

Maternity Protection

Foreword

This guide sets out in simple terms the main provisions of the Employment Ordinance (Cap. 57) on the part of maternity protection. It should be noted that the Ordinance itself remains the sole authority for the provisions of the law explained.

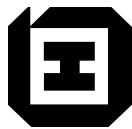
To know more about the Ordinance, please refer to 'A Concise Guide to the Employment Ordinance' published by the Labour Department or the full text of the Ordinance. For details, please browse the following webpages :

A Concise Guide to the Employment Ordinance:

<http://www.labour.gov.hk/eng/public/ConciseGuide.htm>

Full text of the Employment Ordinance:

<http://www.labour.gov.hk/eng/legislat/contentB2.htm>



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Labour Department

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Maternity Leave

A female employee employed under a continuous contract^{Note 1} immediately before the commencement of her maternity leave and having given notice of pregnancy and her intention to take maternity leave to the employer^{Note 2} is entitled to a continuous period of 10 weeks' maternity leave.

Apart from the above 10 weeks, if confinement occurs later than the expected date of confinement, the employee shall enjoy a further period equal to the number of days from the day after the expected date of confinement to the actual date of confinement. The employee may enjoy an additional period of leave for not more than four weeks on the grounds of illness or disability due to the pregnancy or confinement.

Payment for Maternity Leave

An employee is eligible for maternity leave pay for a period of 10 weeks if:

1. she has been employed under a continuous contract for not less than 40 weeks immediately before the commencement of scheduled maternity leave;
2. she has given notice of pregnancy and her intention to take maternity leave to her employer after the pregnancy has been confirmed. For example, the presentation of a medical certificate confirming her pregnancy to the employer^{Note 2&3}; and
3. she has produced a medical certificate specifying the expected date of confinement if so required by her employer^{Note 3}.

Maternity leave pay should be paid on the normal pay day of the employee.

The daily rate of maternity leave pay is a sum equivalent to four-fifths of the average daily wages earned by an employee in the 12-month period preceding the "first day of the maternity leave". If an employee is employed for less than 12 months, the calculation shall be based on the shorter period.

POINT-TO-NOTE:

In calculating the average daily wages, an employer has to exclude (i) the periods for which an employee is not paid her wages or full wages, including rest day, statutory holiday, annual leave, sickness day, maternity leave, sick leave due to work injuries or leave taken with the agreement of the employer, and any normal working day on which the employee is not provided by the employer with work; together with (ii) the sum paid to the employee for such periods^{Note 4}.

An employer who fails to grant maternity leave to a pregnant employee or fails to pay maternity leave pay to an eligible pregnant employee is liable to prosecution and, upon conviction, to a fine of \$50,000.

Medical Examination

When the employee's absence from work to attend medical examination in relation to her pregnancy, post confinement medical treatment or miscarriage is supported by an appropriate medical certificate, any such day on which she is absent shall be counted as a sickness day^{Note 3} and if she has accumulated sufficient number of paid sickness days, be paid sickness allowance at a daily rate equivalent to four-fifths of her average daily wages^{Note 5}.

Notice of Pregnancy

In order to enjoy maternity protection, a female employee has to serve notice of her pregnancy and of her intention to take maternity leave to her employer after her pregnancy has been confirmed by a medical certificate issued by a registered medical practitioner, registered Chinese medicine practitioner or registered midwife. The employee shall, if so required by her employer, produce a medical certificate specifying the expected date of confinement.

Employees may serve their notice of pregnancy to their employers with the sample form at Appendix I of this booklet and retain a photocopy of the notice for necessary reference in future.

Taking of Maternity Leave

- With the agreement of her employer, a pregnant employee may decide to commence her maternity leave from two to four weeks before the ‘expected date of confinement’;
- If the employee does not decide on the date, or fails to secure her employer’s agreement, the employee shall commence her maternity leave four weeks before the ‘expected date of confinement’;
- Maternity leave commences on the ‘date of confinement’ if it occurs before the scheduled maternity leave. In this case, the employee should give notice of the date of confinement and her intention to take 10 weeks’ maternity leave to her employer within seven days of her confinement.

POINT-TO-NOTE:

An employee should, as soon as possible, reach a mutual agreement with her employer on the commencement date of the maternity leave so that appropriate work arrangements during her absence can be made in advance.

Employment Protection

An employer is prohibited from dismissing a pregnant employee from the date on which she is confirmed pregnant by a medical certificate to the date on which she is due to return to work upon the expiry of her maternity leave if:

1. the employee has been employed under a continuous contract, and
2. she has served a notice of pregnancy to the employer.

If a pregnant employee is dismissed by her employer before she has served a notice of pregnancy, she may serve such notice immediately after being informed of her dismissal. Under such circumstances, her employer must withdraw the dismissal decision.

However, the employer is not prohibited from dismissing a pregnant employee under the following circumstances:

- the employee is summarily dismissed due to her serious misconduct; or
- where it has been expressly agreed that the employment is on probation, the employee is dismissed for reasons other than pregnancy during the probation period of not more than 12 weeks.

Except for the circumstances provided above, it is an offence for an employer to dismiss a pregnant employee. The employer is liable to prosecution and, upon conviction, to a fine of \$100,000. Besides, the employer is required to pay the following sums of money to the dismissed employee within 7 days after the day of termination:

1. wages in lieu of notice;
2. a further sum equivalent to one month's average wages as compensation^{Note 4}; and
3. 10 weeks' maternity leave pay if, but for the dismissal, she would have been entitled to such payment.

The employee may also claim remedies for employment protection against her employer if she is dismissed other than for a valid reason as specified in the Ordinance^{Note 6}.

POINT-TO-NOTE:

For employment protection, a female employee who has been employed under a continuous contract should get a medical certificate confirming her pregnancy^{Note 3}, serve a notice of pregnancy and of her intention to take maternity leave to her employer as soon as she has been certified pregnant.

Prohibition of Assignment of Heavy, Hazardous or Harmful Work

If a pregnant employee produces a medical certificate with an opinion as to her unfitness to handle heavy materials, work in places where gas injurious to pregnancy is generated, or do other work injurious to pregnancy, the employer may not allocate such work to the employee. If the employee is already performing such work, the employer shall within 14 days after receiving such request remove her from that work.

Regardless of whether the medical certificate produced by the employee was issued by a registered medical practitioner or registered Chinese medicine practitioner, an employer may, within 14 days after receiving such medical certificate, at the employer's own expense, arrange for the employee to attend another medical examination conducted by a registered medical practitioner or registered Chinese medicine practitioner named by the employer to obtain a second opinion as to the

employee's fitness to undertake the work at issue. If the opinion differs from that obtained by the employee, the employer may refer the employee's request to refrain from giving her the work at issue during her pregnancy period to the Commissioner for Labour for determination. The employer and employee shall comply with any determination made by the Commissioner for Labour.

The Employment Ordinance provides that if the earnings of the employee is affected as a result of her transfer from heavy, hazardous or harmful work, the maternity leave pay or the payment for termination of employment shall be calculated on the basis of the average daily or monthly (as appropriate) wages earned by the employee in the 12-month period preceding the transfer^{Note 4} .

An employer who without reasonable excuse fails to comply with the above requirements is liable to prosecution and, upon conviction, to a fine of \$50,000.

Information on "Work Injurious to Pregnancy", "Heavy Manual Work for Pregnant Employees" and "Other Consideration in Arranging the Work of Pregnant Employees" is provided at Appendices III, IV and V respectively for reference.

Enquiries

Enquiry Hotline: 2717 1771 (the hotline is handled by the 1823 Call Centre)

Homepage Address: <http://www.labour.gov.hk>

Enquiry in person to Offices of the Labour Relations Division of the Labour Department

Addresses: <http://www.labour.gov.hk/eng/tele/lr1.htm>

Note 1: An employee who has been employed continuously by the same employer for four weeks or more, with at least 18 hours worked in each week, is regarded as being employed under a continuous contract.

Note 2: If confinement occurs before a notice of pregnancy is given to the employer or before the scheduled maternity leave, the employee should give notice of the date of confinement and her intention to take 10 weeks' maternity leave to her employer within seven days of her confinement. The employee shall, if so required by the employer, produce a medical certificate specifying the date of confinement.

Note 3: Please refer to Appendix II 'Medical Certificates' in this booklet for the medical certificates concerned.

Note 4: Please refer to Appendix II 'A Guide to the Calculation of Relevant Statutory Entitlements on the Basis of the 12-Month Average Wages with Examples' of 'A Concise Guide to the Employment Ordinance' published by the Labour Department for details of calculation.

Note 5: Please refer to Chapter 5 'Sickness Allowance' of 'A Concise Guide to the Employment Ordinance' published by the Labour Department.

Note 6: Please refer to the part on 'Unreasonable and Unlawful Dismissal' in Chapter 9 'Employment Protection' of 'A Concise Guide to the Employment Ordinance' published by the Labour Department.

Pregnancy Notice

To: _____
(Name of Employer)

I, _____, hereby notify you according to section 12(4) of the Employment Ordinance (Cap.57) that I am certified pregnant by a *registered medical practitioner / registered Chinese medicine practitioner / registered midwife and I intend to take maternity leave.

Signature: _____

Date: _____

NOTE

1. Please give the original copy of this pregnancy notice to the employer and retain a photocopy for necessary reference in future.
2. With the agreement of the employer, a pregnant employee may decide to commence her maternity leave from 2 to 4 weeks before the expected date of confinement. The employee should, as soon as possible, reach a mutual agreement with the employer on the commencement date of the maternity leave so that appropriate work arrangements during her absence can be made in advance.

* Delete as appropriate.

Medical Certificates

Employees shall submit medical certificates issued by registered medical practitioners, registered Chinese medicine practitioners or registered midwives, if so required by employers where applicable, to be eligible for maternity protection. Please refer to the following table which sets out the details:

Certification pertaining to	Issued by a registered medical practitioner	Issued by a registered Chinese medicine practitioner	Issued by a registered midwife
Pregnancy and the expected date of confinement	✓	✓	✓
Actual date of confinement	✓	✗	✓
An additional period of not more than 4 weeks of maternity leave on ground of illness or disability due to pregnancy or confinement	✓	✓	✗
Absence from work to attend a medical examination in relation to pregnancy or post confinement medical treatment, or by reason of miscarriage	✓	✓	✗
Unfitness to handle heavy, hazardous or harmful work	✓	✓	✗

Work Injurious to Pregnancy

Exposure to certain agents at work may be harmful to pregnancy. Pregnant employees should avoid such exposure, particularly in the first trimester. Examples of these agents and the occupations which may give rise to such exposure are given below:-

<u>Agent</u>	<u>Occupations</u>
Metals (lead, mercury)	Lead smelting Car batteries manufacturing Use of fumigant
Gases (carbon monoxide)	Garage (automobile exhaust)
Solvents	Dry cleaning Electronic industry
Sterilising gases (ethylene oxide)	Health professions
Anaesthetic gases (halothane, nitrous oxide)	Health professions
Radiation	Radiography Gas mantle manufacturing
Heat	Glass manufacturing Iron foundries
Infectious agents (rubella virus, cytomegalovirus)	Health profession

Pregnant employees who are concerned about work exposures that may be harmful to pregnancy should seek advice from a medical practitioner. If, in the opinion of the medical practitioner, a pregnant employee is exposed to certain agents at work that are injurious to pregnancy, the employee should be transferred to another job for a period as advised by the attending medical practitioner.

Through modification to a pregnant employee's work, most women should be able to continue working until the last weeks of pregnancy if desired.

Heavy Manual Work for Pregnant Employees

It is generally recognised that pregnant women tend to experience fatigue more easily and are prone to non-specific backache. The women's bulk may also make certain task difficult or even dangerous.

In the case of pregnant domestic helpers who have an otherwise normal and uncomplicated pregnancy course, slight modifications in the work procedures would enable them to continue working until the last weeks of pregnancy. Such modifications may involve provision of a short resting time after lunch, shorter or flexible working hours or avoidance of long periods in a fixed posture and arduous work such as repetitive lifting of heavy objects and ladder-climbing.

Manual Handling

Women in the first five months of normal and uncomplicated pregnancy differ very little from those of non-pregnant women in terms of manual handling work. The following table can be used as a general guide for continuation of various levels of manual work during pregnancy. The table shows the state of pregnancy that healthy employees with normal uncomplicated pregnancies would be able to perform specific manual tasks without undue difficulty or risk to the pregnancy. Pregnant employees with health problems should seek advice from their medical practitioners for their fitness in particular manual handling tasks.

Guidelines for Continuation of Various Levels of Work During Pregnancy

(adopted from publication in the Journal of American Medical Association)

Job Function	Week of Gestation
Sitting with light tasks	
Prolonged (> 4 hours)	40
Intermittent	40
Standing	
Prolonged (> 4 hours)	24
Intermittent (≥30 minutes per hour)	32
(< 30 minutes per hour)	40

Stooping and bending below knee level	
Repetitive (\geq 10 times per hour)	20
Intermittent (between 2-9 times per hour)	28
(< 2 times per hour)	40
Climbing vertical ladders and poles	
Repetitive (\geq 4 times per 8-hour shift)	20
Intermittent (< 4 times per 8-hour shift)	28
Stairs	
Repetitive (\geq 4 times per 8-hour shift)	28
Intermittent (< 4 times per 8-hour shift)	40
Lifting	
Repetitive (> 23 kg)*	20
(between 11 - 22 kg)*	24
(< 11kg)	40
Intermittent (> 23 kg)*	30
(between 11 - 14 kg)	40

- * From the standing position, it is advisable not to lift load alone over the range of 16 - 20 kg. Mechanical assistance and/or team lifting arrangements should be provided to reduce the risk of injury associated with heavy weights.

Other Consideration in Arranging the Work of Pregnant Employees

Special consideration must be given to other physical hazards inherent in the job. These include working at heights (ladders, platforms, poles) and the operation of certain types of heavy machine where an accident could cause serious damage to the pregnant woman or foetus.

Beginning about mid-pregnancy, posture becomes modified to cope with increasing abdominal size. This has implications for:

- (a) balance - problems of working on slippery, wet surfaces;
- (b) comfort - problems of working in tightly fitting workspaces;
- (c) working procedure - dexterity, agility, coordination, speed of movement, reach may be impaired because of increasing abdominal size.

Seating should be comfortable and should allow for frequent changes in posture and getting to and from the workstation easily.

Particular stages of pregnancy are associated with an increased likelihood of symptoms such as dizziness and sickness, swollen ankles, backache and fatigue. Consideration on the part of the employer can help to minimise these or lessen their impact; conversely some forms of work or work organisation may exacerbate them.