

Information on 'Pregnancy in the workplace'

The information is provided as a guide and does not replace legal advice on specific situations of pregnancy and potential pregnancy discrimination.

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1. ANU policies on pregnancy and potential pregnancy

The ANU Equal Opportunity Policy and ANU Prevention of Discrimination, Harassment and Bullying policy requires that employees must not be unlawfully discriminated against either directly or indirectly on the grounds of pregnancy or potential pregnancy. The Grievance resolution policy and procedures for staff outlines the process by which discrimination complaints can be made.

2. ANU Enterprise Agreement on maternity leave, parental leave and return

Clause 30 Parental leave and Schedule S4.4 Parental and adoption leave Enterprise Agreement explains the parental and maternity leave eligibility and entitlements and return to work processes.

3. What is pregnancy or potential pregnancy?

Although there is no definition in the *Sex Discrimination Act 1984* of 'pregnancy', the following is understood to include the 'actual period of pregnancy and any circumstances related to, or connected with, pregnancy'.¹ It refers to the time when a woman is carrying a foetus, as well as the physical characteristics of pregnancy, including increased body size and tiredness. It also includes a woman who is presumed to be pregnant.

'Potential pregnancy' refers to the capability of having children, where women express a desire to have children or when a woman is likely to or is perceived to be likely to become pregnant.²

4. What is pregnancy or potential pregnancy discrimination at work?

There are various State laws and the Federal law, *Sex Discrimination Act 1984* (SDA), which make pregnancy and potential pregnancy discrimination in employment unlawful. Other related laws on pregnancy are included within industrial relations laws, occupational health and safety laws, awards and agreements. Different states provide pregnancy as a relevant ground of discrimination, while others such as NSW don't include pregnancy as a specific ground, however it is included as a characteristic of women.

Direct discrimination on the grounds of pregnancy and potential pregnancy occurs when a woman is treated less favourably than others who are not pregnant or potentially pregnant when the circumstances are the same or not materially different. (s7 (1) SDA)³

¹ HREOC *Pregnancy Guidelines* Appendix A 2001 p.2

² From HREOC *Pregnancy Guidelines* - General Principles 2001 p. 2

³ Refer CCH 4.2.4

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Under the federal law it is unlawful to ask women for information about pregnancy or potential pregnancy in situations where discrimination on those grounds would be unlawful. For example, because it is unlawful to refuse to employ a woman because she is or may become pregnant, it is unlawful to ask a woman in a job interview whether she is pregnant or has plans for pregnancy. Requests for medical information about a woman's pregnancy or potential pregnancy may only be sought for legitimate reasons such as for occupational health and safety purposes, and must be reasonable.⁴ Advice should be sought from Human Resources.

'A classic case of discrimination on the ground of potential pregnancy was *Wardley v Ansett Transport Industries (Operations) Pty Ltd (1984)* EOC 92-002, where a woman was found to have been refused appointment as a trainee pilot by Ansett because of her child-bearing potential. The Victorian Board held that Ansett had discriminated against the complainant on the ground of her sex'.⁵

Indirect discrimination on the grounds of pregnancy and potential pregnancy occurs when there is a requirement, condition or practice that disadvantages pregnant or potentially pregnant women, and is not reasonable in the circumstances⁶.

Indirect discrimination in pregnancy and potential pregnancy is generally not claimed as frequently as direct discrimination, however it is important to note that it is the indirect discrimination issues which can provide indications of systemic barriers to be remedied. Reasonableness of the condition, requirement or practice requires objective assessment, with the onus generally on the employer to demonstrate that the action was reasonable in the circumstances.⁷

Proving indirect discrimination requires that pregnant or potentially pregnant employees be disadvantaged by the condition, requirement or practice, with examples provided including:

'A requirement that pregnant employees must comply with the same lifting requirements as other employees may amount to indirect discrimination if this is unreasonable in the circumstances. A practice of conducting regular office meetings early in the morning, which a pregnant employee is unable to attend because she suffers from morning sickness, may amount to indirect discrimination if it is reasonable to conduct the meetings at another time.'⁸

5. Questions and answers - Recruitment and selection

The following answers have been provided, and adapted, from the CCH 5-920 and HREOC's [Pregnancy Fact Sheet](#)

Can I refuse to employ a job applicant because she is pregnant?

Under the *Sex Discrimination Act*, if the best qualified applicant is a pregnant woman she should be selected for the job. Where the position is a temporary one requiring the completion of a project within a specified time, it may be reasonable for the employer to refuse to employ a pregnant applicant.

As stated in the CCH 9 'under the federal law it is unlawful to ask women for information about pregnancy or potential pregnancy in situations where discrimination on those grounds would be unlawful'. This means that since it is unlawful to refuse to employ a woman because she is or may become pregnant, it will be unlawful to ask a woman when applying for a position at AMP whether she is pregnant or has plans for pregnancy.

⁴ CCH *Aust & NZ Equal Opportunity* 5-820

⁵ *ibid*

⁶ HREOC *Pregnant and Productive: It's a right not a privilege to work while pregnant* Cl. 4.29

⁷ s7C *Sex Discrimination Act 1984* (Cth).

⁸ HREOC *Pregnant and Productive: It's a right not a privilege to work while pregnant* Cl 4.37 and 4.42

⁹ CCH 5-820 Introduction

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It may be reasonable for an employer to 'refuse to employ a pregnant applicant if she is unable to adequately perform the duties required for the position; where there may be OH&S issues in the workplace that cannot be resolved and if the position required the completion of a specific project and the applicant would be unable to meet the deadlines'¹⁰. This is unusual and advice should be sought from Human Resources to assess whether the specific actions in the circumstances are lawful.

Shouldn't women be required to disclose their pregnancy when applying for a job?

Under the *Sex Discrimination Act* women applicants cannot be required to disclose the fact of pregnancy. 11

6 Questions and answers Employment conditions

To what extent do I as an employer have to accommodate an employee's pregnancy?

'Employers should consider making all reasonable adjustments to the workplace to accommodate the normal effects of pregnancy. Employers need to discuss the issues with the pregnant employee to find solutions'¹².

How do I meet my obligations under OH&S and the pregnancy anti-discrimination laws?

Both laws must be dealt with at the same time. The obligation to provide a safe place of work for all employees applies equally to women who are pregnant. Each situation should be assessed individually and objectively. There may be duty of care responsibilities to cover the management of pregnant and potentially pregnant women, dependant on the type of work being undertaken. These can include: exposure to chemicals; identification and management of high risk physical tasks, such as heavy lifting, constant use of stairs or long periods of work on ladders; enabling regular access to toilet breaks; and enabling seating rather than standing, where relevant. 13 Seek advice from OH&S and Human Resources if required.

Can I ask for a doctor's report on the pregnant woman's fitness for work?

Yes, but in most cases this won't be necessary. If a medical report is required, it may be from a doctor nominated by the woman or a doctor of the employer's choice, or both.¹⁴ The Enterprise Agreement, Schedule s.4.4 Parental and adoption leave outlines when an expectant mother should provide a medical certificate.

Should I place any restrictions on the duties of pregnant women?

Unless there is an identified risk or the employee requests a transfer to a different position because of problems associated with her pregnancy, eg. a need to climb ladders, exposure to chemicals, no restrictions should be placed on the duties of a pregnant employee. If you have doubts as to the employee's ability to continue normal duties you should discuss this with her. 15

Can I transfer a pregnant member of staff to a different job?

ANU can transfer a pregnant staff member to a safe job if a staff member is pregnant, in accordance with the following:

- The VANUEA clauses 3.2.3, 7, 11.3, 36, 37 7 Schedule 4.4.6.
- The contract of employment.
- The University's implied duty at law to ensure a safe workplace.
- The employer's duties arising out of out statutory obligations.

¹⁰ *ibid*

¹¹ [Pregnancy Fact Sheet.](#)

¹² *ibid*

¹³ HREOC *Pregnancy Guidelines - Appendix C* 2001 p. 2-3

¹⁴ CCH Equal Opportunity 5-920 from HREOC's *Rights and Responsibilities of Pregnant Workers*

¹⁵ *ibid*

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Unless there is an identifiable risk or the employee requests a transfer, there is no requirement to transfer a pregnant employee.

It is important to recognise that in some cases a transfer could amount to 'detriment' within the meaning of the *Sex Discrimination Act*, particularly if a loss of pay or career opportunities is involved. For instance, pregnant women cannot be removed from customer contact jobs just because the employer believes they are unsightly or 'don't fit the company's image'. If the employee agrees to be moved to a less demanding job which is available, the transfer would not contravene the *Sex Discrimination Act*.¹⁶

7. Questions and answers - Leave for birth of child

What if a woman employee hasn't been employed for 12 months and isn't eligible for maternity leave, does ANU have to continue to employ her?

Women who have been employed for less than 12 months and require leave to give birth and look after the child come within the definition of pregnancy in the *Sex Discrimination Act*. As HROEC 17 advised: 'Pregnant employees who do not qualify for maternity leave are still protected by the federal *Sex Discrimination Act*. Employers and employees can negotiate a fair and reasonable period of leave for those who do not qualify for maternity leave. For example the employer could provide access to other forms of leave (annual leave or unpaid leave).'

8. Questions and answers - Termination

Can a pregnant employee be dismissed if her work is unsatisfactory?

Yes. However, the employer must apply the same rules to her as are applied to other employees. If, for example, she is dismissed for lack of punctuality and another employee has a worse attendance record, the dismissal may infringe the *Sex Discrimination Act* 18. Similarly raising issues of an employee's performance after the employee informs her manager of her pregnancy and request for leave has some difficulties, if these issues have not been raised previously. Each situation needs to be assessed objectively, and advice should be sought from Human Resources

What if my employee returns to work after maternity leave and I just can't give her the same old job back because of changes in the workplace?

An employee is generally entitled to return to the position she held prior to commencing leave or to a comparable position if her original job has ceased to exist. Employers should note that an employee may wish to return to work on a part-time basis. In some situations, an employer may be deemed to have discriminated if a reasonable request for part-time work is refused.¹⁹ Advice should be sought from Human Resources

What if my employee wants to return to work after the birth of her child and she had not been entitled to paid and unpaid maternity leave, do I have to give her the same job back?

As above, an employee is generally entitled to return to the position she held prior to commencing leave or to a comparable position if her original job has ceased to exist. The conciliated and litigated cases indicate that an employer would be expected to enable the employee to return to her substantive position. The *Sex Discrimination Act* continues to apply, even if the pregnant employee is not entitled to maternity leave as referred to in the Enterprise Agreement.

¹⁶ *ibid*

¹⁷ Pregnancy Fact Sheet.

¹⁸ *Op.cit.* CCH Equal Opportunity 5-920

¹⁹ HROEC Fact sheet

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What if my employee wants to return to work part-time after the birth of her child and she had not been entitled to paid and unpaid maternity leave, do I have to give her the same job back part-time?

As above, however the case law for women to return to work on a part-time basis indicates that an employer must seriously consider the request for part-time work. This includes assessing the type of work, whether part-time has been provided to other employees in similar roles, possibility of job share and/or employing other part-time employees. Reference should be made to the *Sex Discrimination Act*, family responsibilities, and the *Discrimination Act (ACT)* as the employee would be requesting part-time employment on the grounds of her family/carers' responsibilities.

9. References

NSW Pregnancy conciliations [Conciliation cases handled by the Board](#)
Anti-Discrimination Commission Queensland [Pregnancy - Case Studies](#)
CCH Aust & NZ Equal Opportunity
[HREOC Federal Discrimination Law 2005 'Chapter 4: The Sex Discrimination Act](#)
[HREOC Harsh realities](#)
[HREOC Pregnant and Productive: It's a right not a privilege to work while pregnant 1999 at .](#)
[HREOC Pregnancy Guidelines 2001](#)
[HREOC Pregnancy Fact Sheet](#)
Thomson's Discrimination Alert at www.discrimalert.com.au
Sex Discrimination Act 1984
Discrimination Act 1991

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