



Maternity at Work



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Disclaimer

The information in *Maternity at Work* was written using selected sections of the Commonwealth's *Fair Work Act 2009* (the Act). The questions and answers are intended as a guide only to the parental leave provisions of the Act and NSW workplace health and safety standards. The information in this booklet was current at the time of printing. You can check whether there have been any changes to the law before relying on information in this booklet by contacting the Fair Work Infoline on 13 13 94.

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Australia's workplace relations system

On 1 January 2010, private sector NSW employers and employees previously covered by the NSW state award system moved into the national workplace relations system. All previously existing awards have been streamlined into around 120 modern awards. These modern awards set out an employee's terms and conditions of employment.

The National Employment Standards (NES) also apply. The NES are set out in the Commonwealth's *Fair Work Act 2009* (the Act) and they prescribe the details of the following 10 minimum standards of employment:

- Maximum weekly hours of work
- Requests for flexible working arrangements
- Parental leave and related entitlements
- Annual leave
- Personal / carer's leave and compassionate leave
- Community service leave
- Long service leave
- Public holidays
- Notice of termination and redundancy pay
- Provision of a Fair Work Information Statement

Together modern awards and the NES make up the minimum safety net for employees covered by the national workplace relations system.

Unpaid parental, adoption and special maternity leave

This booklet is about the **unpaid** parental leave provisions of the Commonwealth Government's *Fair Work Act 2009* (the Act) and is designed for new mothers, their partners and their employers. It contains important information about the procedures to follow to ensure you are able to take parental leave. Workplace health and safety issues about pregnancy and breastfeeding in the workplace are also included. Other types of parental leave are mentioned in the questions and answers.

The minimum entitlements to parental leave under the NES are stipulated in the Act and apply to **all** employees in Australia. This book will provide you with information about these minimum entitlements.

Other laws, awards, enterprise agreements and contracts of employment may provide additional entitlements to parental leave, including paid maternity leave, or may govern your entitlement to parental leave, for example if you are a NSW or Commonwealth public servant. It is important you ask your employer about workplace policies and arrangements relating to parental leave and also what options you may have upon returning to work.

Under the NES you are entitled to take unpaid parental leave for a period of up to twelve months, including 3 weeks

unpaid concurrent leave with your partner around the time of your child's birth or adoption. You also have the right to request a further twelve months of unpaid leave after the initial period. In addition, upon your return to work you can request flexible working hours until your child starts primary school.

Depending on how much unpaid parental leave you take, your partner may also be eligible to take a separate period of up to 12 months unpaid parental leave.

Your workplace may provide additional policies about parental leave or working on a part-time or flexible basis while you are pregnant or upon returning to work. It is important that you check with your employer or union about additional entitlements which may apply in your workplace.

There are 3 main types of parental leave in the Act. All provide for a minimum entitlement of unpaid leave. Parental leave can be:

- **Maternity leave**, in connection with a pregnancy or the birth of a child.
- **Paternity or partner leave**, for a worker whose partner is having a child.
- **Adoption leave**, for parents who have adopted a child under 16 years of age.

Other forms of parental leave include:

Special unpaid maternity leave is taken by a female employee to recover from a pregnancy related illness or a miscarriage or stillbirth within 28 weeks of the expected date of birth.

Unpaid pre-adoption leave of up to two days can be taken by adopting parents to prepare for necessary adoption interviews or exams, unless your employer requires that you take other leave available such as recreational leave or sick/carer's leave.

Concurrent unpaid leave of up to three weeks can be taken by your partner at the time of birth or adoption.

Employees eligible to take parental leave

Parental leave is available to both parents in a relationship, including de-facto and same-sex couples as well as single parents. All employees are entitled to parental leave after completing at least 12 months continuous service with an employer before the expected date of birth or adoption of the child. To be eligible for parental leave you will have or will be responsible for the care of your child.

If you are a casual worker, and have worked on a regular and systematic basis for a sequence of periods over at least 12 months with a reasonable expectation of ongoing employment, you will be entitled to parental leave. See question 9.

The Australian Government's Paid Parental Leave Schemes

Paid Parental Leave

The Commonwealth Government's Paid Parental Leave Scheme (PPL) began on 1 January 2011. It gives new working parents greater flexibility to make decisions about work and family responsibilities when they give birth or adopt a child. It is important to understand that PPL is not about creating a separate or additional right to take time off from work – it is about the right to be paid while you are on leave from work, taking care of your new child.

The scheme provides payments at the rate of the national minimum wage (currently \$606.40 per week before tax) for up to 18 weeks. To be eligible an employee must meet the PPL work test, income test, and residency requirements. The Family Assistance Office will determine a person's eligibility.

PPL payments are subject to tax and the Commonwealth Government does not require employers to make superannuation contributions on these payments. The Commonwealth Government also specifies that while an employee is on PPL, they do not accrue paid leave entitlements, nor does it count as service. However, leave taken at the same time as PPL that would ordinarily count as service, for example paid annual leave, will count as service.

Eligible employees can access PPL in addition to any existing employer

funded paid parental leave entitlement. An employee may choose when to receive PPL, but must receive payments within 12 months of the date of birth or date of placement for the adoption of a child. In most cases, PPL payments will be made through the employer.

New Dad and Partner Pay

The Australian Government has introduced legislation to expand the PPL scheme from 1 January 2013 with a new entitlement for working fathers and partners.

Subject to the passage of legislation, Dad and Partner Pay will be available to eligible fathers and partners caring for a child born or adopted from 1 January 2013.

Dad and Partner Pay will provide eligible working fathers or partners, including adopting parents and parents in same-sex couples, with two weeks of Dad and Partner Pay at the rate of the national minimum wage.

Dad and Partner Pay will help fathers or partners to take time off work around the birth or adoption of their child. Full-time, part-time, casual, seasonal, contract and self-employed workers may be eligible for Dad and Partner Pay.

More information on these schemes is available on the Family Assistance Office website at www.familyassist.gov.au Parents can also contact the Family Assistance Office on 13 61 50 between 8.00 am and 8.00 pm (local time) Monday to Friday.

Unpaid parental leave entitlements

1 Is parental leave paid leave?

Generally no. You will only receive paid parental leave if it is provided in your award, enterprise agreement, contract of employment, or company policy. If you are currently employed, or were recently

employed, you may be eligible for the Commonwealth Government's Paid Parental Leave. See the information box for details.

Are you a NSW Government Employee?

Paid maternity, adoption or other parent leave

Under the *Crown Employees (Public Service Conditions of Employment) Award 2009* (the Award), paid maternity, adoption or other parent leave is available to NSW public sector employees in Government Departments.

Eligible employees are entitled to up to 14 weeks paid maternity or adoption leave or, where maternity or adoption leave does not apply, to one week's paid "other parent" leave. ("Other parents" can also take up to 8 weeks unpaid leave at the time of the birth or adoption.)

Maternity, adoption and other parent leave can be taken at full or half pay. A staff member may also elect to take available recreation leave at half pay in conjunction with maternity, adoption or other parent leave.

NSW public sector employees not covered by the Award are covered by other industrial instruments. Employees can find the award that covers their employment by asking their Human Resources department or their union representative, if they are a union member.

Eligible NSW public sector employees can also access the Commonwealth Government PPL Scheme in addition to NSW public sector paid parental leave entitlements. More information on access to the Commonwealth Government PPL Scheme for NSW public sector employees is available in Department of Premier and Cabinet Circulars 2010-30 and 2010-34, (which can be found at <http://www.dpc.nsw.gov.au/announcements>) or from your Human Resources Department.

For more information about paid maternity, adoption or "other parent" leave, please contact your Human Resources department. Further details can be obtained from the *NSW Government Personnel Handbook* or from the Award at <http://www.dpc.nsw.gov.au>.

2 How long is unpaid parental leave?

You and your partner can each take up to 12 months parental leave. Generally, parental leave can only be taken by one parent at a time and in a single continuous period. There is an option to request to extend your parental leave to a maximum of 24 months, reduced by the amount of any leave taken by your partner. For example if you take 12 months parental leave then your partner may be eligible to take 12 months parental leave when your leave finishes. If you choose to extend your parental leave to the maximum of 24 months then your partner will be ineligible for take parental leave.

If your employer agrees you may attach other authorised leave, including paid leave such as annual leave, to parental leave. Your entitlement to parental leave will, however, be reduced by the amount of any other authorised leave you take. All unpaid parental leave will not extend beyond 24 months after the date of birth or day of placement of your child.

Your partner may be eligible for concurrent unpaid parental leave around the time of birth or placement of your child. Concurrent leave must be for a period of 3 weeks or less, starting from the date of birth or the day of placement. The concurrent period of leave must not end more than 3 weeks after the birth date or placement of your child unless your employer agrees to a different arrangement. In this case the leave could start earlier or end up to 3 weeks later. Concurrent leave is parental

leave and so comes out of your partner's entitlement to 12 months of parental leave.

It is important to check your entitlements with your employer or by calling the Fair Work Infoline on 13 13 94. See question 22.

3 When can I start unpaid parental leave?

If you are an expectant mother and plan to take your parental leave first you may start your leave up to six weeks before the expected date of birth. If your partner, who is not pregnant, takes leave first their leave must start on the date of birth or placement of your child in the case of adoption.

If you take your leave first then your partner's leave must start immediately after your leave finishes. Together you are entitled to no more than 24 months parental leave.

Adoption leave must start on the day of placement of your child.

4 Can I have a longer period of parental leave if I am having twins or triplets?

No. If however you give birth to two children in the same year, for example, in January and then in December, you are entitled to two periods of parental leave (see question 11).

5 Do I have to be married to take parental leave?

No, you can be single, living in a de facto relationship or married.

6 I am 16 years of age. My employer said I am too young to take parental leave.

There is no age qualification for parental leave.

7 Can my employer force me to take parental leave?

Generally no (but see below as well as question 36). If the baby is born on a weekend you may return to work on Monday if you wish (although you should consult with your doctor about any such decision). Also, it is possible that instead of unpaid parental leave you may take any other paid leave you are entitled to, for example, long service leave or annual leave.

If you are pregnant and want to work the six weeks before the birth you may be asked by your employer to provide a medical certificate indicating your fitness to remain in your present position. If your employer asks you to provide a medical certificate you must provide the medical certificate within seven days. Your employer can require you to start parental leave if you do not provide the medical certificate within the seven day period or if your doctor indicates that you will not be fit to work. This form of directed leave runs until the end of the pregnancy or until the planned leave was due to start and is deducted from your unpaid parental leave entitlement.

If your employer asks you to provide a medical certificate and you have difficulty booking an appointment with your doctor within the specified time frame, you should tell your employer in writing as soon as possible, and indicate

when you will be able to see your doctor to obtain the medical certificate. For more information contact your union or the Fair Work Infoline on 13 13 94.

Other eligibility questions

8 How does parental leave affect my employment conditions and benefits?

Parental leave does not break your continuity of service with your employer. However, time away from work on parental leave will not count towards long service leave or other entitlements such as paid holidays or sick leave, unless provided in your award or employment contract.

9 Can I take parental leave if I am employed on a casual basis?

If you are a casual employee and have worked for your employer on a regular and systematic basis for at least 12 months and you had a reasonable expectation of ongoing employment on this basis, had it not been for the birth or expected birth, then you will be entitled to parental leave (see next question). You may also be entitled to parental leave if you have worked for your employer on a casual basis for a sequence of periods totalling 12 months.

10 How long must I have worked for my employer before I can take parental leave?

As a full-time or part-time employee you must have worked for your employer continuously for 12 months before you are eligible for parental leave. If you are a regular casual employee you must have worked on a regular and systematic basis during this 12 month qualifying period and have a reasonable expectation of ongoing employment (see question 9). All other casuals are ineligible for parental leave.

Even if you are not entitled to parental leave your employer can still grant it to you (see question 12). You are also entitled to other protections – you cannot be dismissed because of your pregnancy (see questions 28 and 32) and you must be transferred to a safe job without loss of pay or status or, if there is no safe job, be given paid leave if there is a workplace risk while you are pregnant (see question 36).

If your work has included a combination of part-time, regular casual and full-time employment (with the same employer) during the 12 month qualifying period, you are generally entitled to parental leave. There are some exceptions. For instance, if an employer engages you temporarily through a job agency for four months, and then you resign from the agency to work permanently for that employer for eight months, you may not qualify for parental leave. This is because even though you have met the qualifying period, you have worked for two employers during the 12 months. If you experience such a situation please contact the Fair Work Infoline on 131 394 for clarification.

11 If I have already taken parental leave, must I work another 12 months before taking parental leave again?

No. You do not need to repeat the continuous service qualifying period to be eligible for another period of parental leave (see question 4).

12 I have not worked continuously for my employer for 12 months and I am pregnant. What type of leave am I entitled to take?

Your employer may choose to grant you parental leave in relation to the birth or adoption of your child even if you have not been employed for 12 months. You may also be able to negotiate with your employer that you take part or all of your holidays in advance or that you take a period of unpaid leave. Your union may be able to assist with the negotiations. For casual workers see question 9.

13 There are less than 100 employees at my workplace. Am I still entitled to parental leave?

Yes. If you have worked continuously for your employer for 12 months you are entitled to take parental leave regardless of how many employees are employed at your workplace. See the section on Employees eligible to take parental leave.

Protecting your family friendly working conditions

When you accept a job offer or sign a new employment contract or agreement you should be aware of whether it includes arrangements to help you balance your work and family responsibilities. You should also consider carefully the implications of any opportunity you may have to 'cash out' your accrued sick, personal/carer's or annual leave. ('Cashing out' is where you exchange the security of some of your paid sick leave or annual leave entitlement, for example, for money in the hand).

If you are offered an employment contract or agreement you should check it carefully for arrangements such as employer funded paid parental leave, penalty and overtime rates, shift loadings and flexible working hours. You should be aware that through such an agreement your employer may offer you, for example, a higher rate of pay, but in exchange you may lose extra conditions which help you balance work and family responsibilities. See Question 24.

If agreement cannot be reached between you and your employer about parental leave entitlements, working part-time during or after your pregnancy or any other issue you should contact your union or the Fair Work Infoline on 13 13 94 for advice.

How to apply for parental leave

In most workplaces, expectant parents will have discussed the pregnancy and birth with their employers well before the event. However, there are some formal requirements that must be met.

Providing your employer with the right documentation at the right time about your intention to take parental leave is important. It may also be crucial in determining your entitlement to parental leave. Under the *Fair Work Act 2009* all employers must provide a **Fair Work Information Statement** which contains information about minimum entitlements to parental leave and how to give notice about taking parental leave.

It is essential you take care to inform your employer about your intention to take parental leave in the ways described below.

14 How do I apply for parental leave?

There are documents and notices you must give your employer no later than the times specified to be entitled to take parental leave.

You **must** give written notice of your intention to take parental leave to your employer at least **10 weeks** before the date you wish to start parental leave. This notice must include the intended start and finish dates of the leave.

At least **4 weeks** before you plan to start parental leave you must, if practicable, confirm the intended start and finish dates of your leave as stated in your written notice or any changes to those dates.

Your employer may also require that you provide a medical certificate stating that in your doctor's opinion you are pregnant and the expected date of birth, If the leave is adoption related leave then your employer may request that you provide written evidence of the expected day of placement and that the child will be under 16 years of age at the time of the adoption.

Please see the section at the back of the booklet on Sample letters.

15 What happens if my child is born earlier than expected and I have not supplied my employer with the required documentation?

If your child is born prematurely or there is any other compelling reason why you cannot provide your employer the required notice or documentation within the specified times, then you must advise your employer as soon as possible. For advice on this matter please call the Fair Work Infoline on 13 13 94.

Starting and finishing parental leave

16 Can I start parental leave before the baby is due?

Yes. If you are an expectant mother you can start your parental leave up to six weeks before the due date of your child, as long as you qualify (see question 10) and you have given your employer all the required written notices (see question 14).

17 Can my employer insist I take parental leave either before or after the baby is born?

Generally no, but see questions 7 and 36 for clarification.

18 When I am about to finish parental leave, do I need to write to let my employer know I am coming back to work?

You should give at least four weeks notice of the date you intend to return to work. You will have given this notice when you first applied for parental leave so there is no need to give notice again if the date you originally proposed to return has not changed but it is a good idea to give your employer a courtesy phone call or email.

If your return to work date has changed then you must give your employer at least 4 weeks notice of your intention to return to work.

Varying the length of parental leave

19 Can I change my mind about the length of my parental leave?

Yes. If you plan to take or are taking 12 months parental leave you may request an extension of a further 12 months leave (up to 24 months in total) provided that your partner has not already taken that amount of leave. You must request

the extension in writing at least four weeks before the end of the initial period of leave.

Your employer must respond in writing within 21 days stating whether they grant or refuse your request. Employers may refuse the request only on reasonable business grounds and must include the reasons for the refusal in the written response.

The National Employment Standard does not define 'reasonable business grounds' for refusing a request, but relevant factors may include the:

- effect on the workplace (eg. the impact on finances, efficiency, productivity, customer service),
- inability to manage the workload among existing staff and
- inability to recruit a replacement employee.

You can also shorten your parental leave once it has started if your employer agrees. If you plan on returning to work earlier than planned you should advise your employer as soon as possible and contact the Fair Work Infoline on 13 13 94 for information on required notification periods for returning to work early.

Returning to work early from parental leave may have implications for your partner if he or she is planning on taking parental leave upon your return to work. If your early return to work means that your partner will take parental leave earlier than planned, you still must ensure that the official notification period of 4 weeks is provided to both you and your partner's employer. Please see question 14.

Miscarriage or if your baby dies

20 What happens if I have a miscarriage or my baby dies before I start parental leave?

If you have not started parental leave, the leave is automatically cancelled. However, you are entitled to unpaid special maternity leave or paid sick leave (if you have any available). In this instance you should give your employer notice that you are taking unpaid special maternity leave (which may be given after the leave has started). You must also advise your employer of the period of leave (or expected period of leave) and may be required to provide a medical certificate. See question 25.

21 What type of leave do I take if I have a miscarriage or my baby dies after I have started parental leave?

If you miscarry or your child is stillborn within 28 weeks of the expected date of birth you will be entitled to take special maternity leave. See questions 20 and 25.

Your spouse and paternity leave

22 Can my partner take time off work when I go to hospital to have the baby?

Yes. Your partner is entitled to take concurrent unpaid parental leave for a maximum of three weeks at the time of your child's birth or placement. Your partner may be entitled to additional unpaid simultaneous leave depending on the conditions of employment under his/her award or enterprise agreement. Your partner may also be able to take annual leave or personal/carer's leave (for this reason careful consideration should be given to any opportunity offered to 'cash out' accrued sick, personal/carer's or annual leave entitlements). For more information please contact the Fair Work Infoline on 13 13 94.

23 Can my partner take parental leave at the same time I take parental leave?

No. Except in the case of up to three weeks concurrent unpaid parental leave at the time of birth or placement of your child, you and your partner cannot take parental leave at the same time. See above.

Other forms of leave

24 Can I use my paid sick leave entitlements for prenatal check-ups with my doctor or for pre adoption interviews or examinations?

There is no law that says that you must use your sick leave for prenatal check-ups when you are not sick. If you need to attend a doctor's surgery for a prenatal check-up during work time, this is something you should negotiate with your employer. Some workplaces may have policies which allow you to use your paid sick leave for these appointments. Others may require you to work out other arrangements.

You should consider carefully the implications of any opportunity offered to 'cash out' accrued sick, personal/carer's or annual leave entitlements, as doing so may limit your options in situations like these.

Adoption leave

You are entitled to up to two days of unpaid pre-adoption leave to attend any interviews or examinations required for the adoption of a child.

This leave may be taken as a single continuous period of up to two days or in separate periods which are agreed upon by you and your employer. .

An employer may, however, require that you take another form of leave (e.g. paid annual leave) before accessing unpaid pre-adoption leave. You must give your employer notice when taking unpaid pre-adoption leave and the expected duration as soon as possible (which may be after the leave has started). If required, reasonable evidence must be given to your employer that the leave will be taken to attend an interview or examination related to the approval process for adoption.

25 What is special unpaid maternity leave?

Special unpaid maternity leave is available for the recovery from a pregnancy related illness or if your pregnancy ends for any reason other than the birth of a living child within 28 weeks of the expected due date. The employer may require evidence of these matters and your unfitness for work during the leave period as stated in a medical certificate. You may also use any accumulated sick leave instead of or in addition to special unpaid maternity leave (see question 20). Special unpaid maternity leave lasts for as long as stipulated by your doctor in a medical certificate.

You must give notice that you are taking unpaid special maternity leave, which may be given after the leave has started. You may be required to advise your employer of the period of leave (or expected period of leave) and your employer may also ask you to provide a medical certificate.

Your entitlement to unpaid parental leave is reduced by the amount of any unpaid special maternity leave you take while pregnant.

26 Can I combine my parental leave with other forms of leave?

Yes. When you notify your employer about taking parental leave you can ask to combine the unpaid period of parental leave with any long service and/or annual leave you are entitled to. The combined types of leave must not exceed the maximum period of 104 weeks or go beyond your child's second birthday. Your entitlement to parental leave will be reduced by the amount of any other form of leave taken while on parental leave.

27 Can I use my sick leave entitlement when I'm on parental leave?

You can only use paid sick leave while on parental leave if your employer agrees. You may be able to use paid sick leave instead of or in addition to special unpaid maternity leave (see question 25).

Employer responsibilities

Discrimination

Under the *Fair Work Act 2009* it is unlawful for an employer to discriminate against an employee, former employee or prospective employee because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. This protection applies to full time, part time and casual employees, probationary employees, apprentices and trainees and individuals employed for fixed periods of time or tasks. If you believe that you have been unlawfully discriminated against in your employment you can lodge a complaint with the Fair Work Ombudsman.

How do I make a complaint to the Fair Work Ombudsman?

Please telephone the Fair Work Infoline on 13 13 94 for assistance in making an unlawful workplace discrimination complaint. You are also able to lodge an unlawful workplace discrimination complaint online by visiting **www.fairwork.gov.au**, or the Fair Work Infoline can post a copy of the form to you.

What do I do if I've been sacked due to discriminatory grounds?

If you have been dismissed and you believe it is on the grounds of one of the attributes listed above – (e.g. race, sex, age, pregnancy, family or carer's responsibilities etc) you should make an application to Fair Work Australia in the first instance. There are time frames for lodging an application to Fair Work Australia of 14 days for unfair dismissal, and 60 days for unlawful termination. To find out more contact Fair Work Australia on **1300 799 675**.

Important Note:

There are a range of anti-discrimination laws and you may prefer to raise your concerns with the Australian Human Rights Commission or the NSW Anti-Discrimination Board which administers the *Anti-Discrimination Act 1977*.

More information is available on the internet at the National Anti-discrimination Information Gateway at **www.antidiscrimination.justice.nsw.gov.au** or you can call the Australian Human Rights Commission on **1300 369 711**.

If you are a member of a trade union or employee association, they may also be able to help you.

28 What obligations does my employer have?

Under the Act your employer is required to provide you with the **Fair Work Information Statement**. This document contains information about the NES, modern awards, agreement-making, the right to freedom of association, termination of employment, individual flexibility arrangements, rights of entry, transfer of business, and the respective roles of Fair Work Australia and the Fair Work Ombudsman. The Information Statement will also provide you with the details of your minimum entitlements to parental leave, flexible working arrangements and personal/carer's leave.

Your employer must not dismiss you because you are pregnant, have applied for or are on parental leave. Your employer must inform you of your entitlements to parental leave and how to access the leave, when you inform them of your pregnancy. Your employer must grant you the leave and provide you your same job when you return. Your employer cannot refuse to grant you parental leave if you qualify and have provided the required notice of your intent to take parental leave (see questions 14 & 31). Your employer may however, refuse to grant you an extension of parental leave based on the reasonable business grounds provided at question 19.

When you end your parental leave you are entitled to return to the position you held before you took leave. If your job no longer exists you are entitled to return to an available position for which you are qualified and nearest in status and salary to your former position. If there is no job available comparable to your former

position you may be entitled to redundancy pay. If you are a regular casual employee, this means you may be entitled to be employed in a comparable long term casual position on a regular basis.

If you make a written request for flexible working arrangements to assist you to care for your child after you have returned to work, your employer must give you a response within 21 days. Your employer may only refuse your request on reasonable business grounds and must give reasons for the refusal.

Your employer must keep all your written notices about parental leave including letters and doctor's certificates for seven years.

If your employer does not meet the requirements of the National Employment Standard you can lodge a formal complaint in writing to the Fair Work Ombudsman. Please contact the Fair Work Infoline on 13 13 94 for more information.

If you are having difficulty resolving problems about your entitlement to parental leave or other leave, or your right to return to your position after parental leave the Fair Work Ombudsman, NSW Anti-Discrimination Board, the Human Rights Commission or your union may be able to assist you (see the List of Contacts at the end of this booklet).

29 Can my employer require me to consult the company's doctor about my pregnancy?

No. Your employer cannot make you see the workplace doctor if you are seeing

reports that your employer can request are the medical certificate confirming the pregnancy and expected date of birth, a medical certificate for special maternity leave stating how much time you need off work (see question 25), a medical certificate stating your fitness to remain in your present position up until the birth (see question 7) and a report in relation to an unsafe workplace (see questions 35 & 36).

30 Can my employer hire someone to do my job while I'm on parental leave?

Yes. Your employer may employ someone to do your job if you are on parental leave or to do part of your job if you have reduced your hours of work before starting leave. Before the person starts work, your employer must tell you replacement that they are employed in your position temporarily.

31 I have been told I am not entitled to parental leave because I did not apply for it. Am I still entitled to it?

It is the law that you must provide 10 weeks notice and 4 weeks written notice before commencing parental leave. You are not entitled to take parental leave if you have not given your employer the correct amount of notice.

Under the National Employment Standard your employer must inform you of your parental leave entitlements and obligations. If your employer did not do this, and you have been employed continuously for 12 months, you should write to your employer immediately. You should provide all the information set out

at question 14 and say you did not apply earlier because your employer did not tell you how to apply for parental leave. For more information please contact the Fair Work Infoline on 13 13 94.

If you could not meet the notification requirements because of unforeseen circumstances, such as premature birth, you should advise your employer as soon as possible.

If you have already resigned or were dismissed because of your pregnancy you may be able to make a claim for unfair dismissal, unlawful termination, or discrimination (see the List of Contacts at the end of this booklet).

32 Can I be dismissed because I am pregnant or while I am on parental leave?

It is unlawful for your employer to dismiss you because you are pregnant or you have applied for or are on parental leave. If you are dismissed, seek advice and assistance from your union, the Fair Work Ombudsman, the NSW Anti-Discrimination Board, or the Human Rights and Equal Opportunity Commission (see the List of Contacts at the end of this booklet). If your employment was terminated because of pregnancy or parental leave your employer may be fined and prosecuted on the grounds of unfair dismissal or discrimination on the basis of sex or caring responsibilities. If you are able to prove an unfair dismissal claim, you may be able to get your job back, depending on the circumstances. Please contact the Fair Work Ombudsman on 13 13 94.

Workplace health and safety issues

A sensible approach

Persons conducting a business or undertaking (PCBUs) have a duty, so far as is 'reasonably practicable', to ensure the health and safety of workers engaged by the person.

Pregnancy may affect your response to certain workplace hazards. Your employer or PCBU must take account of these potential changes when assessing the risks of a task or work situation.

To ensure your health and that of your unborn or newborn child while you are pregnant or breastfeeding you should inform your employer of your pregnancy as soon as possible so that any potential risks may be managed or averted.

While you are pregnant it may be necessary to modify your working arrangements several times as your needs change. For example, you may be moved from a standing to a sitting job in the early stages of pregnancy, but you may need more varied tasks as it becomes uncomfortable for you to sit for long periods of time in the later stages of pregnancy. You might need some adjustments to your work area, different sized personal protective equipment, or lifting aids as manual handling becomes more difficult.

Your employer has a responsibility to, as far as reasonably practicable, ensure your workplace is safe for you throughout your pregnancy and while you are breastfeeding. It is against the law for your employer to dismiss you because you are pregnant or breastfeeding.

New work health and safety laws

New work health and safety (WHS) laws were introduced in NSW on 1 January 2012. These laws replaced the occupational health and safety laws in NSW.

The WHS laws are based on the model WHS laws developed by Safe Work Australia. Under these laws the term 'person conducting a business or undertaking' (PCBU) replaces 'employer' as the person who has the primary duty of care for health and safety. .

WorkCover NSW administers and provides advice on the *Work Health and Safety Act 2011*, *Work Health and Safety Regulation 2011* and the codes of practice. The work health and safety legislation is supported by a national compliance and enforcement policy.

For more information on how these new laws effect you and your workplace, please call WorkCover NSW on 13 10 50 or visit www.workcover.nsw.gov.au.

If required, your employer is obliged to transfer you to a safe job during your pregnancy and your pay and conditions cannot change. If no safe job is available your employer is required to grant you leave. To find out whether this leave must be paid, or whether it may be taken as paid sick leave or special unpaid maternity leave, you should contact the Fair Work Infoline on 13 13 94.

33 What physical risks or difficulties may arise at work while I am pregnant?

While pregnant:

- you may have an increased sensitivity to shocks and vibrations
- you may find lifting or excessive movement more difficult or potentially dangerous
- you may be less tolerant to heat and more likely to suffer from heat stress or even faint if working in hot environments
- you may experience tiredness or your blood pressure may increase in response to prolonged exposure to loud noise and also if you work shiftwork
- if you work shiftwork you may experience the nausea and vomiting associated with morning sickness while working very early and late hours
- if your work exposes you to ionising radiation (x-rays for example) this can be harmful to your unborn child.

34 What chemical hazards should I be aware of while pregnant or breastfeeding?

There are many chemical agents which may affect your or your unborn child's health while you are pregnant. Exposure to dangerous chemicals can result in miscarriage, diminished foetal growth, low birth weight or poor survival, prematurity, and maternal death related to pregnancy. It is your employer's responsibility to determine potential

risks and ensure precautions are taken so that recommended limits are adhered to where appropriate. If there is a known high risk of exposure to a dangerous chemical, you should be transferred to a safe job (see question 35).

Some of the more well-known, potentially dangerous chemicals include:

- mercury and mercury compounds used in dental supplies
- lead and lead derivatives found in some paints, petrol, old plumbing, construction materials, solders and wood preservatives
- pesticides, herbicides and fertilisers
- toxic aerosols, dyes and solvents found in some hairdressing, print and photographic products
- cigarette smoke
- paint thinners, cleaning solutions and degreasers
- carbon monoxide
- carcinogenic substances.

Healthcare workers and workers in contact with cancer patients must be aware that exposure to cytotoxic drugs and related wastes may be harmful to you and your unborn child.

People working with sick animals that are administered with cytotoxic drugs may be exposed to cytotoxic drugs and related wastes, which may be harmful to you and your unborn child.

35 What biological factors should I be aware of while pregnant or breastfeeding?

Your workplace must have systems to safeguard your health and safety at all times, regardless of whether or not you are pregnant. You should be aware however, that many biological agents can affect an unborn child if the mother is exposed to them during pregnancy.

Healthcare workers and workers in contact with children are more likely to be at risk from certain biological agents. Examples include hepatitis B, HIV (the AIDS virus), Cytomegalovirus (CMV)¹, herpes (cold sores), tuberculosis (TB), syphilis, chickenpox, typhoid and rubella (German measles). People working with animals and workers in food handling environments may also have an increased risk of exposure to agents such as chlamydiosis, listeriosis, and toxoplasmosis. Generally, the risk of infection is greatly reduced by observing appropriate work safety practices such as good hygiene, wearing gloves and other protective clothing, and appropriate waste disposal.

36 What can I do if I feel the workplace is unsafe during my pregnancy?

In the first instance you should discuss your concerns with your employer, union, or workplace health and safety representative or committee. The next step is to see your doctor for a medical certificate. Your employer has an obligation to assess the risks to you and your baby on the basis of the medical certificate. If the workplace is unsafe for you during your pregnancy your employer must consider:

- adjusting your job to make it safer (see question 37).
- varying your hours of work or working conditions to avoid any risks. You may, for instance, work part-time for a temporary period until the problem is overcome.
- transferring you to another job or work area. This temporary job must be as close as possible in status and pay to your present job (though you will still receive your usual pay).

If an appropriate safe job is not possible or practical you are entitled to take paid 'no safe job leave' for the risk period, and be paid at your base rate of pay for ordinary hours of work in the risk period. At no time should you feel that your job is in jeopardy because of a hazardous situation at the workplace.

¹ Cytomegalovirus (CMV) is a common viral infection. In healthy people, it causes a mild flu-like illness that passes harmlessly within a few days. In certain high risk groups, including pregnant women and organ transplant patients, CMV infection can be dangerous. CMV can cause hearing loss and intellectual disability in unborn babies.

Breastfeeding at work

37 Can I breastfeed at work?

Yes. There is no law that says you cannot breastfeed at work. Employers should consider the breastfeeding needs of mothers returning to work, such as the need for a quiet and private place to express milk, and a small refrigerator for storage. Supporting mothers to breastfeed at work is a simple way employers can encourage staff retention after return to work from parental leave.

If you choose to breastfeed at work, be aware of any risks your workplace may pose to your health or breast milk. If you believe there is a risk you should consult your doctor. If you need to be transferred to a safe job you should provide your employer with a medical certificate (see questions 34, 35 and 36).

If your employer does not address your concerns about workplace safety during your pregnancy or while you are breastfeeding, you should discuss your concerns with your union, or workplace health and safety representative or committee. If you are not satisfied, or if there is no health and safety committee or representative at your workplace, you may make a complaint to WorkCover NSW (see the List of Contacts at the end of this booklet). You may also be able to make a complaint to the Fair Work Ombudsman who may investigate whether your employer has met their obligations under the Act.

Company provides facility for nursing mothers

The Australian Manufacturing Workers Union negotiated an enterprise bargaining agreement with a commercial printing company in Victoria that included the first ever nursing mothers' provision. The company agreed to the provision because they wanted to retain valuable staff. The provision provides a facility for nursing mothers to feed their babies on the site. A room is provided for mothers plus two half-hour breaks during the day and no deduction in pay. (METAL vol 4, no.3, July 1998)

Today, this sort of clause is much more widespread. Businesses that want to retain valuable staff frequently negotiate enterprise bargaining agreements with a family-friendly provision for breastfeeding mothers.

A typical clause in the agreement will state that the business provides a facility for nursing mothers to feed their babies on the site, that a room is provided for mothers and two half-hour breaks during the day are available, with no deduction in pay.

Are you a NSW Government Employee?

Breastfeeding Policy in the NSW Public Sector

On 28 April 2010, the Industrial Relations Commission approved the application by the NSW Director of Public Employment to vary the *Crown Employees (Public Service Conditions of Employment) Award 2009* (the Award).

The variation includes the following provisions:

- A full time staff member or part time staff member working more than four hours a day is entitled to up to two paid breaks of up to 30 minutes each day for the purpose of breastfeeding or expressing milk.

- A part time staff member, who is working less than or equal to 4 hours on any one day is entitled to one paid lactation break of up to 30 minutes on that day.
- Flexible arrangements achieved by mutual agreement between staff members and their supervisors.

The Breastfeeding Policy seeks a flexible and consultative approach to the provision of breaks and facilities for breastfeeding mothers where both employees and supervisors have responsibilities. The Policy acknowledges that breastfeeding promotes the health and well being of mothers and babies.

For more information, please contact your Human Resources department or refer to Department of Premier and Cabinet Circular 2010-13 (which can be found at www.dpc.nsw.gov.au/announcements). Further details can be obtained from the NSW Government Personnel Handbook or from the Award.

The *Anti-Discrimination Act 1977* was amended by the New South Wales Parliament on 24 October 2007 to make it clear that discrimination against women on the grounds of breastfeeding is unlawful. Breastfeeding also encompasses the act of expressing milk. For more information visit the Anti-Discrimination Board website at www.lawlink.nsw.gov.au/adb.

The Commonwealth Government's *Sex Discrimination Act 1984* was amended in June 2011 to prohibit direct discrimination against male and female employees on the grounds of family responsibilities. The amended legislation also establishes breast feeding as a separate ground of discrimination. For more information on the *Sex Discrimination Act 1984* contact the Australian Human Rights Commission on 1300 369 711 or visit www.hreoc.gov.au/

Flexible working arrangements

If you are employed and are the primary carer of a child who is either under school age or under 18 and with a disability you may request a change in your working arrangements to accommodate your caring responsibilities. Examples of flexible working arrangements may include changes in:

- hours of work such as a reduction in hours worked (part time work) or changes to start / finish times,
- patterns of work such as working 'split-shifts' or job sharing, and/or
- location of work such as working from home or another location.

38 Who is eligible for flexible working arrangements?

The same eligibility criteria for parental leave apply to flexible working arrangements. If you are eligible for parental leave (see front section on Employees Eligible to take Parental Leave) then the right to request flexible working arrangements will apply to you if you are the primary carer of a child who is either under school age or under 18 and with a disability.

39 How do I request a flexible working arrangement?

You should make your request as soon as possible in writing setting out the details of the change or changes sought and reasons for the change. For more information of requesting a flexible working arrangement please call the Fair Work Infoline on 13 13 94.

40 What does my employer need to do once I have requested a flexible working arrangement?

Your employer must give you a written response to your request within 21 days, stating whether they grant or refuse the request.

Employers may refuse the request only on reasonable business grounds. If the employer refuses your request, the written response must include the reasons for the refusal.

The National Employment Standard does not require an employer to agree to a request for flexible working arrangements, but refusal must be made on reasonable business grounds. Both you and your employer are encouraged to discuss working arrangements and, where possible, reach an agreement that balances both your needs.

Factors that may be relevant in defining reasonable business grounds could include the:

- effect on the workplace and the employer's business of approving the request, including the financial impact of doing so and the impact on efficiency, productivity and customer service,
- inability to organise work among existing staff,
- inability to recruit a replacement employee, and/or
- practicality or otherwise of the arrangements that may need to be put in place to accommodate your request.

41 What happens if there is a dispute between myself and my employer regarding a flexible working arrangement?

If you and your employer have agreed in an employment contract, enterprise agreement or other written agreement to seek mediation in case of disagreement, the Act empowers Fair Work Australia to deal with the dispute. For more information please call Fair Work Australia on 1300 799 675.

Part-time work

42 I was working part-time before I went on parental leave. Can I return to full-time work when I return from parental leave?

If you changed to part-time hours because of the pregnancy you have the right to return to your full-time job after parental leave. If you are a regular casual full-time employee and reduced your hours before going on parental leave you similarly have the right to return to your full-time position. To avoid a dispute about whether or not you are returning to your full-time job, you should get a written agreement to the part-time or casual work arrangements, or put them in writing to your employer.

What is job-sharing?

Job-sharing is an arrangement where two or more people share the duties and responsibilities of a full-time job on a regular and ongoing part-time basis. Sometimes projects of the job are divided between the workers. Sometimes job-sharers perform the same tasks. Job-sharing arrangements can be worked under your award or enterprise agreement.

Job-sharing request recommended

A local council that refused an employee's request for a job-sharing arrangement was told that it had *breached the Anti-Discrimination Act 1977 (NSW)*. The Industrial Relations Commission of NSW said the council's objection was discriminatory because it did not take into account the fact that the 'overwhelming number of primary child carers in our society are women'. The Commission recommended the job-share request by the council employee be trialled for six months (IRC 6771 of 1997).

43 I was working on a less regular casual basis because of the pregnancy before I went on parental leave. Can I return to regular casual work when my parental leave is over?

If you changed to less regular casual work because of the pregnancy, you have the right, after parental leave, to return to the position held immediately before commencing that less regular casual work.

Refusing to allow part-time work may amount to discrimination

An employer's refusal to allow a woman to work part-time in connection with pregnancy or return from parental leave may be found to be unlawful discrimination.

The *Anti-Discrimination Act 1977* (NSW) makes it unlawful to discriminate against an employee or job applicant on the ground of caring responsibilities.

There are a number of cases where women have successfully asserted their right to work part-time during or after their pregnancy because of their caring responsibilities. In one case, an employee successfully argued that her employer's failure to allow her to return to work on a part-time basis amounted to indirect sex discrimination under the *Sex Discrimination Act 1984* (Cth). The Federal Magistrate found that refusing to allow the

employee to return on a part-time basis effectively 'made it impossible for [her] to return to work at all'². In another case it was found that an employee had been indirectly discriminated against on the basis of sex when her employer was unwilling to consider that she work part-time after her parental leave. The court found that the refusal to consider part-time hours was likely to disadvantage women because of their disproportionate childcare responsibilities³.

It is not just by refusing to consider part-time hours that employers may expose themselves to a discrimination claim. In 1998, another employee successfully claimed that although she had returned to work part-time after parental leave, she was subjected to conditions and performance evaluations which constituted an expectation or requirement to work full-time, which amounted to indirect discrimination. The employee was awarded substantial compensation⁴.

² *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209

³ *Escobar v Rainbow Printing Pty Ltd (No 2)* [2002] FMCA 122

⁴ *Hickie v Hunt & Hunt* [1998] HREOCA 8

Paid employment while on parental leave

44 Can I work for another employer while I am on parental leave?

In some circumstances, you may work for another employer while on unpaid parental leave. But you must ensure the work does not compromise your original employment relationship, for example you probably cannot work for your employer's competitor as this may be a breach of your contract of employment. You should consult your employer before starting temporary employment with another employer or call the Fair Work Infoline on 13 13 94.

45 My employer asked me to come back to work to help out. How does this affect my parental leave?

Your employer cannot ask you to go back to work while you are on parental leave unless you cease to have responsibility for the care of your child. In this case, your employer must give you at least 4 weeks notice prior to returning to work. If you recently gave birth and no longer care for your child your employer cannot request that you go back until 6 weeks after the birth of your child. For more information please call Fair Work Infoline on 13 13 94.

Workplace restructure

46 What happens if my employer sells the business while I am on parental leave?

You are entitled to the same conditions as other staff. If you agree to become employed by the new owner, your entitlements, including parental leave, are preserved. If you are retrenched you may be entitled to redundancy pay in addition to the payment of any accrued entitlements if it is provided in your award, enterprise agreement or contract of employment.

47 What are my entitlements if the workplace is restructured and colleagues are offered other jobs or redundancy packages while I'm on parental leave?

You must be treated no less favourably than other employees. Your employer should contact you about the restructure to explain the effect on your position. You should be offered the same opportunities for redundancy or to apply for new positions as any other employee. If your employer does not contact you, you should ring the employer to ask how the restructure affects you and if problems arise contact the Fair Work Ombudsman on 13 13 94.

Resigning from work

48 Can I resign from work while I am on parental leave?

Yes, but do not leave your resignation advice to the last minute. Check your award, agreement, employment contract or company policy for the notice period you are required to give your employer. Generally, if you are paid fortnightly you must give two weeks notice or if you are paid monthly you must give four weeks notice. If you are resigning for domestic or other pressing reasons, for example, to look after your baby, you may be entitled to long service leave on a pro rata basis. Conditions apply and you should contact your employer, your union or ring the Fair Work Infoline on 13 13 94. Your employer may be willing to grant you leave without pay as an alternative to resigning.

49 If I resign can I change my mind?

Generally, if you resign from work, you do not have the right to withdraw your resignation unless your employer agrees. You should be very sure that resignation is your best option before you take this step. You should seek immediate advice from your union or a legal advisor if your employer will not agree to your request to withdraw your resignation. (See 'unfair dismissal' under For Further Information at the end of this booklet.)

Sample letters

See question 14: How do I apply for parental leave?

If you plan to return to work early, you must write to your employer, see question 19.

The First Letter to your employer – 10 weeks before your baby is due, or the date you wish to start parental leave

This letter notifies your employer that you intend to take parental leave. It must be given to your employer at least 10 weeks before the date you wish to start parental leave. You may also be required to attach a medical certificate stating that you are pregnant and the expected due date. You can vary the letter to fit your particular circumstances. Make sure that you keep a copy of all letters to your employer.

Sign the letter

The Second Letter to your employer – 4 weeks before your baby is due, or the date you wish to start parental leave

This letter lets your employer know how much parental leave you intend to take. The letter must be given to your employer at least four weeks before you wish to start parental leave. You can change the period of leave you are seeking to suit your own circumstances. Remember, apart from a maximum of three weeks concurrent unpaid parental leave at the time of the birth or adoption of your child you and your partner cannot take leave at the same time (unless longer simultaneous leave is provided in your award or employment agreement).

SAMPLE LETTER 1

Write your name and address here

Write your employer's name and address here

Write the date

Dear *(insert employer's name)*

This letter is to notify you that I am pregnant and wish to take parental leave. I have attached a medical certificate confirming my pregnancy and the expected date of birth.

I will write again advising you of the date I would like to start parental leave and how much leave I would like to take.

I would appreciate it if you could provide me with information about workplace policies on parental leave, caring, and/or flexible working arrangements.

Yours faithfully

Sign the letter

SAMPLE LETTER 2

Write your name and address here

Write your employer's name and address here

Write the date

Dear *(insert employer's name)*

I would like to take *(insert length of leave)* weeks parental leave, starting on *(insert date here)* and returning to work on *(insert date here)*.

As part of my parental leave I will use *(eg. three weeks of annual leave)* starting on *(insert date here)* and finishing on *(insert date here)*.

My partner plans to take *(insert length of leave)* weeks concurrent unpaid parental leave once our child is born.

My partner will also take *(insert length of leave if appropriate)* weeks parental leave starting when I return to work on *(insert date here)*.

Yours faithfully,

Sign the letter

List of contacts

Department of Education, Employment and Workplace Relations (DEEWR)

General enquiries phone:
1300 363 079

Fair Work

Fair Work Infoline

Telephone **13 13 94**

Open: 8.00am – 6.00pm
local time, Monday to Friday.
<http://www.fairwork.gov.au>

Fair Work Ombudsman

Telephone **13 13 94**

www.fairwork.gov.au/
Live Chat – Online Service
via website

Fair Work Australia

Telephone 1300 799 675

<http://www.fwa.gov.au/>
Email: inquiries@fwa.gov.au

NSW Industrial Relations (NSW IR)

Telephone **131628**

For copies of this booklet or relevant brochures visit the publications pages of the following website:
www.industrialrelations.nsw.gov.au

NSW IR Aboriginal and Torres Strait Islander Workplace Services Unit

Telephone **1300 361 968**
(local call cost)

WorkCover New South Wales

Telephone **13 10 50**

(free call within NSW)

www.workcover.nsw.gov.au

Anti-Discrimination Board of NSW

Telephone **1800 670 812**

(free call outside Sydney)

www.lawlink.nsw.gov.au/adb

Sydney

Telephone **(02) 9268 5555**

TTY (02) 9268 5522

Wollongong

Telephone **(02) 4224 9960**

TTY (02) 4224 9967

Newcastle

Telephone **(02) 4926 4300**

TTY (02) 4929 1489

Unions NSW

Telephone: **(02) 9881 5999**

Email: mail@unionsnsw.org.au

<http://www.unionsnsw.org.au>

The Combined Community Legal Centres Group (NSW) Inc

There are 40 Community Legal Centres in NSW. Anyone needing legal advice or assistance who cannot afford the services of a private solicitor can contact a Community Legal Centre.

Suite 805, Level 8,
28 Foveaux Street,
Surry Hills NSW 2010

Telephone **(02) 9212 7333**

Fax: 02 9212 7332

Email: clcnsw@clc.net.au

<https://www.clcnsw.org.au/>

Australian Council of Trade Unions

Level 6, 365 Queen Street
Melbourne VIC 3000

Telephone **(03) 9664 7333**

or **1300 362 223**

(local call cost)

Fax (03) 9600 0050

Email help@actu.org.au

<http://www.actu.org.au>

Australian Human Rights Commission

Telephone: **(02) 9284 9600**

Complaints Infoline:

1300 656 419

General enquiries and

publications: **1300 369 711**

Fax: (02) 9284 9611

Australian Breastfeeding Association (ABA)

Telephone the Breastfeeding

Helpline on **1800 686 268**

www.breastfeeding.asn.au

Please note that the above information was correct at the time of printing.

For further information

Information on:

Contacts

Parental leave advice

- your employer
- your union
- Fair Work Infoline

Unfair dismissal

- your union
- Fair Work Ombudsman
- Fair Work Infoline
- contact agencies for discrimination (below)

Discrimination because of pregnancy or parental leave

- your union
- Anti-Discrimination Board of NSW
- Human Rights and Equal Opportunity Commission
- Fair Work Infoline
- your local community legal centre

Superannuation while on maternity leave

- your superannuation fund
- Superannuation Helpline

Unsafe workplace

- your union
- the Occupational Health and Safety Committee at your workplace
- WorkCover NSW

Union membership

If you are not a union member and would like to become one, contact Unions NSW to find out which union covers your work

'... it is a right not a privilege for women in Australia to work while pregnant.'

The rights to work ... are fundamental human rights enshrined within Australian law ...'

(Report of the National Pregnancy and Work Inquiry: Pregnant and Productive, Human Rights and Equal Opportunity Commission, 1999)

