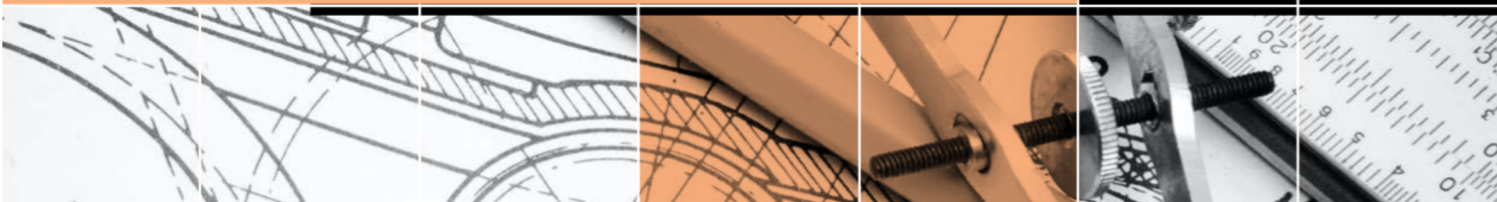


PREGNANCY DISCRIMINATION

– a form of systemic bias



Having a child brings with it both joy and change. One thing that a parent or prospective parent doesn't generally want changed is the status and salary attached to their job. The Fair Work Act 2009 ("the Act") contains a number of protections designed to cover parents of pre-school aged children. This article takes you through the protections provided.

A. Paid Parental Leave (Paid Parental Leave Act 2010 (Cth)) and Unpaid Parental Leave (s70 of the Act):

Primary carers of a newborn may claim up to 18 weeks of paid leave at the national minimum wage. This is a government scheme that can be supplemented by an employer-funded parental leave scheme (by amount and duration). Whether you can claim under an employer's scheme will depend on any relevant enterprise agreement or contract, but both government and employer schemes can be claimed simultaneously.

Unpaid parental leave is available to employees who have at least 12 months of continuous service with the employer (which will include casuals if employment was on a regular and systematic basis). An eligible employee can take up to 12 months' unpaid leave (which may be altered if two parents of the relationship are eligible - each parent can take 12 months' unpaid leave but, other than a period of 8 weeks, the leave cannot be concurrent with another parent taking unpaid leave).

The courts will ensure that an employee's right to take maternity leave will be protected. In *Sagona v Piccoli Investments* for example, the employee Ms. Sagona gave notice to her employers of her pregnancy and of her intention to take time off. Her employers responded negatively, suggesting that time off would affect their own retirement plans, her working hours and her ability to generate income for the business, as it would not be a "good look" for a pregnant person to run photo shoots. Shortly after announcing her pregnancy, Ms. Sagona was presented with a contract requiring her to meet sales targets - a failure to deliver would affect her pay and her ongoing employment. Ms. Sagona refused to sign the contract and subsequently resigned her employment. The court found that the employers had in fact taken adverse action by injuring Ms. Sagona in her employment for reasons that at least included her pregnancy. The court was not receptive to the argument by the employer that it had acted in this way due to safety concerns for Ms. Sagona, suggesting that if the employer had legitimate concerns then it would have sought a medical certificate as to Ms. Sagona's ability to perform her duties (which they had the power to do per s73 and s81 of the Act). Federal Circuit Court Judge Jones said it was a "fundamental entitlement" of an employee to take parental leave to care for a child and not be prejudiced or disadvantaged for exercising that right in the workplace.

"I am satisfied that prevailing community standards demand recognition of the fundamental entitlement of an employee to take (parental) leave to care for their child or children, safe in the knowledge that their employment and future will not be prejudiced because they have exercised their right to take (parental) leave, including to request flexible working arrangements," Judge Jones said.

B. Return to work guarantee (s84):

After an employee has ended their period of parental leave they are entitled to return to the position they held before they commence parental leave. If that position no longer exists (such as due to structural changes) the employee is entitled to be returned to an available position that best suits the employee's qualifications and is closest to the employee's pre-parental leave salary and status.