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Human Rights Commission
Commission ontarienne des
droits de la personne

Policy on preventing discrimination because of

Pregnancy and breastfeeding

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Summary

The Ontario *Human Rights Code* (the *Code*) is a law that provides for equal rights and opportunities and recognizes the dignity and worth of every person in Ontario. The *Code* makes it against the law to discriminate against someone or to harass them because of sex, which includes pregnancy and breastfeeding, in employment, housing, goods, services and facilities, contracts and membership in unions, trade or professional associations.

Child-bearing benefits society as a whole. Thus, women should not be disadvantaged because they are or have been pregnant. It is illegal to discriminate because a woman is pregnant, was pregnant or is trying to get pregnant. It is also illegal to discriminate because a woman has had an abortion, miscarriage, stillbirth, is going through fertility treatments, experiences complications or has specific needs related to pregnancy, or has chosen to breastfeed or not breastfeed her child.

Discrimination based on pregnancy often intersects with discrimination based on other grounds. For example, there are unique and persistent stereotypes about pregnant women who are young, receiving social assistance, from racialized or Aboriginal communities and/or parenting on their own. People who are trans may have unique experiences of discrimination if they are pregnant or breastfeeding.

Employers, landlords, service providers and others must make the environment free from discrimination. Women who are pregnant have the right to be free from harassing comments and behaviour by co-workers, co-tenants, landlords, management, service providers, service users and others.

Organizations should design employment, housing and services inclusively from the outset so pregnant and breastfeeding women can take part equally.

Women have the right to accommodation for pregnancy-related needs. This means that an employer, landlord or service provider may have to change its policies, rules, requirements or practices to allow pregnant women equal opportunities. At work, depending on a woman's needs, this could include more washroom breaks, a flexible schedule or changes in job duties during pregnancy. After a woman's baby is born, an employer should accommodate any needs women have for breastfeeding or expressing milk for her child.

During an employment interview, it is illegal for an employer to ask if a woman is pregnant, has a family, or plans to have a family. It is also illegal to refuse to hire, fire, demote or lay a woman off because she is, was or may become pregnant. Women have an equal right to opportunities and promotions at work, even if they are taking a maternity leave.

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There are other relevant pregnancy-related legislation and protections in Ontario. For example, pregnant women have rights and entitlements to pregnancy and parental leave under Ontario's *Employment Standards Act* and employment insurance benefits under the federal *Employment Insurance Act*. A woman has the same right to the health and disability benefits given to other employees if she is unable to work for health reasons related to the pregnancy and childbirth.

In housing, it is illegal for a landlord to discriminate by denying housing to a pregnant woman or a woman with a child. For example, a landlord cannot refuse to accept an application from a pregnant woman because they say the apartment is "not childproof." Statements that a building is a "quiet building," an "adult lifestyle" building, "not soundproof" or "geared to young professionals," when combined with a refusal to rent to a pregnant woman, may show that discriminatory attitudes related to pregnancy played a role in the refusal.

The *Code* prohibits discrimination against women who are pregnant and breastfeeding in services, goods and facilities. This includes educational institutions, hospitals and health services, insurance providers,¹ public places like malls and parks, public transit, and stores and restaurants. This means that women who are pregnant, or who bring their babies to a restaurant or a theatre, cannot be denied service or access unless there is a legitimate reason for doing so.

This also means that women have the right to breastfeed undisturbed. Women should not be told that they cannot breastfeed their children because they are in a public area. Women should not be asked to "cover up," or move to another area that is more "discreet."

Employers, landlords and service providers must address any discrimination or harassment related to pregnancy that may arise within their organization. If organizations become aware of discrimination or harassment, either through a complaint or other means, they must respond appropriately. Organizations who fail to take steps to address discrimination or harassment or a complaint of discrimination may be found legally liable under the *Code*.

¹ The *Code* allows for an exception for certain types of insurance policies, under section 22. For more information, see the Services, goods and facilities section of this policy (section 9).

1. Introduction

The Ontario *Human Rights Code* states that it is public policy in Ontario to recognize the inherent dignity and worth of every person and to provide for equal rights and opportunities without discrimination. The *Code* aims to create a climate of understanding and mutual respect for the dignity and worth of each person, so that each person feels a part of the community and feels able to contribute to the community.

The *Code* prohibits discrimination because of sex. This includes the right to equal treatment without discrimination because a woman² is, was, or may become pregnant or because she has had a baby.³

Having children benefits society as a whole. Thus, women should not be disadvantaged because they are or have been pregnant. The Supreme Court of Canada has recognized that the financial and social burdens and cost associated with having children should not rest entirely on women, stating, “That those who bear children and benefit society as a whole should not be economically or socially disadvantaged seems to bespeak the obvious.”⁴

Canada is a party to several international agreements and conventions that contain provisions on the pre-natal and post-natal periods. Article 10(2) of the *International Covenant on Economic, Social and Cultural Rights* provides that

² The case law recognizes the unique discrimination that women may face due to their capacity to become pregnant. This policy therefore focuses on the experience of women and uses the personal pronouns “she” and “her” throughout. However, trans or gender diverse people who may not identify as “female,” but whose sex assigned at birth was “female,” may have reproductive systems that permit pregnancy and breastfeeding. Also, some trans or gender diverse people whose sex assigned at birth was “male” can breastfeed. See Rainbow Health Ontario, *Reproductive Options for Trans People: Fact Sheet* online: Rainbow Health Ontario www.rainbowhealthontario.ca/admin/contentEngine/contentDocuments/Reproductive_Options_for_Trans_People.pdf. “Trans” is an umbrella term that describes people with diverse gender identities and gender expressions that do not conform to stereotypical ideas about what it means to be a girl/woman or boy/man in society. “Trans” can mean transcending beyond, existing between, or crossing over the gender spectrum. It includes but is not limited to people who identify as transgender, transsexual, cross dressers or gender non-conforming (gender variant/gender queer/gender diverse). “Gender diverse” means people who do not follow gender stereotypes based on the sex they were assigned at birth. They may identify and express themselves as “feminine men” or “masculine women” or as androgynous, outside of the categories “boy/man” and “girl/woman.” They may or may not identify as trans. For a discussion on how discrimination based on gender identity and gender expression intersect with sex and pregnancy, see section 3.3 Pregnancy, Gender Identity and Gender Expression. See also Ontario Human Rights Commission (OHRC) *Policy on preventing discrimination because of gender identity and gender expression* (2014), online: OHRC www.ohrc.on.ca/en/policy-preventing-discrimination-because-gender-identity-and-gender-expression.

³ For a detailed analysis of court and tribunal decisions relating to discrimination based on pregnancy and breastfeeding since 2008, see OHRC *Human rights obligations related to pregnancy and breastfeeding: Case law review* (2014), online: OHRC www.ohrc.on.ca/en/human-rights-obligations-related-pregnancy-and-breastfeeding-case-law-review.

⁴ *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at 1243.

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special protection should be given to mothers during a reasonable period before and after childbirth. During this time, working mothers should be accorded paid leave or leave with adequate social security benefits.⁵ The *Convention on the Elimination of All Forms of Discrimination Against Women* states that women shall have appropriate services in connection with pregnancy and breastfeeding, including maternity leave and protections against loss of employment.⁶ These covenants recognize the social significance of motherhood, and require States Parties, such as Canada, to ensure a proper understanding of maternity as a social function and to take steps to make sure women are not prevented from reaching their full potential, particularly in the workplace, because of caregiving responsibilities towards their children.

While there have been significant advances towards gender equality, discrimination against women because of pregnancy unfortunately continues to be a common practice in society, particularly in employment. The Human Rights Tribunal of Ontario (HRTO) has remarked:

In this day and age it is still surprising to hear that a pregnant employee, who has medical documentation supporting that she can work the duration of her pregnancy, is being subjected to unilaterally imposed changes to her employment in the form of reduced shifts and hours, and is also terminated for no other reason but for her pregnancy.⁷

Many women who are or who may become pregnant fear that their employers will respond negatively to their pregnancy. This often results in women experiencing considerable stress. In many cases their fears are borne out and they lose their jobs. As well, women who are breastfeeding often face negative attitudes from employers, or when using services or facilities, and may face difficulty getting appropriate accommodation that will allow them to breastfeed their children. Pregnant women may be disadvantaged in their search for housing because landlords do not want children in their buildings, believing that children are noisy, destructive and disruptive. “Adult-only” housing continues to be widespread even though it is not allowed under the *Code*.

This policy sets out the OHRC’s position on discrimination based on pregnancy and breastfeeding at the time of publication. It deals primarily with issues that fall within the jurisdiction of the Ontario *Code*, and which can form the subject matter of a human rights claim. At the same time, the policy interprets the protections of the *Code* in a broad and purposive way, consistent with the principle that the quasi-constitutional status of the *Code* requires that it be given a liberal interpretation that best ensures its anti-discriminatory goals are met.

⁵ 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 03 September 1981, accession by Canada 19 May 1976).

⁶ 18 December 1979, 1249 U.N.T.S. 13, Can. T.S. 1982 No. 31 (entered into force 03 September 1981, accession by Canada 09 January 1982).

⁷ *Bickell v. The Country Grill* (No.4), 2011 HRTO 1333 (CanLII) at para. 40 and again in *Graham v. 3022366 Canada Inc.*, 2011 HRTO 1470 (CanLII) at paras. 49-50.

OHRC policies contribute to creating a culture of human rights in Ontario. This policy can help the public understand the *Code* protections against discrimination and harassment because of pregnancy and breastfeeding. It is also designed to help individuals, employers, organizations, providers of services and housing, and policy-makers to learn their responsibilities and the actions they need to take to make sure they comply with the *Code*.

The analysis and examples used in the policy are based on the OHRC's research, international standards, human rights claims, and tribunal and court decisions. For more information on the purpose of OHRC's policies, see Appendix A.

2. Code protections for pregnancy and breastfeeding

The Supreme Court of Canada has recognized that pregnancy cannot be separated from sex. It stated, "Discrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant."⁸ Section 10(2) of the *Code* states that, "The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant."

"Pregnancy" includes the process of trying to become pregnant and pregnancy from conception up to the period following childbirth. It includes the post-delivery period and breastfeeding.⁹ It also includes discrimination against a woman because she is of childbearing age and may become pregnant.¹⁰ The term "pregnancy" takes into account all the special needs and circumstances of a pregnant woman and recognizes that the experiences of women will differ.

Discrimination because of pregnancy and breastfeeding includes discrimination because a woman:

- Is trying to get pregnant, was pregnant or states she is intending to have a child
- Will be taking a maternity leave¹¹

⁸ *Brooks*, *supra* note 4 at 1242.

⁹ The length of the post-delivery period covered by human rights protections depends on the circumstances of the mother: *Alberta Hospital Association v. Parcels* (1992), 17 C.H.R.R. D/167 (Alta. Q.B.); *Parcels v. Red Deer General & Auxiliary Hospital Nursing Home (Dist. No. 15)* (1991), 15 C.H.R.R. D/257 (Alta. Bd. of Inq.).

¹⁰ In *Wiens v. Inco Metals Co.* (1988), 9 C.H.R.R. D/4795 (Ont. Bd. Inq.), the employer refused to employ women of childbearing age in an area of its plant where there was a risk of accidental emissions of nickel carbonyl gas, which could harm a fetus. The Board of Inquiry found that this policy was discriminatory; it restricted opportunities for all women who had the potential to become pregnant, and a fetus could be adequately protected in other ways.

¹¹ In *Charbonneau v. Atelier Salon & Spa*, 2010 HRTO 1736 (CanLII) at para. 12, the HRTO noted, "Maternity leaves flow so directly from pregnancy and giving birth that treating a woman differently because she plans to take a maternity leave amounts to discrimination because of sex."

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- Has an abortion or experiences complications related to an abortion¹²
- Has a miscarriage (or stillbirth)¹³ or experiences complications related to miscarriage (or stillbirth)¹⁴
- Experiences complications related to pregnancy¹⁵ or childbirth
- Lacks energy due to pregnancy¹⁶
- For reasons related to her appearance while pregnant such as looking “too big,” “fat” or being unable to wear a form-fitting uniform.¹⁷
- Is recovering from childbirth¹⁸
- Is receiving fertility treatments
- Is breastfeeding.

¹² *Chohan v. Dr. Gary W. Lunn Inc.*, 2009 BCHRT 448 (CanLII).

¹³ In a British Columbia Human Rights Tribunal decision, *Tilsley v. Subway Sandwiches* (2001), 39 C.H.R.R. D/102 (B.C.H.R.T.), a woman was fired for not showing up for work when she was in hospital because of a miscarriage. The Tribunal ruled that discrimination because of a miscarriage is one form of discrimination because of sex, and that the employer had a duty to accommodate her pregnancy, which included her miscarriage, to the point of undue hardship.

¹⁴ *Osvald v. Videocomm Technologies Inc. (No. 1)*, 2010 HRTO 770 (CanLII); *Ford v. Adriatic Bakery*, 2010 HRTO 296 (CanLII). In *Ford*, the HRTO rejected the employer’s argument that a woman who was fired after she had a miscarriage could not have experienced discrimination based on pregnancy because she was no longer pregnant when her employment was terminated. The HRTO agreed with the OHRC’s 2008 *Policy on discrimination because of pregnancy and breastfeeding (Policy)* and confirmed that discrimination or harassment related to pregnancy includes discrimination or harassment related to the complications of pregnancy, including the end of the pregnancy.

¹⁵ *Ford, ibid.* The HRTO has not required a woman to provide medical evidence proving that physical problems that coincide with pregnancy are caused by the pregnancy; see *Purres v. London Athletic Club (South) Inc.*, 2012 HRTO 1758 (CanLII) at para. 4. This is consistent with the OHRC’s statement in its 2008 *Policy* that: “Pregnant women should not be required to provide documentation of changes that are normal and natural to any pregnancy, such as the need for more frequent washroom breaks, or a reduction in the ability to stand for lengthy periods of time in the later stages of pregnancy, or the need to attend regular medical appointments.”

¹⁶ *Gilmar v. Alexis Nakota Sioux Nation Board of Education*, 2009 CHRT 34 (CanLII).

¹⁷ In *Peart v. Distinct HealthCare Services Inc.*, 2013 HRTO 305 (CanLII), the HRTO found that the employer had concerns with how the applicant was dressing during her pregnancy and offered to buy her maternity clothes. As well, a manager remarked that the applicant was “looking big” in the context of suggesting that she start her maternity leave early. Therefore, the HRTO found that looking pregnant, and her pregnancy clothing, were factors in the decision to terminate the applicant’s employment. In *Shinozaki v. Hotlomi Spa*, 2013 HRTO 1027 (CanLII), the employer made several highly offensive comments about the applicant’s appearance and physical attractiveness during her pregnancy. The employer’s stereotypical ideas about pregnant women led to a reduction in the applicant’s hours and number of clients and ultimately to the loss of her job. See also *McKenna v. Local Heroes Stittsville*, 2013 HRTO 1117 (CanLII) where a woman’s shifts were cut after expressing concern about wearing a new form-fitting uniform due to her visible pregnancy. The HRTO found that the respondents wanted to re-brand the sports bar by emphasizing the sexual attractiveness of its staff, and they saw the applicant’s visible pregnancy as inconsistent with their re-branding efforts.

¹⁸ “Pregnancy” is understood to extend beyond the date of delivery and post-delivery recovery, which is included in the definition of “pregnancy.” The length of time depends on the mother’s circumstances. See further *Parcels, supra* note 9.

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As noted above, pregnancy includes the post-natal period, which includes breastfeeding. Breastfeeding is a natural part of child-rearing, and so is integrally related to the ground of sex, as well as to family status. Many studies have shown the benefits of breastfeeding for mothers, children and their communities, in terms of physical and emotional health and development.¹⁹ Women should not be disadvantaged in services, housing or employment because they have chosen to breastfeed their children. Nor should they be harassed or subjected to negative treatment because they have chosen not to breastfeed their children. When this policy refers to discrimination based on pregnancy, it includes discrimination based on breastfeeding.

Breastfeeding includes pumping or expressing milk, as well as nursing directly from the breast. Women may choose to breastfeed their children for varying lengths of time, and should not be exposed to negative comments or treatment because, for example, they continue to breastfeed their toddlers.²⁰

Sometimes women are discouraged by others from breastfeeding in public places because of concerns that it is indecent. Breastfeeding is really a health issue, and not one of public decency. Women should have the choice to feed their babies in the way they feel is most dignified, comfortable and healthy.

¹⁹ See for example, Bernardo L. Horta, *et al.*, *Evidence of the long-term effects of breastfeeding: Systematic reviews and meta-analyses* (2007) online: World Health Organization whqlibdoc.who.int/publications/2007/9789241595230_eng.pdf; *Maternal, newborn, child and adolescent health: Breastfeeding* online: World Health Organization www.who.int/maternal_child_adolescent/topics/child/nutrition/breastfeeding/en/ (retrieved June 12, 2014).

²⁰ Note that the World Health Organization (WHO) recommends that infants be exclusively breastfed for the first six months of their lives, and continue breastfeeding together with receiving complementary foods until two years of age, or beyond. For more information, see World Health Organization, “Breastfeeding” online: WHO www.who.int/topics/breastfeeding/en (retrieved May 1, 2014). The full text of the *Innocenti Declaration on the Promotion, Protection and Support of Breastfeeding*, adopted by participants at the WHO/UNICEF policymakers’ meeting on “*Breastfeeding in the 1990s: A Global Initiative*,” can be located at www.unicef.org/programme/breastfeeding/innocenti.htm.

3. Pregnancy and other grounds of discrimination under the Code

3.1. Pregnancy and intersecting Code grounds

A woman's experience of discrimination based on pregnancy may differ based on other aspects of her identity. There are unique and persistent negative stereotypes about pregnant women who are parenting on their own, or who are young, have a disability, are receiving social assistance, are racialized²¹ or Aboriginal, or are lesbian or bisexual. For example, young mothers, especially when they are parenting on their own, may be stereotyped as irresponsible and lacking parenting skills, and may face discrimination in housing. Similarly, some women experience negative attitudes if they are pregnant or have had a child "out of wedlock."²² This could be discrimination based on sex, family status and marital status.

As well, some pregnant women may have unique needs and experience specific barriers related to other aspects of their identities. For example, there may be a lack of appropriate and accessible services and supports for pregnant women who have disabilities.

Mothers who are young, parenting on their own, have a disability,²³ or are racialized or Aboriginal are disproportionately poor,²⁴ and therefore especially vulnerable to the effects of discrimination.²⁵

²¹ Race is a social construct. The *Report of the Commission on Systemic Racism in the Ontario Justice System* defined racialization as "the process by which societies construct races as real, different and unequal in ways that matter to economic, political and social life." Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Justice System* (Toronto: Queen's Printer for Ontario, 1995) (Co-Chairs: D. Cole & M. Gittens) at 40-41. For more information, see OHRC, *Policy and guidelines on racism and racial discrimination* (2005), online: OHRC www.ohrc.on.ca/en/policy-and-guidelines-racism-and-racial-discrimination.

²² Discrimination may also occur when an employer, housing provider or service provider disapproves of a woman's personal circumstances or her relationship with the father of the child. In *Ballentine v. Willoughby* (No. 5), 2009 BCHRT 33 (CanLII), the British Columbia Human Rights Tribunal (BCHRT) found that a woman experienced discrimination based on pregnancy when her employment was terminated in part because the employer was upset with the relationship that led to the pregnancy and was concerned about its impact in the workplace. In *Johnston v. Poloskey* (2008), CHRR Doc. 08-079, 2008 BCHRT 55, where the BCHRT found that a woman had been discriminated against because of pregnancy, the Tribunal found that one of the reasons that the employer (a husband and wife) decided not to continue the woman's employment was because they disapproved of her being pregnant and unmarried, even though they knew and were friendly with the man who was her long-term common-law companion and the father of her child.

²³ Women can also be protected from discrimination based on sex and disability if they experience adverse treatment that is related to pregnancy complications or a disability arising from pregnancy. See *Purres*, *supra* note 15.

²⁴ For example, see Amber Gazso & Ingrid Waldron, "Fleshing out the Racial Undertones of Poverty for Canadian Women and their Families: Re-envisioning a Critical Integrative Approach" (2009) 34(1) *Atlantis* 132; May Luong, "Life after Teenage Motherhood" (May 2008) no. 75-001-X

3.2. Pregnancy and family status

Human rights protections against discrimination based on pregnancy are related closely to those based on family status. The *Code* defines family status as “the status of being in a parent and child relationship.”²⁶ This ground extends protection to persons who are providing care within a parent-child “type” of relationship, including both eldercare and care for young children.²⁷ Situations may arise where discrimination based on pregnancy overlaps with discrimination based on family status. For example, a new mother in the immediate post-natal period will be covered by the grounds of both pregnancy and family status.

Pregnancy discrimination and family status discrimination are often based on the same stereotypes and negative attitudes, such as some employers’ perception that mothers are less capable, committed and competent than other employees, or some landlords’ negative attitudes towards children. Employers or housing providers sometimes discriminate based on pregnancy to avoid dealing with a woman’s family status-related needs at a later date.

Many women who are pregnant also already have children; they may therefore experience discrimination based on pregnancy and family status at the same time.²⁸

Men may also experience discrimination based on family status because of their relationship with women who are pregnant, or because they have accommodation needs relating to caring for a newborn.²⁹

Perspectives online: Statistics Canada www.statcan.gc.ca/pub/75-001-x/2008105/pdf/10577-eng.pdf; The Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities reported that in 2008, “Female-headed lone-parent families were particularly at risk of low income and had a low-income rate of 20.9%, compared to 7.0% among male-headed lone-parent families... The same year, 36% of all children living in low-income households, approximately 218,000 children, lived in female-headed lone-parent families.” See Report of the Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities, *Federal Poverty Reduction Plan: Working in Partnership Towards Reducing Poverty in Canada* (2010) at 22 (Chair: Candice Hoepfner) online: Parliament of Canada www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4770921&Language=E&Mode=1&Parl=40&Ses=3&File=24; Marika Morris & Tahira Gonsalves, *Women and Poverty – Third Edition*, Canadian Research Institute for the Advancement of Women, online: Canadian Research Institute for the Advancement of Women <http://criaw-icref.ca/WomenAndPoverty> (retrieved April 10, 2014).

²⁵ The HRTO has recognized some of these particular vulnerabilities when deciding on remedies. In *Maciel v. Fashion Coiffures Ltd.* (No. 3) (2009), CHRR Doc. 09-2373, 2009 HRTO 1804 (CanLII), the HRTO noted the applicant’s vulnerability as a young person. In both *Maciel* and *Graham*, *supra* note 7, the HRTO considered the effects on the claimants as single parents.

²⁶ Ontario *Human Rights Code*, R.S.O. 1990, c. H-19, s. 10(1).

²⁷ See further, OHRC, *Policy and guidelines on discrimination because of family status* (2007), online: OHRC www.ohrc.on.ca/en/policy-and-guidelines-discrimination-because-family-status.

²⁸ See *Brown v. PML and Wightman (No. 4)*, 2010 BCHRT 93 (CanLII).

²⁹ In *McDonald v. Mid-Huron Roofing*, 2009 HRTO 1306 (CanLII), the HRTO found that a man experienced discrimination based on family status when he was fired from his job due to absences related to his wife’s serious pregnancy-related complications, and because he had to take his premature baby to a medical appointment.

3.3. Pregnancy, gender identity and gender expression

A person's gender identity and gender expression are protected by the *Code*.³⁰ This policy also applies to people who are trans or gender diverse and experience discrimination based on pregnancy and breastfeeding. Trans or gender diverse people who are pregnant or nursing may be vulnerable to unwanted attention, disrespectful treatment, or inappropriate conduct or comments from others because they do not conform to gender norms. Negative perceptions persist that children may be harmed by a trans parent.³¹

In employment, some trans men³² whose lived gender identity³³ is male may have to disclose that they are trans because they need to ask for a pregnancy accommodation, which may make them vulnerable to discrimination. Some trans people report that their specific lived experiences with gender were invisible to some health care workers providing fertility or pregnancy support.³⁴

³⁰ "Gender identity" refers to each person's internal and individual experience of gender. It is a person's sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex. "Gender expression" refers to how a person publicly presents or expresses their gender. This can include behaviour and outward appearance such as dress, hair, make-up, body language and voice. A person's chosen name and pronoun are also common ways people express their gender. Others perceive a person's gender through these attributes. For more information, see the OHRC's *Policy on preventing discrimination based on gender identity and gender expression*, *supra* note 2.

³¹ "[T]he notion that a child will be harmed by a trans parent lingers in child custody decision-making, in family planning policy and practice, and in public opinion, and is experienced by trans parents as discrimination..." Jake Pyne, *Transforming Family: Trans Parents and their Struggles, Strategies and Strengths* (2012), online: LGBT Parenting Connection www.lgbtqparentingconnection.ca/resources.cfm?mode=3&resourceID=444bca3c-ba19-213b-d94e-e941220871c1&subjectID=59, at 8.

³² A person whose sex assigned at birth is "female" and identifies as a man may identify as a trans man (female-to-male FTM).

³³ A person's "lived gender identity" refers to the gender a person internally feels ("gender identity" along the gender spectrum) and publicly expresses ("gender expression") in their daily life including at work, while shopping or accessing other services, in their housing environment or in the broader community.

³⁴ Pyne, *supra* note 31 at 5, 22 and 25.

3.4. Pregnancy and domestic abuse

Women's experience with pregnancy can intersect with experiences of gender-based violence. There is research indicating that pregnant women are at greater risk of domestic violence, and that violence may increase during pregnancy.³⁵

Women who are facing violence in the home can end up being disciplined at work, or even losing their jobs because of rigid absenteeism policies. Landlords that discriminate against lone mothers with children can place women who are attempting to leave abusive relationships at serious risk. They may end up returning to an abusive relationship because they have literally nowhere else to go.³⁶

4. Forms of discrimination based on pregnancy and breastfeeding

The *Code* provides that every person has the right to be treated equally without discrimination because of pregnancy in the social areas of employment; housing accommodation; services, goods and facilities; contracts; and membership in unions, trade and professional associations. The purpose of human rights laws is to prevent the violation of human dignity by removing barriers and making sure that every person has equal opportunity to live his or her own life without being hindered by discrimination.

A woman experiences discrimination in a social area when she experiences negative treatment or impact, intentional or not, based on her pregnancy. Discrimination includes any distinction, including any exclusion, restriction or preference based on pregnancy, that impairs the recognition of human rights and fundamental freedoms.³⁷

³⁵ See Public Health Agency of Canada, *Woman Abuse – Overview Paper* (2009) online: Public Health Agency of Canada www.phac-aspc.gc.ca/ncfv-cnivf/publications/femviof-eng.php (retrieved February 3, 2014); Muriel McQueen Fergusson Centre for Family Violence Research, *Family Violence and Pregnancy, Fact Sheets* (2004) Series 11/16 Pregnancy, online: <http://fvps.ca/womanabuseresearch/factsheet11.pdf>.; While Canadian data on physical abuse during pregnancy is limited, the 1993 Violence Against Women Survey found that 21% of women experiencing abuse were assaulted during pregnancy. In 40% of these cases, the abuse started during pregnancy. See Statistics Canada, *Measuring Violence against Women, Statistical Trends 2006* (2006), online: Statistics Canada www.statcan.gc.ca/pub/85-570-x/85-570-x2006001-eng.pdf.

³⁶ These issues were raised during the OHRC's 2005 public consultations on discrimination based on family status. See OHRC, *The Cost of Caring: Report on the Consultation on Discrimination on the Basis of Family Status* (2006) online: OHRC www.ohrc.on.ca/en/cost-caring-report-consultation-discrimination-basis-family-status at 10.

³⁷ The Supreme Court of Canada has described discrimination in the context of equality claims under s. 15 of the Canadian *Charter of Rights and Freedoms* as a distinction based on a prohibited ground that has the "effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society," *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 174.

To establish *prima facie* discrimination (discrimination “on its face”) under the *Code*, a claimant must show that:

1. They have a characteristic protected under the *Code* (e.g. pregnancy)
2. They experienced adverse treatment or impact within a social area (i.e. with respect to a service, employment, housing, etc.), and
3. The protected characteristic was a factor in the adverse treatment or impact.³⁸

The most important issue to determine is whether pregnancy was a *factor* in the negative treatment or impact. Even if pregnancy or being of child-bearing age is only one of the factors in a decision to restrict a woman’s equal access to employment, housing or services, *prima facie* discrimination will be found.³⁹

Once *prima facie* discrimination is established, the burden then shifts to the organization or person responsible to either provide a credible non-discriminatory explanation, or justify the conduct or practice using one of the defences available under the *Code* (also see sections 5 and 6, Reasonable and *bona fide* requirements and the Duty to accommodate for more information).

4.1. Direct, indirect and subtle discrimination

Discrimination can take many forms. It may be direct and overt, where an individual or organization deliberately treats a woman differently because she is, was or may become pregnant. This type of discrimination usually arises from negative attitudes and biases, and is a common form of discrimination based on pregnancy. For example, a service provider may ask a breastfeeding mother to either stop breastfeeding or leave, because it does not allow breastfeeding on the premises, or an employer may dismiss a pregnant employee because of stereotypes that pregnant women cannot do their jobs.

If a woman claims she was treated negatively because of pregnancy and there is reason to believe that the organization or person may not have known she was pregnant, the woman may have to show that the organization or person knew or ought to have known of the pregnancy.⁴⁰

³⁸ *Moore v. British Columbia (Education)*, [2012] 3 S.C.R. 360.

³⁹ In *Dhillon v. Planet Group*, 2013 BCHRT 83 (CanLII), the BCHRT accepted that performance problems were a factor in the employer’s decision to terminate a woman’s employment, but so was the announcement of her pregnancy. In this case, the employers did not formally address performance concerns with the claimant before terminating her employment. See also *Guay v. 1481979 Ontario Inc. (No. 3)* (2010), CHRR Doc. 10-2213, 2010 HRTO 1563 (CanLII); *Riggio v. Sheppard Coiffures Ltd.* (1988), 9 C.H.R.R. D/4520 (Ont. Bd. Inq.); *Stefanyshyn v. 4 Seasons Management Ltd. (4 Seasons Racquet Club)* (1986), 8 C.H.R.R. D/3934 (B.C.C.H.R.).

⁴⁰ An organization might learn of a woman’s pregnancy because she tells them directly, or it may be obvious due to the circumstances. In several instances, the HRTO and other human rights tribunals have found, based on the evidence and credibility of the witnesses, that the employer did not know and had no way of knowing that the employee was pregnant (or trying to become pregnant) when the decision to terminate her employment was made. See *King v. S.P. Data*

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Example: A woman who was six weeks pregnant was employed as a telemarketer for less than a month when she resigned during a training session. She alleged that the trainer made remarks that she used the washroom too often and ate too much, and that this indicated that the trainer did not want a pregnant woman working for the company. However, the woman said she had not told the trainer or anyone in management about her pregnancy. The HRTO concluded that there was no discrimination. In this case, the pregnancy was not obvious at six weeks and the woman had not established that the employer knew or ought to have known that she was pregnant.⁴¹

Discrimination may also happen indirectly. It may be carried out through another person or organization.

Example: A company contracting services from a temp agency takes on a worker who later tells the employer she is pregnant. The company tells the agency not to send any more female workers who look like they are pregnant or are of child-bearing age.

Both the organization and person who sets out discriminatory conditions, and the organization or person who carries out this discrimination, can be named together in a human rights claim and held jointly responsible.

Discriminatory remarks are not always made openly. People don't necessarily voice their stereotypical views to explain their behaviour. Subtle discrimination might only be detected when looking at all of the circumstances to see if a pattern of behaviour exists.

Example: A new employee notified her manager after one week of employment that she was pregnant. Not long afterwards, her employment was terminated. The employer claimed the employee was fired due to performance issues. The HRTO found that while there may have been some performance issues, the decision to terminate the employee was significantly influenced by the employee's pregnancy because the employer felt it would not be worthwhile to train her before she started her leave.⁴²

Capital, 2012 HRTO 500 (CanLII); *Sloan v. Just Energy Corp. (No. 2)*, 2012 HRTO 127 (CanLII); *Aujla v. BJS Sales Marketing Inc.*, 2010 HRTO 966 (CanLII).

⁴¹ In *King, ibid.*, the HRTO noted that comments about eating too much or using the washroom could, in some circumstances, be related to the physical effects of pregnancy and might form part of the evidence in a case of discrimination based on pregnancy. However, in this instance the applicant did not establish that such remarks were made. See also *Weimer v. Richards Packaging Inc.* (2008), CHRR Doc. 08-536 (Alta. H.R.P.); *Burgess v. Stephen W. Huk Professional Corp.* (2009), 69 C.H.R.R. D/1 (Alta. H.R.T.), 2010 ABQB 424 (CanLII).

⁴² *Guay, supra* note 39; *Comeau v. Community Solutions Ltd.*, 2010 HRTO 1391

Individual acts themselves may be ambiguous or explained away. But when viewed as part of a larger picture, they may lead to a conclusion that discrimination because of pregnancy was a factor in the treatment of a person. An inexplicable departure from the usual practices may support a claim of discrimination.⁴³ Criteria applied to some people but not others may also be evidence of discrimination, if it can be shown that pregnant and breastfeeding women were singled out for negative treatment.

The cumulative effect of both overt and subtle discrimination is profoundly damaging to people who experience it.

4.2. Harassment and poisoned environments

The *Code* prohibits harassment because of sex (which includes pregnancy and breastfeeding). In addition to the *Code*'s explicit protection against harassment in housing and employment, harassment is also prohibited in services, goods and facilities, contracts, and membership in unions, trade and vocational associations.⁴⁴

The *Code* defines harassment as “engaging in a course of vexatious⁴⁵ comment or conduct that is known or ought reasonably to be known to be unwelcome.” Harassment will have happened if the person carrying out the behaviour knew or should have known it was unwelcome. If the victim says the behaviour is unwelcome then the harasser “knows.” If the harasser didn’t know (or didn’t intend to harass), it is still harassment if a “reasonable” person would know such behaviour is unwelcome.⁴⁶ What is considered “reasonable” includes the perspective of pregnant women.

⁴³ See *Johnson v. Halifax Regional Police Service* (2003), 48 C.H.R.R. D/307 (N.S. Bd.Inq.) at para. 57 for an example of a case where deviations from normal practice supported a finding of racial discrimination.

⁴⁴ The HRTO has confirmed that the Supreme Court of Canada has said that harassment is a form of discrimination (see *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252). Therefore, even in the absence of a specific prohibition on harassment in services, contracts etc., the *Code* applies; *Haykin v. Roth*, 2009 HRTO 2017 (CanLII).

⁴⁵ In *Murchie v. JB's Mongolian Grill*, 2006 HRTO 33 (CanLII), the HRTO found that a serious single incident could constitute harassment. However, more often a single incident is treated as a form of discrimination, see e.g. *Romano v. 1577118 Ontario Inc.*, 2008 HRTO 9 (CanLII) and *Haykin, ibid.*

⁴⁶ See *Reed v. Cattolica Investments Ltd. and Salvatore Ragusa*, [1996] O.H.R.B.I.D. No. 7. See also, *Gregory v. Parkbridge Lifestyle Communities Inc.* 2011 HRTO 1535 (CanLII) at para. 87 citing *Ghosh v. Domglas Inc. (No. 2)* (1992), 17 C.H.R.R. D/216 (Ont. Bd. Inq.) at paras. 43 to 48 and *Dhanjal v. Air Canada*, 1996 CanLII 2385 at p. 50 (CHRT).

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Victims do not have to explicitly or directly object to harassment.⁴⁷ They may feel vulnerable and may not speak out because of a threat or fear or because the person has some power or authority over them, like a manager or landlord. Some may simply withdraw or walk away.

Employers, landlords and service providers have an obligation to maintain an environment that is free of discrimination and harassment, whether or not anyone objects.

Example: A woman advised she was pregnant during a job interview. She was hired to work at a store, but during her training period her supervisor made various comments, such as that she should not have been hired because she was pregnant. The supervisor also expressed concern about the employee's ability to "handle" the work while pregnant, and asked questions about whether she had taken the job to get pregnancy leave benefits. The supervisor insisted the employee tuck in her shirt although this was difficult because of her pregnancy. The HRTO found that this was harassment based on sex and pregnancy.⁴⁸

Pregnancy-related harassment may take a variety of forms, including:

- Repeated negative, demeaning or paternalistic comments about a pregnant woman's appearance,⁴⁹ pregnancy symptoms, or capacity as a mother. Sometimes, a woman's pregnancy is treated as license to make overly personal comments about her appearance or personal choices that would not otherwise be considered socially acceptable. For example, a pregnant woman may be subjected to frequent commentary about her weight, or her anticipated attitude towards work once she has had the baby
- Unwanted touching, commonly of a pregnant woman's stomach
- Resentful comments about a woman's pregnancy
- Negative comments about the impact of a woman's impending maternity leave on the workplace, or the fact that she has been pregnant more than once while working at the same job
- Negative comments about a pregnant woman's capacity to work or be in the workplace.⁵⁰

⁴⁷ In *Harriott v. National Money Mart Co.*, 2010 HRTO 353 (CanLII) at para.104, the HRTO found that the respondent's continued sexualized and inappropriate comments and conduct were unwelcome in the workplace. The HRTO, citing earlier case law, also confirmed that a person is not required to protest or object to the harassing conduct for discrimination to be found (at para. 108).

⁴⁸ *Arunachalam v. Best Buy Canada Ltd.*, 2010 HRTO 1880 (CanLII).

⁴⁹ In *Shinozaki*, *supra* note 17, the HRTO found that the applicant was subjected to a course of vexatious comments and conduct related to changes to her body during pregnancy, including that she looked "fat" and "ugly," as well as comments about her "body tone" (at paras. 9, 12, & 49); *Peart*, *supra* note 17.

⁵⁰ In *Shinozaki*, *supra* note 17, the applicant was subjected to a comment that, as a pregnant woman, she "should not be in the workforce but rather convalescing at home." The HRTO found that this was "clearly based on a negative stereotype about pregnant women not belonging in the

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Example: Once a female employee tells her manager and co-workers that she is pregnant with her first child, she is often told that “she will not want to come back to work” and that “she will no longer be as driven about her work” once she has had her baby. She begins to worry that she will not be welcome back to work after her maternity leave, or that she will no longer be considered a valuable worker.

Harassment may not explicitly refer to a woman’s pregnancy. For example, in employment, if a woman who is pregnant experiences groundless and repeated criticism of her work performance, or becomes the brunt of demeaning practical jokes and teasing that is not directed at other employees, this may be harassment because of her pregnancy.

A poisoned environment is also a form of discrimination that can happen in employment, housing or services.⁵¹ A poisoned environment may happen when unwelcome comments and conduct are ongoing or widespread throughout an organization. This can lead to a hostile or oppressive atmosphere for one or more people from a *Code*-protected group.

While ongoing exposure to harassment can be a factor, a poisoned environment is based on the nature of the comments or conduct and the impact on an individual or group rather than just on the number of times the behaviour happens.⁵² Even a single statement or incident, if sufficiently serious and substantial, can create a “poisoned environment.” Behaviour need not be directed at any one person to create a poisoned environment. A person can experience a poisoned environment even if he or she is not a member of the group that is the target.

workplace,” (at para. 31). In *Vaid v. Freeman Formal Wear*, 2009 HRTO 2273 (CanLII), the applicant’s supervisor, after finding out she was pregnant, questioned her ability to perform the job and whether the company would be liable if she slipped and fell on the way to work in the winter. Although not specifically framed as a harassment or poisoned environment claim, the HRTO found that the supervisor was signaling to the applicant that her pregnancy was not welcome in the workplace, thereby creating an unwelcome and discriminatory work environment, in violation of the *Code*.

⁵¹ In employment, tribunals have found that the atmosphere of a workplace is a condition of employment as much as hours of work or rate of pay. A “term or condition of employment” includes the emotional and psychological circumstances of the workplace. A poisoned environment can also happen in housing and services. *Smith v. Menzies Chrysler Inc.*, [2009] O.H.R.T.D. No. 1906 (QL); *Dillon v. F.W. Woolworth Co.* (1982), 3 C.H.R.R. D/743 at para 6691 (Ont. Bd. Inq.); *Naraine v. Ford Motor Co. of Canada (No. 4)* (1996), 27 C.H.R.R. D/230 at para. 50 (Ont. Bd. Inq.).

⁵² See *Moffatt v. Kinark Child and Family Services (No. 4)* (1998), 35 C.H.R.R. D/205 (Ont. Bd. Inq.) and *Kharoud v. Valle-Reyes* (2000) BCHRT 40. In *Dhanjal*, *supra* note 46, the tribunal noted, “In short, the more serious the conduct the less need there is for it to be repeated, and, conversely, the less serious it is, the greater the need to demonstrate its persistence in order to create a hostile work environment...” (at p. 50).

Example: In front of other women at a public pool, a staff member tells a woman she is “being disgusting” for breastfeeding her child. The comment results in a poisoned service environment for the breastfeeding woman, and it can poison the environment of the other women as well, regardless of whether they have children.

Not addressing discrimination and harassment may in itself cause a poisoned environment.⁵³ The result of a poisoned environment is that certain people or groups, such as pregnant women, face negative terms and conditions of employment, tenancy or services that other people do not experience.

4.3. Systemic discrimination

Discrimination is not always just between individuals. It can be more complex and “systemic,” embedded in patterns of behaviour, policies⁵⁴ and practices that are part of the administrative structure or informal “culture” of an organization, institution or sector. It can be hidden to the people who don’t experience it. It can create or perpetuate a position of relative disadvantage for women who are, have been or may become pregnant. These behaviours, policies or practices sometimes appear neutral on the surface but can have an adverse or negative effect, creating or continuing disadvantage and limiting rights and opportunities because of pregnancy.⁵⁵

Example: An employer has a policy that after three years of continuous service, a term appointment converts into an indeterminate one. However, the policy excludes unpaid leaves of greater than 60 days (including maternity and parental leaves) when calculating continuous service. While on its face, this “continuous service” policy may appear to be neutral, it has an adverse effect on women who, more often than men, have gaps in their employment due to maternity and parental leaves.⁵⁶

⁵³ *McKinnon v. Ontario (Ministry of Correctional Services)*, [1998] O.H.R.B.I.D. No. 10.

⁵⁴ In *Gilmar*, *supra* note 16, the Canadian Human Rights Tribunal found that the respondent school board’s policy of deliberately offering one-year contracts, in part to get around its obligations to employees who may be pregnant, was discriminatory.

⁵⁵ In *Moore*, *supra* note 38, the Supreme Court of Canada reaffirmed its earlier definition of systemic discrimination set out in its seminal 1987 decision *Canadian National Railway Co. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at p. 1138-1139 as, “practices or attitudes that have, whether by design or impact, the effect of limiting an individual’s or a group’s right to the opportunities generally available because of attributed rather than actual characteristics.” The OHRC uses “systemic discrimination” when referring to individual organizations, institutions or a system of institutions, that fall under the jurisdiction of the *Code* (e.g. the education system).

⁵⁶ In *Lavoie v. Canada (Treasury Board)* (No. 2) (2008), CHRR Doc. 08-379, 2008 CHRT 27, the Canadian Human Rights Tribunal found that such a policy was discriminatory based on sex. The CHRT rejected the argument that excluding parental leave did not discriminate against women as men were entitled to parental leave as well. The evidence established that, in practice, persons taking parental leave greater than 60 days were predominantly women.

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Systemic discrimination may include aspects of overt as well as adverse effect discrimination that overlap and compound the problem.⁵⁷

In employment, the culture and structure of some organizations and sectors may not be designed to take into account employees' needs related to caring for infants or young children. Workplaces that do not recognize these needs can effectively bar women from equal opportunities and advancement, and can lead to them not entering or leaving the profession altogether.⁵⁸ Depending on the circumstances, these barriers may amount to systemic discrimination.

Organizations and institutions have a positive obligation to make sure they are not engaging in systemic discrimination. They should prevent barriers by designing policies and practices inclusively up front. They should also review their systems and organizational culture regularly and remove barriers where they exist.

Organizations and sectors that have low representation of women, particularly in leadership positions, should look at their organizational policies and cultures to see if they are creating barriers to pregnant women and employees with caregiving responsibilities.

Where an organization believes or has reason to believe that discrimination, systemic barriers or the perpetuation of historical disadvantage may potentially exist, it is the OHRC's position that it should collect and analyze data.⁵⁹ In addition, whether or not formal data collection has taken place, an organization or institution must be conscious of issues of representation and cannot choose to remain unaware of disparities that exist.

⁵⁷ *Pivot Legal Society v. Downtown Vancouver Business Improvement Assn.* (No. 6) (2012), CHRR Doc. 12-0023, 2012 BCHRT 23, at para. 581: "To summarize, I find that systemic discrimination, like individual discrimination, may include components of direct, as well as adverse effect discrimination."

⁵⁸ For example, many female lawyers are systemically disadvantaged in private practice, in part because having and caring for children conflicts with the structure of the profession. This leads a disproportionate number of women to leave the profession, compared to men. See *Final Report – Retention of Women in Private Practice Working Group* (2008), online: Law Society of Upper Canada, [www.swc-cfc.gc.ca/rc-cr/gapo-ebop/index-eng.html?pedisable=true](http://sup1.hosted.exlibrisgroup.com:1702/primo_library/libweb/action/display.do?tabs=moreTab&ct=display&fn=search&doc=EKTRON397_en&indx=2&reclds=EKTRON397_en&recldxs=1&elementId=1&renderMode=poppedOut&displayMode=full&frbrVersion=&dscnt=1&vl(1UI0)=contains&scp.scps=scope%3A%28EKTRON%29&frbg=&tab=default_tab&dstmp=1404487708897&srt=rank&mode=Basic&dum=true&vl(freeText0)=final+report+retention&vid=LSUCEKTRON); Ruth Montgomery, *Gender Audits in Policing Organizations* (2012), online: Status of Women Canada www.swc-cfc.gc.ca/rc-cr/gapo-ebop/index-eng.html?pedisable=true; Royal Canadian Mounted Police, *Gender and Respect: The RCMP Action Plan*, online: RCMP www.rcmp-grc.gc.ca/gba-ecses/action/index-eng.htm at 7-8.

⁵⁹ See the OHRC's *Count me in! Collecting human rights-based data* (2010) for more information, at www.ohrc.on.ca/en/count-me-collecting-human-rights-based-data.

Organizations must also address new problems when they come up. To the greatest extent possible, this means changing policies and practices to include and accommodate⁶⁰ more people instead of merely making exceptions for people who don't "fit" in the existing system.⁶¹

Establishing a special program⁶² is one way to address systemic discrimination and enhance equality.

Example: Research shows that female lawyers who are sole practitioners or are in very small firms experience multiple barriers if they take time away from their practice to have children. These lead many women to leave their practice. To help solve this issue, a law society offers a fund for men and women who are parents for up to 12 weeks to cover expenses relating to their law practice during a maternity, parental or adoption leave.⁶³

4.4. Reprisal

The *Code* protects people if they experience reprisal or threats of reprisal.⁶⁴ A reprisal is an action, or threat, that is intended as retaliation, punishment or "payback" for claiming or enforcing a right under the *Code*. However, there is no strict requirement that someone who alleges reprisal must have already made an official complaint or application under the *Code*. Also, to prove reprisal, a person does not have to show their rights were actually infringed.⁶⁵

⁶⁰ For more information about the duty to accommodate see section 6 of this policy.

⁶¹ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ["*Meiorin*"].

⁶² Special programs are allowed under section 14 of the *Code*. A "special program" is designed to help people who experience hardship, economic disadvantage, inequality or discrimination and protects these programs from challenge by people who do not experience the same disadvantage. See the OHRC's *Your guide to special programs and the Human Rights Code* (2013), online: OHRC www.ohrc.on.ca/en/your-guide-special-programs-and-human-rights-code.

⁶³ This example is based on The Law Society of Upper Canada's (LSUC) Parental Leave Assistance Program. The Law Society of Upper Canada, *Parental Leave Assistance Program*, online: LSUC www.lsuc.on.ca/with.aspx?id=2147487024 (retrieved July 4, 2014).

⁶⁴ See "Reprisal": section 8 of the *Code*. Also see section 7(3)(b) which prohibits reprisal for rejecting a sexual solicitation or advance, where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.

⁶⁵ *Noble v. York University*, 2010 HRTO 878 (CanLII), 2010 HRTO 878, paras. 30-31, 33-34.

Reprisal is established if:

- An action was taken against, or a threat was made to, the claimant
- The alleged action or threat was related to the claimant having claimed, or trying to enforce a *Code* right, and
- There was an intention on the part of the respondent to retaliate for the claim or the attempt to enforce the right.

Example: In a human rights claim against her employer, a woman alleged that she was forced to take an unpaid leave due to her pregnancy. The woman and the employer settled this claim. Three weeks after the settlement was reached, the employer sent a letter to Human Resources Development Canada saying that the woman was dismissed due to “recent litigation” (meaning the human rights claim) and that the employment relationship was negatively affected to the point that it would not be possible to continue her employment. The HRTO found that this was reprisal and violated the *Code*.⁶⁶

5. Reasonable and *bona fide* requirements

There may be circumstances where a decision, policy, practice or process results in discrimination based on pregnancy, but is nonetheless justified because it is reasonable and *bona fide* (legitimate) in the circumstances. The Supreme Court of Canada has set out a framework for examining whether a *bona fide* requirement has been shown.⁶⁷ If *prima facie* discrimination is found to exist, the organization must establish on a balance of probabilities that the standard, factor, requirement or rule:

1. Was adopted for a purpose or goal that is rationally connected to the function being performed
2. Was adopted in good faith, in the belief that it is necessary to fulfill the purpose or goal, and
3. Is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.⁶⁸

As a result of this test, the rule or standard itself must be inclusive and must accommodate individual differences up to the point of undue hardship rather than maintaining discriminatory standards and accommodating people who cannot meet them. This ensures that each person is assessed according to his or her own personal abilities instead of being judged against presumed group characteristics.⁶⁹

The ultimate issue is whether the person responsible for accommodation has shown that accommodation has been provided up to the point of undue hardship.

⁶⁶ *Chan v. Tai Pan Vacations Inc.*, 2009 HRTO 273 (CanLII). See also *Bickell*, *supra* note 7.

⁶⁷ *Meiorin*, *supra* note 61.

⁶⁸ See section 6.6. of this policy for more information on undue hardship.

⁶⁹ *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 at para. 19-20 [hereinafter *Grismer*].

The following non-exhaustive factors should be considered:⁷⁰

- Whether the person responsible for accommodation investigated alternative approaches that do not have a discriminatory effect
- Reasons why viable alternatives were not implemented
- Ability to have differing standards that reflect group or individual differences and capabilities
- Whether persons responsible for accommodation can meet their legitimate objectives in a less discriminatory way
- Whether the standard is properly designed to ensure the desired qualification is met without placing undue burden on the people it applies to
- Whether other parties who are obliged to assist in the search for accommodation have fulfilled their roles.

Example: A pregnant woman who cleaned houses requested accommodation from her employer because she found it hard to clean floors and bathtubs on her hands and knees. Although her employer accommodated her on one occasion, it took the position that if her pregnancy prevented her from cleaning on her hands and knees, she would be unable to continue working in the future. Despite receiving doctors' notes that said that the employee was able to work with modifications, she was never scheduled to work again. The HRTO found that this was discrimination. It found that the employer's requirement to only clean by hand (instead of using a mop, for example) was not a *bona fide* or legitimate requirement, and that the employer could have accommodated the woman's pregnancy by modifying her work.⁷¹

6. Duty to accommodate

Women should not have to choose between their own health, or the health of their baby, and their jobs, housing or being able to take part in a service. For example, a human rights tribunal noted the importance of accommodating breastfeeding women at work:

In their working lives, women face particular challenges and obstacles that men do not. A woman who opts to breastfeed her baby takes on a child-rearing responsibility which no man will ever truly face. In order for a working mother to bestow on her child the benefits that nursing can

⁷⁰ Meiorin, *supra* note 61 at para. 65.

⁷¹ Korkola v. Maid Day! Maid Day! Inc., 2013 HRTO 525 (CanLII). See also Yap v. The Brick Warehouse, 2004 BCHRT 22, CHRR Doc. 04-049. In Stackhouse v. Stack Trucking Inc. (No. 2), (2007), 60 C.H.R.R. D/119, 2007 BCHRT 161, the BCHRT found that a woman was discriminated against based on pregnancy when her employer refused to accommodate her request, as per the advice of her physician, to work a 10-hour day (instead of her regular 11 ½-hour day).

provide, she may require a degree of accommodation. Otherwise, she may end up facing a difficult choice that a man will never have to address. On the one hand, stop nursing your child in order to continue working and making a living for yourself and your family. On the other hand, abandon your job to ensure that your child will be breastfed.⁷²

The same type of analysis applies to pregnant women.

Under the *Code*, employers and unions, housing and service providers have a legal duty to accommodate the needs of women based on pregnancy, unless it would cause undue hardship. Most accommodations are not difficult, and should not cause a major burden for those responsible. The goal of accommodation is to help everyone have equal opportunities, access and benefits. Failure to accommodate may lead to a finding of discrimination under the *Code*.

6.1. Procedural and substantive duties

The duty to accommodate has both a procedural component (the process) and a substantive component (the accommodation provided). Both are equally important.⁷³

The procedural duty involves the considerations, assessments and steps taken to respond to an accommodation need. The courts have said, “a failure to give any thought or consideration to the issue of accommodation, including what, if any, steps could be taken constitutes a failure to satisfy the ‘procedural’ duty to accommodate.”⁷⁴

Example: A woman was hired as a live-in caregiver for two young children. When her employment started, she told her employer that she was unexpectedly pregnant, and was suffering from nausea, but emphasized that she still wanted the job. The next day, the employer decided not to proceed with her job, citing concerns about how the caregiver would deal with the physical demands of the job, given that she was experiencing significant nausea. A human rights tribunal found that the employer did not start an adequate process for exploring whether accommodation was possible without undue hardship.⁷⁵

⁷² *Cole v. Bell Canada*, 2007 CHRT 7, CHRR Doc 07-206 at para. 61.

⁷³ See *Meiorin*, *supra* note 61 at paras. 65-6 and *Grismer*, *supra* note 69 at paras. 22 and 42-45. See also *Adga Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON SCDC), at para. 107 (ON SCDC).

⁷⁴ *Adga Group Consultants*, *ibid.*, at para. 107.

⁷⁵ *Mazuelos v. Clark*, 2000 BCHRT 1, 36 C.H.R.R. D/385; See also *Purres*, *supra* note 15; *Williams v. Hudson's Bay Co.*, 2009 HRTO 2168 (CanLII).

The substantive duty is about the appropriateness or reasonableness of the chosen accommodation as well as the reasons for not providing an accommodation, including proof of undue hardship.⁷⁶

6.2. Principles

The duty to accommodate is made up of several principles, including respect for dignity, individualization, integration and full participation.

6.2.1. Respect for dignity

Human dignity involves many factors, including respect for pregnant women and their self-worth as well as their physical and psychological integrity and empowerment. It is also about privacy, confidentiality, comfort, autonomy, individuality and self-esteem.

Dignity includes considering how accommodation is provided and the person's own participation in the process. Organizations responsible for providing accommodation should consider the different ways people may need accommodation in their workplace, housing environment or when accessing a service.

6.2.2. Individualization

There is no set formula for people who might need accommodation because of pregnancy or breastfeeding. Each person's needs are unique and must be considered when an accommodation request is made. While some accommodations may only meet one person's needs, organizations will find that many of the changes they implement will benefit others as well.

6.2.3. Integration and full participation

Employment, housing, services and facilities should be designed, and may need to be adapted, to accommodate the needs of pregnant women in a way that best promotes their integration and full participation.⁷⁷ Segregated treatment is less dignified and is unacceptable unless it can be shown to be the best way to achieve equality in the circumstances.⁷⁸

⁷⁶ In *Gourley v. Hamilton Health Sciences*, 2010 HRTO 2168 (CanLII), at para. 8, the HRTO stated: "The substantive component of the analysis considers the reasonableness of the accommodation offered or the respondent's reasons for not providing accommodation. It is the respondent who bears the onus of demonstrating what considerations, assessments, and steps were undertaken to accommodate the employee to the point of undue hardship..."

⁷⁷ *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241.

⁷⁸ *Ibid.* The Supreme Court stated that "integration should be recognized as the norm of general application because of the benefits it generally provides" (at para. 69). However, the Court found that in Emily Eaton's circumstances, segregated accommodation was in her best interests. The Court was of the view that this was one of those unusual cases where segregation was a more appropriate accommodation.

6.2.4. Inclusive design

Achieving integration and full participation requires barrier-free inclusive design up front as well as removing existing barriers. Good inclusive design will minimize the need for people to ask for individual accommodation. The *Supreme Court of Canada* has been clear that systems must be designed to be inclusive of all persons and to reflect differences among individuals. Standards should provide for individual accommodation, to the extent that this is reasonably possible.⁷⁹

Organizations should design inclusively for the needs of pregnant women when they develop or change policies, programs, procedures, standards, requirements and facilities. They should not create new barriers.

Example: A large retail outlet designs its facilities to include a nursing room with comfortable chairs for women who wish to breastfeed their children in private. It also creates a breastfeeding policy, and educates staff on women's rights to breastfeed their children throughout the store.

6.3. Providing appropriate accommodation

Special needs during the pre-natal and post-natal period can be accommodated, short of undue hardship, in a variety of ways. The OHRC's position is that the duty to accommodate requires determining and taking the most appropriate accommodation, unless it causes undue hardship. The most appropriate accommodation is one that most respects the dignity of the individual, meets the individual's needs, promotes inclusion and ensures confidentiality.

Accommodation should result in equal opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges enjoyed by others, or it may be proposed and adopted to achieve equal opportunity. People should not experience disadvantage owing to needs related to prohibited grounds of discrimination. Where the most appropriate accommodation would result in undue hardship, the accommodation provider should consider next-best, phased-in or interim accommodation.

6.4. The accommodation process

Accommodation is a multi-party process. Everyone should work together cooperatively and respectfully to develop and implement appropriate accommodation solutions. There is a duty to enter into a cooperative and respectful dialogue to develop, implement and maintain appropriate accommodation. In the workplace, this involves the employer, the employee, and possibly the workplace bargaining agent, if any.

⁷⁹ *Meiorin*, *supra* note 61.

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Where an employer contracts with an outside company that provides assistance in addressing employees' accommodation needs, the employer is still responsible if the outside company does not appropriately manage the accommodation request.⁸⁰

Where a pregnant or breastfeeding woman has accommodation needs, she is responsible for clearly informing the employer, housing provider or service provider that she needs accommodation and what accommodation she needs. While women are generally required to make their needs known, an employer, service provider or housing provider can also tell a woman that accommodation is available if she needs it.

Where necessary, the pregnant woman should provide documentation from professionals about her accommodation needs. Pregnant women should not be asked to give documentation of changes that are obvious or normal and natural to any pregnancy, such as the need for more frequent washroom breaks, or a reduced ability to stand for lengthy periods of time in the later stages of pregnancy, or the need to attend regular medical appointments. Breastfeeding women should not be asked to provide medical documentation to prove the need to breastfeed their children.⁸¹

Accommodation providers should accept accommodation requests in good faith, unless there are legitimate reasons for acting otherwise. Depending on the circumstances, employers, housing and service providers are entitled to request sufficient information from the employee to make the accommodation, and may seek expert advice or opinions where needed.

The accommodation provider should bear the cost of any medical information or documentation needed in the accommodation process.

The person seeking accommodation should take part in discussions about possible accommodation solutions, and cooperate with any experts whose help is needed to manage the accommodation process.

The accommodation provider must take an active role in making sure that different approaches and possible accommodation solutions are explored.

Once the employer, landlord or service provider is aware of what accommodation is needed, they have a duty to take the necessary steps to accommodate the special needs and circumstances of the pregnant employee, short of undue hardship, and to do so in a timely way.⁸²

⁸⁰ *Williams, supra* note 75.

⁸¹ *Cole, supra* note 72 at para. 77.

⁸² In *Turnbull v. 539821 Ontario Ltd. (c.o.b. Andre's Restaurant)*, [1996] O.H.R.B.I.D. No. 20 [QL], the Board of Inquiry found that where the employee's pregnancy was affecting her ability to do the duties of her job, the employer had an obligation to accommodate her even if she did not specifically request accommodation.

Everyone involved in the accommodation process has a duty to cooperate to the best of their ability. In some cases, an organization may have met its procedural and substantive duty to accommodate where the person did not sufficiently take part in the process, refused or otherwise could not take part at all. However, during the accommodation process, if there is confusion about a woman's needs or whether accommodation is still needed, an organization must ask before deciding that she has not taken part.⁸³

Organizations should also consider if there are any disability or other *Code*-related factors that may prevent the person from taking part in the process. The organization may need to accommodate these factors as well. They should also consider whether there is a need to adjust the accommodation because it is not working.

6.5. Forms of accommodation

It is important to keep in mind that each woman's experience of pregnancy is unique, and symptoms and needs will vary. In employment, employers should not expect a pregnant woman to "tough it out" because others in similar positions have not requested accommodation. And they should not impose accommodations on pregnant women (such as modified duties, hours or alternative work) who are not requesting them, because of assumptions about pregnancy.⁸⁴

The need for accommodation based on pregnancy and breastfeeding will most often arise in workplace situations, but it may also happen in housing and service situations. Some examples of accommodation are:

- An employee may be temporarily relocated to another work station or location or re-assigned to alternative duties
- A flexible work schedule can be provided to accommodate medical appointments, including treatment for infertility, as well as breastfeeding needs⁸⁵

⁸³ In *Gonneau v. Denninger*, 2010 HRTO 425 (CanLII), a woman could not come into work due to pregnancy-related complications. The HRTO found that the employer breached the *Code* by issuing a Record of Employment without asking the woman to clarify whether she intended to come back to work or needed further accommodation. However, the HRTO noted that the applicant had contributed to the situation by not keeping her employer advised of her status and intentions and had therefore failed to fulfill her part in the accommodation process. This affected the amount of damages the woman was awarded because of the discrimination.

⁸⁴ For example, in *Vaid*, *supra* note 50, the HRTO stated, "If a woman is pregnant and requires accommodation in the performance of her job duties, it is her responsibility to come forward to request such accommodation. It is not the employer's role to question a pregnant employee about whether she can perform certain duties, particularly in the absence of an indication of any actual difficulty in performing such duties," at para. 23. See also *Knibbs v. Brant Artillery Gunners Club Inc.* 2011 HRTO 1032 (CanLII).

⁸⁵ *Cole*, *supra* note 72. The Canadian Human Rights Tribunal found that an employer violated the *Canadian Human Rights Act* when it failed to respond appropriately to an employee's request for schedule adjustments that would allow her to continue to breastfeed her son.

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- Where required, a quiet, private environment can be provided for pregnant employees to rest during breaks
- Chairs can be provided for people who need to sit (for example, at work⁸⁶ or in a service environment)
- Breaks can be allowed as necessary. Employees who require breaks, such as for pumping or breastfeeding, or for eating more often to counteract pregnancy-related nausea or due to gestational diabetes, should normally be accorded those breaks, and not be asked to forgo normal meal breaks as a result, or work additional time to make up for the breaks, unless the employer can show undue hardship. Similarly, pregnant women should not have their time docked or be otherwise penalized for using the washroom more often
- A supportive environment can be provided for a woman who is breastfeeding. Accommodation may mean allowing a caregiver to bring the baby into the workplace or a service environment where children do not typically attend (such as a college or university class) to be breastfed, making scheduling changes to permit time to express milk or breastfeed or to reach home in time to breastfeed, and providing a comfortable, dignified and appropriate area so that a woman can breastfeed, or express and store breast milk. In some special cases, it may involve permitting a leave of absence from work.⁸⁷ A supportive environment can generally be created with minimum disruption.

6.6. Undue hardship

Accommodation providers are not required to put in place accommodations that would amount to undue hardship. The test for undue hardship is set out fully in the OHRC's *Policy and guidelines on disability and the duty to accommodate*.⁸⁸ The same standard applies to all grounds of the *Code*, including pregnancy.

⁸⁶ See *Williams*, *supra* note 75; *Purres*, *supra* note 15.

⁸⁷ See *Carewest v. Health Sciences Association of Alberta (Degagne Grievance)* (8 January 2001), [2001] A.G.A.A. No.2 (J.C. Moreau). A labour arbitrator found that a woman had been discriminated against when her employer did not accommodate her breastfeeding needs to the point of undue hardship. The grievor, who was on maternity leave, requested an extension of her leave to meet her breastfeeding needs. The employer was willing to have the grievor express or pump milk during her scheduled breaks or lunch hour; but this was not practical for the grievor because of her particular breastfeeding history. The arbitrator ruled that the employer had failed to make a sufficient effort to seek solutions to accommodate the woman, and that it had not accommodated her to the point of undue hardship.

⁸⁸ OHRC, *Policy and guidelines on disability and the duty to accommodate* (2000) online: OHRC www.ohrc.on.ca/en/policy-and-guidelines-disability-and-duty-accommodate.

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The *Code* lays out three considerations in assessing whether an accommodation would cause undue hardship. The three factors are:

- Cost
- Outside sources of funding, if any
- Health and safety requirements, if any.

No other considerations can be properly considered. Factors such as business inconvenience, employee morale or customer preference for receiving service from non-pregnant women, will not justify discrimination.⁸⁹

The onus of proving that an accommodation would cause undue hardship lies with the accommodation provider. The evidence needed to show undue hardship must be real, direct, objective, and in the case of costs, quantifiable. A mere claim without supporting evidence that the cost or risk is “too high” based on impressionistic views, paternalistic attitudes or stereotypes will not be enough.⁹⁰

Example: When a female restaurant server reached the later stages of her pregnancy, her employer asked her to switch over to bartending, a lower-paying role, for the rest of her pregnancy, because they were concerned about the safety of her fetus. She refused, and offered to provide a doctor’s note concerning her fitness to continue as a server. In response, the employer asked the employee to sign a waiver of any liability on the part of the employer if she was injured at work during her pregnancy. A human rights tribunal found that the employer had discriminated based on sex and pregnancy.⁹¹

In most cases, accommodations for needs related to pregnancy will not require significant expenditures. Instead, they involve increasing the flexibility of policies, rules and requirements. This may involve some administrative inconvenience, but inconvenience by itself is not a factor for assessing undue hardship.

⁸⁹ In *Shinozaki, supra* note 17, the HRTTO stated, “The applicant submits, and I agree, that the clear inference to be drawn from [the owner’s] comments is that she wanted to have “sexy-looking” massage therapists whose physical appearance [the owner] thought would appeal to customers; and that the applicant’s pregnancy made her less desirable as an employee” (at para. 30). In *Middleton v. 491465 Ontario Ltd.* (1991), 15 C.H.R.R. D/317 (Ont. Bd. of Inq.), the complainant, a waitress at a strip bar, was fired when she was four months pregnant. The Board of Inquiry dismissed the argument that it might be a *bona fide* requirement for a waitress at such a restaurant to not be pregnant, as it might impair the enjoyment of the patrons.

⁹⁰ In *Gareau v. Sandpiper Pub*, 2001 BCHRT 11, CHRR Doc. 01-040e, the Tribunal stated at para. 49 that:

It was not appropriate for the Respondents to impose their views of the risks associated with working as a server while pregnant on the Complainant in the absence of any objective basis for that assessment. That was an assessment more appropriately made by the Complainant. Nor was it appropriate for the Respondent to impose on her a requirement that she waive rights enjoyed by other employees merely because they disagreed with her assessment.

See also *Purres, supra* note 15; *Graham, supra* note 7; *Vaid, supra* note 50.

⁹¹ *Gareau, ibid.*

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If an accommodation is likely to cause significant health and safety risks, this could be considered “undue hardship.” The *Code* recognizes that the right to be free from discrimination must be balanced with health and safety considerations. Organizations have a legal obligation to protect the health and safety of all their employees, clients, tenants and others.⁹² They should consider whether changing or waiving a health and safety requirement or providing accommodation might result in a serious health or safety risk. For the health and safety concern to amount to undue hardship, the concern must be genuine and the risk must be significant enough that it outweighs the benefits of the requested accommodation.

An organization should look at:

- The nature and severity of the risk, the likelihood of it happening, and who might be affected.
- If the risk only involves the person asking for accommodation, would the person be willing to assume it?
- How does the risk compare to other risks allowed within the organization or already tolerated in society as a whole?

Organizations must try to mitigate risks where they exist. The amount of risk that exists *after* accommodations have been made and precautions have been taken to reduce the risk (short of undue hardship based on cost) will determine whether there is undue hardship.⁹³

Example: A customer service associate worked behind the front counter of a health club, where she was required to stand. After becoming pregnant, she experienced swelling in her feet and pain in her legs. Her doctor gave her a note saying that she should avoid prolonged standing and that she would benefit from being able to sit and stand alternately. Without considering the note, her employer denied her accommodation request because it said that putting a stool behind the counter would be a safety issue. As a result, the employee was forced to ask for part-time hours. The HRTO found that the employer failed to accommodate the employee because it took no steps to measure the space behind the counter or test out a chair or stool. It also failed in its procedural duty because it did not review and respond to her doctor’s note, or discuss with the employee how to accommodate her.⁹⁴

⁹² For example, see the *Occupational Health and Safety Act*, S.O. 1990, c.H. O.1.

⁹³ For more information about undue hardship, see OHRC, *Policy and guidelines on disability and the duty to accommodate*, *supra* note 8.

⁹⁴ *Purres*, *supra* note 15; See also *Williams*, *supra* note 75; *Graham*, *supra* note 7.

7. Employment

Protection against discrimination in employment extends to all aspects of the employment relationship, from the recruitment and selection process, through all the various aspects of the working relationship, to the termination of the employment. Employment includes full-time work, part-time work, volunteer work, student internships, special employment programs, probationary employment,⁹⁵ and temporary or contract work.

7.1. Other relevant pregnancy-related legislation and protections

Pregnant women have significant legislated rights in addition to those under the *Code*, most importantly under the Ontario *Employment Standards Act (ESA)* and the federal *Employment Insurance Act (EIA)*. These rights may overlap with *Code* protections, or may provide additional protections. It is important to remember that these pieces of legislation have purposes that may differ from those of the *Code*, and are aimed at providing minimum standards only. The *Code* has primacy over provincial legislation. This means that where there is a conflict between rights under the *Code* and rights under the other provincial legislation, the *Code* takes precedence unless the legislation specifically states otherwise.⁹⁶

7.1.1. Entitlements under the *Employment Standards Act*

For detailed information on entitlements under the ESA, contact Employment Standards at the Government of Ontario Ministry of Labour (www.labour.gov.on.ca).

The *ESA* entitles pregnant employees who fall under that legislation to pregnancy leave, and sets minimum standards for that leave,⁹⁷ including:

- Who is entitled to pregnancy leave
- Information that pregnant employees must provide to their employers when requesting pregnancy leave
- Timelines for beginning and ending pregnancy leave
- Length of a pregnancy leave
- Entitlements where there has been a stillbirth or miscarriage.

The *ESA* also entitles parents to take parental leave when a child is born or comes into their care, control and custody for the first time. Both parents may take parental leave.⁹⁸ The *ESA* sets out minimum standards for:

- Who may take parental leave

⁹⁵ *Osvald, supra* note 14.

⁹⁶ *Human Rights Code, supra* note 26, s. 47(2).

⁹⁷ *Employment Standards Act 2000*, S.O. 2000, c.41, ss.46-4 [ESA].

⁹⁸ *Ibid*, ss. 48-49.

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- Notice that employees must provide to the employer regarding parental leave

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- When parental leave must begin and end
- The length of parental leave.

During pregnancy and parental leave, the *ESA* protects the employee's right to continue to take part in employer benefit plans. The employee's leave period is to be included in any calculation of the employee's length of employment, length of service or seniority. At the end of the leave, the employee must be reinstated to the position he or she most recently held with the employer, or, if that no longer exists, a comparable position, unless the person's employment has been terminated for reasons unrelated to the leave. An employer cannot refuse to give the employee her job back because it prefers the person who was hired to replace her during the leave.⁹⁹

Under the *ESA*, employees must be paid the greater of the rate that they were making before the leave, or the rate that they would have been making if they had worked throughout the period of leave.¹⁰⁰

Note that the *ESA* prohibits employers from intimidating, dismissing or otherwise penalizing an employee because he or she is or will become eligible to take a leave, intends to take a leave, or takes a leave under the Act.¹⁰¹

7.1.2. Benefits under the *Employment Insurance Act*

For detailed information on benefits under the *EIA*, contact Service Canada (www.servicecanada.gc.ca).

Eligible workers who are away from work due to pregnancy, childbirth or adoption may be entitled to pregnancy and parental benefits under the *EIA*. Employment insurance benefits may be payable for up to 15 weeks for pregnancy and up to 35 weeks for parental benefits, for a potential total of 50 weeks of employment insurance benefits for women who give birth. In some cases, pregnant women may also be eligible for up to 15 weeks of sickness benefits.

⁹⁹ In *Henderson v. Marquest Asset Management Inc.*, 2010 CanLII 34120 (ON LRB), the Ontario Labour Relations Board (OLRB) found that the employer breached s. 53 of the *ESA* when it terminated the employment of a woman who took a maternity leave, and retained the person hired to replace her while she was on leave. The OLRB confirmed that a woman should not be disadvantaged by taking a maternity or parental leave, even if the leave results in the company finding an employee they prefer. This type of situation may also violate human rights laws; see *Su v. Coniston* 2011 BCHRT 223 (CanLII).

¹⁰⁰ *ESA*, *supra* note 97, ss. 51-53.

¹⁰¹ *Ibid*, s. 74. Employees considering filing a claim that their employer has breached the *ESA* should be aware that this may affect any human rights application they make to the HRTO. See the OHRC's *Human rights obligations related to pregnancy and breastfeeding: Case law review*, *supra* note 3, for more information.

7.1.3. Collective agreements and company policies

Pregnant women may also have rights under company policies and collective agreements. Company policies and collective agreements cannot act as a bar to providing accommodation to pregnant women, subject to the undue hardship standard. Unions and employers are jointly responsible for negotiating collective agreements that comply with human rights laws, and should build conceptions of equality into collective agreements.

7.2. Hiring, promotions, transfers, termination

Discrimination in employment because of pregnancy is often based on common negative stereotypes and attitudes, such as:

- A pregnant woman will not be able to work productively and effectively during her pregnancy¹⁰² and accommodating her needs will be onerous
- A woman will use her pregnancy as a reason not to work¹⁰³
- A pregnant woman generally does not return to work after her maternity leave¹⁰⁴
- If she does return from maternity leave, she will no longer be a desirable employee, as her priority will be her childcare responsibilities rather than her career.

These ideas are long-standing and persistent, even though they are not borne out by the facts. They may influence employers to refuse to hire pregnant women, to outright terminate their employment, or to discourage them from staying at or returning to the workplace.

Subject to *bona fide* requirements, denying or restricting employment opportunities in hiring, or transferring, *etc.* a woman because she is, was or may become pregnant or because she has had a baby, is a violation of the *Code*.¹⁰⁵ An employer cannot refuse to hire a pregnant woman thinking that she will be going

¹⁰² In *Bickell*, *supra* note 7, the HRTO found that a waitress was discriminated against when her shifts were reduced and she was eventually dismissed from her employment. This happened because her employer said she was getting “too big to do the job,” despite her having a doctor’s note confirming she could still work (at para. 17). See also *Knibbs*, *supra* note 84; *Splane v. Ultimate Fitness* (2011), CHRR Doc. 11-0695, 2011 HRTO 195; and *Sutton v. Best Western Tower Inn*, 2010 BCHRT 314 (CanLII).

¹⁰³ In *Peart*, *supra* note 17, the HRTO found that the employer’s perception that the applicant was using her pregnancy as an excuse not to work was a factor in terminating her employment.

¹⁰⁴ In *Phillips v. Distinctive Vertical Venetians Mfg. Ltd.* (2006), CHRR Doc. 06-853 (Sask. H.R.T.), a Tribunal ruled that the onus is on the employer to clarify if there is any confusion about whether an employee intends to come back to work after a maternity leave. See also *Su*, *supra* note 99; *Keeper-Anderson v. Southern Chiefs Organization Inc.* (2008), CHRR Doc. 08-379, 2008 CHRT 26.

¹⁰⁵ *Charbonneau*, *supra* note 11; *de Lisser v. Traveland Leisure Vehicles Ltd.* 2009 BCHRT 36 (CanLII).

on maternity leave, or for other reasons related to the pregnancy. Despite the potential for some inconvenience to an employer of having to train a new employee and then replacement during maternity leave, this is not valid justification for deciding not to hire a pregnant woman.¹⁰⁶

Example: A woman was hired to work as a receptionist in a hair salon. She advised her employer that she was four months pregnant the first day of work and was fired the same day. Although the woman was hired to work full-time hours, the employer claimed she was fired because she had asked to work part-time hours. The HRTO did not accept this version of events, and determined the woman was fired after revealing her pregnancy.¹⁰⁷

Under section 23(2) of the *Code*, employers cannot make inquiries, whether written or oral, during the application stage of the hiring process, that directly or indirectly classify applicants based on a prohibited ground. Employers cannot request that applicants provide information about whether they are, have been or intend to become pregnant. Even where an employer still offers the woman the job, these types of questions are discriminatory.¹⁰⁸ Such questions could be discriminatory on the grounds of family status,¹⁰⁹ sex (pregnancy) or both. Employers may only ask questions related to pregnancy and breastfeeding at a personal interview in the rare circumstance that the inquiry relates to a *bona fide* occupational requirement.

Pregnant women and women of childbearing years are vulnerable to subtle forms of marginalization in the workplace. Employers sometimes withhold or withdraw projects or opportunities¹¹⁰ from pregnant women or women of childbearing age because they question the woman's commitment, competence or capacity, or because they believe that "she will be gone on leave soon anyway." Employers cannot refuse to provide training or promotions to women because of the mere fact that they are pregnant or that they will be taking a pregnancy-related leave of absence. The fact that a woman will be taking a pregnancy-related leave of absence should not be taken into account in determining access to workplace opportunities, unless there is a *bona fide* requirement involved.

¹⁰⁶ *Charbonneau*, *supra* note 11. In *de Lisser*, *ibid.*, the BCHRT found that the employer's requirement that a replacement for a maternity leave (who was also pregnant) be available to work the entire duration of the leave was not a *bona fide* requirement. In *Guay*, *supra* note 39, the HRTO found that a newly hired employee was dismissed in part because there was a perception that there would not be enough time to train her before her pregnancy leave.

¹⁰⁷ *Maciel*, *supra* note 25; see also *Dorvault v. Ital Décor Ltd.* (No. 3), 2005 BCHRT 148, 52 C.H.R.R. D/136.

¹⁰⁸ *Vaid*, *supra* note 50.

¹⁰⁹ *Hobbs v. Hamel, The Cleaning House Ltd.*, 2012 HRTO 1068 (CanLII).

¹¹⁰ This could also include withholding the required job evaluations. See *Gilmar*, *supra* note 16.

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Where possible, employers should make sure that women who are away from work due to pregnancy-related leaves are informed about major developments and workplace opportunities. A woman loses more than just a project or a promotion when she is discriminated against because of pregnancy – she experiences a missed opportunity, which may have long-term consequences for her employment prospects.¹¹¹

Example: When a one-year position as a Vice Principal became vacant, a highly regarded teacher with previous positive experience as a Vice Principal applied. The school board refused to consider her application because she would be on maternity leave for the first part of the term. The Alberta Court of Queen’s Bench found that the woman had been discriminated against based on sex. While the school board expressed concerns about the continuity and disruption to the system, the Court found that the inconvenience that would have been caused by accommodating the claimant’s maternity leave would not have caused undue hardship.¹¹²

An employer is entitled to make changes to a workplace while a woman is on leave, but must make sure that she is not disadvantaged or negatively affected by the decisions compared to other employees who are not on leave.¹¹³ Where changes to the organization are being planned, this means asking women on maternity leave for input, if other employees have this same opportunity, particularly if a woman’s job will be affected.¹¹⁴

Example: A human rights tribunal found that while a woman was on maternity leave, she was excluded from having any involvement with the company, excluded from any consultation about the development of the new sales structure that would affect her position, had her flexible work arrangements

¹¹¹ *Brown, supra* note 28; In *Kern v. Human Resources Capital Group Inc.*, 2011 HRTO 144 (CanLII), the HRTO agreed, saying:

As set out in the excerpt from the Commission’s [*Policy on discrimination because of pregnancy and breastfeeding*, 2008], it would be discriminatory to limit or withhold employment opportunities from her while on leave. In this case, the applicant was likely entitled to ask for and receive information about potential opportunities for which she might apply. Whether she ended her leave early or not would be a matter for her to decide.

She was entitled to the information necessary to make that kind of choice (at para. 51).

However, the HRTO concluded, based on the facts of the case, that the applicant did not experience discrimination as there were no opportunities that should have been brought to her attention.

¹¹² *Woo v. Alberta (Human Rights and Citizenship Commission)*, 2003 ABQB 632, 49 C.H.R.R. D/510.

¹¹³ *Parry v. Vanwest College Ltd.*, 2005 BCHRT 310, 53 C.H.R.R. D/178; *Su, supra* note 99.

¹¹⁴ In *Brown, supra* note 28, the BC Human Rights Tribunal noted, “Being on maternity leave does not disentitle a person from being consulted about changes to the workplace, particularly those which may have a direct effect on [her]” (at para. 1109). Further, “...the lost opportunity to have input is itself adverse, and intimately connected to her being on maternity leave.” (at para. 1116).

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cancelled, and was demoted from a manager to a salesperson. The tribunal found that this was adverse treatment that was linked to the claimant's pregnancy and to her family status, and concluded that the employer had discriminated against her.¹¹⁵

Discriminatory termination of employment due to pregnancy may take a variety of forms, including:

- Terminating a woman's employment at the time she announces her pregnancy,¹¹⁶ after she becomes visibly pregnant,¹¹⁷ or because of symptoms or complications related to her pregnancy¹¹⁸
- Dismissing a pregnant employee who requests accommodation for pregnancy-related needs¹¹⁹
- Constructively dismissing a pregnant employee through harassment,¹²⁰ failing to schedule her for work,¹²¹ demotions,¹²² unwanted transfers, forcing her on leave,¹²³ excessive criticism of her work, failure to accommodate her pregnancy-related needs,¹²⁴ or other negative treatment
- Dismissing an employee while she is on leave,¹²⁵ when it is time for her to return from pregnancy-related leave,¹²⁶ or refusing to offer her another employment contract because of her pregnancy.¹²⁷

Example: A woman worked as a bartender. After her employer learned of her pregnancy, the employer repeatedly questioned her about whether she would continue to work, discussed the need to find a new bartender, tried to persuade her to leave her job early, tried to change her shifts, and accused her of stealing beer as a pretext for firing her. The HRTO found the employer had discriminated against the woman based on her pregnancy.¹²⁸

¹¹⁵ *Brown*, *supra* note 28.

¹¹⁶ In *Ong v. Poya Organics & Spa Ltd.*, 2012 HRTO 2058 (CanLII), the HRTO found that the applicant's employment was terminated the day after revealing her pregnancy, and that her employer knew she was pregnant. See also *Maciel*, *supra* note 25; *Kooner-Rilcof v. BNA Smart Payment Systems, Ltd.* (2012), CHRR Doc. 12-0263, 2012 BCHRT 263 (CanLII); *Guay*, *supra* note 39; *Mann v. JACE Holdings Ltd.* (2012), CHRR Doc. 12-0234, 2012 BCHRT 234.

¹¹⁷ *Bickell*, *supra* note 7.

¹¹⁸ *Splane*, *supra* note 102; *Osvald*, *supra* note 14.

¹¹⁹ *Korkola*, *supra* note 71.

¹²⁰ *Shinozaki*, *supra* note 17;

¹²¹ *Graham*, *supra* note 7.

¹²² *Brown*, *supra* note 28.

¹²³ *Graham*, *supra* note 7.

¹²⁴ *Korkola*, *supra* note 71; *Purres*, *supra* note 15; *Williams*, *supra* note 75.

¹²⁵ *Keeper-Anderson*, *supra* note 104.

¹²⁶ *Su*, *supra* note 99.

¹²⁷ *Gilmar*, *supra* note 16.

¹²⁸ *Dodds v. Sharks Sports Pub*, 2007 HRTO 17 (CanLII), CHRR Doc. 07-329.

Policy on preventing discrimination because of pregnancy and breastfeeding

Where an employer knows that a woman is pregnant and she experiences a negative employment outcome, such as losing her job, human rights tribunals have said that this situation needs to be examined carefully to make sure that the pregnancy was not a factor in the treatment she received.¹²⁹ This is particularly the case where the termination closely follows a woman revealing her pregnancy, asking for a maternity leave or telling her employer that she will be returning from a maternity leave.¹³⁰ Decision makers have even said that the suspicious timing¹³¹ creates an inference that the pregnancy was a factor in the termination, saying “the timing alone indicates a nexus, and demands an explanation.”¹³²

Human rights tribunals have also said that an employer cannot refuse to give an employee her old job back at the end of her pregnancy or parental leave, or a comparable job if her job no longer exists.¹³³

Example: An employee taking a maternity leave told her employer when she was planning to come back to work. Her employer told her that due to a downturn in business, he had no choice but to lay her off. However, the person hired to replace the employee during her leave was kept on after she was laid off. A tribunal found that this was discrimination based on sex (pregnancy). The tribunal said that the employer “was entitled to take reasonable steps to address the difficult economic reality it was facing, including laying off employees. What it was not entitled to do, however, was to refuse to allow [the claimant] to return to her position when another person was occupying that position and performing work that, but for her leave, [the claimant] would have been performing.”¹³⁴

If an employer is not clear about how long a woman plans to take for a maternity leave, it has a duty to clarify this, without assuming that a woman will not be coming back to work.¹³⁵ An employer should not dictate the length of maternity leave a woman takes (if it is within the parameters set by the *ESA*).

An employer cannot arbitrarily decide that a pregnant employee should take a leave of absence as an accommodation measure, without considering other options for dealing with a situation requiring accommodation, in consultation with the affected employee.¹³⁶

¹²⁹ See *Comeau*, *supra* note 42; *Kooner-Rilcof*, *supra* note 116; *Mann*, *supra* note 116.

¹³⁰ *Comeau*, *supra* note 42.

¹³¹ *Kooner-Rilcof*, *supra* note 116.

¹³² *Ibid.* at para. 59.

¹³³ *Parry*, *supra* note 113; *Su*, *supra* note 99.

¹³⁴ *Su*, *ibid.*, at para 54.

¹³⁵ *Su*, *ibid.* The BCHRT stated that if the employer was uncertain of what the complainant’s plans were about the duration of her leave, it should have asked her to clarify. Without making inquiries, it was not open to the employer to assume that the complainant was only taking a 17-week maternity leave and to further assume that she had abandoned her position when she did not return after that time period ended.

¹³⁶ See *Emrick Plastics v. Ontario (Human Rights Commission)* (1992), 16 C.H.R.R. D/300 (Ont. Div. Ct.) appeal from (1990), 14 C.H.R.R. D/68 (Ont. Bd. of Inq.)

Policy on preventing discrimination because of pregnancy and breastfeeding

Example: A woman who worked as a Mobile Patrol Officer for a security company advised her employer that she was pregnant. She was told she could not work any more shifts for alleged health and safety reasons, and was put on short-term disability leave, even though she did not believe she had a disability. Because she was not eligible for sick benefits, and her maternity leave benefits would be affected by not being able to work, she took a job with a competitor. Because of this, her employment was terminated. The HRTO found that the employer's claim that the presence of a pregnant woman on the job would cause health and safety risks was based not on empirical data or fact, but on stereotypes. It found that the employer treated the announcement of her pregnancy as though the woman was announcing a disability. The decision to terminate the woman's employment when she had no income due to the discrimination and was forced to look for another job was further discrimination linked to her pregnancy.¹³⁷

Even where a woman may be accommodated due to pregnancy complications by being given a leave of absence, the employer is not entitled to assume that she will not be coming back to work. As part of the accommodation process, the employee should let the employer know about her plans for coming back to work. However, before making an assumption that an employee is not coming back to work, the employer has an obligation to clarify with her first.¹³⁸

If an employer perceives that a woman's poor work performance is related to her pregnancy (e.g. an employee is less productive due to fatigue), it must inquire about this relationship and explore accommodation options before using discipline or terminating her employment.¹³⁹

Example: An employee suffered a miscarriage while she was at work, and needed surgery to deal with the complications that resulted. Because of this, she was absent a total of 3.5 days. Upon her return to work, she was dismissed from her job. The reasons given were excessive absenteeism and performance problems. The HRTO found that her employers did not document a pattern of absenteeism, except for the doctor's appointments related to her pregnancy and the time off she needed due to her miscarriage. It also found that while there were some performance problems, the employer did not follow their progressive discipline policy, assess whether these performance issues were connected to the employee's pregnancy, and determine if accommodation was required. The HRTO concluded that the woman's pregnancy and its complications were factors in her termination, and this was discriminatory.¹⁴⁰

¹³⁷ *Graham, supra* note 7.

¹³⁸ *Gonneau, supra* note 83.

¹³⁹ *Peart, supra* note 17; *Yap, supra* note 71; *Splane, supra* note 102; *Sutton, supra* note 102.

¹⁴⁰ *Osvald, supra* note 14.

It is important that employers have good human resource practices such as documenting performance concerns and engaging in progressive performance management. In such circumstances, it may be easier for an employer to show that a woman's employment was terminated due to performance concerns or legitimate business reasons and not for reasons related to her pregnancy.¹⁴¹ A failure to do so may result in an adverse inference being drawn.

7.3. Health-related absences and benefit plans

What follows below is a discussion of the human rights aspects of pregnancy-related leaves. For information about employment standards and employment insurance requirements and entitlements, consult with the provincial Ministry of Labour and the federal Services Canada.

Health-related absences from work and benefit plans are the subject of employment standards and employment insurance legislation, as well as human rights law. Section 25(2) of the *Code* states that group insurance contracts between employers and insurers do not violate the equal treatment provisions of the *Code* with respect to age, sex, marital status or family status, as long as they comply with the *ESA* and its Regulations. However, no provisions permitting differential treatment of health-related absences because of pregnancy during maternity leave have been included in the Regulations under the current *ESA*, and the current Regulations require employers to provide the same benefit entitlements to employees on pregnancy or parental leave as are provided to employees who are on other types of leave.¹⁴²

As a general principle, once an employer decides to provide an employee benefit package, they must do so in a non-discriminatory way. Exclusions from benefit plans that disproportionately affect a group identified under the *Code* will violate human rights law, unless there is a *bona fide* reason.

The courts have recognized that pregnancy and childbirth place unique demands on women. Giving special maternity benefits to pregnant women that are not available to other parents has been upheld by the courts as non-discriminatory, insofar as these benefits exist to recognize the special physical and psychological needs and demands on pregnant women, including the physical changes and risks associated with pregnancy; the profound physical demands of childbirth; the recovery needs of the post-partum period; and the demands associated with

¹⁴¹ For example, in *Comeau, supra* note 42, the HRTO found that although the applicant's employment was terminated while she was pregnant, there was evidence of documented performance concerns before she advised the employer of her pregnancy and that despite coaching she was incapable of performing the duties of her position. The HRTO relied on the performance logs that the employer produced to substantiate its claim of ongoing performance issues.

¹⁴² O. Reg. 286/01, s. 10.

breastfeeding.¹⁴³ However, leave programs or benefit policies that are based on stereotypical gender roles or assumptions based on family status will be subject to human rights challenges.¹⁴⁴

The Supreme Court of Canada has held that while pregnancy is not an illness or disability, it is a valid health-related reason for absence from work.¹⁴⁵ Therefore, pregnant employees with health-related needs should not be treated less favourably than employees who are absent from work for other health-related reasons, such as illness, accident or disability. This applies at any stage of a pregnancy.

“Health” is defined broadly to include:

- The physical and psychological health of the woman
- The health, well-being, growth and development of the fetus
- A woman’s ability to function as a social being, interacting with her family, employer and significant others.

A “health-related absence from work” can therefore mean any absence that is related to a woman’s health, or the health and well-being of the fetus.

Where an employer has a benefit plan that compensates health-related absences or gives disability benefits to its employees, a woman is entitled to disability benefits during that portion of the pregnancy or parental leave that she is unable to work for health reasons related to the pregnancy and childbirth. Payment must begin as soon as the pregnant woman is away from the workplace for a health-related reason.¹⁴⁶ Any health-related portion of maternity leave is to

¹⁴³ See *Schafer v. Canada (Attorney General)* 1997, 149 D.L.R. (4th) 705, (Ont. C.A.), (leave to appeal to the Supreme Court of Canada denied on January 29, 1998), and *Tomasson v. Canada (Attorney General)*, 2007 FCA 265.

¹⁴⁴ In 2000, a male doctor practicing in Ontario applied to receive benefits under the Ontario Medical Association’s Maternity Leave Benefit Program (MBLP), funded by the Ministry of Health, as he was staying at home to care for his newborn child while his wife returned to work. His application was denied, as the program only granted benefits to female doctors. Complaints were filed against the Ontario Medical Association and the Ministry of Health shortly thereafter, citing discrimination based on sex. A stated purpose of the MBLP was to give female doctors the opportunity to “bond” and spend time with their newborn babies by reducing the financial hardship of being away from their practice. The OHRC argued that this bonding opportunity should also be made available to male doctors. An agreement was reached to replace the MBLP with the Pregnancy and Parental Leave Benefits Program (PPLBP), under which female doctors continue to be entitled to receive benefits for pregnancy leave, but where both male and female doctors are now entitled to apply for parental leave benefits to spend time with their newborn or newly adopted children. See OHRC, “Commission settlement guarantees gender equality for doctors seeking parental leave,” (28 September 2006), online: OHRC www.ohrc.on.ca/en/news_centre/commission-settlement-guarantees-gender-equality-doctors-seeking-parental-leave.

¹⁴⁵ *Brooks*, *supra* note 4.

¹⁴⁶ *Parcels*, *supra* note 9.

be treated the same as other health-related leaves such as a sick leave or disability leave. The employee should be compensated at substantially the same level and should be subject to the same conditions as an employee who becomes ill, such as the requirement to provide a medical confirmation for the absence.¹⁴⁷ Pregnant employees are to be compensated for the full period of their health-related absence, whether it occurs during the pre-natal or post-natal period, and including recovery from childbirth.

Different women have different medical and physiological needs related to pregnancy and childbirth depending on their circumstances. For example, the time required to recover from childbirth varies. Because women respond differently to pregnancy, requests for health-related absences should generally be assessed and granted on an individual basis. Pregnant employees who require leave for health-related pregnancy concerns should follow the proof-of-claim procedures of the employer's benefit plan to establish that the health-related absence is valid.

A Divisional Court decision, *Crook v. Ontario Cancer Treatment and Research Foundation*, confirmed a Board of Inquiry's decision that sick leave benefits should be available, for health-related reasons, to a woman who has recently given birth when she has chosen not to go on maternity leave under the *ESA*.¹⁴⁸

Finally, a woman may have health problems related to her pregnancy that force her to be away from work *before* or *after* her pregnancy or parental leave. She can access health benefits under a workplace sick or disability plan in this situation. However, she should check with Employment Standards at the Ministry of Labour because her decision to take short- or long-term disability leave may affect her right to take pregnancy and/or parental leave. There are strict rules about when she is entitled to take pregnancy or parental leave and when she must notify her employer. The duty to accommodate under the *Code* operates alongside employment standards entitlement. For example, the *Code* may require employers to provide leaves of absence greater than those outlined in the *ESA*, where there is a valid pregnancy-related reason.

Women on maternity leave continue to be entitled to other benefits under employment-related benefit plans including pension, life insurance, accidental death, extended health and dental plans.¹⁴⁹ Employers are also required to continue to make contributions to such plans, so long as employees continue to make their contributions, as required.¹⁵⁰

¹⁴⁷ *Brooks*, *supra* note 4; *Parcels*, *supra* note 9; see further *Stagg v. Intercontinental Packers Ltd.* (1992), 18 C.H.R.R. D/392 (Sask. Bd. of Inq.).

¹⁴⁸ *Ontario Cancer Treatment & Research Foundation v. Ontario (Human Rights Commission)* (1998), 34 C.C.E.L. (2d) 56, 108 O.A.C. 289 (Ont. Div. Ct.); upholding *Crook v. Ontario Cancer Treatment & Research Foundation (No. 3)* (1996), 30 C.H.R.R. D/104 (Ont. Bd. of Inq.).

¹⁴⁹ *ESA*, *supra* note 97, ss. 51(1)-(2).

¹⁵⁰ *ESA*, *supra* note 97, s. 51(3).

8. Housing

Section 2 of the *Code* protects a woman against discrimination if she is, was or may become pregnant. This right applies to renting, being evicted, building rules and regulations, repairs, harassment, and use of services and facilities.

The *Code* also protects against such discrimination in other housing situations, including buying property, negotiating mortgages,¹⁵¹ and condominium living arrangements (for example, discriminatory restrictions on the use of shared spaces).

Pregnant women who are seeking housing may face a range of negative and discriminatory attitudes and stereotypes. Some landlords prefer not to have children in their premises because they believe that children are noisy, disruptive, and will damage the property. Lone mothers face powerful negative stereotypes, particularly if they are racialized, Aboriginal, young or receiving social assistance, including stereotypes that they are less responsible, less reliable, inadequate parents, and more likely to default on their rent.¹⁵²

In some cases, landlords directly refuse applications because a woman is expecting a child.¹⁵³ For example, a landlord may refuse to accept an application from a pregnant woman because the apartment is “not childproof.” They may also use a number of euphemisms to discourage or deny applications from families that are expecting children. Statements that a building is:

- A “quiet building”
- An “adult lifestyle” building
- “Not soundproof”
- “Geared to young professionals”

may, when coupled to a refusal to rent to a pregnant woman, indicate that discriminatory attitudes related to pregnancy played a role in the refusal. Section 13 of the *Code* prohibits the publication or display before the public of any notice, sign, symbol, emblem or other representation that indicates the intent to discriminate. Using such phrases in advertisements may be considered an announcement of intent to discriminate.

Example: Over time, a young woman shared a two-bedroom apartment with various roommates. The owners were aware of the arrangement, and she received their approval for each co-tenant. She was later involved with one of these co-tenants and became pregnant. When the superintendent

¹⁵¹ Federally regulated banks that provide mortgages are not under the jurisdiction of the Ontario *Code*. These are covered by the *Canadian Human Rights Act*.

¹⁵² See, for example, Humewood House, Submission to the OHRC Public Consultation on Human Rights and Rental Housing, July 2007. Also see *The Cost of Caring*, *supra* note 35 at 47-50.

¹⁵³ For example, in *Segin v. Chung*, 2002 BCHRT 42, CHRR Doc. 02-0223, the BCHRT found that a landlord discriminated based on sex when it refused to rent an apartment to a pregnant woman because of concerns about liability should her baby fall down the stairs.

found out she was pregnant, he asked her if she was “intending to give the baby up for adoption” and said that the owners “didn’t want kids in the building.” The Board of Inquiry found that the woman had been discriminated against because of her sex and family status. In the Board’s view, one of the main reasons she was evicted “was her pending motherhood.”¹⁵⁴

There is no defence under the *Code* that permits “adult lifestyle” housing that results in the exclusion of children.¹⁵⁵ However, the *Code* does permit age restrictions in housing under some circumstances.¹⁵⁶

As well as direct discrimination, pregnant women may also face systemic barriers in accessing and maintaining housing. For example, as children join a family, housing needs will change and additional space will be required. Families expecting children are therefore more likely to request transfers between rental units in the same building, and to be disproportionately negatively affected where such transfers are denied. An Ontario Board of Inquiry¹⁵⁷ found that rules prohibiting transfers between rental units are discriminatory.¹⁵⁸

Landlords must address any discrimination or harassment related to pregnancy that may arise within their rental housing environment, whether between tenants, or involving agents of the landlord, or others who are part of the housing environment, such as contracted maintenance workers. If landlords become aware of discrimination or harassment, either through a complaint or other means, they must respond appropriately. Landlords who fail to take steps to address a poisoned environment or a complaint of discrimination may be found liable.

9. Services, goods and facilities

Section 1 of the *Code* prohibits discrimination in “services, goods and facilities” based on pregnancy and breastfeeding. This includes educational institutions, hospitals and health services, insurance providers, public places like malls and parks, public transit, and stores and restaurants. This means that women who are pregnant, or who bring their babies to a restaurant or a theatre, cannot be

¹⁵⁴ *Peterson v. Anderson* (1992), 15 C.H.R.R. D/1 (Ont. Bd. of Inq.).

¹⁵⁵ See further *Dudnik v. York Condominium Corp. No. 216* (1990), 12 C.H.R.R. D/325 (Ont. Bd. of Inq.), reversed in part (1991) (sub nom. *York Condominium Corp. No. 216 v. Dudnik* 79 D.L.R. (4th) 161 (Div. Ct.)).

¹⁵⁶ Section 15 of the *Code* permits preferential treatment of persons aged 65 and over, and therefore permits housing that is limited to persons over the age of 64. Section 14 of the *Code* permits special programs to alleviate hardship and disadvantage, such as specially designed barrier-free housing projects aimed at older persons with disabilities. Section 18 creates a defence for religious, philanthropic, educational, fraternal or social institutions or organizations that primarily serve the interests of older persons and that provide housing as part of their services.

¹⁵⁷ Before the HRTO was established, decisions under the *Code* were made by Boards of Inquiry.

¹⁵⁸ *Ward v. Godina* (1994), CHRR Doc. 94-130 (Ont. Bd. of Inq.).

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denied service or access unless there is a *bona fide* reason for doing so. This also means that women have a right to breastfeed undisturbed, and cannot be prevented from breastfeeding a child in, for example, a public area or restaurant. They also cannot be asked to move to a more “discreet” area to breastfeed a child, or to “cover up.” Complaints from other people will not justify interfering with a woman’s right to breastfeed.

Example: While a mother was waiting in a courtroom to contest a parking ticket, she began to breastfeed her infant son. The security guard asked her to leave the courtroom and nurse her son where she would not be seen. A tribunal ruled that this was discriminatory.¹⁵⁹

Education providers have the same type of obligation as employers to accommodate women who are pregnant or breastfeeding, including the obligation to cooperatively discuss options and create a supportive environment.

Example: An educational program requires all of its students to complete a co-op placement as a condition of graduation. These placements last several weeks, and are in locations across the province. A student who has a young baby who is still breastfeeding asks to be accommodated in a placement within a reasonable commute of her home, so that she can go home in the evening to breastfeed her baby, and more easily transport the breast milk she will be pumping during the day. The program explores accommodation options with her.

Service providers should take steps to design their services in a way that is inclusive of pregnant and breastfeeding women.

Example: The City of Toronto has approved a policy on breastfeeding in public that supports women who live, work in or visit Toronto to breastfeed anytime and anywhere in public spaces controlled by the City. The City also promotes positive attitudes towards breastfeeding through public events such as annual Breastfeeding Challenges.¹⁶⁰

¹⁵⁹ *Quebec (Commission des droits de la personne et des droits de la jeunesse) et Giguère c. Montréal (Ville)*, 2003 QCTDP 88, 47 C.H.R.R. D/67.

¹⁶⁰ Medical Officer of Health, City of Toronto, *Breastfeeding in Public* (2007) online: City of Toronto www.toronto.ca/legdocs/mmis/2007/hl/bgrd/backgroundfile-4311.pdf. Information about the City of Toronto policy, and other municipal breastfeeding supports can be found on the website of the City of Toronto’s Public Health Department, at www1.toronto.ca/wps/portal/contentonly?vgnextoid=7f274485d1210410VgnVCM10000071d60f89RCRD. The City of Hamilton has also created a “Breastfeeding on City Premises Policy,” which supports and encourages mothers to breastfeed in all City-owned facilities. See Corporate Human Resources Policy, Health, Safety and Wellness, Policy No: HR-52-11, Approved 2012-11-08, online: City of Hamilton www.hamilton.ca/NR/rdonlyres/E3636298-4579-4130-BBC9-57D90FC87AE4/0/BreastfeedingonCityPremisesPolicyNOV8.pdf.

Access to services may be affected by negative attitudes and stereotypes. For example, lone mothers are heavily stigmatized, especially if they are young, racialized or Aboriginal, or receiving social assistance, and these women may face unwarranted scrutiny, be denied services, or be subjected to harassment when seeking services.

Example: A young Aboriginal lone mother receiving social assistance is told by her caseworker that she “is just having babies to get benefits” and that she “should have her tubes tied.”

The *Code* allows for an exception for certain types of insurance policies, under section 22. This section permits individual and group insurance policies, which are offered as a service, to make distinctions based on sex if the distinctions are made on reasonable and *bona fide* grounds. In *Zurich Insurance Co. v. Ontario (Human Rights Commission)*,¹⁶¹ the Supreme Court of Canada stated that a discriminatory practice in the insurance industry is “reasonable” if:

- a) It is based on a sound and accepted insurance practice; and
- b) There is no practical alternative.

Example: A professional association offers as a service to its members an optional insurance policy. The policy has a specific provision requiring a 30-day pre-existing condition restriction that applies only to women who are pregnant. This means that a woman who is pregnant at the time she applies for the policy is not eligible for coverage. If a pregnant woman challenges this requirement, the insurance provider, and possibly the professional association, would have to show that this requirement meets the test of a sound and accepted insurance practice and that there is no practical alternative.

10. Making complaints

People who believe they have experienced discrimination based on pregnancy or breastfeeding should try to raise the matter or make a complaint with their employer, union or other vocational association, landlord or service provider. If this is not possible or the problem is not addressed, they can ask the Human Rights Legal Support Centre¹⁶² for advice or make an “application” or claim to the Human Rights Tribunal of Ontario¹⁶³ within one year from the last alleged incident. People can also ask another person or organization to file an application on their behalf.

¹⁶¹ [1992] 2 S.C.R. 321.

¹⁶² www.hrlsc.on.ca/en/Default.aspx

¹⁶³ www.hrto.ca/hrto/

11. Corporate liability

Organizations have a legal duty and ultimate responsibility to maintain an environment free from discrimination and harassment because of sex. They must take steps to prevent and respond to violations of the *Code* or they may be held liable and face monetary penalties or other orders from a tribunal or court.

It is unacceptable to choose to remain unaware, ignore or fail to address potential or actual human rights violations, whether or not a complaint is made.¹⁶⁴

Under section 46.3 of the *Code*, a corporation, trade union or occupational association, unincorporated association or employers' organization will be held responsible for discrimination, including acts or omissions, committed by employees or agents in the course of their employment. This is known as "vicarious liability."

Responsible parties violate the *Code* where they directly or indirectly, intentionally or unintentionally infringe the *Code*, or where they otherwise authorize, condone or adopt behaviour that is contrary to the *Code*.

Multiple organizations may be held jointly liable where they all contribute to discrimination. Tribunals and courts may also find organizations liable because they failed to respond appropriately to discrimination and harassment. Organizations may face higher damages (costs or other orders) as a result.¹⁶⁵

"Vicarious liability" does not apply to the parts of the *Code* dealing with harassment. However, because a poisoned environment is a form of discrimination, when harassment amounts to or results in a poisoned environment, vicarious liability does apply. The "organic theory of corporate liability" may also apply. That is, an organization may be liable for acts of harassment carried out by its employees if it can be proven that management was aware of the harassment, or the harasser is part of the management or "directing mind" of the organization.¹⁶⁶

Generally speaking, anybody with authority or significant responsibility for the guidance of others will be considered part of the "directing mind." For more information about corporate liability, see the OHRC's *Policy on preventing sexual and gender-based harassment*.¹⁶⁷

¹⁶⁴ *Re Dupont Canada Inc. and Kingston Independent Nylon Workers Union* [1993] O.L.A.A. No. 426 at para. 67; *Alberta v. Alberta Union of Provincial Employees (Banack Grievance)* [1999] A.G.A.A. No. 74 at para. 86.

¹⁶⁵ *Smith v. Menzies Chrysler Incorporated*, 2008 HRTO 37 (CanLII).

¹⁶⁶ *Olarte v. DeFilippis and Commodore Business Machines Ltd. (No. 2)* (1983), 4 C.H.R.R. D/1705 (Ont. Bd. Of Inq.), aff'd (1984), 14 D.L.R. [4th] 118 (Div. Ct.); *Ontario Human Rights Commission v. Farris*, 2012 ONSC 3876 (CanLII) at para. 33.

¹⁶⁷ OHRC, *Policy on preventing sexual and gender-based harassment* (2011) online: OHRC www.ohrc.on.ca/en/policy-preventing-sexual-and-gender-based-harassment-0.

12. Preventing and responding to discrimination

12.1. Organizational reviews, policies and education

Corporate liability involves more than individual instances of discrimination and harassment. Organizations also risk violating the *Code* if they do not address underlying problems such as systemic barriers, a poisoned environment or an organizational culture that condones discrimination.

There are several steps organizations can take to make sure they are following the *Code* and human rights principles related to pregnancy and breastfeeding. Strategies include developing and implementing:

- A barrier prevention, review and removal plan
- Anti-harassment and anti-discrimination policies
- An accommodation policy and procedure
- An internal complaints procedure
- An education and training program
- Ongoing monitoring and evaluation.

Under the *Occupational Health and Safety Act*, all workplaces in Ontario are expected to develop harassment policies and review these at least annually. Harassment policies should specifically recognize protection for pregnancy and breastfeeding under the ground of sex, among other *Code* grounds.¹⁶⁸

For more information about these types of strategies, see the OHRC's, *A policy primer: Guide to developing human rights policies and procedures*.¹⁶⁹

¹⁶⁸ Also see *Occupational Health and Safety Act*, *supra* note 92, s. 32.0.1(1)

¹⁶⁹ (2013) online: OHRC www.ohrc.on.ca/en/policy-primer-guide-developing-human-rights-policies-and-procedures.

Appendix A: Purpose of OHRC policies

Section 30 of the *Code* authorizes the OHRC to prepare, approve and publish human rights policies to provide guidance on interpreting provisions of the *Code*. The OHRC's policies and guidelines set standards for how individuals, employers, service providers and policy-makers should act to comply with the *Code*. They are important because they represent the OHRC's interpretation of the *Code* at the time of publication.¹⁷⁰ Also, they advance a progressive understanding of the rights set out in the *Code*.

Section 45.5 of the *Code* states that the Human Rights Tribunal of Ontario (HRTO) may consider policies approved by the OHRC in a human rights proceeding before the HRTO. Where a party or an intervenor in a proceeding requests it, the HRTO *shall* consider an OHRC policy. Where an OHRC policy is relevant to the subject matter of a human rights application, parties and intervenors are encouraged to bring the policy to the HRTO's attention for consideration.

Section 45.6 of the *Code* states that if a final decision or order of the HRTO is not consistent with an OHRC policy, in a case where the OHRC was either a party or an intervenor, the OHRC may apply to the HRTO to have the HRTO 'state a case' to the Divisional Court to address the inconsistency.

OHRC policies are subject to decisions of the Superior Courts interpreting the *Code*. OHRC policies have been given great deference by the courts and the HRTO,¹⁷¹ applied to the facts of the case before the court or the HRTO, and quoted in the decisions of these bodies.¹⁷²

¹⁷⁰ Note that case law developments, legislative amendments, and/or changes in the OHRC's own policy positions that take place after a document's publication date will not be reflected in that document. For more information, contact the OHRC.

¹⁷¹ In *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 at para. 53 (Ont. Bd. Inq.), the Tribunal applied the United States Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (4th Cir. 1971) to conclude that OHRC policy statements should be given "great deference" if they are consistent with *Code* values and are formed in a way that is consistent with the legislative history of the *Code* itself. This latter requirement was interpreted to mean that they were formed through a process of public consultation.

¹⁷² For example, the Ontario Superior Court of Justice quoted at length excerpts from the OHRC's published policy work in the area of mandatory retirement and stated that the OHRC's efforts led to a "sea change" in the attitude to mandatory retirement in Ontario. The OHRC's policy work on mandatory retirement heightened public awareness of this issue and was at least partially responsible for the Ontario government's decision to pass legislation amending the *Code* to prohibit age discrimination in employment after age 65, subject to limited exceptions. This amendment, which became effective December 2006, made mandatory retirement policies illegal for most employers in Ontario: *Assn. of Justices of the Peace of Ontario v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 16 at para. 45 (Sup.Ct.). See also *Krieger v. Toronto Police Services Board*, 2010 HRTO 1361 (CanLII) and *Eagleson Co-Operative Homes, Inc. v. Théberge*, [2006] O.J. No. 4584 (Sup.Ct. (Div.Ct.)) in which both the HRTO and the Court applied the OHRC's *Policy and guidelines on disability and the duty to accommodate*, available at: www.ohrc.on.ca/en/resources/Policies/PolicyDisAccom2.