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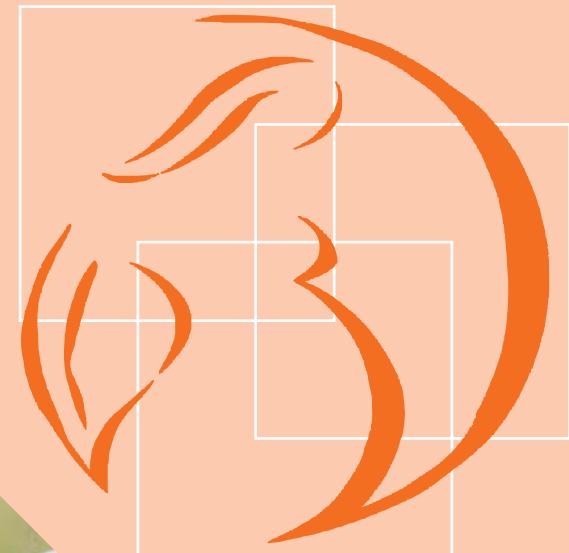
Maternity Protection Resource Package

From Aspiration to Reality for All

PART TWO

Module
9

Employment protection and non-discrimination



Maternity Protection Resource Package

From Aspiration to Reality for All

Module 9: Employment protection and non-discrimination



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Module 9: Employment protection and non-discrimination

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Module 9: Employment protection and non-discrimination¹

Maternity often constitutes a source of discrimination in employment, in relation to access to employment, equal opportunities, treatment at work and termination of employment. Thus, measures to safeguard the employment of pregnant workers and to combat all forms of discrimination against women in employment based on maternity are, together, an integral part of maternity protection. ILO Conventions have become increasingly comprehensive in terms of the extent of the protection that should be provided.

Key contents

This chapter discusses employment protection and non-discrimination in relation to maternity at work, reviews the relevant provisions of international labour standards on maternity protection, and highlights measures to deal with concrete problems that arise throughout the world, such as:

- ➡ Protection against dismissal on grounds related to maternity
- ➡ The right to return to the same position or an equivalent one after maternity leave
- ➡ Protection of employment-related entitlements
- ➡ Protection against discrimination in access to employment, including prohibitions against requiring a woman to take a pregnancy test at the time she applies for a job

Employment protection refers to the right of a female worker to not lose her job during pregnancy or maternity leave as well as during a period following her return to work, the duration of which is specified by national laws or regulations. The second dimension of employment protection is the right of a woman employee to return after maternity leave to the same or equivalent position she held prior to maternity leave and to be paid at the same rate. Employment protection has been a fundamental element of maternity protection since the very first ILO Convention on the issue in 1919 and remains a key provision of the most recent ILO Convention on Maternity Protection, 2000 (No. 183).

¹ This module draws primarily from:

ILO: *ABC of women workers' rights and gender equality*, Second edition (Geneva, 2007).

— *Maternity at work: A review of national legislation*, Second edition, Findings from the ILO's conditions of work and employment database (Geneva, 2010).

Women who take maternity leave or medical leave for reasons related to pregnancy must not be placed at a disadvantage relative to any other workers, men or women, who have not had to cope with the demands of childbearing. Worldwide, various laws protect working women who are pregnant, who return from maternity leave, or who are breastfeeding, from being dismissed, transferred to a lower position, or passed over for job advancement opportunities.

Protection against discrimination refers to the right of all women not to be treated less favourably in a work situation – including access to employment – because of their sex and more specifically, due to circumstances arising from their reproductive function. Convention No. 183 recognizes the fact that while discrimination might be suffered on the job, it can also negatively affect women in search of employment and therefore pre-emptive measures must be taken in order to prevent maternity from constituting a source of discrimination.

The Universal Declaration of Human Rights proclaims that all men and women are entitled to enjoy their fundamental rights and freedoms without discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. A range of international human rights and labour standards, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the ILO’s Conventions on equality and non-discrimination, provide an international legal framework for the realization of these rights. Across the world, these instruments have informed laws and policies which aim to mitigate discriminatory practices in the context of work and employment. Gender-related non-discrimination measures protect potential female workers in relation to their reproductive function: possible pregnancy, breastfeeding and maternity leave. Discrimination could mean, for example, refusing to hire a woman because she is currently or may become pregnant. In many countries this is illegal.

It is difficult to estimate the extent of discrimination on the basis of maternity. Surveys on the topic are rare and developing survey instruments that can precisely capture discrimination is extremely complex. Nonetheless, maternity-related discrimination remains a continuing problem based on studies which show the number of complaints made to human rights organizations, equal opportunities bodies (e.g. see **Box 9.1**), and trade unions, as well as the number of cases serviced by legal centres and judicial courts.

Box 9.1 Maternity-related discrimination complaints

Hong Kong, China. Statistics produced by the Equal Opportunities Commission of Hong Kong indicate that gender discrimination is a pervasive problem in Hong Kong, comprising 46 per cent of all employment-related complaints investigated in 2008-2009 (428 out of 931). Of these, more than half (i.e. 233 cases or 54 per cent) were pregnancy-related.

Italy. A 2006 study of discrimination complaints cases reviewed by the Office of the National Council of Equality, attached to the Ministry of Labour, showed that among the various types of discrimination, a substantial proportion (34 per cent) of reported cases (212) covered by the regional and district boards were related to working conditions, and more than half of these (i.e. 110 cases or 17.7 per cent of the total) concerned maternity.

Sources:

Equal Opportunities Commission (EOC): *Annual Report 2008/2009*, (Hong Kong, China 2009).

ISFOL: “Indagine sui casi di discriminazione trattati dalle Consigliere regionali e provinciali di parità”, Rete nazionale delle Consigliere di parità, Ministry of Labour and Social Welfare (Rome, 2006).

There is some evidence that maternity-related discrimination complaints are on the rise:

- In the Dominican Republic, the Secretariat of State for Labour reported an increase in maternity-related discrimination from 91 cases in 2005 to 128 in 2009.
- In Costa Rica, the Labour Inspectorate received 635 cases in 2009, up from 230 cases in 2008.²
- In the United States, pregnancy discrimination claims grew faster than all job bias claims (i.e. 31 and 24 per cent, respectively) from 2005 to 2010.³ In particular, claims from women of colour were on the rise, with complaints filed by women of African-American, Hispanic and Asian/Pacific descent in 2005 up by 45, 135 and 90 per cent, respectively, from 1995 levels.⁴
- In Singapore, 119 maternity-related complaints were filed with the Ministry of Manpower in the first nine months of 2009, the highest total since records started being reported in 2004 and double the 2007 monthly rate.

Increases in maternity-based discrimination complaints may be due to a number of reasons. They could reflect increases in discriminatory actions. They could correspond to increases in the number of women in the workforce, or the number of women working during pregnancy. They could also reflect greater awareness of anti-discrimination laws or growing confidence in the effectiveness of complaints bodies and courts, so that more women make complaints. Thus, we cannot conclude, based on the figures above, that maternity-based discrimination *per se* is on the rise. This qualification notwithstanding, these statistics suggest that maternity-related discrimination remains a pervasive issue for many women and an impediment to gender equality in the workplace.

There have been concerns in a number of countries that maternity-related discrimination has grown in recent years as a result of the economic crisis. For example, a legal review on gender equality published by the European Commission considered the financial crisis as an influence on the reported increase in maternity-related discrimination complaints received by the gender equality body of Greece.⁵ In Spain, an NGO working on mothers' rights published a research study that attributed increases in the percentage of women experiencing maternity-related job dismissals and increases in the difficulties for pregnant women to find employment, to the economic crisis.⁶ In Singapore, the trade unions have cited tough economic times to help to explain reports of growing maternity-related discrimination.⁷

Whether maternity discrimination or complaints thereof, or a combination of both, are increasing, the fact remains that any persistent discrimination is unacceptable and warrants action. The first part of this module helps to explain what employment protection and non-discrimination involves. Later sections suggest action that can be taken by stakeholders to improve information, education, awareness and action to prevent and address discrimination.

² P. Rimassa: *Legislación y jurisprudencia comparadas sobre derechos laborales de la mujeres: Centroamérica y República Dominicana* (San José, ILO, 2010), p. 56.

³ "Pregnancy discrimination claims show increase", in *Wisconsin Law Journal* (2010, 12 Apr.).

⁴ National Partnership for Women and Families: *The Pregnancy Discrimination Act: Where we stand 30 years later* (Washington, D.C., 2008).

⁵ European Network of Legal Experts in the Field of Gender Equality: *European Gender Law review 2010-1*. (Brussels, European Commission, 2010).

⁶ Fundación Madrina 2010. *La crisis en España margina laboralmente cada hora a más de 9 mujeres madres trabajadoras*, Nota de Prensa.

⁷ R. Basu: "Pregnant? You're fired", in *The Straits Times*, 8 Nov. 2009.

Employment protection related to maternity

Employment protection related to maternity safeguards the employment of working women throughout their maternity. Through such protection, a female worker has the right to (1) retain her job during pregnancy and maternity leave and (2) return to her position or an equivalent one upon return. This section looks separately at each of these two elements.

Protection against dismissal

Despite the fact that dismissal related to pregnancy has been a critical concern at the ILO since the beginning of discussions on maternity protection, it still exists in many (if not all) countries (see **Box 9.2**). This practice is usually driven by either an unsubstantiated fear of reduced productivity or the paternalistic view that a pregnant woman cannot work.

Box 9.2 Dismissal on grounds of maternity

Dismissal on grounds related to maternity is still a reality throughout the world. Although there is a critical lack of systematic research on the frequency of maternity-related dismissal, several countries do collect and report such data.

The United Kingdom. In 2005, a report released by the Equality and Human Rights Commission (EHRC) stated that around seven per cent of pregnant women (i.e. approximately 30,000 per year) lose their jobs due to pregnancy. Many more (i.e. approximately 45 per cent) suffer some sort of financial loss or are pressured to quit their jobs.

France. A national research project mandated by the French Government in 1998 concluded that every year four per cent of pregnant women in France (i.e. 29,500) lose their jobs due to their pregnancy. While only 126 cases of pregnancy-based discrimination were reported to the French Equal Opportunities and Anti-Discrimination Commission (HALDE) in 2008 (i.e. two per cent of total cases), 615 such cases were reported in 2010 (five per cent of the total). According to HALDE, discrimination based on pregnancy, gender and family responsibilities affected 12 per cent of working women in 2010.

Russian Federation. In 2006 alone, the State Labour Inspectorate uncovered and stopped more than 22,900 cases of employer-perpetrated labour legislation violations related to working women. The most common types of violations were: dismissal of pregnant women and women with children under three years; non-payment of state social insurance during maternity leave; night work or work during holidays without the woman's written consent; violations of standard recruitment and dismissal procedures for female workers; and violations of business trip procedures for pregnant workers or persons with family responsibilities.

Sources:

Equality and Human Rights Commission (EHRC): *Greater Expectations*, Summary Final Report, (Manchester, 2005).

Groupe d'Etude en Néonatalogie: *Enquête Nationale Périnatale 1998*, Ministère de la Santé, (Paris, 2001).

Haute Autorité de Lutte contre les Discriminations et pour l'Égalité (HALDE): *Rapport Annuel 2010* (Paris, 2010).

ILO: *Work and family responsibilities: Russian Federation* (Moscow, 2010).

Maternity-related dismissal directly impacts the economic security and health of victims of discrimination as well as that of their children. Lower income due to job loss means less revenue with which to raise a newborn. Lack of access to affordable healthcare of sufficient quality is also a risk for unemployed women, which can in turn increase otherwise preventable incidences of maternal and infant mortality.

With regard to employment opportunities, dismissal on grounds of maternity can delay women's return to the labour force. Such delays have been shown to have adverse effects on women's salaries, as well as access to certain benefits (e.g. seniority and promotions). In general, either the lack of laws against employment discrimination or their lack of effectiveness create gender-based disparities, which contribute to unequal job access and unequal pay between men and women, as well as a "glass ceiling" preventing women from acceding to senior managerial or leadership positions.

Despite the significance of the issue and its impact on overall gender equality in all societies, there is still an unfortunate lack of data. Many countries have adopted strict legal provisions on the matter and have functioning judicial systems to process complaints (see **Box 9.3**). However, there is often a gap in the enforcement of provisions, as complexity and inaccessibility in the legal system reduces the likelihood that victims of illegal practices report abuses.

Box 9.3 Case law on dismissal due to pregnancy, Norway

A female bank teller received notice of dismissal for the reason that, over time, she had had too many large discrepancies in the amounts in her till. The employee did not accept this as the true reason for termination, but claimed that it was because she had been on pregnancy-related sick leave. The case was brought to the Municipal Court, which judged that the pregnancy was indeed the true reason for the dismissal notice, which was consequently deemed invalid. The woman maintained her position, although as she had suffered no economic loss, no compensation was awarded.

Source: European Network of Legal Experts in the Field of Gender Equality, 2010, op. cit

ILO Conventions have become increasingly comprehensive in terms of the extent to which maternity protection should be provided. In earlier maternity protection Conventions (Nos. 3 and 103), protection against dismissal was limited to the period of absence for reasons related to maternity, whereas the protected period was increased in Convention No. 183 to also cover pregnancy and a period following the return to work, usually corresponding to the period during which national legislation provides for breastfeeding arrangements. Dismissals during this period may only be made on grounds unrelated to maternity.



It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer.

Convention No. 183, Article 8(1)

In addition, Convention No. 183 specifically provides that the responsibility to prove that the dismissal of an employee during the protected period is not related to her pregnancy shall rest on the employer. This is an important provision, since the decision to dismiss rests with the employer and proving evidence of the employer's intention would be extremely difficult for an individual worker.

National legislation and country-specific practices have evolved in many countries over time, so as to extend maternity-leave employment security to a longer protection period covering pregnancy and the weeks after birth. In most countries for which data is available, national legislation provides employment protection during maternity. This usually includes the prohibition of dismissal during pregnancy and maternity leave.

These prohibitions are more or less flexible, depending on the country. In some, dismissal is prohibited with no exceptions (in accordance with ILO Conventions Nos. 3 and 103); in others, it is prohibited on the grounds of maternity, but allowed for reasons regarded as legitimate and unconnected with maternity (in accordance with ILO Convention No. 183), such as misconduct or failure on the part of the worker to honour obligations under the employment contract, cessation of activity by the enterprise, *force majeure*, normal expiry of the employment contract or completion of the work for which the worker was recruited.

Employment protection also varies considerably with regard to the period it covers. To be even more effective, protection against dismissal should also cover the period **following** the worker's return to work. This protection is the subject of special provisions in different countries, as the actual period of protection may vary considerably (see **Box 9.4**).

Box 9.4 Country examples of duration of employment protection

In many countries, the duration of employment protection extends well beyond the end of maternity leave, as in the Republic of Moldova (from pregnancy until the child is 6 years old); in Azerbaijan, Estonia, Lithuania and Mongolia (from pregnancy until the child is 3 years of age); in Portugal (from pregnancy until the child is 2 years old); in Gabon (from pregnancy to 15 months after birth); in Chile and Panama (from pregnancy to 1 year after the expiry of the maternity leave); in the Plurinational State of Bolivia, Somalia, the Bolivarian Republic of Venezuela and Viet Nam (from pregnancy to 1 year after confinement); and in Argentina (from notification of pregnancy to 7 months after confinement).

In others, protection extends to the end of the nursing period. Pregnant women and nursing mothers are protected in Guatemala, Indonesia and Malta, among others.

There are still some countries where employment protection is limited to maternity leave and any strict extensions thereof, as in Botswana, Cambodia, Fiji, Republic of Korea, Lebanon, Lesotho, Libyan Arab Jamahiriya, Malaysia, Niger, Paraguay and Uganda.

In a small number of countries, protection is even more limited. Most EU Member States prohibit the dismissal of workers from the beginning of pregnancy to the end of maternity leave, except in cases not connected with their condition and authorized under national legislation or practice.

Source: ILO, 2010, op. cit., p. 22.

In some countries, dismissal is legitimate on grounds non-related to maternity, in accordance with the most recent ILO Convention on Maternity Protection (No. 183). The following are common examples of grounds for dismissal:

- serious fault, gross negligence or violation of work discipline on the part of the employee;
- valid reasons stipulated in common and labour law or by the Ministry of Labour;
- the undertaking has ceased to exist;

- expiry of fixed-term contracts or the end of the work for which a woman was engaged;
- imprisonment of the worker;
- the cause of dismissal pre-dates pregnancy;
- work for another undertaking while on leave;
- failure to resume work on the expiry of the unpaid leave granted to her.⁸

In a few countries, prohibitions against dismissal related to maternity leave have been conferred onto fathers who have primary responsibility for their baby, e.g. if they are widowed or single, or take over for the mother.

- In Chile, a father can take the remainder of “maternity leave” if the mother dies and he is protected against dismissal for one year after the end of postnatal leave.
- In Mongolia, single fathers are protected from dismissal as long as their child is below 3 years of age.
- In The former Yugoslav Republic of Macedonia, the father can take maternity leave instead of the mother and he is protected from dismissal during this period.

Assigning the burden of proof for dismissal

A second key element in Article 8 of the Maternity Protection Convention, 2000 (No. 183) is the provision regarding the burden of proof. Specifically, Article 8 states that the burden to prove that dismissal is not related to maternity shall be on the employer. This provision offers additional protection to women against discriminatory dismissal. Given that the ‘real’ rationale for dismissal is generally known only to the employer, it is pragmatically very difficult for workers to show that the dismissal was in reality maternity-based discrimination. Thus, transferring the burden of proof to the employer strengthens the worker’s protection and enforces the principle of equal treatment.

The provision regarding the burden of proof is reflected in many countries’ legislation. Where dismissal is allowed during the protection period, different grounds may be invoked as legitimate, such as those noted above, but the employer must demonstrate proof of these (see **Box 9.5**).

One of the ways national legislation obliges employers to prove that dismissal is not discriminatory is to stipulate a presumption of dismissal based on maternity when it occurs within the protected period. In several countries, the employer is obliged to ask for judicial or administrative authorization before giving notice of dismissal. This can provide additional safeguards to ensure that dismissal is unrelated to maternity.

⁸ ILO, 2010, op. cit.

Box 9.5 Assigning the burden of proof in Costa Rica

Until recently, dismissals during maternity leave were relatively common in Costa Rica. When a worker filed a complaint, employers simply cited the restructuring or reorganization of their company. In a court decision handed down in March 2005, the *Sala Segunda de Costa Rica* recognized this motive to be insufficient and explicitly required that the burden of proof must lie with the employer. Employers must provide a justification before dismissal takes place. If there is any doubt that the underlying motive may be pregnancy-related, the benefit of the doubt is given to the employee.

Source: ILO: *Legislación y jurisprudencia comparadas sobre derechos laborales de las mujeres: Centroamérica y República Dominicana* (San José, 2011).

Labour courts are crucial in ensuring that statutory provisions are respected and in assessing the validity of reasons given by employers and their possible connection with maternity, but they are a last resort. Examples of sanctions include reinstatement of the employee, as well as financial compensation.

Compensation in case of dismissal

Despite existing protective measures, discriminatory dismissal does occur in practice. In many countries, when employers do not comply with the ban on dismissal, legal action can be taken and compensation paid. However, although Convention No. 183 explicitly prohibits dismissal, it does not deal expressly with the issue of how the prohibition should be enforced, leaving this matter to the discretion of the ratifying countries, subject to the examination of national law and practice in this regard by the ILO supervisory bodies. (see **Module 5** on main international frameworks).

Countries in which compensation is provided include Albania, Argentina and Ecuador (equal to one year's remuneration), Denmark (between 39 and 72 weeks of compensation depending on the job), the Dominican Republic (five months' salary), Belgium (six months of gross remuneration), Colombia and Honduras (60 days of wages), Tunisia, Zambia, and the Lao People's Democratic Republic (unspecified damages as well as reinstatement).

Since dismissal may have implications in terms of whether or not a woman receives the cash benefits she would have earned during maternity leave, it is important to note the distinction between the situation of a woman who meets the maternity benefits eligibility criteria under a social security or insurance scheme and that of a woman who is not eligible or not covered by such a scheme. In the first case, dismissal will normally have no effect on the payment of benefits which the worker will receive during her leave. The second situation is more precarious: when the employer is directly responsible for leave benefits, dismissal from work can also mean the non-payment of these benefits. Provisions exist in some countries to ensure that the worker's wages continue to be paid. In Botswana, for example, legislation specifies that dismissal of an employee without good cause within three months of the birth of her child, does not affect the employer's obligation to pay maternity benefits (i.e. the employer has to continue paying benefits).

The Committee of Experts on the Application of Conventions and Recommendations (CEACR) has on many occasions stressed the importance of granting cash benefits during the period of leave even in the case of dismissal intervening during the protected period.

When provisions related to dismissal protection prove ineffective, it becomes the state's responsibility to impose sanctions that not only serve as a disincentive for employers, but also provide means for the victims to withstand any economic pressure caused by the loss of their employment. This involves having an effective complaints mechanism, including a competent authority to deal with these cases.

Guaranteed right to return to work or equivalent position

The right to return after maternity leave to the same or an equivalent position as the one held prior to maternity leave is an important part of employment protection during maternity. Assigning a woman to an inferior position upon return from leave constitutes discrimination and lack of job protection which leads to gender-based discrimination. Such practices alienate women from the workplace and from the labour force in general, and widen the inequality between men and women in employment.

It is difficult to assess exactly how often the right to return is violated in practice. There is a general lack of information regarding how many women suffer from this form of discrimination, in part because it is a multifaceted concept. Transferring to a job that is not equivalent may represent a loss in wages, benefits, authority, seniority, pension rights, promotion opportunities, training, bonuses or other difficult-to-capture dimensions (but see **Box 9.6** for an effort in the United Kingdom to measure the extent of pregnancy discrimination).

Box 9.6

Measuring discrimination in the right to return in the United Kingdom

Discrimination upon return to work is perhaps one of the most frequent forms of discrimination against working mothers. It is inadequately quantified, due to the complexity of the issue. The many forms of such discrimination include dismissal or pressure to resign upon return, financial loss, loss of certain forms of social security and loss of seniority, an essential component of obtaining wage raises and promotions. However, several countries have tried to establish data on this form of discrimination.

A study conducted in 2005 by the UK EHRC concluded that around 45 per cent of all pregnant women were victim of some form of discrimination due to their pregnancy. Fourteen per cent of all pregnant women (i.e. 60,000) suffered from some form of financial loss, such as a salary reduction, failure to get a promotion or raise, and the loss of benefits.

Source: EHRC, 2005, op. cit.

The right to return is explicitly mentioned in the most recent ILO Convention on Maternity Protection, 2000 (No. 183). The interruption of work for maternity leave is temporary in nature and hence should not differ from annual leave. However, if no explicit provision exists regarding the right to return, it may not be widely implemented in practice. For this reason, many countries have put in place specific provisions which expressly guarantee women the right to return to the same or an equivalent position with equal pay, as envisaged in Convention No. 183.



A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.

Convention No. 183, Article 8 (2)



A woman should be entitled to return to her former position or an equivalent position paid at the same rate at the end of her leave referred to in Article 5 of the Convention. The period of leave referred to in Articles 4 and 5 of the Convention should be considered as a period of service for the determination of her rights.

Recommendation No. 191, Article 5

In the event that, for health or safety reasons,⁹ returning to the same position is not possible, an equivalent but less dangerous position must be found and paid at the same rate as that which the employee left for maternity leave.

The Recommendation on Maternity Protection, 2000 (No. 191) goes even further than Convention No. 183 by taking into account the inherent problems that can arise when returning from maternity leave in terms of determining rights, such as calculating seniority, promotions, pensions and health or disability benefits.

As is the case with any justified leave of absence, the right of a worker to return to her former work or an equivalent position is crucial for a woman wage-earner who has just had a child (see **Box 9.7**). This right is all the more important now that a growing number of women are returning to work soon after childbirth, usually immediately after the end of maternity leave. For example, the percentage of women with children under three years of age who are in work is 52.4 per cent in the United Kingdom, 57.7 in Belgium, 61.5 in Portugal and 64.5 per cent in the Netherlands.¹⁰

In many countries, provisions regulating the return to work are explicit. In some, the right to return includes the right to return to the same or an equivalent post, paid at an identical rate as pre-leave remuneration. In others, provisions do not explicitly take into account all aspects mentioned in Article 8(2) of Convention No. 183 and its Recommendation No. 191.

⁹ This would be the case, for example, if a lactating woman was exposed to certain chemicals or other agents that could potentially cause harm to the newborn through breastmilk; for more details, see **Module 8**.

¹⁰ OECD: Maternal Employment statistics, Family Database, 2008, http://www.oecd.org/document/40/3746,en_21571361_38039199_37836996_1_1_1_1,00.html [accessed 20 Sep. 2011].

Box 9.7**The right to return in case law, France**

The underlying logic in the right to return to the same position or one of equivalent pay after maternity leave is that the leave itself should not be the main criterion for change in employment status. In other words, maternity leave should have the same status as annual leave when determining the woman's rights upon return. A recent case in France shows this very well:

A woman was working as a teacher in a school when she went on maternity leave. Upon her return, the school director wrote to inform her that she would be working in a class with another teacher. As a result of this change, she lost part of the control of her class. She refused this change in conditions and took the case to the *Cour de Cassation*. On 3 February 2010, the court decided that the employer had violated the obligation to offer the employee the same position as the one she occupied when leaving.

Source: European Network of Legal Experts in the Field of Gender Equality: *European Gender Law review 2010-11* (Brussels, European Commission, 2010).

In certain countries, exemptions can be made to the right of return to the position held before maternity leave. For example, in the United Kingdom, the size of the enterprise is taken into account.¹¹ In the United States, the Family and Medical Leave Act allows an employer to refuse to allow certain high-salaried employees to return to their previous positions if this is deemed necessary to prevent serious economic prejudice to the employer's activities. These measures are not recommended by the ILO, as a state-run benefit mechanism could compensate for the economic loss encountered by employers when coping with maternity leave.

Non-state actors, such as trade unions and employers' organizations, can play a key role in helping workers to realize their rights to employment protection. **Box 9.8** gives several examples of trade union related action and **Box 9.9** provides a case of employer awareness-raising targeting employers.

Box 9.8**The role of trade unions**

In many countries, trade unions focus on ensuring the implementation of existing laws, often by duplicating them in collective agreements.

In **Brazil**, an analysis of collective agreements established in 2000 found that the most frequent clause, found in 85 per cent of agreements, concerned job security for pregnant workers: a right already established by law. The unions feel that this will help to ensure that the provisions are applied and that in case of infringement, they will be in a strong position to defend the worker.

In **Ireland**, the International Trade Union Confederation (ITUC) maintains that "every day women are let go or discriminated against in the workplace for pregnancy-related reasons." It has launched a campaign to inform women of their maternity protection rights under national legislation, encouraging them to join the union to help them to protect their rights.

Source: C. Hein: *Reconciling work and family responsibilities: Practical ideas from global experience* (Geneva, ILO, 2005).

¹¹ Enterprises employing five workers or less are not obliged to comply, if it is not reasonably possible to allow the worker to return to her post or do alternative work under conditions not less favourable than those that would have applied had she not taken maternity leave.

Box 9.9 Managing parenthood in the United Kingdom

The EHRC of the UK has been very proactive in recent years in assessing discrimination due to maternity. They have published a training package that covers the main concerns employers have when dealing with women who are expecting a baby. The package includes recommendations on how employers should deal with a pregnant employee asking for leave in a non-discriminatory fashion, as well as workplace policy advice for pregnancy and adoption. How to manage the return to work after maternity or paternity leave is also covered and examples of small and medium-sized businesses are provided, such as the following:

Happy Ltd. (35 employees)

Happy Ltd. provides maternity benefits above the statutory minimum and has a very flexible maternity leave policy, which leads to high retention rates. The managing director reports:

Before workers go on maternity leave we ask them what they want – they can choose to have KIT (keeping in touch) days, or another form of contact that they prefer. We encourage them to visit with their children if they would like to. We also have agreed for a worker having difficulty with childcare to bring her son into the office for the morning. He was able to play while she worked. If we hadn't allowed this, she wouldn't have been able to work at all so by being flexible we are able to find a win-win solution. When it comes to women returning to work after maternity leave, Happy Ltd are equally flexible, and allow employees to return when they are ready and to stagger their return according to their needs, even if this means some adjustment of their previous role. We never had the need to refuse a request for part-time working to both women and men. We are very proud of our employees and put a lot of work and effort into making sure they are the best they can be. It would be very short-sighted to lose them just because they have a family.

Central Scotland Forest Trust (30 employees)

The Central Scotland Forest Trust provides mothers with a “quiet room” if they need to rest or express breastmilk; teleworking and a phased return to work after maternity leave, so that an employee can choose to start on fewer hours and then build up to their standard working week. “All these things are in place because of a clear business case. It’s because we gain so much,” the head of HR explains. “It’s about recruitment and retention. We want to have the competitive edge and be an employer of choice – working here should be a fulfilling and enriching experience. In return we get better qualified staff which can take us as an organization to the next level.”

Source: EHRC: Guidance on managing new and expectant parents,
<http://www.equalityhumanrights.com/advice-and-guidance/guidance-for-employers-pre-october-10/guidance-on-managing-new-and-expectant-parents/> [accessed 20 Sep. 2011].

National legislation in a number of countries also takes into account the cases of mothers who do not wish to return to work or are unable to do so because, for example, childcare facilities are inadequate: such laws allow them to resign without notice during pregnancy or breastfeeding. For example, in Cameroon, Côte d'Ivoire and Niger, a worker who is pregnant or nursing her child may end her employment contract without notice and without obligation to pay compensation for breach of contract. The same applies in Gabon, although only for nursing women.

In some cases, provisions guaranteeing the right to return to work cover both maternity and other types of leave (e.g. parental leave). In the countries of the European Union (EU), return to work must be guaranteed not only to women on maternity leave, but also to workers on paternity, parental or adoption leave.¹²

¹² European Council: “Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, amended by the Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002”, in *Official Journal* (2002, No. L269, 5 Oct.), pp. 15-20, quoted in ILO, 2010, op. cit., p. 46.

Maintaining employment entitlements

Under Recommendation No. 191, the period of maternity leave should be considered as a period of service in determining a worker's rights. This provision affects many aspects of financial security and economic benefits, such as:

- Seniority in the company, which can be an important factor in calculating wages and distributing promotions.
- Any other promotion criteria should not be affected by maternity leave.
- Pay increases awarded while a worker is on maternity leave would have to apply to the said worker.
- Pension rights and health or disability benefits should be computed as if the worker were in service with the company.

These considerations, together with those contained in Convention No. 183, give a full and comprehensive scope of issues to be taken into consideration when elaborating national legislation relative to maternity protection (see **Box 9.10**).

Box 9.10 Maintaining employment entitlements in Belgium

In 1999, a tenured member working half-time at the post office, a public body in Belgium, was asked to resume full-time work on a certain date. When her management discovered that she was to go on maternity leave at the same time as she was supposed to resume full-time work, she was informed that her reappointment would wait until the end of her maternity leave. She would therefore only receive maternity benefits rated at half-time pay.

After taking this decision to court and after several appeals, the Belgian *Cour de Cassation* ruled that this was a case of discrimination on the grounds of maternity, thus overturning the ruling of the Labour Court of Appeal of Liège. The Labour Court of Appeal, taking into account European Court of Justice (ECJ) case law, agreed that the loss of pay was not adequately grounded, and the employee was awarded the other half of her maternity entitlements.

Source: European Network of Legal Experts in the Field of Gender Equality, 2010, op. cit.

While entitlements linked to seniority, such as paid annual leave, appear to be widely recognized and guaranteed, the same does not seem to apply to certain other entitlements. Women wage-earners are often at a disadvantage in comparison with their male counterparts in areas such as access to training and career development, as women who have been on maternity leave may be consciously or unconsciously passed over for some opportunities.

Non-discrimination in relation to maternity

“Non-discrimination in relation to maternity” refers to the right of all women not to be treated less favourably in a work situation – including access to employment – because of their sex, or due to circumstances arising from their reproductive function. Importantly, employers should not be allowed to require a pregnancy test or proof of sterilization as a condition of employment, nor should they be allowed to question a job applicant about their plans for childbearing.

Some employers intentionally avoid hiring young women to avoid the possibility that they may utilize maternity leave at some future point in their careers. In many countries, pregnancy appears to be a factor not only in women losing their jobs but also in having difficulty obtaining a job in the first place.¹³

This is more than an issue of discrimination between men and women. Pregnant women or women who have young children can be subject to discrimination relative to female workers without children, or breastfeeding women may be subject to discrimination in relation to working mothers who are not breastfeeding. Clear policies on non-discrimination related specifically to a woman’s reproductive function are essential and measures must be in place to protect women of reproductive age. In fact, this perspective is relatively recent in legislation and as such, not always understood or considered by policy-makers.

ILO Convention No. 183 on maternity protection calls for member States to adopt appropriate measures to prevent discrimination in employment specifically on the grounds of maternity, including access to employment. Previous ILO standards on maternity protection provided only for women already employed and did not mention women seeking employment, which is a key concern from the point of view of equality of opportunity and treatment between men and women.



Each Member shall adopt appropriate measures to ensure that maternity does not constitute a source of discrimination in employment, including – notwithstanding Article 2, Paragraph 1 – access to employment.

Convention No. 183, Article 9(1)



Measures referred to in the preceding paragraph shall include a prohibition from requiring a test for pregnancy or a certificate of such a test when a woman is applying for employment, except where required by national laws or regulations in respect of work that is:

- (a) *Prohibited or restricted for pregnant or nursing women under national laws or regulations; or*
- (b) *Where there is a recognized or significant risk to the health of the woman and child.*

Convention on Maternity Protection, 2000 (No. 183), Article 9(2)

¹³ C. Hein, 2005, op. cit., p. 113.

As an example of a measure appropriate to guarantee that maternity is not a source of discrimination, the Convention on Maternity Protection, 2000 (No. 183) also specifically prohibits requiring women to take pregnancy tests (with a few exceptions related to work-based risks to health) at the time they apply for employment. Such a prohibition therefore also needs to be expressly established by national law and practice. A general prohibition of discrimination based on maternity would not be sufficient to give effect to this provision of the Convention.

While no specific provisions on the subject of discrimination are contained in Conventions Nos. 3 and 103 on maternity protection, a number of other ILO Conventions address the matter:

- **Equal Remuneration Convention, 1951 (No. 100)** requires that rates of remuneration be established without discrimination based on sex. This is one of the fundamental human rights Conventions of the ILO and has been ratified by 168 member States.
- **Discrimination (Employment and Occupation) Convention, 1958 (No. 111)** specifically defines discrimination in employment and occupation and requires ILO member States to adopt and implement a national policy on equality of opportunity and treatment irrespective of race, colour, sex, religion, political opinion, national extraction or social origin. Although pregnancy and maternity are not explicitly mentioned, sex-based discrimination under the Convention also includes discrimination based on marital status, family situation (especially in relation to responsibility for dependant persons), pregnancy or confinement. This also is one of the eight fundamental human rights conventions and is ratified by 169 member States. The CEACR, in assessing the implementation of Convention No. 111, has on many occasions raised concerns about pregnancy- or maternity-based discrimination against employed women and women seeking employment. Insufficient maternity benefits, lack of social insurance coverage, discrimination upon recruitment or upon return and unfair dismissal are amongst the concerns that have been raised over the past few years under Convention No. 111 (see **Box 9.11**).¹⁴
- **Discrimination (Employment and Occupation) Recommendation, 1958 (No. 111)** accompanies Convention No. 111 and provides additional guidance on the formulation and implementation of a national policy against discrimination in employment and occupation, including measures of prevention.
- **Social Policy (Basic Aims and Standards) Convention, 1962 (No. 117)** calls for social policy to aim at abolishing all discrimination against workers on grounds of race, colour, sex, belief, tribal association or trade union affiliation in respect of labour legislation and agreements; admission to public or private employment; conditions of engagement and promotion; opportunities for vocational training; conditions of work; health, safety and welfare measures; discipline; participation in the negotiation of collective agreements; and wage rates, which shall be fixed according to the principle of equal pay for work of equal value. It has been ratified by 32 countries.
- **Employment Policy Convention, 1964 (No. 122)** requires freedom of choice of employment and the fullest possible opportunity for all workers to qualify for, and to use their skills and endowments in jobs for which they are well suited,

¹⁴ To find all CEACR observations and direct requests for every ILO Convention, see the Universal Query Form, <http://www.ilo.org/ilolex/english/ilquery.htm>

irrespective of race, colour, sex, religion, political opinion, national extraction or social origin. This convention has 104 ratifications.

- **Workers with Family Responsibilities Convention, 1981 (No. 156)** aims to ensure equality of opportunity and treatment for men and women workers with family responsibilities without being subject to discrimination. This Convention has been ratified by 41 member States.

Box 9.11

Observations made by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) regarding the Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Insufficient maternity benefits and lack of social insurance

Islamic Republic of Iran, 2010

“The Committee notes from the ITUC’s submission that an increasing number of women are working in temporary jobs and contract employment, and thus are not covered by legal entitlements and facilities, including maternity protection. The ITUC states that since Iranian labour law does not require companies employing less than 20 people to abide by these regulatory protections and women often work in small and medium-sized enterprises, they may in practice face serious discrimination in the labour market. The Committee recalls that the Conference Committee had urged the Government to ensure that all entitlements and facilities are made available to women working in temporary and contract employment.”

Zimbabwe, 2008

“The ZCTU had raised concerns regarding discrimination against women in access to certain benefits, including maternity leave, particularly as many women are contract workers, seasonal workers and domestic workers. The Committee notes the Government’s indication that with respect to maternity benefits for public servants, the Public Service Act is being amended, and will be brought into conformity with international labour standards. The Committee requests the Government to keep it informed of the status of the amendments to the Public Service Act, and also to indicate how female contract workers, seasonal workers and domestic workers are protected against discrimination.”

Discrimination upon recruitment or upon return

Croatia, 2010

“The Committee is concerned that, as observed by the Ombudsperson, a wide range of discriminatory practices exist that exclude pregnant women or women having small children from employment.”

Guatemala, 2010

“[The Committee] requested the Government to step up its efforts to tackle discrimination on the ground of pregnancy with regard to obtaining or keeping a job and to strengthen the protection afforded to pregnant workers.”

Unfair Dismissal

Ecuador, 2010

“The Committee notes the concern expressed by the Committee on the Elimination of Discrimination Against Women in its concluding observations of November 2008 about the high rates of women’s underemployment and unemployment, especially in rural areas, and cases of gender discrimination in the workplace, including dismissals relating to maternity, and discriminatory labour practices against women, especially indigenous and migrant women and those of African descent.”

Panama, 2010

"The Committee refers to its previous comments in which it considered communications received from FENASEP concerning cases of the dismissal of women on the grounds of maternity or pregnancy. The Committee notes the Government's indication that the women were employed under fixed-term contracts and that they were removed from their posts simply because the period for which they had been recruited came to an end. [...] The Committee urges the Government to take the necessary measures to prevent discrimination on the ground of pregnancy, especially with regard to access to employment and job security and to ensure that temporary contracts are not used as a means to discriminate against woman based on pregnancy."

Source: ILO: *ILOLEX Advanced Query Form*, <http://www.ilo.org/ilolex/english/ilolexquery.htm> [accessed 20 Sep. 2011].

In all regions, there are countries that have enacted legislation prohibiting discrimination based on sex, although the nature and scope of such legislation varies. For instance, there are countries that protect all workers from discrimination based on sex, concerning access to employment, recruitment, promotion, changes in position, dismissal, retirement and other working conditions. Other countries have special anti-discrimination provisions that cover women¹⁵ or men.¹⁶ Legal provisions in a number of countries specifically prohibit discrimination on the basis of maternity. For example, in Côte d'Ivoire, employers may not take a woman's pregnancy into account when hiring her or terminating her contract of employment during a trial period. In various countries, legal provisions nullify contracts or otherwise restrain attempts to restrict rights related to maternity, as in Fiji, the Philippines and Singapore. In other countries, it is specifically stated that differential treatment providing support during maternity is not deemed to be contrary to non-discrimination legislation.

Regional legal instruments also address discrimination based on sex, including maternity. In the EU, the principle of equality and non-discrimination between men and women is enshrined in the Treaty on the Functioning of the European Union. Article 8 of the Treaty states that the EU shall in all its activities aim to eliminate inequalities and promote equality between men and women.

As regards the field of employment, the principle of gender equality is further developed in Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. In several of its judgments, the European Court of Justice has considered that refusing to appoint a woman because she is pregnant was direct discrimination on grounds of sex and therefore contrary to EU law.¹⁷ All EU Member States are thus required to respect the provisions on equal treatment and non-discrimination between women and men, taking into account the case-law of the European Court of Justice.

In the Caribbean region, the Caribbean Community (CARICOM) has issued model legislation on issues affecting women, including model legislation on equality for women in employment. The text sets out detailed provisions on the protection of women from

¹⁵ In Argentina, women may sign any type of employment contract and, as a result of collective labour agreements or official regulations, shall not be subjected to any type of discrimination in employment based on sex or marital status, although the latter may change in the course of her employment relationship. In the Philippines, employers cannot discriminate against women on the basis of their sex.

¹⁶ In Norway, further provisions may be prescribed as to which types of different treatment are permitted, including provisions regarding affirmative action in favour of men in connection with the care of children.

¹⁷ European Commission: "Report from the Commission on the implementation of Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding", Brussels, 1999, Section 9, p.13.

discrimination on the grounds of sex, marital status or pregnancy with respect to access to employment and other aspects. Although not binding on CARICOM Member States, the instruments provide clear guidance to countries in the region to tackle discrimination on these grounds through legislation.

Explicit prohibitions against requiring women to take pregnancy tests (with certain exceptions noted earlier) at the time they apply for employment does not yet seem to be widespread in labour legislation. Among the countries for which information is available, only 11 have concrete provisions banning pregnancy tests. However, other countries (such as Chile and Colombia) have adopted provisions to prohibit or limit the use of pregnancy tests when employed for a discriminatory purpose.¹⁸ In some countries, this prohibition is implicit in other legal texts, as in Switzerland, where it is included in the provisions concerning the protection of privacy.¹⁹

It should be noted that even though a woman may be protected by law in the case of a required pregnancy test, as a potential employee she could be in a difficult position to refuse to comply with the employer's request. Communication, information and enforcement to ensure that employers are aware of, and comply with laws prohibiting pregnancy tests can be important components of national efforts to prevent such discrimination.

Preventing and addressing maternity-related discrimination

It is the state's responsibility to set out the legal grounds and enforcement mechanisms regarding maternity-related employment protection and non-discrimination and, when such provisions have proven ineffective, to push sanctions that serve as a disincentive for employers to discriminate while providing a means for victims to withstand economic insecurity caused by the loss of their employment. In particular, governments can consider the following measures:

- Review and strengthen legislation on employment protection and non-discrimination on the basis of pregnancy and maternity.
- Collect and publish data on maternity-based discrimination, including breakdowns by type of discrimination (termination, access to employment, right to return, loss of entitlements, etc.) and by demographic characteristics, industry, occupation, location and size of enterprise, in order to identify trends, key issues, and targeted strategies.
- Establish, fund, staff and train an independent complaints body and mechanism to which employees and employers can have access without workers risking the loss of their employment.
- Strengthen the labour inspectorate to understand, identify and provide information on maternity-based employment discrimination.
- Undertake communication and information campaigns with employers and workers on maternity protection rights, including clear guidance on the provisions for maternity-related employment protection and non-discrimination.

¹⁸ This information can be found in the ILO database of international labour standards, ILOLEX <http://www.ilo.org/ilolex/english/index.htm>, which contains ILO Conventions and Recommendations, ratification information, comments of the Committee of Experts and the Committee on Freedom of Association, representations, complaints, interpretations, General Surveys and numerous related documents.

¹⁹ ILO, 2010, op. cit., p. 63.

- Incorporate training on employment protection and non-discrimination in government-provided training to businesses.
- Target education and enforcement strategies to selected industries, occupations, or geographic locations where data and analyses show particular problems.

A number of countries have developed effective complaints mechanisms, including competent authorities to deal with these cases. **Box 9.12**, below, provides the example of France, which has set up an authority to address discrimination.

Box 9.12
Creation of the French High Authority for the Struggle against Discrimination and for Equality (HALDE)

The High Authority for the Struggle against Discrimination and for Equality (*Haute Autorité de Lutte contre les Discriminations et pour l'Egalité*, HALDE) is an independent administrative authority created by the French Government (under Law No. 2004-1486 of 30 December 2004) to examine all forms of discrimination, both direct and indirect, either prohibited by law or by an international instrument to which France must comply.

Individuals (alone or through a political representative) or associations are entitled to file complaints with the High Authority. The HALDE provides assistance to the victims in filing their cases. However, the HALDE is also authorized to initiate proceedings *ex officio*.

The HALDE can act as a mediator between the parties to the case. As an outcome of proceedings, it issues recommendations to end any discrimination found, but it is also able to impose sanctions and accord compensation to the victim. It may investigate on-site. In cases where the person responsible for the site refuses this, the HALDE may obtain a court order permitting it to proceed. In the event that elements that constitute a crime are found, the Authority must inform the Public Prosecutor. Where facts could lead to disciplinary action against a public servant, the responsible authority must be informed. Finally, the HALDE can intervene in discrimination cases before the courts.

The Authority also plays a role as agent of communication and information concerning the promotion of equality and coordinates research on the issue. It may also recommend legislative changes.

The law was amended by decree in 2005 (Decree No. 2005-215) and in 2007.

Cases examined so far have referred to discrimination on the basis of health/disability, sex, maternity, trade union activity, age, religious convictions, sexual orientation, family situation, physical appearance, political opinion, life style and genetic characteristics. The numbers and proportions of cases related to maternity protection brought to the Authority are shown below.

Year	Sex		Pregnancy		Family situation	
	n	%	n	%	n	%
2005	86	6.0	--	--	78	5.5
2006	203	5.0	--	--	83	2.0
2007	372	6.0	--	--	366	6.0
2008	347	4.0	126	2.0	280	3.0
2009	668	6.5	259	2.5	262	2.5
2010	562	5.0	618	4.5	341	2.5

Source: HALDE, 2010, op. cit., p. 21.

Government efforts

There are examples of government efforts to extend education and outreach to employers and workers to better inform them about existing laws regarding discrimination and their rights and obligations. In New Zealand, for example, the Human Rights Commission developed the *Employers' guidelines for the prevention of pregnancy discrimination* which helps to clarify what pregnancy discrimination is under the law and provides practical guidance for setting up workplace environments that are supportive of pregnancy.²⁰ The Australian Human Rights and Equal Opportunity Commission (HREOC) has issued *Pregnancy guidelines* for employers and trade unions to explain the requirements of that country's federal sex discrimination act and to offer practical help with managing pregnancy in the workplace.²¹

Employers' and workers' organizations

Employers' associations and trade unions can also contribute to efforts to prevent and address discrimination on the basis of maternity. Employers' organizations are instrumental in providing their members with clear information on laws and policies as well as practical measures for meeting their obligations. In the United Republic of Tanzania, for example, when a new labour law was enacted in 2004, the Association of Tanzania Employers (ATE) provided training and materials for employers around the country to help them understand the provisions and implications of the law, including those related to maternity protection. Trade unions at national and international levels have produced research on maternity protection and discrimination, as well as awareness raising information for workers on the principles and rights related to maternity protection, including employment protection and non-discrimination. For example, in the United States the AFL-CIO provides information and resources for workers on their labour rights during pregnancy.²²

Civil society

Civil society organizations have been at the forefront of many national efforts to identify and address discrimination. Women's legal rights centres and other women's advocacy groups exist in many countries, and collect information on a range of topics relating to women's rights, including on maternity protection and pregnancy discrimination. Such centres and groups work to raise public awareness, lobby for better laws and enforcement, and in some cases provide direct assistance to women who have been victims of discrimination.

In Spain, for example, *Fundación Madrina*, an organization assisting young pregnant women, undertook research and publicity on the growth of job termination of pregnant women and increasing difficulties for pregnant women in getting a job in the context of the financial crisis.²³ In Australia, when the government considered changes in maternity protection and paternal and parental leaves, numerous community organizations formally submitted their views on the issues alongside government agencies, trade unions and employers, and several, (including the Work/Life Association, the National Foundation for Australian Women, regional Working Women's Centres (community based organizations),

²⁰ Human Rights Commission: *Employers' guidelines for the prevention of pregnancy discrimination* (Auckland, 2005).

²¹ Human Rights and Equal Opportunity Commission: *Pregnancy guidelines* (Sydney, Commonwealth of Australia, 2011).

²² See AFL-CIO, http://www.aflcio.org/issues/jobseconomy/workerstrights/rightsatwork_e/disc_pregnancy.cfm.

²³ *Fundación Madrina: La crisis en España margina laboralmente cada hora a más de 9 mujeres madres trabajadoras*, Nota de Prensa, 2010.

the Australian Breastfeeding Association, the Women's Employment Rights Project of the Inner City Legal Centre, and the Women's Legal Centre), advocated for stronger protection against pregnancy discrimination.²⁴

Beyond maternity: Discrimination and parenthood

The question of how to ensure that employment candidates of childbearing age do not suffer discrimination in employment or recruitment is difficult to resolve because women still bear the heaviest burden of family responsibilities. Their absence on maternity or other leaves can create organizational problems for employers and, in some cases, financial burdens (e.g. paying salaries during leaves of absence when there are no collective social security systems). These questions are additionally complex given that they relate to a worker's private life and involve reconciling this with the demands of working life. They are also affected by the societal perception of a woman's role in relation to her reproductive function.

Discrimination on the basis of family responsibilities extends beyond maternity, with findings, where the data is available, of maternal (but not paternal) penalties in the labour markets. In most societies, motherhood and the family responsibilities associated with it still strongly shape the image of women at work and may negatively influence particular recruitment decisions (see **Box 9.13**). In part, perceptions about the higher costs of hiring women due to maternity or family responsibilities, despite their inaccuracy, may affect whether or not employers select female candidates (see **Box 9.14**). Research suggests that, due to certain cultural stereotypes, men with family responsibilities do not experience similar disadvantages (see **Box 9.13**).

Box 9.13 Attitudes towards working mothers in the United States

A recent study has shown that there are lower expectations of workers who are also mothers in the United States. To a large extent, mothers are rated as less hireable, less suitable for promotion and deserving of lower salaries because they are seen to be less competent and less committed to paid work, and consequently discriminated against when hiring and salary decisions are made.

The results of this study have implications for understanding some of the enduring patterns of gender inequality in paid work. While many factors are certainly responsible for its persistence, this study suggests that cultural beliefs about the tension between motherhood and "ideal worker" roles may play a part in reproducing this pattern of inequality.

A second enduring pattern of gender inequality is the so-called "glass ceiling", a metaphor for the barriers that restrict women's movement up the career ladder to the highest positions in organizations and firms. To the extent that employers view mothers as less committed to their jobs and less "promotable", the glass ceiling women face could be in part a motherhood ceiling.

There is a suggestion that women who are able to prove their competence by displaying what are often considered "masculine" qualities can to a certain extent invert the trend of discrimination. However, this seems to be less likely for mothers, as they are caught in the "double-bind" of either taking additional time off to care for their children or taking a minimum of time off and being perceived as cold and selfish. In either case, their employment prospects are dimmed, thus resulting in culturally-rooted discrimination.

Source: S. Correll and S. Benard: "Normative Discrimination and the Motherhood Penalty", in *Gender & Society*, (2010, Vol. 24, No. 5, Oct.), pp. 616-646.

²⁴ See the Productivity Commission website at <http://www.pc.gov.au/projects/inquiry/parentalsupport/submissions>.

Box 9.14

ILO study counters the myth that working women engender higher costs

A study on wage and non-wage costs of hiring men and women in Argentina, Brazil, Chile, Mexico and Uruguay found that the monetary costs assumed by employers hiring women are very low: less than two per cent of gross monthly wages, ranging from a low of 0.2 per cent in Mexico to 12.8 per cent in Chile. In terms of maternity costs, the study revealed a low incidence of pregnancy per year and therefore a low total number of maternity leaves and associated benefits. Moreover, because these countries have established public funds, social security systems or welfare contributions paid by the workers, employers do not directly bear the costs of the wages of women on maternity leave and their health care before and during delivery. The study concluded that the perception of women as more costly than men to employ is not accurate.

Source: L. Abramo and R. Todaro: *Cuestionando un mito: Costos laborales de hombres y mujeres en América Latina* (Lima, ILO, 2002).

Care must be taken to design legislation and policies in ways that avoid reinforcing stereotypes of women as caregivers and “secondary earners”, and instead promote the equal sharing of care work and equal labour market opportunities for women and men. Legislation that assumes that only women have care responsibilities can in some cases reinforce gender disadvantage in the labour market. For example, obliging enterprises to set up childcare centres when they have a certain number of female workers overlooks any possibilities that men might have childcare responsibilities. For this reason, the ILO notes that measures designed to promote the harmonization of work and family responsibilities, such as childcare services, should not be specific to women. Such legislation provides an incentive to employers to, for example, limit the number of women workers to less than the number that would require the establishment of a crèche. More generally, all measures that put the cost of maternity benefits directly on the employers of women may be adding to labour market disadvantage.

In view of the risk that maternity protection or work/family policies might disadvantage women in the labour market or raise the potential of discrimination, several countries have pro-actively adopted comprehensive gender-balanced leave policies. Iceland, for instance, provides a total of nine months paternity leave (see **Module 6**). Three months are reserved for the mother, three for the father and three are to be shared between the two. Studies have shown that since the introduction of these measures, Icelandic men have been progressively taking more time off to care for their children. Such measures represent innovative ways to distribute the share of household care work more equally among women and men while also strengthening women’s position in the labour market. They can also potentially reduce discrimination since a more gender-balanced distribution of parental leave can reduce the perceived costs of hiring one sex or the other.

For further discussion on designing legislation, policies and workplace measures that support work and family in ways that are conducive to achieving equal opportunities in the labour market for both women and men, see **Module 11**.

Key points

- ➡ Employment protection provides protection against termination of the employment of a woman on maternity leave and ensures that she can return to work at the end of her leave to the same position or to one that is equivalent to the position she held prior to leave.
- ➡ Requiring the employer, rather than the worker, to prove that dismissal is not related to maternity strengthens the worker's protection and enforces the principle of equal treatment.
- ➡ Protection against discrimination based on maternity is defined as the right of all women not to be treated less favourably in a work situation – including access to employment – on the basis of maternity.
- ➡ Requiring a pregnancy test at the time a woman applies for a job is prohibited in the ILO Maternity Protection Convention, 2000 (No. 183), except under certain circumstances; this provision is beginning to appear in national legislation around the world.
- ➡ Information on how much maternity-related discrimination happens is not widely available, but reports from complaints bodies, trade unions, surveys, and legal centres indicate that such discrimination continues and in some places may be increasing.
- ➡ Stakeholders have a range of means available for taking action to prevent and address discrimination. Information and education campaigns for employers and workers on legal rights and guidance on establishing positive workplace environments for pregnancy can be practical and effective. Nevertheless, government action in strengthening legal frameworks, and establishing complaints and enforcement mechanisms is critical.
- ➡ Discrimination on the basis of care-giving responsibilities extends beyond maternity, with findings of motherhood (but not fatherhood) penalties in the labour market in countries where the issue has been studied. Policies must be designed in ways that avoid reinforcing stereotypes of women as caregivers and secondary earners, and instead promote the equal sharing of care work and more equal labour market opportunities for women and men.

Key resources



European Network of Legal Experts in the Field of Gender Equality: European Gender Law review 2010-1 (Brussels, European Commission, 2010).

This is the most recent review to date of new developments in European gender law. It contains updates on policy throughout EU countries, alongside court rulings and an assessment of how EU legislature has affected these countries. It offers clear examples that allow anyone to understand the main principles behind gender anti-discrimination laws.

Available at: <http://ec.europa.eu/social/BlobServlet?docId=6142&langId=en>



Haute Autorité de Lutte contre les Discriminations et pour l'Egalité (HALDE): Rapport Annuel HALDE 2010 (Paris, 2010).

The HALDE is a recent body established by the French Government to ensure greater efficiency in combating discrimination in all its forms. Dealing with maternity-related discrimination is one of the many issues the HALDE is faced with. It rules on hundreds of such cases each year, a number that is growing as the HALDE raises awareness of its practices and ways in which it can help women. Its annual report gives an overview of its purpose and actions.

Available at: <http://www.halde.fr/Rapport-annuel-2010,14653.html>



ILO: Legislación y jurisprudencia comparadas sobre derechos laborales de las mujeres: Centroamérica y República Dominicana (San José, 2010).

This report provides an assessment of gender-related legislation in Central America. It goes over key ILO Conventions and highlights the main issues pertaining to maternity rights, with a strong accent on non-discrimination laws. It also gives an indication as to how such laws are enforced, with data on court rules as well as case studies. It then gives recommendations as to how greater protection can be provided to those women in need.

Available at: <http://dwt.oit.or.cr/>



Equality and Human Rights Commission (EHRC): Greater Expectations (Manchester, 2005).

The EHRC has been extremely effective in providing data and policy guidance on gender discrimination in the United Kingdom. This report is an illustration of how discrimination towards mothers is well-rooted in developed countries. It shows that despite having a fully functioning legal system, the UK needs to do more in order to ensure gender equality at the workplace. The report concludes with recommendations of steps that can be taken to improve mothers' workplace situations. Although it targets the UK, lessons learned are transposable to any economy.

Available at:

http://www.equalityhumanrights.com/uploaded_files/eoc_pregnancygfi_summary_report.pdf



Human Rights Commission: Employers' guidelines for the prevention of pregnancy discrimination (Auckland, 2005).

The New Zealand Human Rights Commission has published these guidelines to serve employers in implementing non-discriminatory policies for women at all stages of pregnancy and maternity. It goes over social difficulties, health hazards, benefits, adequate leave, and other essential components of maternity protection. Although tailored to New Zealand, the recommendations it provides can be transposed to employers in other countries.

Available at:

http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/12-Jun-2005_20-16-44_Pregnancy.pdf



Human Rights and Equal Opportunity Commission (HREOC): Pregnancy guidelines (Sydney, 2001).

The Australian Human Rights and Equal Opportunity Commission has published extensive guidelines on how to assess and deal with pregnancy discrimination at the workplace. It covers many sensible issues for women in maternity, such as recruitment, leave, benefits and dismissal, illustrated with case studies and policy briefs. These guidelines can be useful for both workers and employers. Although they are written particularly for Australia, the recommendations that are featured are applicable in many countries.

Available at:

http://www.hreoc.gov.au/sex_discrimination/publication/pregnancy/guidelines/

Visual presentation model

SLIDE 1: Key contents

Mod. 9 Employment protection and non-discrimination

Key contents

This chapter discusses employment protection and non-discrimination in relation to maternity at work, reviews the relevant provisions of international labour standards on maternity protection, and highlights measures to deal with concrete problems that arise throughout the world, such as:

- ➲ Protection against dismissal on grounds related to maternity
- ➲ The right to return to the same position or an equivalent one after maternity leave
- ➲ Protection of employment-related entitlements
- ➲ Protection against discrimination in access to employment, including prohibitions against requiring a woman to take a pregnancy test at the time she applies for a job

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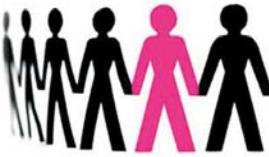
SLIDE 2: Employment protection

Mod. 9 Employment protection and non-discrimination

Employment protection

Employment protection: The right of a female worker to not lose her job during pregnancy or maternity leave as well as during a period following her return to work:

- ➲ Protect women against dismissals during this period
- ➲ Ensure a woman's right to return after maternity leave to the same or an equivalent position and to maintain her employment entitlements (such as seniority, pay increases, pension rights, etc)



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SLIDE 3: Employment protection related to MP: Protection against dismissal

Mod. 9 Employment protection and non-discrimination

Employment protection related to MP: Protection against dismissal

No dismissal during:

- ⌚ Pregnancy
- ⌚ Maternity leave
- ⌚ Leave for maternity related illness or complications
- ⌚ A period following women's return to work

No dismissal except for reasons **unrelated** to maternity:

- ⌚ Burden of proof is on the employer to show that the dismissal is not related to:
 - pregnancy,
 - childbirth and its consequences,
 - nursing

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SLIDE 4: Employment protection related to MP: Right to return

Mod. 9 Employment protection and non-discrimination

Employment protection related to MP: Right to return

The right to return to the same or an equivalent position with equal pay after leave is a key component of maternity protection

If return is dangerous or absolutely impossible, an equivalent position with the same pay must be found

Maintaining employment entitlements is an important part of economic security and gender equality. These include:

- ⌚ Seniority in the company, which can be an important factor in calculating wages, training and promotions
- ⌚ Any other promotion criteria
- ⌚ Pay increases awarded while a worker is on maternity leave
- ⌚ Pension rights and health and disability benefits, that should be computed as if the worker were in service at the company

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SLIDE 5: Non-discrimination in relation to MP and ILO standards

Mod. 9 Employment protection and non-discrimination

Non-discrimination in relation to MP and ILO standards

Protection against discrimination refers to the right of all women not to be treated less favourably in a work situation – including access to employment – because of their sex

- ➲ ILO member States shall ensure that maternity is not a source of discrimination in employment:
 - Examples: recruitment; access to training; conditions of employment; promotion opportunities etc.
- ➲ No pregnancy testing at recruitment

Many countries have measures to prevent discrimination – however only 11 ban pregnancy tests

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SLIDE 6: Preventing and addressing maternity-related discrimination

Mod. 9 Employment protection and non-discrimination

Preventing and addressing maternity-related discrimination

It is the State's responsibility to adopt legal measures that prevent maternity-related discrimination, and to enforce them

In particular, governments can consider the following measures:

- ➲ Review and strengthen legislation
- ➲ Collect and publish data on maternity-based discrimination
- ➲ Establish, fund, staff and train an independent complaints body and mechanism
- ➲ Strengthen the labour inspectorate
- ➲ Undertake communication and information campaigns to employers and workers
- ➲ Incorporate training on employment protection and non-discrimination in government-provided training to businesses
- ➲ Target education and enforcement strategies to selected industries, occupations, or geographic locations where data and analyses show particular problems

Employers, workers and civil society all play important roles

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SLIDE 7: Beyond maternity: Discrimination and parenthood

Mod. 9 Employment protection and non-discrimination

Beyond maternity: Discrimination and parenthood

Discrimination on the basis of care-giving responsibilities extends beyond maternity

Findings of motherhood (but not fatherhood) penalties in the labour market in countries where the issue has been studied

Policies must be designed in ways that:

- ➲ Avoid reinforcing stereotypes of women as caregivers and secondary earners
- ➲ That strengthen more equal sharing of care work and more equal opportunities in the labour market for both women and men

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SLIDE 8: Key points

Mod. 9 Employment protection and non-discrimination

Key points

- ➲ Employment protection provides protection against termination of the employment of a woman on maternity leave and ensures that she can return to work at the end of her leave to the same position or to one that is equivalent to the position she held prior to leave.
- ➲ Requiring the employer, rather than the worker, to prove that dismissal is not related to maternity strengthens the worker's protection and enforces the principle of equal treatment.
- ➲ Protection against discrimination based on maternity is defined as the right of all women not to be treated less favourably in a work situation – including access to employment – on the basis of maternity.
- ➲ Requiring a pregnancy test at the time a woman applies for a job is prohibited in the ILO Maternity Protection Convention, 2000 (No. 183), except under certain circumstances; this provision is beginning to appear in national legislation around the world.
- ➲ Information on how much maternity-related discrimination happens is not widely available, but reports from complaints bodies, trade unions, surveys, and legal centres indicate that such discrimination continues and in some places may be increasing.
- ➲ Stakeholders have a range of means available for taking action to prevent and address discrimination. Information and education campaigns for employers and workers on legal rights and guidance on establishing positive workplace environments for pregnancy can be practical and effective. Nevertheless, government action in strengthening legal frameworks, and establishing complaints and enforcement mechanisms is critical.
- ➲ Discrimination on the basis of care-giving responsibilities extends beyond maternity, with findings of motherhood (but not fatherhood) penalties in the labour market in countries where the issue has been studied. Policies must be designed in ways that avoid reinforcing stereotypes of women as caregivers and secondary earners, and instead promote the equal sharing of care work and more equal labour market opportunities for women and men.

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- █ **Part 1: Maternity Protection at work: The basics**
- █ **Part 2: Maternity Protection at work in depth: The core elements**
- █ **Part 3: Taking action on Maternity Protection at work**



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