

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.

For details of the Ordinance, please refer to ‘A Concise Guide to the Employment Ordinance’ published by this Department or the full text of the Ordinance at the following websites:

A Concise Guide to the Employment Ordinance:

www.labour.gov.hk/eng/public/ConciseGuide.htm

Full text of the Employment Ordinance:

www.labour.gov.hk/eng/legislat/contentB2.htm



Labour Department

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Maternity Leave

A female employee employed under a continuous contract¹ immediately before the commencement of her maternity leave and having given notice of pregnancy and her intention to take maternity leave to the employer² is entitled to a continuous period of 14³ weeks' maternity leave.

Apart from the above 14 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 14 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^{2&4}; and
3. she has produced a medical certificate specifying the expected date of confinement if so required by her employer⁴.

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.

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.

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 14 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.

³ Eligible employees whose confinement occurs before 11 December 2020 are entitled to a continuous period of 10 weeks' maternity leave.

⁴ Please refer to Appendix II 'Medical Certificates/ Certificates of Attendance' in this booklet for the medical certificates concerned.

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 periods⁵.

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, Medical Treatment and Miscarriage

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/ certificate of attendance⁶, any such day on which she is absent shall be counted as a sickness day 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 wages⁷.

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.

⁵ For the calculation method, please refer to Appendix 1 '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'.

⁶ Please refer to Appendix II 'Medical Certificates/ Certificates of Attendance' in this booklet for the medical certificates/ certificates of attendance concerned. Certificate of attendance is not applicable to a medical examination in relation to pregnancy conducted before 11 December 2020.

⁷ Please refer to Chapter 5 'Sickness Allowance' of 'A Concise Guide to the Employment Ordinance'.

Taking of Maternity Leave

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.

- 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 14 weeks' maternity leave to her employer within seven days of her confinement.

POINT-TO-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 24⁸ weeks of pregnancy. If before 24 weeks of pregnancy an employee delivers a surviving child or the child prematurely dies after being born, it is not a case of miscarriage. A female employee, whose child is incapable of survival after being born at or after 24 weeks of pregnancy, is entitled to maternity leave if other conditions are met.

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.

⁸ Before 11 December 2020, miscarriage means the expulsion of the products of conception which are incapable of survival after being born before 28 weeks of pregnancy.

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.

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 compensation⁹; and
3. 14 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 Ordinance¹⁰.

POINT-TO-NOTE:

For employment protection, a female employee who has been employed under a continuous contract should get a medical certificate confirming her pregnancy¹¹, serve a notice of pregnancy and of her intention to take maternity leave to her employer as soon as she has been certified pregnant.

⁹ For the calculation method, please refer to Appendix 1 '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'.

¹⁰ Please refer to Chapter 10 'Employment Protection' of 'A Concise Guide to the Employment Ordinance'.

¹¹ Please refer to Appendix II 'Medical Certificates/ Certificates of Attendance' in this booklet for the medical certificates concerned.

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 transfer¹².

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 Considerations in Work Arrangement of Pregnant Employees" is provided at Appendices III, IV and V respectively for reference.

¹² For the calculation method, please refer to Appendix 1 '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'.

Enquiries

Enquiry Hotline: 2717 1771 (the hotline is handled by “1823”)

Homepage Address: www.labour.gov.hk

Enquiry in person to Offices of the Labour Relations Division:
www.labour.gov.hk/eng/tele/lr1.htm

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/ Certificates of Attendance

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

| Certification pertaining to | Type of certificates | Issued by a registered medical practitioner | Issued by a registered Chinese medicine practitioner | Issued by a registered midwife | Issued by a registered nurse |
|---|---------------------------|---|--|--------------------------------|------------------------------|
| Pregnancy and the expected date of confinement | Medical Certificate | ✓ | ✓ | ✓ | ✗ |
| 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 | | ✓ | ✓ | ✗ | ✗ |
| Absence from work to attend a medical examination in relation to pregnancy | Certificate of attendance | ✓ | ✓ | ✓ | ✓ |

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 professions |
| Cancer treatment drugs | Health professions |

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 few 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 tasks 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 few weeks of pregnancy. Such modifications may involve provision of a short rest 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 specific manual tasks that healthy employees with normal uncomplicated pregnancies of different state would be able to perform 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 (≥ 10 times per hour) | 20 |
| Intermittent (between 2-9 times per hour) | 28 |
| (< 2 times per hour) | 40 |
| Climbing vertical ladders and poles | |
| Repetitive (≥ 4 times per 8-hour shift) | 20 |
| Intermittent (< 4 times per 8-hour shift) | 28 |
| Stairs | |
| Repetitive (≥ 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 |
| (< 11 kg) | 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 Considerations in Work Arrangement 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 fetus.

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. A considerate employer can help minimise or lessen these symptoms; while some forms of work or work arrangement may exacerbate them.