

POLICY ON DISCRIMINATION BECAUSE OF PREGNANCY AND BREASTFEEDING

**ONTARIO
HUMAN RIGHTS
COMMISSION**

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PLEASE NOTE

This policy statement contains the Commission's interpretation of provisions of the Ontario *Human Rights Code* relating to discrimination because of pregnancy and breastfeeding. It is subject to decisions by Boards of Inquiry and the courts. The policy should be read in conjunction with those decisions and with the specific language of the *Code*. Any questions regarding this policy should be directed to the staff of the Ontario Human Rights Commission.

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POLICY ON DISCRIMINATION BECAUSE OF PREGNANCY AND BREASTFEEDING

1. INTRODUCTION

The Ontario *Human Rights Code* (the "**Code**") states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The provisions of the **Code** are aimed at creating a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.

The **Code** prohibits discrimination because of sex. Section 10(2) of the **Code** establishes that the right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is, was or may become pregnant or because she has had a baby.

In addition, section 11 of the **Code** provides that it is also discriminatory if a workplace rule or requirement results in an adverse impact on persons who are identified by a prohibited ground of discrimination, except where the requirement, qualification or factor is reasonable and *bona fide* in the circumstances. In other words, rules and requirements that are neutral on their face may have a discriminatory impact.

Most of the complaints filed with the Ontario Human Rights Commission (the "Commission") by women alleging discrimination because of pregnancy, including breastfeeding, are related to the workplace. Nevertheless, the right to equal treatment without discrimination because of sex or pregnancy extends to accommodation (housing *etc.*), services, goods and facilities, contracts and membership in trade unions.

This policy has several purposes:

- to help the public understand how the **Code** protects women against discrimination because of pregnancy or because they are breastfeeding;
- to make women aware of their right to equal treatment in employment, accommodation, services, goods and facilities, contracts and membership in trade unions, without discrimination because they are, or may become pregnant, or because they are breastfeeding, and

- to assist employers and providers of services and accommodation, to understand that they also have responsibilities under the **Code** to accommodate the needs of women who are, or may become, pregnant or are breastfeeding.

2. BACKGROUND

Anti-discrimination legislation seeks to address and remove unfair disadvantages that result from the fact that a person belongs to a group identified under the **Code**. Child-bearing benefits society as a whole, and therefore women should not be disadvantaged as a result of being pregnant.¹ The Supreme Court of Canada has recognized that the financial and social burdens and the cost associated with having children should not rest entirely on women.²

Several international agreements and conventions to which Canada is a party contain provisions with respect to the pre-natal and post-natal periods. Article 10(2) of the **International Covenant on Economic, Social and Cultural Rights** provides that special protection should be accorded to mothers during a reasonable period before and after childbirth. During such a period, working mothers should be accorded paid leave or leave with adequate social security benefits. **The Convention on the Elimination of All Forms of Discrimination Against Women** states that women shall have appropriate services in connection with pregnancy and breastfeeding.

Unfortunately, discrimination against women because of pregnancy continues to be a common practice in society, particularly in employment. Many women who are, or may become, pregnant do not know how their employers will respond to their pregnancy. This often results in these women experiencing considerable stress and even fear that they may lose their job.

As well, women who are breastfeeding often face negative attitudes from employers, and when using services or facilities. They may experience difficulty in securing appropriate accommodation that will allow them to nurse their children.

Women who are pregnant may experience varying forms and degrees of discrimination, depending on what other characteristics form part of their personal identity or status in society. For example, pregnant women who receive social assistance, or who are young, single, involved in a same-sex relationship, or who have a disability, are often more vulnerable and therefore more likely to be subject to discriminatory behaviour than pregnant women who are in a traditional family structure.

3. MEANING OF PREGNANCY

The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is, was or may become pregnant or because she has had a baby. "Pregnancy" therefore includes the process of pregnancy from conception up to the period following childbirth and includes the post-delivery period and breastfeeding.³ The term "pregnancy" takes into account all the special needs and circumstances of a pregnant woman and recognizes that the experiences of women will differ.

Special needs can be related to circumstances arising from:

- miscarriage;⁴
- abortion;
- complications because of pregnancy or childbirth;
- conditions which result directly or indirectly from an abortion/miscarriage;
- recovery from childbirth;⁵ or
- breastfeeding.

4. DISCRIMINATION "BECAUSE OF PREGNANCY" IS DISCRIMINATION BASED ON SEX

Only a woman can become pregnant, so pregnancy is a characteristic that is necessarily linked to a woman's sex.⁶ Section 10(2) of the *Code* states that:

The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

5. BREASTFEEDING AND DISCRIMINATION

As noted above, pregnancy includes the post-natal period, which includes breastfeeding. Breastfeeding is a natural part of child-rearing, and so is integrally related to the ground of sex, as well as to family status. Numerous studies have demonstrated the benefits of breastfeeding for mothers, children, and their communities, in terms of physical and emotional health and development. Women should not be disadvantaged in services, accommodation or employment because they have chosen to breastfeed their children.

Breastfeeding includes pumping or expressing milk, as well as nursing directly from the breast.

Sometimes women are discouraged by others from breastfeeding in public places because of concerns that it is indecent. Breastfeeding is really a health issue, and not one of public decency. Women should have the choice to feed their baby in the way that they feel is most dignified, comfortable, and healthy.

6. OTHER RELEVANT GROUNDS OF DISCRIMINATION UNDER THE *CODE*

Family status

In addition to sex, discrimination can occur because of one's family status. "Family status" is defined in section 10(1) of the *Code* and refers to:

... the status of being in a parent and child relationship.

There are numerous stereotypes about a mother with a young child, particularly about her ability to continue working. For example, some believe that a mother who has an infant at home may miss work more often than employees who do not have a young family, or may be less committed to their employer or to their career. Others may feel that hiring or keeping an employee who may become pregnant or who is on maternity leave costs the company too much. However, Boards of Inquiry have rejected the argument that the cost of upgrading or retraining a woman after she returns from maternity leave is a defence to discriminating against a woman because of her family status.

7. OTHER RELEVANT SECTIONS OF THE *CODE*

The *Code* protects women against discrimination in the workplace (section 5); in services (section 1); in accommodation (e.g. housing) (section 2); contracts (section 3); and membership in trade unions (section 6). The *Code* also specifically prohibits harassment because of sex in accommodation (section 7(1)) and employment (section 7(2)).

Section 11 of the *Code* provides protection from constructive discrimination for women who are, were or may become pregnant, or who have had a baby, when there is a rule, requirement or factor which may not be discriminatory on the surface, but when applied may have an adverse impact on women because of pregnancy or breastfeeding.

8. EMPLOYMENT (section 5)

a. Hiring, Promotions, Transfers, Termination

Subject to *bona fide* requirements, denying or restricting employment opportunities in hiring, or transferring *etc.*, a woman because she is, was or may become pregnant or because she has had a baby, is a violation of the *Code*. Certain work-related practices or behaviours may also constitute discrimination such as:

- limiting or withholding employment opportunities, or withholding training,

regardless of work performance or years of service. This may include failing to inform women who are away on pregnancy leave about major developments and workplace opportunities;

- not assigning a pregnant woman to a major project or team project;
- being overly critical of a pregnant woman's work;
- docking a pregnant woman's time for using the washroom more frequently;
- making a pregnant woman the subject of inappropriate comments or jokes;
- terminating her with or without notice, because of her pregnancy;
- subjecting her to unwanted transfers;
- denying sick leave benefits; and
- refusing to cooperatively engage in a process to find appropriate arrangements to permit a woman to continue breastfeeding her child.

(see "Endnotes" for detailed examples).⁷

Even if pregnancy or being of child-bearing age is only one of the factors in a decision to deny a woman employment-related opportunities, this could nevertheless constitute a violation of a woman's right to freedom from discrimination under the **Code**.⁸ A woman loses more than just a job or a promotion when she is discriminated against because of pregnancy. She experiences a "missed opportunity" which has far greater consequences for her employment prospects.

If an employee is terminated for any reason related to pregnancy, the employer may be found to have violated her rights under the **Code and the Employment Standards Act ("ESA")**.

Bona Fide Occupational Requirement

In some circumstances, differential treatment of a woman because she is, was or may become, pregnant may be legitimate if it can be demonstrated that *not* being pregnant is a *bona fide* occupational requirement.

Example: A woman who was seven months pregnant was denied a position as kitchen help in a restaurant. The Board of Inquiry heard evidence that the position would be physically demanding. As the woman had never performed these kitchen duties she would not know the extent of the duties and physical requirements expected for this job. The Board of Inquiry was satisfied in this particular instance that it was likely that *not* being in the later stages of pregnancy was a reasonable occupational requirement.⁹

To be considered a *bona fide* occupational requirement under human rights legislation, the requirement, qualification or factor must be imposed in good faith and be reasonable from an objective viewpoint.¹⁰ Case law and Boards of Inquiry apply a very high standard before accepting the defence of a *bona fide* occupational requirement. In other words, certain restrictions may have a rational or reasonable connection to the occupation and are therefore

acceptable defences. Without such a connection to the occupation the employer will not have a defence of a *bona fide* occupational requirement.

Example: A Board of Inquiry found that an employer had discriminated against a female employee when it refused to employ her in a section of the company that processed certain gases. The employer defended its action on the basis that, from time to time, there are accidental emissions of a gas which may be harmful to women of child-bearing age or to a fetus. The Board of Inquiry found that the risk of harm to a fetus from the accidental emission of the gas was minimal. As well, the scientific research did not support the company's concerns. The Board of Inquiry noted that any woman who knows she is pregnant or who intends to become pregnant, could be transferred from this section until after she has given birth.¹¹

b. Duty to Accommodate

In order for a requirement to be reasonable and *bona fide* in the circumstances, it must be shown that the needs of the particular group protected under the **Code** cannot be accommodated "short of undue hardship". "Short of undue hardship" is a standard that applies to the person required to make the accommodation, and takes into consideration costs, outside sources of funding, and health and safety factors. Customer complaints, business inconvenience, or collective agreement provisions do not justify discriminatory actions against women who are pregnant or breastfeeding.

Assessment of undue hardship must be based on evidence that is objective, real and direct.

The Supreme Court of Canada in *Brooks v. Canada Safeway* established that discrimination against women because of pregnancy includes not only discriminatory action, but also the failure to accommodate the special needs of persons who fall into this category.

Special needs during the pre-natal and post-natal period can be accommodated, short of undue hardship, in a variety of ways. Some examples are provided below.

- An employee may be temporarily relocated to another work station or location or re-assigned to alternative duties;
- A flexible work schedule can be provided to accommodate medical appointments, including treatment for infertility;
- Breaks can be allowed as necessary. It is a general human rights principle that persons should not experience disadvantage owing to needs related to prohibited grounds of discrimination. Therefore, employees who require breaks, such as for pumping or breastfeeding, should normally be accorded those breaks, and not be asked to forgo normal meal breaks as a result, or work additional time to make up

for the breaks, unless the employer can show undue hardship.

- A supportive environment can be provided for a woman who is breastfeeding. Accommodation may mean allowing the care-giver to bring the baby into the workplace to be breastfed, making scheduling changes to permit time to express milk or breastfeed at work, and providing a comfortable, dignified and appropriate area so that a woman can breastfeed, or express and store breast milk at work. In some special cases, it may involve permitting a leave of absence.¹² A supportive environment can be created with minimum disruption.

When the application of a rule has an adverse impact on women who are, were or may become pregnant or those who have had a baby, the rule may violate their rights under the **Code**. Consideration must be given to introducing an appropriate accommodation measure, short of undue hardship.

Example: A police officer requested light duties for the last stages of her pregnancy. The Police Service had a policy that did not provide a modified work program and her request for light duties was denied. Instead, she was told that she could take a part-time civilian position at a much lower salary. This meant that the officer would have to resign from the force. The Board of Inquiry stated that the rule of "no modified duties" was applied to all officers but it clearly excluded "pregnant women from consideration of the fact they are at higher risk during the latter stages of their pregnancy". It found that the accommodation offered was unreasonable because other male officers who were injured were given lighter duties. The Board of Inquiry concluded that the Police Service discriminated against the police officer because of her sex.¹³

In this example, the policy was applied equally to all police officers and, on its face, did not discriminate. However, because the rule adversely affected those who became pregnant, it constituted "constructive discrimination" in relation to pregnant women. The uniform application of the policy of not providing modified duties resulted in pregnant police officers being negatively affected.

It is important to note that an employer cannot arbitrarily decide that a pregnant employee should take a leave of absence as an accommodation measure, without considering other options for dealing with a situation requiring accommodation, in consultation with the affected employee.

Employee's and Employer's Responsibility

Both the employee and the employer share the responsibility for determining the most appropriate form of accommodation that a given set of circumstances may require. There is a duty to enter into a cooperative and respectful dialogue in order to develop, implement and maintain appropriate accommodation.

- If a pregnant employee is advised by her doctor that she can no longer work in a

particular job, she is responsible for clearly informing the employer of her need for accommodation and of the accommodation required.

- Employers should accept requests for accommodation in good faith, unless there are legitimate reasons for acting otherwise. The employer is entitled to request sufficient information from the employee in order to make the accommodation, and may seek expert advice or opinion where required.
- Once the employer is aware of what accommodation is required, the employer has a duty to take the necessary steps to accommodate the special needs and circumstances of the pregnant employee, short of undue hardship.¹⁴
- The employer cannot insist that the employee take an unpaid leave of absence as an accommodation measure. Accommodation should be provided in a way that most nominally affects the employee's rights.

Under the **Code**, employers must demonstrate that a particular form of accommodation would lead to excessive costs or health and safety concerns, in order to justify a claim of undue hardship.

c. Benefit Plans

As discussed below, employee benefit plans or employment practices that result in disadvantage because of pregnancy constitute discrimination under the **Code** on the basis of sex and pregnancy.

A Divisional Court decision, *Crook v. Ontario Cancer Treatment and Research Foundation*, confirmed a Board of Inquiry's decision that sick leave benefits should be available, for health-related reasons, to a woman who has recently given birth when she has chosen not to go on maternity leave under the **ESA**.¹⁵

d. Health-Related Absences¹⁶

In the *Brooks* decision, the Supreme Court of Canada said that pregnancy leave should be included in employee benefit plans without having to be categorized as an illness, accident or a disability. Under the *Brooks* doctrine, if a pregnant employee produces proof that she must be absent from work for health-related reasons, at whatever stage this might be during the pregnancy, she cannot be treated differently or adversely from other employees who are also absent from work for other "health-related reasons".

"Health" was broadly defined in the *Brooks* decision to include:

- the physical and psychological health of the woman;
- the health, well-being, growth and development of the fetus; and

- a woman's ability to function as a social being, interacting with her family, employer and significant others.

A "health-related absence from work" can therefore mean any absence that is related to a woman's health, or the health and well-being of the fetus.

Pregnancy leave is used for bonding and nurturing. As well, different women have different medical and physiological needs following childbirth depending on their circumstances, and the time required to recover from childbirth varies. Because women respond differently to pregnancy, requests for health-related absences are usually assessed and granted on an individual basis. Pregnant employees who require leave for health-related pregnancy concerns should follow the proof-of-claim procedures of the employer's benefit plan to establish that the health-related absence is valid.

An Alberta court decision in *Alberta Hospital Association v. Parcels* endorsed the *Brooks* principle that a health-related reason for absence from the workplace by a pregnant employee is not to be treated differently from other health-related absences.¹⁷ This applies generally where the woman is pregnant and where the condition which requires time off is associated with pregnancy.

The court in *Parcels* concluded that:

- Where an employer has a benefit plan that compensates health-related absences or provides disability benefits to its employees, a woman should be entitled to disability benefits during that portion of the pregnancy or parental leave that she is unable to work for health reasons related to the pregnancy and childbirth. Payment must begin as soon as the pregnant woman is away from the workplace for a health-related reason.
- Any health-related portion of maternity leave is to be treated the same as other health-related leaves such as a sick leave or disability leave. The employee should be compensated at substantially the same level and should be subject to the same conditions as an employee who becomes ill, such as the requirement to provide a medical confirmation for the absence.¹⁸
- Pregnant employees are to be compensated for the full period of their health-related absence, whether it occurs during the pre-natal or post-natal period, and including recovery from childbirth.

These principles are consistent with the general tenet in *Brooks* that women who are absent for health reasons related to their pregnancy should not be treated differently from employees absent for other health-related reasons.

Section 25(2) of the **Code** states that contracts of group insurance between employers and

insurers do not violate the equal treatment provisions of the **Code** with respect to age, sex, marital status, same-sex partnership status or family status, so long as they comply with the **ESA** and regulations.

Prior to the proclamation of a new **ESA** in 2001¹⁹, Regulation 321 under the previous **ESA** permitted health-related absences because of pregnancy during maternity leave to be treated differently from other health-related absences where a workplace disability plan was based on a contract of group insurance. Such a plan was defined in that regulation²⁰ to include any plan, fund or arrangement that insures against loss of income because of sickness, accident or disability and includes short and long term income insurance or benefit plans. Practically speaking, this meant that the right to receive benefits under disability plans ended when a woman chose to go on pregnancy or parental leave under the **ESA**. But if an employer offered disability benefits to other employees who were off on other kinds of leave such as educational leaves or sabbaticals, then the **ESA** provided that benefits should also be paid to women on pregnancy leave and parental leave. No provisions permitting differential treatment of health-related absences because of pregnancy during maternity leave have been included in the Regulations under the new **ESA**. **Regulations under the new Act require employers to provide the same benefit entitlements to employees on pregnancy leave or parental leave as are provided to employees who are on other types of leave.**²¹

Finally, a woman may have health problems related to her pregnancy that force her to be away from work *before or after* her pregnancy leave or parental leave. She can access health benefits under a workplace sick or disability plan in this situation. However, she should check her dates of leave with the Employment Standards Branch at the Ministry of Labour since her decision to take short or long term disability leave may affect her right to take pregnancy and/or parental leave. There are strict rules about when she is entitled to take pregnancy or parental leave and when she must notify her employer.

Women on maternity leave continue to be entitled to other benefits under employment-related benefit plans including pension plans, life insurance plans, accidental death plans, extended health plans and dental plans.²² Employers are also required to continue to make contributions to such plans.²³

e. **Special Programs: section 14**

Section 14 of the **Code**, which deals with "special programs", allows for differential treatment of persons protected under the **Code** if that program is designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve equality of opportunity. The purpose of maternity leave (both health-related and voluntary portions) is to address the circumstances related to pregnancy. Women have experienced, and continue to experience, considerable disadvantage in employment, housing, *etc.* because of pregnancy. As previously noted, the Supreme Court of Canada has acknowledged that the cost associated with bearing children rests disproportionately on women.

Section 14 recognizes that:

- "special programs" which are designed to relieve hardship or economic disadvantage or to achieve equality are necessary and legitimate; and
- the equality rights provisions of the **Code** are not infringed by the implementation of a special program.

For further information on the application of section 14 please refer to the Commission's *Guidelines on Special Programs*.

f. Harassment/Poisoned Environment

Actual intention to harass is not required to establish evidence of a poisoned environment. If the comment or conduct is known or ought reasonably to be known to be unwelcome, it may be considered as "harassment". The phrase "ought to have known" introduces an objective element to the test.²⁴ Ongoing jokes and comments or derogatory statements made about pregnant women in a workplace or service setting, may create a "poisoned environment" for women by making them feel harassed, threatened or unwelcome.

9. ACCOMMODATION (e.g. housing) (section 2)

Section 2 of the **Code** protects a woman who is, was or may become pregnant, or has had a baby against discrimination in housing.

Example: A young woman shared a two bedroom apartment with various roommates. The owners were aware of the arrangement, and she received their approval for each new co-tenant. She was later involved with one of these co-tenants and became pregnant. When the superintendent found out she was pregnant, he asked her if she was "intending to give up the baby for adoption" and said that the owners "didn't want kids in the building". The Board of Inquiry found that the complainant had been discriminated against because of her sex and family status. In the Board's view, one of the main reasons she was evicted "was her pending motherhood".²⁵

A Board of Inquiry has also decided that "Adult Only" rules in condominiums discriminate on the grounds of "family status".²⁶

10. SERVICES, GOODS AND FACILITIES (section 1)

The **Code** prohibits discrimination in "services, goods and facilities" against women who are pregnant. This includes educational institutions, hospitals and health services, insurance providers, public places like malls and parks, public transit, and stores and restaurants. This

means that women who are pregnant, or who are accompanied by their newborn babies to a restaurant or a theatre, cannot be denied service or access unless there is a *bona fide* reason for doing so.

The **Code** prohibits discrimination in "services, goods and facilities" against women who are breastfeeding. This means that women have a right to nurse undisturbed, and cannot be prevented from breastfeeding a child in, for example, a public area or restaurant. They also cannot be asked to move to a more "discreet" area to breastfeed a child, or to "cover up". Complaints from other persons will not justify interfering with a woman's right to breastfeed.

Education providers have the same type of obligation as employers to accommodate women who are breastfeeding, including the obligation to cooperatively discuss options and create a supportive environment.

The **Code** allows for an exception for certain types of insurance policies, under section 22. This section permits individual and group insurance policies, which are offered as a service, to make distinctions based on sex if the distinctions are made on *reasonable and bona fide* grounds. In *Bates v. Zurich*,²⁷ the Supreme Court of Canada stated that a discriminatory practice in the insurance industry is "reasonable" if:

- a) it is based on a sound and accepted insurance practice; and
- b) there is no practical alternative.

Example: A professional association offers as a service to its members an optional insurance policy. The policy has a specific provision requiring a 30-day pre-existing condition restriction that applies only to women who are pregnant. This means that a woman who is pregnant at the time she applies for the policy is not eligible for coverage. If a pregnant woman challenges this requirement, the insurance provider, and possibly the professional association, would have to show that this requirement meets the test of a sound and accepted insurance practice and that there is no practical alternative, according to *Bates v. Zurich*.

11. COLLECTIVE AGREEMENTS AND COMPANY POLICIES

Employers and labour representatives are recognizing their obligations under the **Code**, as well as their shared responsibility to maintain workplace environments that are free from discrimination.

Collective agreements or other contractual arrangements cannot act as a bar to providing accommodation, subject of course to the undue hardship standard. Unions and employers are jointly responsible for negotiating collective agreements that comply with human rights laws, and should build conceptions of equality into collective agreements.

A woman who is pregnant or breastfeeding may have rights that can be pursued by a grievance

under a collective agreement. Provincial labour laws allow arbitrators to apply and interpret the **Code** to grievances that involve human rights violations.²⁸ Some issues that may be more appropriately dealt with through the grievance process include:

- whether a pregnant woman can use sick leave and annual vacation leave for maternity leave;²⁹
- whether sick-leave days and vacation leave can be accumulated while a woman is on maternity leave; and³⁰
- seniority issues relating to maternity leave.³¹

Persons are not obligated to exhaust an internal complaint resolution mechanism before considering other avenues of complaint such as approaching the Commission or filing a grievance. An individual may elect to file two complaints at the same time -- one under the employer's internal policy and one with the Commission. However, if there is a grievance procedure in place under a collective agreement, the Commission may elect to exercise its discretion under section 34 of the **Code**, and decide to not deal with a complaint. This is because section 48(11)(j) of the *Labour Relations Act* allows labour arbitrators to interpret and apply human rights legislation.

Internal anti-harassment and anti-discrimination policies are not governed by provincial legislation and the Commission does not consider them in the same way as the grievance procedure under a collective agreement. This means that if the complainant is not satisfied with the resolution, s/he can contact the Commission. If this is the case, the complaint **should** be filed within the six-month limitation period which begins from the time of the alleged harassment. If a complaint is not filed within the time frame, the Commission may decide not to deal with the complaint, subject to section 34 (1)(d) of the **Code**.

12. OTHER PREGNANCY-RELATED LEGISLATION

The **Code** protects women's right to equal treatment in employment without discrimination because they are, were, or intend to become pregnant. The federal *Employment Insurance Act* and the provincial **ESA** also have provisions that relate to pregnancy, but with different purposes.

The **ESA** identifies employees' and employers' rights and responsibilities concerning pregnancy leave and job security. The **ESA** provides for the following:

- Employees' and employers' responsibilities concerning pregnancy and parental leave and job security;
- Requirements for qualification for pregnancy and parental leave;

- Entitlement of women to return to the job held prior to the leave;
- The employer's responsibility to maintain certain benefits on the woman's behalf while she is absent on leave; and
- A prohibition on intimidating, dismissing, or otherwise penalizing a woman, or threatening to do so, because that woman is or will become entitled to take pregnancy leave, intends to take a leave, or actually takes a leave.

*For detailed information on the **ESA**, please contact the Employment Standards Branch of the Ministry of Labour.*

Under the *Employment Insurance Act*, a woman who has worked the required number of hours during the qualification period can receive employment insurance benefits for up to 15 weeks while she is off work due to her pregnancy. The benefit period can begin up to eight weeks before her child is expected to be born, and ends at the latest 17 weeks after the child was expected to be delivered, or was delivered. The Act also provides for parental employment insurance benefits for up to 35 weeks, for a combined potential total of 50 weeks of employment insurance benefits for women who give birth.

For detailed information on employment insurance, please contact Human Resources Development Canada.

There are areas of overlap between the **Code** and the **ESA** with respect to pregnancy and the workplace. Generally speaking, the Ontario Human Rights Commission deals with the following situations:

- harassment because of pregnancy or breastfeeding;
- accommodation needs arising from pregnancy or breastfeeding;
- reprisal against pregnant employees, including withholding of employment opportunities or training because of pregnancy or breastfeeding; and
- employee benefit plans that discriminate because of pregnancy.

The Ministry of Labour's Employment Standards Branch deals with the following situations:

- disputes with the employer regarding the commencement or duration of maternity or parental leave, or reinstatement following leave;
- disputes regarding the continuation of benefits during maternity or parental leave; and
- reprisal because of pregnancy or parental leave, including situations where women who are eligible for pregnancy leave are reprimanded against after they have informed their employers that they are pregnant, but before a formal request for leave has been made under the **ESA**.

Related Provisions Under the *Employment Standards Act*

- A pregnant employee is entitled to take a leave of absence without pay, so long as she has been employed for at least 13 weeks prior to her due date. The leave may

commence as early as 17 weeks prior to her due date, or as late as the day she gives birth (s. 46(2)).

- An employee is responsible for notifying her employer that she wishes to take pregnancy leave, and her employer may require her to provide a certificate from a legally qualified medical practitioner stating her due date (s. 46(4)).
- The pregnancy leave may last for up to 17 weeks; the employee may then begin parental leave, which may last for up to 35 weeks (s. 47(1)).
- Women who experience a still-birth or miscarriage are entitled to take at least 6 weeks off after their still-birth or miscarriage, or to complete their 17-week pregnancy leave, whichever ends later (s. 47(1)).
- Women who are away on pregnancy leave continue to participate in their employers' pension, life insurance, accidental death, extended health, or dental plans, unless they elect in writing not to do so. Employers must continue to make their contributions to these plans during the leave, unless they are notified in writing that the employee does not intend to continue making her contribution (s. 51).
- The period of the leave is included in the calculation of the employee's length of employment, length of service, and seniority, for the purpose of determining employment rights. However, it is not included in the calculation of whether a probationary period has been completed (s. 52).
- When the pregnancy leave ends, the employer must reinstate the employee to the position she most recently held, if it still exists. If it does not, she must be reinstated to a comparable position, unless her employment has been terminated for reasons unrelated to her pregnancy (s. 53).
- Upon reinstatement, the employee must be paid the greater of the wage she was most recently earning with the employer, or the wage she would have been earning had she worked through the leave (s. 54).
- Employers may not reprise against women for exercising, or attempting to exercise, their rights regarding pregnancy leave (s. 74). Employers who violate these provisions of the **ESA** may be required to reinstate the employee, financially compensate her, or both.

13. FOR FURTHER INFORMATION

For more information about the Ontario Human Rights Commission or this policy statement, please call 1-800-387-9080 (toll free) or in Toronto (416) 326-9511 (TTD (416) 314-4535), during regular office hours from Monday to Friday. You can also visit our Web site at www.ohrc.on.ca.

RELEVANT *CODE* PROVISIONS

- Section 1 Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap. R.S.O. 1990, c.H.19, s.1
- Section 2 (1) Every person has a right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status, handicap or the receipt of public assistance.
- (2) Every person who occupies accommodation has a right to freedom from harassment by the landlord or agent of the landlord or by an occupant of the same building because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, marital status, family status, handicap or the receipt of public assistance. R.S.O. 1990, c. H.19, s. 2.
- Section 3 Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap. R.S.O. 1990, c. H. 19, s. 3.

- Section 5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offenses, marital status, family status or handicap.
- (2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offenses, marital status, family status or handicap. R.S.O. 1990, c.H. 19, s. 5.
- Section 6 Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or handicap. R.S.O. 1990, c.H. 19, S.6.
- Section 7 (1) Every person who occupies accommodation has a right to freedom from harassment because of sex by the landlord or agent of the landlord or by an occupant of the same building.
- (2) Every person who is an employee has a right to freedom from harassment in the workplace because of sex by his or her employer or agent of the employer or by another employee.
- Section 8 Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and to refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing. R.S.O. 1990, c. H.19, s. 8.
- Section 10 (2) The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant. R.S.O. 1990, c. H.19, s. 10 (2).

- Section 11 (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
 - (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right. R.S.O. 1990, c.H.19, s. 11 (1).
- (2) The Commission, the Board of Inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any. R.S.O. 1990, c.H.19, s.11 (2); 1994, c. 27, s. 65 (1).
- Section 22 The right under sections 1 and 3 to equal treatment with respect to services and to contract on equal terms, without discrimination because of age, sex, marital status, family status or handicap, is not infringed where a contract of automobile, life, accident or sickness or disability insurance or a contract of group insurance between an insurer and an association or person other than an employer, or a life annuity, differentiates or makes a distinction, exclusion or preference on reasonable and *bona fide* grounds because of age, sex, marital status, family status or handicap.

If a Human Rights Complaint is Made Against You

1. If the Commission receives a complaint against you, Commission staff will contact you to discuss the matter.
2. Commission staff will explain how the *Code* applies to the situation and how the complaint procedure works. Commission staff will work with you and the person making the complaint to try and resolve the concerns. The Commission also offers mediation services.
3. If the concerns cannot be resolved and mediation is not successful, the complaint may proceed to the investigation stage.
4. You can ask the Commission not to deal with the complaint under section 34 of the *Code* if:
 - a) another Ontario Law would be better suited to deal with the situation, such as the *Labour Relations Act*.
 - b) you believe that the person making the complaint has no reasonable basis to support a claim of discrimination, or that the complaint is in bad faith, or that a remedy has already been obtained by the complainant somewhere else;
 - c) the matter is outside the Commission's legal authority;
 - d) the person making the complaint waited longer than 6 months from the last incident of discrimination to file a complaint.
5. The Commission is neutral and does not take sides in the complaint. Commission staff will assist you with questions about the complaint procedure. However, if you require legal representation or advice, please contact a lawyer.

If You Have a Human Rights Complaint

1. If you have a human rights complaint, you may contact the general inquiries line at 1-800-387-9080 or in Toronto at (416) 326-9511 from Monday to Friday during office hours. A Commission staff person will tell you if your concerns are covered by the Ontario *Human Rights Code* (the "*Code*").
2. Commission staff will explain how the *Code* applies to your situation and how the complaint procedure works. Commission staff will work with you and the other party to resolve the concerns. The Commission also offers mediation services.
3. If you want the Commission to address your concerns, you should file a complaint within 6 months from the last incident of discrimination. This time limit is set out in section 34 of the *Code*.
4. "Filing a complaint" means that you have completed the Commission's complaint form and provided all requested details. You must have signed, dated and returned the form to the Commission.
5. When you file a complaint, Commission staff will work with you and the person/company you have filed against, to try and resolve the complaint through mediation.
6. The Commission may consider not to deal with a complaint under section 34 if:
 - a) another Ontario Law would be better suited to deal with the situation, such as the *Labour Relations Act*.

- b) you have no reasonable basis to support a claim of discrimination, or that you have made the complaint in bad faith, or that you have already obtained a remedy somewhere else;
 - c) the matter is outside the Commission's legal authority;
 - d) you have waited longer than 6 months from the last incident of discrimination to file a complaint.
7. The Commission is neutral and does not take sides in the complaint. Commission staff will assist you with questions about the complaint procedure. However, if you require legal advice, please contact a lawyer.

ENDNOTES

1. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.
2. *Ibid.*
3. The length of the post-delivery period covered by human rights protections is dependent on the circumstances of the mother: *Alberta Hospital Association v. Parcels* (1992), 17 C.H.R.R. D/167 (Alta. Q.B.); *Parcels v. Red Deer General & Auxiliary Hospital Nursing Home (Dist. No. 15)* (1991), 15 C.H.R.R. D/257 (Alta. Bd. of Inq.).
4. In a recent British Columbia Human Rights Tribunal decision, *Tilsley v. Subway Sandwiches* (2001) 39 C.H.R.R. D/102 (B.C.H.R.T.), a woman was fired for not showing up at work when she was in hospital because of a miscarriage. The Tribunal ruled that discrimination because of a miscarriage is one form of discrimination because of sex, and that the employer had a duty to accommodate the employee's pregnancy, which included her miscarriage, to the point of undue hardship.
5. "Pregnancy" is understood to extend beyond the date of delivery and post-delivery recovery, which is included in the definition of "pregnancy". The length of time is dependent on the circumstances of the mother. See further *Parcels*, *supra*, note 4.
6. *Supra*, note 1.
7. The following are examples of situations where Boards of Inquiry have found that a woman's right to be free from discrimination in employment because she is or may become pregnant has been violated:

Examples

. **Hiring:** A pregnant woman was offered a position as a clerk, but when the employer learned that she was pregnant, the offer was withdrawn. A Board of Inquiry found that she was denied employment because she was pregnant and this constituted discrimination. It also found that the woman was entitled to compensation for lost employment insurance benefits for which she would have qualified had she not been denied the opportunity to work. If the employer had hired her as agreed, she would have received wages. "But for the discrimination", her employer would have made the appropriate deductions and therefore she would have been entitled to employment insurance benefits. *McAlpine v. Canada (Canadian Forces)* (1988), 9 C.H.R.R. D/5190 (CHRT). See also *Jenner v. Point West Development Corp.* (1990), 21 C.H.R.R. D/336 (Ont. Bd. of Inq.). In the *Jenner* decision, the Board of Inquiry found that the question of the complainant being available to work was so clearly

linked with pregnancy and being a woman that the employer's decision not to hire her because she would not be available for the whole season amounts to deciding not to hire because she was pregnant.

. **Promotion:** The B.C. Human Rights Council (B.C.H.R.C.) found that the employer discriminated against a pregnant employee when the employer failed to consider her for a promotion. Instead, she was *demoted* immediately before she was scheduled to go on maternity leave. The Board of Inquiry reviewed evidence that the employee was not provided with a written evaluation of her performance and that less than a standard period of time was allowed for the employee to meet performance objectives. It concluded that these also constituted discrimination on the basis of pregnancy. See further *Magee v. Warner Lambert Canada* (1990), 12 C.H.R.R. D/208 (B.C.H.R.C.).

. **Termination:** The B.C. Human Rights Council found that a complainant was discriminated against when she was dismissed from her job as a cocktail waitress because she was pregnant. The employer had argued that it was not appropriate for a cocktail waitress to be pregnant. The Board of Inquiry did not accept the employer's argument that not being pregnant was a *bona fide* occupational requirement. In another situation, the Board of Inquiry found that the employer discriminated against the employee by refusing her a transfer from the employer's Saskatoon office to the Edmonton office and then terminating her, because she was pregnant. The employer did not want to replace the pregnant employee during her absence on maternity leave. *Infra*, note 8, *Stefanyshyn, Wormsbecker v. SuperValu and Westfair Foods Ltd.* (1983), 4 C.H.R.R. D/1443.

- **Breastfeeding:** A labour arbitrator found that a woman had been discriminated against when her employer did not accommodate her breastfeeding needs to the point of undue hardship. The grievor, who was on maternity leave, requested an extension of her leave in order to meet her breastfeeding needs. The employer was willing to have the grievor express or pump her milk during her scheduled breaks or lunch hour; however this was not practical for the grievor because of her particular breastfeeding history. The arbitrator ruled that the employer had failed to make a sufficient effort to seek solutions to accommodate the grievor, and that it had not accommodated her to the point of undue hardship. See *Carewest v. Health Sciences Association of Alberta (Degagne Grievance)* (8 January 2001) [2001] A.G.A.A. No. 2 (J.C. Moreau)

8. *Riggio v. Sheppard Coiffures Ltd.* (1988), 9 C.H.R.R. D/4520 (Ont. Bd. of Inq.); *Stefanyshyn v. 4 Seasons Management Ltd. (4 Seasons Racquet Club)* (1987), 8 C.H.R.R. (B.C.H.R.C).

9. *Mack v. Marivtsan* (1989) 10 C.H.R.R. D/5892 (Sask. Bd. of Inq.).

10. *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202.

11. *Wiens v. Inco Metals Co.* (1988), 9 C.H.R.R. D/4795 (Ont. Bd. of Inq.).
12. See *Carewest v. Health Sciences Association of Alberta*, supra, note 7.
13. *Julie Lord v. Haldimand-Norfolk Police Services Board* (June 14, 1995), unreported, Mikus, L. (Ont. Bd. of Inq.). See also, *Emrick Plastics v. Ontario* (Human Rights Commission) (1992), 16 C.H.R.R. 300 (Div. Ct.), *Hienke v. Brownell* (1991), 14 C.H.R.R. D/68/ (Ont. Bd. of Inq.); *Re Orangeville Police Services Board and Orangeville Police Assn* (1994) 40 L.A.C. (4th) 269.
14. In an unreported decision, *Tammy Turnbull v. 539821 Ontario Ltd. - Andre's Restaurant* (June 21, 1996) McKellar, M.A. (Ont. Bd. of Inq.), the Board of Inquiry decided that because the employer knew the employee was pregnant, the employer was responsible for accommodating her even if she did not specifically request accommodation.
15. *Ontario Cancer Treatment & Research Foundation v. Ontario (Human Rights Commission)* (1998), 34 C.C.E.L. (2d) 56, 108 O.A.C. 289 (Ont. Div. Ct.); upholding *Crook v. Ontario Cancer Treatment & Research Foundation (No.3)* (1996), 30 C.H.R.R. D/104 (Ont. Bd. Of Inquiry).
16. While pregnancy is an entirely normal condition, serious medical complications can arise involving some period of time during which the woman is unable to work. Pregnancy itself, cannot be classified as an illness; it is a unique condition which does not fit appropriately into any other category for compensating time lost from work.

After several years of debating whether or not pregnancy is “akin” to sickness or disability, the courts and provincial legislatures have acknowledged that the special needs associated with pregnancy do not correspond to any other health-related condition. This recognition was crucial to advancing the development of pregnancy-related benefits.
17. *Alberta Hospital Association v. Parcels* (1992), 17 C.H.R.R. D/167 (Alta. Q.B.).
18. See further *Stagg v. Intercontinental Packers Ltd.* (1992), 18 C.H.R.R. D/392 (Sask. Bd. of Inq.).
19. S.O. 2000, c. 41, in force September 4, 2001.
20. Regulation 321 to the *Employment Standards Act*, section 1.
21. O. Reg. 286/01 under the *Employment Standards Act 2000*, s. 10.
22. Subsections 51(1) and (2) of the *Employment Standards Act*.
23. Subsection 51(3) of the *Employment Standards Act*

24. See section 10 of the **Code** for the definition of "harassment".
25. *Peterson v. Anderson* (1992), 15 C.H.R.R. D/1 (Ont. Bd. of Inq.).
26. See further *Dudnik v. York Condominium Corp. No. 216* (1990), 12 C.H.R.R. D/325 (Ont. Bd. of Inq.), reversed in part (1991) (*sub nom. York Condominium Corp. No. 216 v. Dudnik* 79 D.L.R. (4th) 161 (Div. Ct.)).
27. *Zurich Insurance Co. v. Ontario (Human Rights Commission) (sum nom. Bates v. Zurich Insurance Co. of Canada)* (1985); 6 C.H.R.R. D/2948 (Ont. Bd. of Inq.); reversed 8 C.H.R.R. D/4069; (*sub nom. Ontario (Human Rights Commission) v. Zurich Insurance Co.*) 10 O.A.C. 220 (Div. Ct.), affirmed (1989), 70 O.R. (2d) 639, leave to appeal granted (1990), 73 O.R. (2d) x (note) (S.C.C.); affirmed [1992] 2 S.C.R. 321.
28. Bill 7 amended the **Labour Relations Act** (section 48 (12)(j)) to permit arbitrators
to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement.
29. See *Ontario Secondary School Teachers' Federation (District 34) v. Essex County Board of Education*, (April 4, 1996), unreported, Adams, J. (Ont. Div. Ct.).
30. Where the sick leave or vacation leave or pay is calculated based on the period of time that a person has been "in service" or "continuously employed", most arbitrators have held that employees who were off work because of maternity leave were entitled to include the period of time that they were not at work. If the collective agreement clearly excludes women who are on maternity leave from accruing sick leave or vacation leave/pay, the grievor should consider filing a human rights complaint with the Commission.
31. Section 52 of the **ESA** states that seniority and service lengths accrue during pregnancy and parental leave. Section 5 of the **ESA** states that no one can contract out of an employment standard. This includes collective agreements. Employees may therefore have protection under the **ESA** if their collective agreement says that seniority will not accrue while a woman is off on maternity leave.