of the employee’s commitment or competencies while she is pregnant
- Unreasonable refusal to consider a pregnant employee’s request to work overtime or on casual shifts
- Excluding the pregnant worker from workplace activities and functions
- Not accommodating the physical requirements of a pregnant worker, such as allowing for more frequent breaks or providing a maternity uniform
- Derogatory or offensive comments about a pregnant worker’s body size, habits, or other characteristics associated with pregnancy, such as the desire to eat or urinate frequently (see “Harassment of pregnant workers” on pg. 25)
- Actions or neglect of responsibilities by the employer that have or can potentially have adverse effects on the health and well-being of the employee or her baby
- Exclusion from consideration for permanent employment, professional development programmes, or project work
- Diverting away from the pregnant worker opportunities, clients, materials, or other factors that may affect an employee’s pay or promotion.

CASE NOTE: M V H - CONCILIATION

M complained that when she advised her employer H (an agency), that she was pregnant, the agency reduced the amount of work it made available to her. M complained that she had been discriminated against because of her pregnancy.

M stated that when she first began working she was provided with a high number of clients and approximately 40 hours of work per week. M stated that when she advised her clients that she had become pregnant, none of them considered this to be a problem. M stated that her doctor was happy for her to continue working during her pregnancy.

After advising the agency of her pregnancy, M was told that there was less work available for her. The agency began to re-allocate M's clients to other workers, and stopped referring new clients to her. M's hours were dramatically reduced.

The agency stated that the reason M's hours and clients had been reduced was because of changes to funding. The agency also claimed that they had received complaints from some of M's clients about her standard of work, and some had requested a new worker. M stated that she had received no complaints from any of her clients, nor had she received any prior reprimands from the agency regarding her performance.

After being notified of the complaint, H agreed to enter into conciliation. The agency offered M an apology for any misunderstandings that may have occurred, with an assurance that any appropriate work that became available would be offered to her both before and after her parental leave. After a two-week trial period to test the agency's willingness to uphold the settlement agreement, M advised that she was happy with the work that the agency was referring to her and that her complaint had been resolved.

Temporary transfers

Under section 16 of the PLEPA, if a worker is unable to perform her work to the safety of herself or others, or is incapable of performing her work adequately, her employer may temporarily transfer her to a different job. When considering safety issues, the employer should take into account the Health and Safety in Employment Act 1992.

Good employment practice involves consultation with the employee about any transfer. To avoid a complaint of pregnancy discrimination, employers should ensure that any such transfer to another role does not negatively impact on the pay, benefits, or work opportunities for the employee.

Preferential treatment

Section 74 of the HRA and section 106(3)(b) of the ERA states that preferential treatment for pregnant workers, as well as for those with responsibility for caring for children or dependants, is not considered to be unlawful.

THE RIGHT MOVES: “My morning sickness only lasted for a few weeks, but during that time I simply couldn’t stand facing customers before 10am each day. I arranged with my boss to have him cover for me until 10am, then I worked his Saturday afternoon to make up the hours. When I started feeling better in the mornings, I was able to open up the shop at 8am. It was great to have that flexibility to help me through a pretty rough time.”

Accommodating a pregnant worker

The physical effects of pregnancy, such as tiredness and nausea, are often short-lived and are unlikely to significantly affect an employee's overall performance. Employers should consider all reasonable options to ensure that a pregnant worker's performance is maintained or adjusted and that the employee is feeling supported and safe.

Pregnancy is different for every woman and it is unreasonable to make assumptions about what a pregnant woman requires in order to continue performing in her role. The employee, perhaps in discussion with her union representative, should always be consulted when discussing options to accommodate her pregnancy.

PUT SIMPLY: When making a work decision that will affect a pregnant employee, employers should always consult with the employee throughout the process.

Examples of ways in which a pregnant worker may be accommodated are by providing:

- Seating for work that can reasonably be performed sitting down. For example, seats should be available for factory workers, check-out clerks, banking staff and those performing tasks while stationary.
- Flexible work hours. If the pregnant worker is more productive at certain times of the day (for example, after mid-morning), arrange with the employee for her to work different shifts or to make up the hours at a different time. Remember to always do this in consultation with the woman and in a way which does not compromise her conditions of work, opportunities, or pay.
- The transfer of the pregnant employee to another department or section where physical duties may be lighter or safer (see "Temporary transfers" section on pg. 9)
- The opportunity to eat and drink frequently, especially in jobs where breaks or food facilities may not be accessible every two hours

- Uniforms for pregnant workers. Where an employee is required or chooses to wear a uniform, sizes should be large enough to accommodate the woman's changing shape throughout the pregnancy
- Assistance from other staff on some potentially unsafe duties

EXAMPLE: If lifting is a small part of all workers' jobs, arrange for other staff to do or help with the pregnant worker's lifting. The pregnant employee can undertake other, safer responsibilities.

- A sick bay or private area to rest during lunch and tea breaks, or other times if necessary
- Temporary carpark spaces. Walking longer distances from public car parks may be difficult or uncomfortable for a pregnant worker
- Clean and accessible toilet facilities. The physical changes a woman experiences while she is pregnant can mean that she requires more frequent toilet breaks
- Flexible work location. Determine if part or some of the employee's work can be performed at their home or at a location which is more accessible and comfortable for the worker. Working from an alternative location can mean that the worker can reduce or eliminate travel time, work in more comfortable conditions, or access resting or medical facilities more easily.

DID YOU KNOW? A woman's volume of blood increases by at least 40% during pregnancy. To manufacture more blood, her body demands higher levels of food, water and rest.

CASE NOTE: O & H V D - MEDIATION

The complainants, who were pregnant, objected that their employer's uniform requirements were uncomfortable. Female employees were required to wear their uniform shirts tucked into their skirts, although pregnant employees could wear their shirts out if an additional apron was worn.

The employees complained that wearing their shirts tucked in was uncomfortable. They objected to wearing an apron as this meant an additional layer of clothing when they were experiencing discomfort from the heat and their increased body weight.

When the employees raised this with their manager, she maintained that the employees had only two options available to them: to wear their shirts tucked in or worn out with an apron.

After mediation, the employer agreed to take into consideration the needs of pregnant employees in a review of the company's uniform policy.

The complainants were pleased that their concerns had been taken on board by management and that the discomfort they had experienced because of their work uniforms would not be imposed upon other pregnant staff. All parties were satisfied with the outcome.

THE RIGHT MOVES: “While she was pregnant, we arranged for Rachel to take the portable computer home for a couple days a week instead of coming into the office. When she was in the office, she seemed more rested and productive than when she was coming into the city every day. She said that working on two major reports from home was a lot easier without all the distractions of the city office. It must have been, because we got a top quality report from her two weeks before its deadline.”

Sometimes, the circumstances of a pregnancy or workplace arise that can mean that a pregnant employee can no longer do her job safely or perform her work adequately even when special measures to accommodate the pregnancy have been put into place. Where this occurs and the employer cannot find suitable alternative work, section 14 of PLEPA says that the employer can direct the pregnant worker to commence leave early on a date appointed by the employer.

Good communication is vital to maintaining a positive relationship with an employee during her pregnancy. Employers should ensure that all decisions made regarding a pregnant worker’s ability to do the job, safety concerns and parental leave should be made alongside the employee, her caregivers, and/or her union representatives.

Using sick leave because of pregnancy-related illness.

Employees who become ill during pregnancy have the same sick leave entitlements as other employees. It does not matter if the illness is related to the pregnancy, such as nausea or pre-eclampsia, or if it is a more general illness, such as colds or the flu.

If an employee is entitled to unlimited sick leave and the work responsibilities of that employee are suffering due to recurring illness, the employer should consult with the worker, and perhaps her union representative, to determine a temporary and satisfactory solution. For example, work hours or location could be temporarily made flexible, work responsibilities could be shifted, or the worker may wish to take a period of paid or unpaid leave until the illness subsides. Remember that employers are required to do this in a way that does not compromise the pregnant employee's conditions of work, opportunities, or pay.

For leave relating to pregnancy-related appointments, see "Special Leave" section.

CASE NOTE: D V W - CONCILIATION

A pregnant woman, who was due to commence unpaid parental leave, became ill and required time off work. The woman's employer denied her request to utilise her paid sick leave entitlement, instead requiring her to commence unpaid parental leave 17 days earlier than anticipated. The woman argued that her illness was not a consequence of her pregnancy and that as such she had an entitlement to sick leave. The employer argued that the woman was unwell due to reasons related to her pregnancy and that it was therefore appropriate for her unpaid parental leave to start early.

The Complaints Division of the Human Rights Commission considered that the woman was discriminated against by reason of her sex. The Complaints Division formed the opinion that if the woman had not been pregnant at the time she became ill, she would not have been treated in the same way.

In forming its opinion the Complaints Division considered s 14 of the PLEPA. The Complaints Division did not consider that s 14 of PLEPA limits an employee's entitlement to sick leave even if the sickness is related to pregnancy.

The matter was settled to the satisfaction of all parties. The employer agreed to provide the woman with a written apology and an assurance that it would not breach the HRA in the future. It further agreed to take steps to amend the parental leave provisions within the company's collective employment contract. The employer also agreed to pay the woman a sum of damages for loss of wages and also for humiliation, loss of dignity and injury to feelings.

Please note that from January 1, 2002 the Complaints Division of the Human Rights Commission no longer exists. A new disputes resolution process has been introduced.

Special leave

PLEPA provides unpaid leave from work for mothers for pregnancy-related reasons, such as attending appointments with maternity care providers or ante-natal classes. To be eligible, an employee must have worked at least an average of 10 hours each week (including at least one hour per week or 40 hours per month) for the same employer for 12 months before the expected date of birth.

Although the entitlement to special leave is unpaid, many employers provide paid leave for pregnant workers and their partners to attend the necessary maternity care appointments.

DID YOU KNOW? A woman should regularly visit her lead maternity caregiver (midwife, obstetric specialist, or GP) throughout her pregnancy. The frequency of visits depends on how many weeks pregnant she is and whether she requires any special care. In a normal 40-week pregnancy, the expected number of antenatal visits are:

12 - 28 weeks	monthly
28 - 36 weeks	fortnightly
36 weeks - birth	weekly

Health and safety issues

Generally, if a workplace is safe for all workers, it is likely to be safe for pregnant workers. The Health and Safety in Employment Act 1992 requires employers to ensure the health, safety and welfare of employees at work.

Some duties and environmental factors are not considered safe for pregnant workers or their babies. Because of the formation stages of tissue, some exposures are of greater risk to the unborn baby.

These include:

- Heavy lifting and handling
- Exposure to some chemicals
- Exposure to some radiation
- Risk of infection
- Poor oxygen supply

A risk assessment of a pregnant worker's duties and work environment should be undertaken as early as possible in the pregnancy. If a risk is identified, employers should consider whether the task can be performed by another staff member or the harmful environmental factor avoided. If neither is possible, employers should take steps to reduce the risk to the lowest level practicable. Consultation with the pregnant worker, her maternity caregivers or OSH medical staff and possibly her union representative is crucial to ensuring that her workplace remains safe for her and her baby.

THE RIGHT MOVES: "I was fine packing the groceries in the carry bags during my pregnancy, but when it came to loading the heavy ones into the trolleys, I was experiencing back strain. When I talked to my supervisor about it, she made sure that one of the trolley collectors was around to help me load the trolleys. The other staff were great about it. My lower back problems eased in no time at all."

If workplace hazards cannot be avoided or reduced, the employer, in consultation with the pregnant worker, may consider temporarily transferring the worker to other duties during her pregnancy (see "Temporary transfers" section on pg. 9). To avoid a complaint of pregnancy discrimination, it is important that a transfer to another role does not negatively impact the pay, benefits, or work opportunities for the employee.

PUT SIMPLY: If health and safety concerns require a pregnant worker to be transferred to a different role, there should be no changes to her pay, benefits, or opportunities for promotion.

It is good employment practice to publicly display information relating to the risks that certain workplace duties or environmental factors may have on all workers. If certain conditions or substances are known to pose a risk to pregnant women or their unborn babies, information about these should also be displayed in the workplace.

If a pregnant woman expresses concern about a suspected hazard area, it is good practice to rotate duties to avoid exposure and provide peace of mind, even though information does not support that there is a risk to mother or baby.

Heavy lifting and handling

Because of hormonal changes which make a woman's ligaments more elastic in preparation for birth, one of the greatest workplace risks to pregnant women is injury to the joints or the onset of postural problems. Pregnancy is often associated with back pain, particularly as the baby grows. Manual handling duties can exacerbate this or cause a specific problem. If heavy lifting and handling is part of a pregnant worker's job, precautions should be put in place to ensure that these tasks are undertaken with a minimum of risk or are temporarily allocated to another staff member.

Employers should conduct a periodic review of the pregnant worker's duties as the changes in a woman's shape will almost certainly make it more difficult to perform heavy lifting and handling tasks as the pregnancy progresses.

DID YOU KNOW? A woman's average body temperature rises 1-2 degrees during pregnancy. She is more likely to feel warm when others are cool or hot when others are warm, and is more likely to get overheated after being physically active.

Exposure to some chemicals

Some chemicals have negative health implications for pregnant women or their babies. It is important that a woman and her maternity caregivers understand what ingredients are contained in all workplace cleaning solutions, materials, fumes and other agents to which the employee is exposed. This needs to be complemented by measures to minimise exposure e.g. extraction, personal protection. These measures are likely to be enough to allow a woman to remain in the job with little or no risk to her or the baby.

Examples of chemicals that may be harmful during pregnancy are:

- Lead (found in some paints, leaded gasoline, old plumbing, construction materials, solders, wood preservatives)
- Mercury (used in dental supplies)
- Pesticides, herbicides, and fertilisers
- Toxic aerosols, dyes, and solvents (found in some hairdressing, print and photographic products)
- Excessive second-hand cigarette smoke, such as in bars, casinos and other entertainment establishments
- Degreasers, paint thinners, and cleaning solutions

Employers should provide information to the pregnant worker about possible health risks of solutions used at work or obtain independent medical advice where there is lack of information or knowledge. If a chemical is identified as potentially harmful, it should be avoided by the pregnant worker or steps to reduce her exposure to it should be taken.

THE RIGHT MOVES: “Sadie said she was worried about the effect that the lead-based paint might have on her baby while she was pregnant and she got her midwife to write me a letter to explain why. So I made sure she got the jobs where the stripped paint was newer, after they stopped using lead. It was nice to know that Sadie’s work wasn’t doing any harm to that little kid.”

Exposure to some radiation

Ionising radiation, such as that found in diagnostic x-rays, has a much higher energy level than non-ionising radiation and repeated exposure to high doses of this kind of radiation can cause tissue damage in the foetus.

Employers should provide protective gear and provide safety training for all employees who work around diagnostic x-ray equipment. Permanent notices about the effects of radiation, with a caution for pregnant women, should also be displayed. Ensuring proper maintenance and safety procedures for equipment are adhered to is also the responsibility of the employer.

Low-energy waves of non-ionising radiation which are emitted by radios, televisions, microwave ovens, ultrasound equipment, power lines and the sun are usually considered harmless. Even so, prudent avoidance is advised, especially when concern is expressed.

Risk of infection

Healthcare workers and workers in contact with children and animals can be regularly exposed to infections which may cause harm to a foetus. These include:

- Toxoplasmosis (transmitted in the handling of raw meat, cat litter or faeces, or other animals infected by it)
- Hepatitis A, B and C viruses
- Listeria (transmitted by the consumption of infected raw seafood, cooked chilled food, water or soil)
- Rubella (German measles)
- Chlamydiosis and listeriosis (prevalent in the lambing season in ewes)

In general, good hygienic and precautionary practices, such as frequent hand-washing, wearing gloves and the safe disposal of needles, will greatly reduce the risk of infection to pregnant workers. Employers have a duty to ensure workplace practices are safe for all workers.

Poor oxygen supply

Occupations where a consistent supply of oxygen cannot be ensured pose a threat to a pregnant worker. Underwater diving, firefighting and working in some types of aircraft are examples of roles where a temporary transfer or change of duties may be required.

Employers should ensure that information is available for all workers on the risks that poor oxygen supply can pose.

Harassment of pregnant workers

Employers have the responsibility of providing a safe and harassment-free workplace for all employees, including pregnant workers. It is also the employer's responsibility to ensure that other employees treat pregnant workers fairly and safely. Steps should be taken to provide safe working environments for pregnant workers.

Unlawful sex discrimination may occur when an employee is subjected to harassment because of her pregnancy and experiences a negative impact as a result.

Examples of harassment because of a woman's pregnancy include:

- Derogatory comments about her physical size and shape
- Pictures, screen savers or other visual material portraying pregnant women in a demeaning or hostile manner
- Unwanted touching of a pregnant woman's abdomen or other parts of her body
- Negative comments about a pregnant worker's habits or other characteristics associated with pregnancy, such as the desire to eat or urinate frequently
- Unwelcome references to the presumed changes in a pregnant woman's private life, such as changes in her sex life or relationship with her partner.

Putting into place workplace policies, procedures and staff training programmes addressing sexual harassment, equal employment opportunities, and anti-discrimination are the best form of protecting workers from any type of workplace harassment.

Chapter 4:

Preparing for parental leave

Employers are required to provide parental leave for all eligible employees. Failure to do so, or doing something to disadvantage an employee with respect to her parental leave rights or payments, may be grounds for a complaint under PLEPA.

Employees are eligible if:

- They have worked at least an average of 10 hours each week (including at least one hour per week or 40 hours per month) for the same employer for 12 months before the expected date of the baby's birth.

Adoptive parents and spouses or partners can also be eligible for parental leave.

Contact the Department of Labour, Employment Relations Service (details overpage) for specific information on eligibility.

Unpaid parental leave

Employers must provide eligible working mothers with up to 52 weeks unpaid leave on request and, in general, are required to hold their jobs open for them when they return to work. Women who are not eligible for parental leave but who remain working throughout their pregnancy must not have their employment terminated on account of their pregnancy. Employers can also agree that non-eligible employees can take a period of parental leave.

Under PLEPA, an employee may choose to begin her unpaid leave:

- Up to 6 weeks before the expected due date of her baby, or
- As directed by her lead maternity caregiver, or
- As agreed with the employer.

Parental leave can be shared with the employee's spouse or partner (if the spouse/partner is eligible under the same criterion). This includes de facto and same sex partners. The spouse or partner is also eligible for up to two weeks unpaid leave.

Key position

There are some situations where an employer may indicate that a job cannot be kept open because it is a key position in the organisation. The test of a key position is not that it would be inconvenient to replace the employee with another permanent or contract employee for the period of leave, but whether it is reasonable to do so. Matters such as the size of the organisation and the training period or skills required in the job will be considered.

These circumstances are uncommon and employers who are considering advising an employee that they are unable to keep the job open for this reason should contact their employers' organisation or the Department of Labour, Employment Relations Service.

Paid leave

All employees eligible for unpaid parental leave are also entitled to payment for the first 12 weeks of their parental leave, up to a maximum of \$325 before tax per week. The payment can be transferred in full or in part to their eligible spouse or partner.

However, the employee will no longer receive payments if:

- She returns to work on a part-time or full-time basis before the 12 week paid leave period is over, and
- Her remaining paid leave has not been transferred to her spouse or partner.

This scheme is taxpayer-funded and therefore does not require an employer to continue paying a worker while she is on leave. However, the employer is required to complete an application form for the employee to verify that the worker is employed and to confirm the paid parental leave arrangements. The employer's form and other information about the employer's obligations can be downloaded from Employment Relations Service website at the address below.

Failure by an employer to meet the obligations under PLEPA may be grounds for a complaint under Part 7 of the Act.

FOR MORE INFORMATION ...

Step-by-step information for pregnant workers, their partners, adoptive parents and employers concerning applications for all types of leave and calculating entitlements are provided by the Department of Labour, Employment Relations Service (0800 800 863) or www.ers.dol.govt.nz/parentalleave.

Combining Government and employer's paid parental leave schemes

Many employers provide their own paid parental leave schemes for employees and report business benefits from doing so, including improved staff retention and loyalty, continuity of client contact and retention of institutional knowledge. Where an employment agreement includes such provisions, the employer must comply with those arrangements regardless of the worker's access to the government-funded scheme.

PUT SIMPLY: If an employee has a paid parental leave scheme or any parental leave related payment in her employment agreement, she is entitled to receive payment from BOTH the Government and her employer.

If the employment agreement does not currently contain provisions for paid parental leave and the employer wishes to enhance the Government's scheme for all or some of their employees, there are some options available. These include:

- Extending the length of their paid leave by providing a payment for a period of the statutory unpaid leave in addition to the 12 weeks' payment by the government

EXAMPLE: 12 weeks leave with payment by the Government (up to \$325 gross per week)

+ 4 weeks leave with payment by the employer

+ up to 36 weeks unpaid leave with job protection

16 weeks paid leave + up to 36 weeks unpaid leave with job protection

- "Topping-up" the Government payment so that employees earning more than \$325 gross per week remain on full pay during the 12-week Government-funded paid parental leave period
- Providing paid leave before the expected due date of the employee's baby. The employee could rest in the final weeks of her pregnancy while on full or part pay and begin her statutory leave with Government payments at the expected due date
- Negotiating with the employee terms for paid parental leave which are best suited to her particular situation, as long as those terms are not less favourable than the terms of the PLEPA.

THE RIGHT MOVES: "We're a small company and Sarah was our first employee to go on parental leave. We wanted to provide her with some form of paid leave in addition to the Government's one, but we didn't have a paid parental leave policy in place. I asked Sarah what she thought would be most helpful and fair to her. We agreed that 6 weeks' pay in a lump sum would be the best, so that she could use it as needed before, during or after the Government entitlements. Sarah was grateful for our support, and I am confident that we will see Sarah's return to work as soon as she is ready and able. And she has agreed to help us develop a paid parental leave policy for all our staff."

Under PLEPA, the obligation is on the employer to provide up-to-date and accurate information to pregnant workers about their leave entitlements after the employee has applied for leave. The employer is also required to ensure that all employer obligations (such as filling out an application form for the employee's Government paid parental leave entitlements) are fulfilled. The employer's form and other information about the employer's obligations can be downloaded from Employment Relations Service website www.ers.dol.govt.nz/parentalleave.

Chapter 5:

On and returning from leave

On leave

A worker who is on parental leave is still regarded as an “employee” and as such has most of the same employment rights as they had before beginning leave.

To ensure that an employee on leave enjoys the same employment rights, an employer should:

- Agree with the worker about the process and frequency of communicating with her while she’s on leave, especially about organisational changes, workplace functions and other information which may affect her return to work

PUT SIMPLY: Communication is the key to maintaining a positive employment relationship with a worker while she is on leave.

- Be flexible about the worker’s expected date of return from leave
- Be open to consider changes to the worker’s hours or role, such as part-time work, job-sharing, or moving into a role which is more supportive of her responsibilities outside of the workplace
- Be supportive of the breastfeeding worker’s need to express and store her milk at work.

THE RIGHT MOVES: As part of their resource kit to all new parents, Stagecoach New Zealand Ltd provides a “Stork Report” agreement setting out a communication plan between the employee and their manager whilst the employee is away from work. The “Stork Report” helps minimise possible isolation and keeps the employee informed. Employees on parental leave are also invited to participate in workplace activities such as training sessions, social events, and the use of the company’s Open Learning Centre.

EEO Trust Best Employers 2001

Holiday entitlements

An employee cannot be forced to use her holiday entitlements while she is on leave. Information about her holiday leave accruals should be made available to her before, during and after leave, but the employer cannot pressure her to take leave owing for use during the parental leave period.

Annual holidays accrue during parental leave according to section 42(2) of PLEPA. Payment for annual leave is at the average rate of pay over the year in which they have been accrued. Therefore, if any unpaid parental leave is taken during that year the average pay will be less than the ordinary pay rate.

Injuries on unpaid parental leave and ACC

If an employee who is on unpaid parental leave suffers an injury and is unable to return to work at the expected date due to that injury, they may be eligible to receive weekly compensation for loss of earnings from ACC.

To be eligible for weekly compensation from ACC in these circumstances, the employee must have a written agreement with the employer verifying that they are on unpaid parental leave. The agreement must also specify the date that parental leave began and the expected return to work date.

If ACC accepts the claim, weekly compensation payments will be based on the employee's earnings in the period immediately prior to the start of the parental leave.

FOR MORE INFORMATION ...

For specific information about ACC entitlements for workers on leave, see the ACC website at www.acc.co.nz.

Organisational re-structuring

Employers should involve workers on leave to the same extent as workers not on leave when undertaking an organisational re-structure which may include redundancies or job changes. Employers should not assume that because a worker is on parental leave that they would prefer a redundancy or reduction of work hours. It is important that workers on leave are consulted with throughout the organisational change process.

Returning from leave

An employee returning from leave is entitled to the same role with the same terms and conditions of work as she had before she went on leave. Where the pregnancy required some temporary adjustment or accommodation to the normal role prior to taking leave (such as a change of hours or responsibilities), the employee is entitled to return to the job and shifts she held immediately prior to the temporary adjustment. The employer is required to ensure that workers who are returning from leave are not given less substantial or secure conditions of work than they had before they went on leave.

CASE NOTE: DRYFOUT V NZ GUARDIAN TRUST COMPANY LTD (1996)

On her return from parental leave, Mrs. Dryfout requested a change in her work hours so as to work between 8:45am and 4:35 pm with only a 20-minute lunch break, five days per week. This was to accommodate her childcare arrangements which were available only between 8am and 5pm.

Her employer refused her request and she filed a claim for breach of contract under the Employment Contracts Act, seeking an interim injunction to prevent her employer from insisting on the hours, which would have forced her to resign. The injunction was granted, and the case settled without a substantive hearing.

Dismissal

In general, employees cannot be dismissed because they took parental leave, unless there is a good reason. Under section 51 and 52 of PLEPA, a good reason is if:

- A redundancy situation occurred during the employee's parental leave and following redundancy there was no vacant position substantially similar to the one the employee had at the beginning of their parental leave; OR
- The employee held a key position, which could not be held open (see "Unpaid Parental Leave" section on pg. 27 for advice on a key position); AND
- During the 26 weeks following the end of the employee's leave, no vacant position substantially similar to the position held by the employee was available.

Some employees returning from leave may wish to work part-time, on a job share basis, or different shifts than she previously worked. One New Zealand case has suggested that women returning from maternity leave may have a right to alternative employment arrangements (see *Dryfout v Guardian Trust Company Ltd* (1996) below). In the good faith environment under the ERA, it is important to consider any proposals for changes in work arrangements on return from parental leave.

A number of New Zealand employers report that offering part-time work as a transition to full-time work is an incentive for women to return to work rather than resign after leave.

CASE NOTE: PROCEEDINGS COMMISSIONER V STEPHEN PENNEY AND D & D MANUFACTURING LTD – CRT 65/00

M worked for D & D Manufacturing Ltd as a sewing machinist. When she discovered she was pregnant she told her immediate supervisor. The supervisor told M not to tell Stephen Penney who was a director of the company. The supervisor warned that Mr Penney was likely to dismiss M. When M began suffering from morning sickness she decided that she needed to tell Mr Penney she was pregnant.

Once M told Mr Penney of her pregnancy he began to ignore her. Some weeks later M noticed Mr Penney was interviewing job applicants. She returned to work after several days sick leave and found one of the job applicants at her desk doing her work.

M was then dismissed and told by Mr Penney that he was sick of her problems becoming his problems. M did not receive a warning. She did not receive holiday pay, her previous weeks' wages or notice or severance pay.

M suffered a great deal of distress in the late stages of her pregnancy because of the way she had been treated by Mr Penney.

The Complaints Review Tribunal considered that M had lost her job and been treated unfairly because she was pregnant. The Tribunal awarded M \$9,815.17 in damages for both pecuniary loss and injury to feelings.

Breastfeeding breaks

The benefits of breastfeeding for both mother and baby are well-documented; breast milk is the healthiest source of nutrition for babies. Breastfed babies are less likely to be ill and to develop some diseases later on in life. Mothers who breastfeed are more likely to enjoy a quick recovery from childbirth. Mothers who continue to breastfeed after returning to work are less likely to have time off work with a sick baby.

A mother's right to breastfeed her baby in public is substantiated in New Zealand case law (see "additional resources" section). Although this right has not yet been tested in the courts in relation to breastfeeding at work, prohibiting a woman from breastfeeding at work could be considered to be sex discrimination.

It makes good employment practice to support a worker who is breastfeeding by:

- Providing paid, regular breaks for breastfeeding
- Offering the use of a quiet room or space for her and her baby at regular intervals during the day
- Ensuring those who are responsible for the baby while the mother is working (and therefore transporting the baby to the mother's workplace) have access to and are welcomed by the workplace
- Supporting the mother as needed in ways that will accommodate her during the breastfeeding period.

DID YOU KNOW? Infants lack the ability to efficiently produce immunoglobulins, which help the body overcome infection. The mother's immunoglobulins are transmitted in the breast milk for the first 4 - 6 months after birth, giving breast-fed babies good protection against gastroenteritis, respiratory and ear infections, asthma, and other common childhood infections.

THE RIGHT MOVES: Mothers who are keen to continue breastfeeding when they return to work have a room designated for expressing milk and breastfeeding. One woman returned two months after the birth of her baby for one day a week - often having to bring her baby in with her. She then returned to work full-time eight months later and continued breastfeeding until the baby was 20 months old. Pregnant women, who need to bring their car to work, can be given a carpark for that period.

*EEO Trust Best Employers in Work & Life 2000
Hesketh Henry Lawyers and Notaries*

Family status discrimination

The HRA and ERA make unfair treatment - either direct or indirect - of employees with family responsibilities unlawful. Employers cannot treat workers who care for children at home in a way that is unfair and different from those workers who do not have family responsibilities.

Section 74 of the HRA and section 106(3)(b) of the ERA state that preferential treatment for workers who have childcare responsibilities is lawful.

EXAMPLE: Planning a regular staff meeting at a time when a worker had arranged with the employer to collect her children from school may constitute unlawful discrimination on the grounds of family status.

Examples of ways in which workers with family responsibilities may be accommodated are:

- Job sharing
- Flexible start and finish times
- Permanent part-time work
- Staggered or part-time return from maternity leave
- Leave in school holidays
- Providing information about local childcare options
- Childcare subsidies
- Access to phones at work
- Doctor and family appointments allowed in work time
- Child space at work
- Trained back-up staff

Additional Resources

Business Best Practice

- Equal Employment Opportunities Trust website, www.eeotrust.org.nz.
- Human Rights and Equal Opportunities Commission (Australia), "Pregnancy Guidelines," <http://www.hreoc.gov.au/sexdiscrimination/pregnancy/guidelines/forward.html>, 13/11/2001.
- EEO Trust, "How Can We Help? Families and the Workplace" - A Guide for Employers.
- Human Rights Commission and New Zealand Employers' Federation: "A Guide for Employers: Human Rights Act and Equal Employment Opportunities (EEO)."
- EEO Trust, "Valuing Working Parents: Effective Retention Strategies" (Mercer Cullen Egan Dell).
- EEO Trust, Ministry of Women's Affairs, NZ Employers' Federation supported by Telecom NZ Ltd, "Work and Family Directions - What New Zealand Champions Are Doing."
- EEO Trust supported by Telecom NZ Ltd, "Work and Family: Steps to Success."

Health and Safety

- Ernest Orlando Lawrence Berkeley National Laboratory, Environment Health & Safety Training, "Workplace Hazards to Reproductive Health," <http://www.lbl.gov/ehs/html/reprohealth>
- National Institute for Occupational Safety and Health (Spain), "The Effects of Workplace Hazards on Female Reproductive Health," <http://www.cdc.gov/niosh/99-104.html>
- NORA (National Occupational Research Agenda) Priority Research Areas, Disease and Injury: Fertility and Pregnancy Abnormalities, <http://www.cdc.ov/niosh/diseas.html>
- Tyoterveiset, "Legal Provisions on the Protection of Pregnant Women at Work," <http://www.occuphealth.fi/tl/tiedotus/tyoterv/299engl/pregnant8.htm>
- University of Bath, "Reproductive Hazards: Information for Workers Planning Families," <http://internal.bath.ac.uk/bio-sci/bbsafe/reprohaz.htm>

Breastfeeding

- Ministry of Health (New Zealand), "Breastfeeding and Working" (leaflet), 2001.

Policy issues, overseas

- Human Rights and Equal Opportunities Commission (Australia), "Pregnancy Inquiry Issues Paper," 1999.
- EOR (Equal Opportunities Review) No.101/January 2002 p.32
(Report on European Court of Justice case: Tele Danmark v HK
(acting on behalf of Brandt-Nielsen)(October 2001)

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