

Appendix 2

Pregnancy Guidelines: General Principles

Excerpt from Pregnancy Guidelines, a report of HREOC's National Pregnancy and Work Inquiry

Pregnancy Discrimination at Work

Pregnancy is a normal, healthy physical condition that many women experience. Various laws have been put in place to ensure that pregnant women are not disadvantaged in their employment because of their pregnancy.

The Sex Discrimination Act 1984 (Cth) (the federal Sex Discrimination Act) makes pregnancy and potential pregnancy discrimination in employment unlawful.

The principles arising from the federal Sex Discrimination Act are set out below. For more information, see the full text of the *Pregnancy Guidelines*.

Anti-discrimination laws are only one part of the legal framework covering pregnancy and work. Industrial relations laws, occupational health and safety (OH&S) laws, awards and agreements also deal with pregnancy issues. Employers, supervisors and employees need to understand these laws in addition to anti-discrimination laws.

This summary is intended to provide an overview of the principles involved in avoiding pregnancy discrimination at work, and may be copied and distributed to inform workplace participants of their rights and responsibilities.

The Federal Sex Discrimination Act

Who Is Covered?

The federal Sex Discrimination Act covers all private sector and Commonwealth employers and employees. All types of employees are covered, including temporary, casual, full-time and part-time workers, apprentices and trainees. Commission agents, contract workers and partners in partnerships of six partners or more are also covered.

Employers must not discriminate. Employers can also be held liable for the actions of their managers, employees and agents such as recruitment agents, unless they take reasonable steps to prevent the discrimination.

Recruitment agents and individual employees may also be held liable if they assist, aid, instruct, induce or permit an employer to discriminate.

Case Example

A policy requiring temporary employees to work full-time before being made permanent was found to

indirectly discriminate. The complainant had resigned from permanent employment after taking leave to have a baby and returning to work on a part-time basis. The requirement to work full-time was not reasonable in view of evidence that the temporary employees were largely very experienced and had already completed a two-year period of probation. (*Speering v. Ministry for Education* (1993) EOC 92-513)

What Is Pregnancy Discrimination?

Direct pregnancy and potential pregnancy discrimination takes place when a woman is treated less favourably because she is pregnant or has the potential to become pregnant.

Indirect pregnancy and potential pregnancy discrimination takes place when there is a requirement, condition or practice that disadvantages pregnant or potentially pregnant women. It will not be discriminatory if the requirement, condition or practice is reasonable in the circumstances. In assessing whether an action was reasonable, a court will consider, among other things, the disadvantage to the employee, how the disadvantage could be overcome and whether it is proportionate to what an employer sought to achieve.

Under the federal Sex Discrimination Act, the term "pregnancy" refers to the time when a woman is carrying a foetus, as well as physical characteristics of pregnancy such as having a large abdomen and tiredness.

The term "potential pregnancy" refers to being capable of having children, a situation where a woman has expressed a desire to have children or when a woman is likely or is perceived to be likely to become pregnant. An act of pregnancy discrimination may also be sex discrimination or discrimination on the ground of family responsibilities, depending on the circumstances.

When Is Discrimination Unlawful?

The following principles help identify how to avoid discrimination at each stage of the employment relationship.

Case Example

An organisation refused to employ a woman as a trainee pilot because of the possibility of absences due to possible future pregnancy.

Although the woman was rated highly at the

interview, the organisation argued that it could not justify the investment in training if it was likely the woman would have children later. The organisation was found to have discriminated against the woman. (*Wardley v. Ansett Industries (Operations) Pty Ltd* (1984) EOC 92-002)

Recruitment

Pregnant or potentially pregnant women must be treated the same as any other potential employee during the recruitment process.

To avoid discrimination, employers and employment agencies should seek the best applicant for the job based on merit, regardless of pregnancy or potential pregnancy.

Assumptions about the capacities of pregnant women and mothers of young children should not intrude upon the recruitment process.

Always ask questions that are job specific. Avoid asking applicants about whether they have or want to have children. Rather, ask questions about ability to travel or complete a project within the given timeframe.

If a pregnant applicant is genuinely unable to perform the requirements of the job, it is not discriminatory to refuse her the job.

Using recruitment agents?

To prevent discrimination in recruitment, employers should tell recruitment agents that they expect the best job candidates to be interviewed, irrespective of pregnancy or potential pregnancy.

Case example

A convention supervisor was transferred to a telephonist position (at the same salary) because she was pregnant. Her employer said that it did not look good for a pregnant woman to be carrying film projectors and raised other OHS issues. Although the employee's salary remained the same, the employer was found to have discriminated, as it had demoted the employee because of her pregnancy. The Tribunal was also satisfied that the employee was able to carry out her duties safely. (*Duggan v. Shore Inn Pty Ltd* (1992) EOC 92-457)

Employment

Pregnant or potentially pregnant employees should be treated in a fair and equitable manner. Employers should not reduce an employee's terms and conditions or deny other benefits on the basis of pregnancy or potential pregnancy.

Where necessary, employers should make all reasonable adjustments to the workplace to accommodate the normal effects of pregnancy. Employers need to discuss the issues with the pregnant employee to find solutions. Where medical issues are associated with a pregnancy or legitimate OHS issues arise, employers should make reasonable adjustments

in the workplace to allow pregnant employees to continue to work. It is not discriminatory to accommodate an employee who is pregnant. In limited cases where medical or OHS issues cannot be resolved, an employer may need to temporarily transfer a pregnant employee. Constant references to an employee's pregnancy, touching her stomach and badgering her about whether she is "really" planning to come back to work are likely to amount to discrimination.

When an employee has had her position adjusted in some way because of her pregnancy, her benefits should remain the same, although her salary may alter if her hours decrease.

Simple Measures Can Prevent Discrimination

Depending on the workplace, simple measures to accommodate pregnancy can include:

- Adequate toilet breaks.
- Providing larger uniforms or not requiring pregnant women to wear uniforms.
- Providing seating.

In some cases an assessment of exposure to hazardous materials will be required and managed in a non-discriminatory way.

Leave

Minimum maternity leave provisions are set in industrial relations laws, awards and agreements. Employee entitlements and notice requirements should be checked as they differ from workplace to workplace.

Minimum leave entitlements for non-casual employees include:

- Up to 12 months unpaid maternity leave after 12 months service, and
- Access to sick leave when ill during pregnancy.

Some casuals qualify for unpaid maternity leave, pregnant employees who do not qualify for maternity leave are still protected by the federal Sex Discrimination Act. Employers and employees can negotiate a fair and reasonable period of leave for those who do not qualify for maternity leave.

Employers and co-workers should not assume that pregnant employees will automatically take 12 months maternity leave, as women take varying amounts. Some women take no maternity leave at all, preferring to utilise paid annual leave or long service leave.

Generally, employees are entitled to return to their former position after maternity leave.

Employers can help prevent discrimination by:

- Advising pregnant employees of their rights and responsibilities in relation to maternity and sick leave.
- Having policies and procedures for managing maternity leave, including how the employee and employer can keep in touch during the leave.
- Developing an information kit on maternity leave for employees and managers.

Restructuring?

Remember to advise and consult your employees on maternity leave if the organisation is undergoing a restructure. Redundancy arrangements should be offered to an employee on maternity leave in the same way it is offered to other employees. Just because an employee is pregnant or on maternity leave, does not mean she will want to be made redundant.

Dismissal and Retrenchment

An employer cannot dismiss or retrench an employee because she is pregnant or has the potential to become pregnant, even if this reason is only one of the reasons for her dismissal.

An employer may dismiss or retrench an employee if the decision is based on reasons other than pregnancy such as:

- Genuine financial reasons.
- Poor or inadequate work performance.
- Serious or wilful misconduct.

Case Example

Following a restructure, an employee was transferred to new duties on return from maternity leave without consultation. The Hearing Commissioner found that the complainant's pregnancy was a factor in the change of duties. This was because the pregnancy led to her being on maternity leave and the restructuring occurred without consultation during this time. The conduct of the employer was found to be unlawful sex discrimination. (*Gibbs v Australian Wool Corporation* (1990) EOC 92-327)

How Can Pregnancy Friendly Policies Help?

Effective anti-discrimination policies can limit employer liability in the event of a complaint, as they demonstrate the employer taking steps to prevent acts of discrimination. Policies aimed at achieving a balance between work and family life can also benefit organisations through, for example, increased productivity and staff retention.

Writing a policy need not be difficult. Start with a document explaining what constitutes pregnancy and potential pregnancy discrimination, stating that it will not be tolerated and inform all workplace participants of the action that will be taken if discrimination occurs. A good policy will also include information about maternity leave and how the organisation manages pregnancy related issues such as OHS.

Once a policy is developed, it should not be left to languish on a file or intranet. For effective implementation and employer protection, the policy must be well communicated. Education of all parties is required if anti-discrimination laws and the organisation's policy are to be adhered to.

Remember that the facts of each situation will

determine whether unlawful discrimination has occurred.

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