

Chapter 6: Maternity Protection

Maternity Leave

A female employee employed under a continuous contract immediately before the commencement of her maternity leave and having given notice of pregnancy and her intention to take maternity leave to the employer is entitled to the following periods of leave:

- a continuous period of 10 weeks' maternity leave;
- if confinement occurs later than the expected date of confinement, a further period equal to the number of days from the day after the expected date of confinement to the actual date of confinement;
- an additional period of leave for not more than four weeks on the grounds of illness or disability due to the pregnancy or confinement.

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.
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- *NOTE: Confinement means the delivery of a child; miscarriage means the expulsion of the products of conception which are incapable of survival after being born before 28 weeks of pregnancy. If before 28 weeks of pregnancy an employee delivers a surviving child or the child prematurely dies after being born, it is not a case of miscarriage.*

Payment for Maternity Leave

An employee is eligible for maternity leave pay 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; and
3. she has produced a medical certificate specifying the expected date of confinement if so required by her employer.

Maternity leave should be paid for a period of 10 weeks and it 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.

NOTE: In calculating the average daily wages, an employer has to exclude (i) the periods for which an employee is not paid his 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. (see Appendix 1 for details)

Offences and Penalties

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. (see the part on Two Categories of Paid Sickness Days in Chapter 5 and the part on Medical Certificates in this Chapter).

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 or the notice of dismissal.

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.

Offences and Penalties

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

*see Appendix 1 for details of the calculation

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. (see the part on Eligibility and Remedies for Employment Protection in Chapter 10)

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.

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.

(see Appendix 1 for details of the calculation).

Offences and Penalties

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.

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 for 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	✓	x	✓
An additional period of not more than 4 weeks of maternity leave on ground of illness or disability due to pregnancy or confinement	✓	✓	x
Absence from work to attend a medical examination in relation to pregnancy or post confinement medical treatment, or by reason of miscarriage	✓	✓	x
Unfitness to handle heavy, hazardous or harmful work	✓	✓	x