

Pregnant? Know your rights in the workplace



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WATCH: According to an employment lawyer, there are “protective leave provisions” that can protect a person’s job while on maternity leave.

You hear of it happening: women who go on maternity leave and are let go from their jobs – but are companies actually allowed to do that?

Well according to career experts, it all depends on why and how the person is let go and when – and knowing these rights could mean the difference between keeping your job and fighting for it.

“We don’t typically recommend that employers let go of an employee while [the employee is] on maternity leave,” Cissy Pau, principal consultant at Clear HR Consulting, says. “[Employees] can’t be let go from their job because of the maternity leave.”

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But there is an exception – someone who is on maternity leave can be let go if restructuring within the company occurs during their time off, but Pau usually advises that companies let the employee finish their leave and only enact the changes upon their return.

However, if a woman feels she’s been let go from her position at a company because of her pregnancy, then that’s where the story changes, employment lawyer David Whitten of Whitten & Lublin in Toronto says.

According to Whitten, there are two pieces of legislation that apply in this situation that protect women who are pregnant in the workplace: the Employment Standards Act (ESA) and the Human Rights Code.

(Being based in Ontario, Whitten speaks in reference to the ESA of Ontario and the Ontario Human Rights Code. Legislation may vary from province to province.)

The Employment Standards Act (ESA) contains very specific provisions, we call them the “protective leave” provisions, which stipulate what an employer has to do for an employee that takes a pregnancy or parental leave, and it protects them and their job if they qualify,” Whitten explains. “With the pregnancy and parental leaves under the legislation, there is a qualifier, and that’s that you have to be employed for at least 13 weeks before you can cloak yourself into protection under the Employment Standards Act. So if you started later than 13 weeks before your due date, you’re not going to be entitled to this protection under the legislation.”

That 13-week qualifier applies to full-time, part-time, permanent or term contract employees provided that the employee is employed by an employer that is covered by the ESA, the ESA details.

But even if your employer is not covered by the ESA, there's still the second option that provides protection: the Human Rights Code.

"It says that you can't treat someone differently, or make adverse decisions regarding their employment based on parental status, and pregnancy falls within that category," Whitten points out. "So even if you haven't been employed for more than 13 weeks with your employer – although you may not get the protection of the ESA – you do enjoy the protection of the Human Rights Code and it says your [employers] can't discriminate against you on the basis of your pregnancy."

The Employment Standards Act

If you qualify under the ESA, you are able to take 17 weeks of pregnancy leave and pair it with 35 weeks of parental leave for a total of one year, Whitten explains. This is considered protective leave because that means the employer is legally obligated to restore you to your pre-leave position at the end of the 52 weeks.

Or if your pre-leave position doesn't exist anymore, then the employer must offer you a comparable position if one is available – if one is not available and your pre-leave position no longer exists, then the employer is entitled to terminate you, Whitten says.

"If they don't restore you to your previous position or comparable position, and it's found that they existed – like there either was your previous position that still existed, or that there was a comparable position available – the Ministry of Labour is where you apply for relief, and the Employment Standards Branch is the branch of government that deals with that at the Ministry of Labour," Whitten adds.

Sometimes, Whitten explains, employers will take a liking to the employee's maternity replacement.

"When it comes time for that person to return, I'll get a call from the employers saying that they still have this position but they like the current person who's in it better," Whitten says. "That is not sufficient justification for not returning a person to their position. So it's a very powerful protection for women because it stands for the proposition that even if your replacement is better liked, considered more competent, etc. you'll still get your job back, and if you don't then you can make that complaint to the Ministry of Labour."

If the complaint is found to be justified by an employment standards officer at the Ministry of Labour, the

employer can be ordered to reinstate back wages.

And if the officer doesn't think those back wages are enough under the circumstances, they can award damages to the complainant.

"Back wages can be awarded from the date that you should have been reinstated to the date of the decision by the employment standards officer, plus they can award an additional amount or loss of opportunity," Whitten says.

Earlier this year, the federal Liberal government introduced a new option: an 18-month parental leave with the 2017 federal budget.

However, if parents are interested in doing this, it requires tinkering with how they choose to utilize their Employment Insurance (EI) benefits.

Protections under the Human Rights Code

As for the code, Whitten says it's a little more general in its application – it states that you can't discriminate on the basis of pregnancy.

If you've already made a complaint to the Ministry of Labour and it was found to be in your favour, though, it doesn't stop you from also filing a complaint with the Human Rights Tribunal.

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"You can allege that you were discriminated against," Whitten says. "If you're successful with that application, you're going to be awarded general damages that aren't taxable – so you get the money tax-free."

What the tribunal looks at, Whitten explains, is to what extent did the pregnancy play in the decision to terminate – not if it was just the primary reason.

"You don't have to prove that it was the only reason why they terminated you, all you have to prove is that it played some role in the decision to terminate," Whitten says. "It's called a rebuttable presumption that arises, that the tribunal assumes that there was discrimination and then it's over to the employer to prove otherwise. It's a hard onus for an employer to satisfy if they haven't documented the reason for the termination. For example, if it well and truly was an elimination of the role, they have to prove that – that this role hasn't been unbundled and the duties redistributed to other employees, they have to prove that that role no longer exists completely unrelated to the pregnancy."

Telling your boss about your pregnancy

Both Whitten and Pau agree, it's best if you tell your boss about your plans for maternity leave as soon as possible.

“I suggest – assuming you've been employed under the ESA for at least 13 weeks – you tell your boss as soon as you know because as soon as they're aware of the pregnancy, you're cloaked in the protection of the ESA and the Human Rights Code,” Whitten says. “There's no reason to keep it secret because your employer can't be found to have discriminated against you for something that your employer wasn't aware of.”

“I think at some point it's going to be pretty obvious,” Pau says. “It's such a personal call, but if I'm advising my employer, obviously giving them as much notice as possible is good. That gives them the chance to plan appropriately. But especially in the first trimester women don't often know what's going to happen along the way so a lot of times people will wait until they start showing.”

Tips for women while on maternity leave

Pau suggests that women on maternity leave keep in touch with their employer during their time away.

“You don't have to do it every day or every week but just touch base once every few months and let them know how things are going,” she says. “I think it's helpful for women who are planning to come back to work at the end of their leave. Just be aware of what's been going on and any major changes that have happened so that you're not hit all at once when you return.

Also, advise your employer if there have been any changes to your circumstances, Pau adds.

“A lot of times we'll see women who want to come back early, or who want to extend their leave,” she says. “Let your employers know that with advanced notice is, again, really helpful from a planning perspective.”

Some women, however, will use that time off for career exploration, Pau points out.

“This helps them figure out if they want to return to work or if they don't want to return to work,” Pau says. “So it's always a good time for women to do some research into other industries and other places they may be interested in working in. It's a good career evaluation time.”