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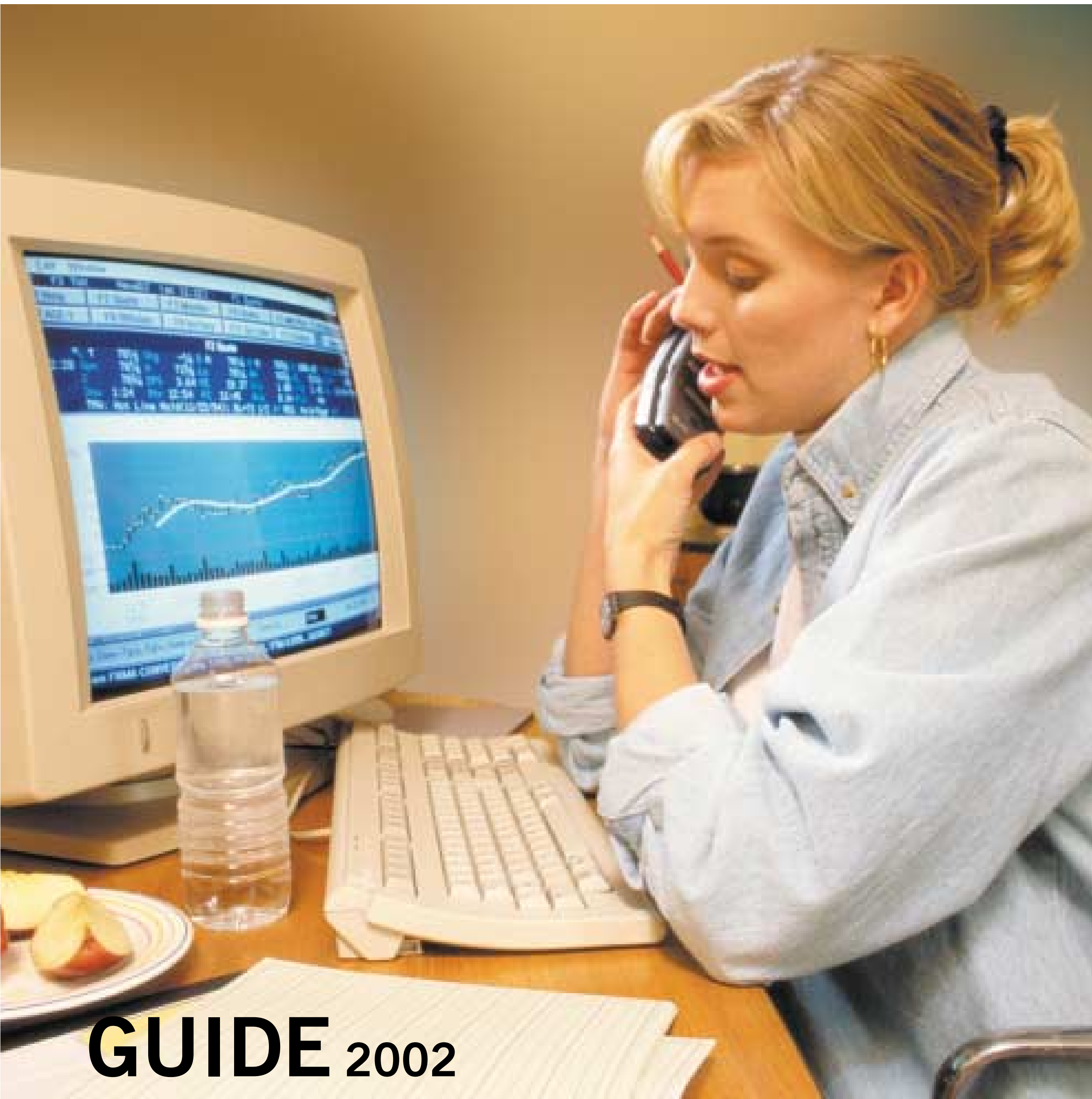
NEW SOUTH WALES

PREGNANCY
AND WORK



GUIDE 2002

WorkCover **Watching out for you**

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Preface

How does pregnancy affect the management of health and safety in your workplace?

It is important to protect the health, safety and welfare of working women who may be pregnant or breastfeeding, or who might become pregnant. This Guide provides practical advice for employers and contractors to assist them develop safe systems of work for pregnant women and provide a workplace free from discrimination.

How to use this information

What is this guide about?

This guide provides a systematic approach to ensuring that work and workplaces are safe, fair, and consistent with the entitlements of pregnant women and new mothers, including being able to continue in paid work. It provides advice on integrating the requirements of the relevant legislation: industrial relations, anti-discrimination and occupational health and safety. This will also help employers meet the legal requirements of the *Occupational Health and Safety Act 2000* to ensure the welfare, including the physiological and psychological welfare of their employees.

Relevant work hazards to pregnant and breastfeeding women are described. The risk assessment approach outlined will assist employers make decisions about eliminating or reducing the risks arising from these hazards.

Who is this for?

This guide is intended for use by employers to assist them to implement appropriate policies and procedures in their workplaces. Others who will find this useful are personnel officers, supervisors and employees.

Implementing policies and procedures outlined in this guide will help:

- reduce the likelihood of misunderstanding and confusion about correct procedures;
- reduce the likelihood of harm and the employer's liability;
- provide a more harmonious and productive work environment; and
- ensure that employees obtain their entitlements.

Development of this guide

This guide was developed by WorkCover NSW with the assistance of: the Anti-Discrimination Board, Department of Industrial Relations, Department for Women, Labor Council of NSW, and Australian Business Ltd.

1. INTRODUCTION

1.1 Legislation covered in this guide

This guide sets out and explains procedures for meeting the interrelated requirements of legislation in NSW applying to:

- occupational health and safety (including some specific hazards);
- industrial relations and issues relating to pregnancy, maternity leave, return to work, and breastfeeding; and
- anti-discrimination.

1.2 Scope - persons covered in this guide

This guide covers all persons working in NSW in relation to *occupational health, safety and welfare matters*.

In relation to *maternity leave* the coverage of this guide is the same as the coverage of the *Industrial Relations Act 1996*. The Commonwealth *Workplace Relations Act 1996* also contains minimum entitlements to parental leave, which supplement, and do not override, parental leave entitlements under NSW legislation, awards, agreements and contracts of employment (section170KA, and Schedule 14).

In relation to *pregnancy and sex discrimination* matters the coverage is the same as the NSW A*nti-Discrimination Act 1977*. The Commonwealth *Sex Discrimination Act 1984* also applies to many workers in NSW, but does not cover state government employees.

1.3 Applying this guide

Employers should note that implementing parts of this guide may involve conflict with the *Sex Discrimination Act 1984* and the *Anti-Discrimination Act 1977* unless exemptions are obtained. **While the procedures recommended are intended to avoid this, the employer should obtain independent legal and medical advice in individual cases.**

1.4 Interpreting this guide - terms used

Some terms used in this guide distinguish between legal requirements and recommendations.

Recommended practices

In this guide, words such as “should” indicate recommended courses of action. The words “may” or “consider” indicate a possible course of action. However, you may choose an alternative method of achieving a safe and equitable system of work.

Legal requirements

Words such as “must”, “requires”, and “mandatory” indicate legal requirements with which the relevant person must comply.

The legal concept of “discrimination” and “reasonableness” are important in discrimination law. Definitions and concepts are provided in appendix, section 9.2.1 and 9.3.1.

A Glossary of technical OHS terms used is provided in chapter 8.

2. IMPLEMENTING THIS GUIDE

2.1 Aims and objectives

The aim of this guide is to assist employers to implement safe and non-discriminatory workplaces, so that women workers are accorded their rights when pregnant and breastfeeding at work.

This guide provides:

- information and advice to assist employers to implement appropriate policies;
- advice on assessing OHS risks for pregnant and breastfeeding workers;
- information for workers on their rights;
- a guide to resources for specific matters.

2.2 Policies and planning in your workplace

In general, legislation requires that the health, safety and welfare of pregnant employees are ensured in non-discriminatory ways that are consistent with their employment rights, including any entitlements to maternity leave, and maintenance of their pay, conditions and status.

To do this, the first step is to develop suitable policies and procedures for your workplace, providing information and solutions to ensure that harassment, discrimination and injury do not occur.

In order to be non-discriminatory, policies and practices relating to pregnancy at work need to be sufficiently flexible to accommodate the range of differences in:
(a) the health status and needs of the individual;
(b) their work circumstances and requirements and capacities; and
(c) the risks to their health.

These policies and procedures should be disseminated on a regular basis. Managers and supervisors should communicate these to employees, preferably through face to face contact.

The second step is to provide training for managers and supervisors that will assist them in the identification of unlawful or unacceptable behaviour in the workplace, and to carry out health and safety policies and procedures.

2.3 Consultation with employees

The third aspect of developing procedures and policies for dealing with pregnancy and breastfeeding in your workplace is to consult with all employees.

Employers are required to consult with employees on all occupational health, safety and welfare matters, including the risk assessment process and the adoption of measures intended to control risk. Employees have the right to elect OHS representatives for the purposes of consultation. In enterprises of more than 20 employees, representatives may also form an OHS Committee with management nominees.

Relevant law - Occupational Health and Safety Act sections 13-18.

Consultation involves the sharing of information and the exchange of views between the employer and employees, and their representatives. It provides the opportunity for employees to contribute to decision making in a timely fashion to prevent or resolve any problems. Employers are required to value and take into account the views of their employees. Consultation fosters cooperation in the workplace.

In a small workplace, consultation could take the form of an informal discussion between the employer and employees. It could also be appropriate to use a formal process through OHS representatives, if elected in your workplace. In workplaces with larger numbers of employees, consultation should occur through the OHS Committee, if elected for the workplace or enterprise.

Employees should be encouraged to raise health and safety concerns including matters relevant to pregnancy and breastfeeding. It is important to involve employees in decisions about the risk assessment and the choice of control measures. Experience has shown that when employees help to choose the measures to control risks they are more likely to use and maintain the controls.

Consultation should not be limited to OHS matters, but include all relevant industrial and discrimination matters affecting pregnant or breastfeeding workers.

Issues to include in consultation are:

(a) how your policies, procedures and management systems address pregnancy and breastfeeding;

(b) ways of communicating issues, hazards and risks in relation to pregnancy, fertility and breastfeeding in the workplace (including occasions when new information becomes available or work processes change);

(c) identifying hazards, assessing risks related to pregnancy and breastfeeding, and choosing suitable control measures;

(d) additional training requirements for potentially affected workers;

(e) choosing a medical practitioner (eg one who specialises in occupational medicine and issues relevant to your workplace), especially when health surveillance is required;

(f) how the implementation and effectiveness of risk control measures will be monitored;

(g) issues in relation to changing work location, procedures for workers who are pregnant (such as a transfer to a safe job), and the provision of welfare facilities for pregnant or breastfeeding workers;

(h) any particular cultural sensitivities or practices among employees regarding pregnancy, breastfeeding or medical examination (for example some may prefer to be examined or tested by a woman doctor), so that the issues can be dealt with in culturally sensitive ways;
(i) any issues regarding travel to medical appointments for workers in rural or remote areas, especially where the medical consultations are required by the employer.

Further advice on implementing the consultation requirements is provided in the NSW *Code of Practice: OHS Consultation*.

2.4 Training and information about pregnancy and breastfeeding issues

Training is an important way of making sure all employees, including supervisors, know the correct procedures in your workplace. It also helps employees adapt when new procedures are introduced. This includes procedures relating to pregnancy and breastfeeding. For new employees, induction training is important. Relevant training for employees on how to protect their health and safety is part of the employer's duty of care under the OHS Act and Regulation.

The details and extent of training will depend on the hazards and risks in your workplace, and the duties performed by each employee. Matters relating to pregnancy and breastfeeding, such as outlined in this guide, should be included where relevant.

The provision and content of OHS training should also be discussed with the OHS representatives or by the OHS committee, if you have a formal consultation structure.

Pregnancy, fertility and breastfeeding issues should be included in OHS training where relevant. Topics for training could include, but are not limited to:
(a) The procedures for systematically managing safety in your workplace.
(b) Legislative requirements and responsibilities.
(c) Advice on the particular risks in your workplace, control measures, personal safety and provisions for welfare.
(d) How to identify and use relevant guidance material.
(e) Involvement in the workplace OHS consultation mechanisms.
(f) Involvement in the hazard identification, risk assessment and control process.
(g) Administrative procedures used to ensure health, safety and welfare.
(h) Emergency procedures.

If there is a change to work processes that could affect hazards or risks, the content of training for the relevant employees should be reviewed.

3. CONDITIONS AND PROCEDURES DURING EMPLOYMENT AND RECRUITMENT

3.1 Recruiting a pregnant woman or a woman who may become pregnant

Employers generally cannot lawfully control OHS risks by avoiding employing pregnant women.

It is generally unlawful to discriminate directly or indirectly against a woman on the basis of pregnancy or potential pregnancy, in relation to arrangements for determining who should be offered employment, or the terms or conditions on which employment is offered.

You must ensure that OHS risks in relation to potential pregnancy are not used as a barrier to employing women in your workplace (for practical advice see chapters 4 and 5).

Relevant law: Sex Discrimination Act sections14(1) and (2); Anti-Discrimination Act sections 25(1A) and 2A - for further information see appendix section 9.1.1

It is inappropriate to make enquiries during recruitment processes about an applicant's intentions regarding future pregnancy or how childcare needs will be met. Such questions could appear to be, and may be found to indicate, sex or pregnancy discrimination.

When the position is a temporary one requiring the completion of a project within a specified time, it may be lawful for the employer to refuse to employ a pregnant applicant if a man who was unable to attend work for a similar part of the contract period would have been rejected for recruitment.

Since you may recruit women who are pregnant, your assessment of OHS risks should include this possibility. This is a factor to include in your planning. Medical information about a pregnancy may be sought so an employer can address OHS issues, provided the information is not used in a discriminatory matter when received.

3.2 Entitlements of pregnant employees

3.2.1 main entitlements - outline

The main entitlements of a pregnant employee are:
(a) Unpaid maternity leave up to a year, with the right to return to her former position.
(b) Health and safety of the employee and the newborn child.
(c) Protection against discrimination on the basis of pregnancy or potential pregnancy.
(d) Relevant information about her rights, and health and safety.

Where a pregnant employee's job puts her health and safety or that of her unborn or newborn child at risk, an employer is required to take action to avoid exposure to the risk (see chapter 4).

Where there is a risk, temporary adjustments to working conditions or hours of work should be made. If these are not feasible, a transfer to more suitable work, which is comparable in status and pay, may occur. If neither of these possibilities exist, the employer is to grant maternity leave, or any available sick leave, for as long as is necessary to avoid exposure to the risk.

Verbal abuse or harassment in relation to the pregnancy can constitute discrimination. However, the fact that the pregnancy is referred to or discussed does not necessarily amount to, or provide evidence of discrimination.

Anti-Discrimination Act s 25(2) - see appendix 9.2.1

3.2.2 Information to be provided to a pregnant employee by employer

When the employer becomes aware that the employee is pregnant, the employer must inform the employee of her entitlement to maternity leave, and her obligations to give the required notices relating to her maternity leave. The employer cannot rely on an employee's failure to give the required notices (see appendix 9.2.2.5), and an employee cannot be denied maternity leave for failure to notify as required if the employer has not given this information to the pregnant employee.

Industrial Relations Act s 67(1)(a) & (b)

Occupational health and safety information relevant to pregnancy must also be provided (see chapter 4, section 4.4.3).

3.3 Maternity leave

3.3.1 Entitlement

A female employee who is employed on a full time or part time basis (other than a seasonal employee), and who has had at least 12 months continuous service with her employer, is entitled to maternity leave of up to 52 weeks.

The employee has the right to return to her former position after maternity leave.

Casual employees who have worked on a regular and systematic basis for 12 months are also entitled to maternity leave.

If an employee has worked permanently for less than 12 months, but their total employment as a permanent and casual employee for the one employer has been for at least 12 months, then they are entitled to maternity leave. For the duration of the casual component of the employee's service, she must have been employed on "an unbroken regular and systematic basis".

Special maternity leave is available when the employee is not on maternity leave, but where the pregnancy terminates before the birth or the employee suffers illness related to pregnancy - see section 3.5.

It is the employee's responsibility to apply for maternity leave. She must provide notices of her intention to take maternity leave. The employee can give notice of pregnancy and apply for maternity leave before the requirement for 12 months continuous service has been met.

Industrial Relations Act ss 53, 57 & 58 - see appendix 9.2.2.1

Maternity leave must be taken in a single unbroken period. It does not to extend beyond one year after the birth of the child, except with the employer's consent.

It is not compulsory for a pregnant woman to take maternity leave. There is no minimum period of maternity leave. There is no requirement for a specific period to be taken before or after the birth.

If a business has been transferred to a new owner and the person's employment continues, the period of service with the former employer counts as service with the new employer.

Further details on maternity leave are published in the Department of Industrial Relations booklet *Maternity at Work*. This includes draft letters of advice the employee must provide. This is summarised in the appendix section 9.2.2.5.

3.3.2 Change the period of maternity leave

An employee may cancel, shorten or extend the period of her maternity leave.

An employee can extend the period of maternity leave once, but not beyond the maximum entitlement. In addition, an employee may interrupt her maternity leave by returning to work on a full time, part time or casual basis with the agreement of her employer. The total period of leave cannot be extended beyond 52 weeks by such a return to work, without the consent of the employer. However, with the agreement of the employer the employee can extend the period at any time and beyond the maximum entitlement.

Industrial Relations Act ss 54 to 56, 61 to 66 - see appendix 9.2.2.1

3.3.3 Awards - further entitlements

Awards, enterprise agreements, or contracts of employment (including employment policies in particular organisations) may provide maternity leave entitlements more generous than those in the *Industrial Relations Act*. These include periods of paid leave, longer periods of leave, specific guaranteed entitlements to return to part time work, or to take broken periods of maternity leave.

3.4 Records the employer must keep in relation to maternity leave

The employer must keep for six years records of:

- each maternity leave that has been granted; and
- all notices and documents given to the employer in connection with each maternity leave (see section 9.2.2.5).

Industrial Relations Act s.67(2)

3.5 Entitlement to other types of paid and unpaid leave including sick leave

The employee is entitled to take part or all of any accrued annual leave or long service leave instead of, or in conjunction with, unpaid maternity leave. However, the total period of leave taken cannot extend beyond a maximum period of 52 weeks unless agreed by the employer.

The employer may agree to the employee taking other forms of paid leave (such as sick leave) in conjunction with, or instead of, maternity leave.

Industrial Relations Act s.62(1) & 62(3)

A pregnant employee has the right to take any paid (or unpaid) sick leave on the same basis as any other employee. This includes any requirements regarding provision of medical (or other) certificates for absence for illness or for consultations with medical practitioners, as included in industrial instruments, employment policies, or rules.

Restriction of a pregnant employee's access to her sick leave entitlements for attending regular pre-natal medical appointments (certified by a medical practitioner, or other practitioner, as required under an industrial instrument or the employment contract) could amount to less favourable treatment.

Special maternity leave is available when the employee is not on maternity leave, but where the pregnancy terminates before the birth or the employee suffers illness related to pregnancy. The length of this unpaid leave is as certified by a medical practitioner. This leave is not counted toward the maximum entitlement, that is, 52 weeks. In addition, the employee can take any paid sick leave owing instead of or in addition to special maternity leave.

Workers compensation entitlements to paid leave and medical expenses may also apply to a pregnant worker injured at work.

3.6 Changing hours or pay

3.6.1 General requirements

A pregnant employee's hours of work or pay should not be changed without her agreement just because she is pregnant. Any adjustments in hours necessary for health and safety reasons should not involve any adverse consequence such as loss of pay or status. For example, an automatic exclusion of a pregnant employee's eligibility for shift work or night work is likely to be discriminatory.

If an employer does change the pregnant employee's hours of work, the employer must ensure that the changed hours are consistent with ensuring the employee's health, safety and welfare. Consultation between employer and employee can assist in ensuring the occupational health and safety of working hours. Documentation of decisions made and the reasons for them can be relevant for establishing the health and safety considerations, and consequent actions taken, in relation to working hours.

In general, employees' hours are set by industrial instruments, and/or their employment contracts, and/or terms of their engagement. An employee's pregnancy does not of itself provide a basis for varying the employment contract. Variation to hours of engagement can be made by agreement, providing this is within any legislated limitations or the provisions of industrial instruments (where applicable).

However, the employer must temporarily adjust the employee's work conditions or hours of work to avoid exposure to a risk to the health and safety of the employee, or her unborn or newborn child. For further advice, see chapters 4 and 5.

Industrial Relations Act s 70(2) - see appendix 9.3.2

3.7 Promotion and training opportunities - discrimination issues

Opportunities for training, promotion or any other benefit of employment must not be denied because an employee is, or may become, pregnant.

If a person is transferred to a new job, the employer must ensure that suitable information, instruction, training and supervision is provided to protect their health and safety.

3.8 Accommodating the welfare and specific needs of pregnant employees

3.8.1 General principles

In general, pregnant employees should be provided with appropriate equipment and work environments to ensure their health, safety and welfare at work. It is not discriminatory to provide specific rights or privileges for a pregnant employee. Especially towards the end of the pregnancy, adjustments to how work is carried out may be required.

Providing appropriate equipment for employees may mean that specific equipment, such as safety clothing, would need to be provided for a pregnant woman, depending on the circumstances. Well-fitting protective equipment (e.g. face masks and shields, overalls) is necessary for adequate protection against dust, fumes, and spillages. Adjustable equipment, lighting, seating, work benches, etc, can increase flexibility in meeting individual needs. For example, a chair to sit on if her work usually involves standing for long periods and the work can safely be performed while seated. Equipment should take account of the ergonomic requirements, and the state of health, of the person who may use or wear it.

Steps needed to ensure an employee's welfare will vary from workplace to workplace, and according to the type of work carried out, the number of employees, and what is feasible under the circumstances. It could include seating, access to clean and private toilet and other facilities, running water, drinking water, adequate rest breaks, and/or access to a refrigerator for storage of expressed breast milk.

For more information see chapters 4 and 5.

3.8.2 Discrimination

Making adjustments to accommodate specific needs of pregnant employees may be necessary to avoid discrimination against them.

As examples:

- A requirement that staff stand for prolonged periods at a check out may discriminate indirectly against pregnant women if this is not reasonable in all the circumstances. *See section 5.3.2 - Standing for long periods*.
- Less favourable treatment could occur where wearing a uniform is required, and the uniforms provided do not accommodate pregnancy.
- A requirement to use particular furniture or equipment or work in environments that do not accommodate the change in body shape that happens during pregnancy may discriminate indirectly against pregnant women unless the requirement is reasonable in all the circumstances.

Transferring a pregnant employee to another job solely because of concerns about how she looks is likely to be discriminatory.

Anti-Discrimination Act s 25; Sex-Discrimination Act s 14. See appendix section 9.2.4.2.

3.9 Miscarriage or death of the newborn child

If the employee miscarries before she starts maternity leave, her application for maternity leave is cancelled automatically. She is entitled to take unpaid leave, called special maternity leave, for the period certified by her medical practitioner as necessary before her return to work. The employee is entitled to take any paid sick leave she has accrued, either instead of or in addition to the special maternity leave. The employee must provide documentation including medical certificates.

If the employee miscarries while on maternity leave, or the child dies while the employee is on leave, the employee may give notice to her employer that she intends to resume work and is entitled to resume work within two weeks of giving the notice.

Industrial Relations Act s 61, 71

3.10 Returning to work after maternity leave

3.10.1 General principles

An employee is entitled to return to the position she held before maternity leave was taken, or before being transferred because of the pregnancy to another position (for example, part time work or to another safer job). However, a readjustment period to physical workload and working conditions may be required after a significant absence from work. Consider including this issue in the flexible work arrangements (including working from home) adopted for your workplace or enterprise.

If the former position no longer exists, she is entitled to any other available position for which she is qualified and capable, and which is as nearly as possible comparable in status and pay to her former position. Any relevant OHS training for the new job must be provided.

Industrial Relations Act s 66 - see appendix 9.4.1.

3.10.2 Discrimination

An employee returning from maternity leave must not be discriminated against because of her pregnancy or sex.

For example, a requirement that work is available only on a full time basis and that no part-time work be made available could indirectly discriminate against a woman who seeks part-time work after returning from maternity leave, unless it is reasonable.

Failing to consult an employee who is absent on maternity leave about restructuring affecting her job may discriminate against her. When restructuring or offering redundancy packages, employers must not discriminate against pregnant employees or those on maternity leave.

3.11 Breastfeeding

An employer must take account of occupational health and safety risks in relation to breastfeeding.

When an employee returns from maternity leave, breastfeeding may be a relevant factor to take into account in a workplace risk assessment. For example a particular substance at the workplace may pose a *biological, chemical or physical* hazard to a lactating woman and/or her child. Further advice on control measures is provided in chapters 4 and 5. Additionally, if a woman does breastfeed her child at the workplace, any risk in the workplace to the child must also be considered.

Where there is still a risk to the health or safety of a breastfeeding employee or of her newborn child, an employer is required to take the following measures in the prescribed order:

1) Temporarily adjust the employee's working conditions or hours of work.
2) If this is not feasible, transfer her to a safe job.
3) If none of these measures is feasible, grant maternity leave or any available sick leave.

Industrial Relation Act s.70 includes breastfeeding - see appendix 9.2.4

There may also be a risk of contamination of expressed breast milk at the workplace. A clean and private place in which to express breast milk, and an appropriate storage place is desirable. You should address this in policies and planning for your workplace.

There are many benefits to women, babies and employing organisations in permitting and facilitating breastfeeding at work. There are health benefits for women and babies. Employers can benefit through retention of valuable staff, earlier return from maternity leave, reduced absences (as breastfed babies have fewer infections), improved employee relations (through meeting employee needs), and a positive image of the organisation in the community.

There are many ways employers can support employees who are breastfeeding. Developing a policy provides a framework for agreement. The provision of information for everyone in the workplace demonstrates the organisation's commitment to a work environment supportive to women combining work and breastfeeding. Some organisations provide kits for new parents, including information on leave entitlements, flexible work, childcare, arrangements and facilities to support breastfeeding.

Lactation breaks to express milk or breastfeed babies contribute to women maintaining milk supply, and to their personal physical comfort during the work day. The number of times the woman needs to express milk or breastfeed a baby depends on its age, with younger babies requiring more frequent feeding. Workplace facilities that facilitate breastfeeding include a private, clean and lockable area with comfortable seating, facilities for washing hands and equipment, adequate refrigeration for storing expressed milk, and lockable storage facilities for breast pumps and other equipment. Facilities might include a specific parents' room, or if space is limited, a first-aid or sick room or scheduling the private use of another room or office. For further advice on breastfeeding at work, see contact details for the Nursing Mothers' Association of Australia and other organisations in chapter 7. If babies are present in the workplace, health and safety risks to them must also be assessed and controlled.

4. OCCUPATIONAL HEALTH AND SAFETY - MANAGING THE RISKS

4.1 OHS Act

The Occupational Health and Safety Act 2000 requires that:
(a) Employers must ensure the safety, health and welfare of their employees, and other persons in the workplace.
(b) Self-employed contractors must ensure the health and safety of others at the workplace who may be affected by their work.
(c) Employees are obliged to cooperate with the employer in ensuring health and safety.

Legislation requires that the health, safety and welfare of pregnant employees are ensured in non-discriminatory ways, that are consistent with their employment rights, including any entitlements to maternity leave, and maintenance of their pay, conditions and status. When interpreting OHS requirements, take into account the objects of the OHS Act, which state that the work environment must be adapted to the physiological and psychological needs of people at work.

Pregnancy should be dealt with in relation to the OHS policies for your workplace. Smoking in the workplace should be actively discouraged for all workers.

Further legal outline - see appendix 9.2.3

4.2 Risk management

> The *OHS Regulation 2001* requires employers to identify hazards, assess risks, and eliminate or control the risks to health and safety. See chapter 2 of the Regulation.

An important tool in reducing the risks to health and safety is the risk management approach. You should deal with the risks to those who are pregnant, and those who have returned to work following birth, in the same manner and context as managing health and safety risks to all workers at your workplace. Planning and preparation of work procedures are important parts of risk management.

This is done by:
1. Identifying relevant hazards.
2. Assessing the risks arising from the hazards.
3. Adopting control measures to eliminate or reduce the risks, following the hierarchy of control.
4. Recording these decisions and checking the continued effectiveness of the control measures.

5. For pregnant employees, additional steps may be necessary, such as a transfer to a safe job (see section 4.5).

This process applies regardless of whether the workers are casual, temporary, permanent employees, or contractors.

Workers should be involved in the risk assessment process and the choice of control measures through the consultation mechanisms established for your workplace (see chapter 2). The risks posed by contractors entering your workplace to carry out additional work must also be assessed.

In some cases the effectiveness of control measures may need to be monitored. This may include appropriate medical examinations or tests.

This guide will help you by indicating a systematic approach and listing some of the hazards and risks that may affect pregnancy and breastfeeding (chapter 5).

4.3 Hierarchy of control

In some cases, controlling the worker's exposure will also control exposure to the foetus, or child (if breastfeeding).

A range of methods can be used to eliminate or control risks. The following is a list of measures which must be considered, in order of preference. Eliminate the risk, or if this is not practicable, minimise risk by choosing the most practicable method earliest in the following order of preference. In some circumstances a combination of these measures is desirable.

1. Design and planning - try and ensure that hazards are "designed out" when new materials, equipment and work systems are being planned. Try and eliminate hazards from the workplace.
2. Substitute an identified hazard for less hazardous materials or processes, or adopt a safer process.
3. Isolate the hazard, for example through the use of guards or remote handling techniques.
4. Provide engineering controls such as effective ventilation for hazardous substances.
5. Adopt administrative procedures to ensure safe work practices.
6. Personal protective equipment (PPE) is the lowest preference, but sometimes the only practicable method of providing protection.

You should consider applying the hierarchy of control on the basis of continuous improvement. The controls you first choose may be improved upon as other options become available.

4.4 Assessing risks to health and pregnancy

4.4.1 General approach

When ensuring the health, safety and welfare of employees, the fundamental approach to risk assessment requires inclusion of the risk factors related to pregnancy. These factors should be considered in the same manner as other types of individual differences (e.g. an individual sensitivity to dermatitis or an allergy).

Planning should ensure that such risks are anticipated and controlled effectively. The decision making process can be summarised in three steps:

(a) First consider whether the risk assessment indicates that the control measures normally applied for all workers will be effective for pregnant workers (see sections 4.4.2 to 4.4.4 below).

(b) If your normal control measures are inadequate (as they may not be as pregnancy advances) then specific individual control measures must be devised, if they can be (see section 4.4.5).

(c) If control is still not adequate, there are provisions for:

i. transfer to a safe job,
ii. maternity leave, or
iii. sick leave.

These are described in section 4.5.

4.4.2 Types of risks relevant to pregnancy and breastfeeding

There are four types of OHS risks to consider:

1. Risks to fertility (including those which may also affect men as well as women);
2. Risks to the health of pregnant workers (some of which may also affect the foetus);
3. Risks to the health of the unborn foetus;
4. Risks to children from chemicals transmitted during breastfeeding.

4.4.3 Information on OHS

Employees who are pregnant, breastfeeding or planning parenthood should be warned of any risks to conception, to the development of the foetus, or in breastfeeding that could be caused by their work duties. Those workers who could be adversely affected can elect not to perform those duties.

These risks should be included in the normal flow of OHS information required by law. Suppliers of plant and substances are obliged to provide employers with relevant OHS information, which must be passed on to employees.

4.4.4 Assessing risks - factors to consider

Establish the risks to a pregnant employee, or breastfed child, objectively on the basis of an assessment of:

(a) the particular employee (including using medical certification and/or advice regarding pregnancy-related physical changes in general and in relation to the particular employee, if necessary);

(b) the hazards to the pregnant or breastfeeding employee and/or unborn/newborn child; and

(c) the particular circumstances at her workplace (including any necessary information, expert advice or technical assistance).

4.4.5 Individual health

An individual's health and disposition is a relevant factor in the risk assessment and control process.

When allocating duties, take into consideration the state of the individual's health, drawing upon medical advice as appropriate. Pregnancy can affect an employee's health and capacity to perform her normal duties. Adapt the work situation to suit her new circumstances, or allocate other tasks, as far as practicable.

In making such decisions, it may be necessary to seek a medical assessment of the individual case in relation to the specific duties of a job.

4.4.6 Review of risks

The effectiveness of the control measures adopted should be evaluated periodically. Objective measurements of exposure to risk may be necessary to ensure that control measures are effective.

> Employers must review risk assessments when there is evidence they are no longer valid, when injury or illness results, or when significant changes to work are proposed. *See OHS Regulation 2001*, clause 12.

Keep the risk assessment and control plan under review in relation to the stages of pregnancy. Even if the hazards remain constant, the possibility of damage to the foetus will vary at different stages of the pregnancy. Breastfeeding issues, such as appropriate controls, will also need to be considered for the period breastfeeding takes place.

Information about the incidence of particular types of injury is relevant in assessing level of risk and the appropriate action to take. The employee's own assessment of her health status and work capacities is also relevant. The employer may request the employee to obtain advice from her medical practitioner regarding her ability to carry out particular work, and make this advice available.

The advice provided by the employee's medical practitioner provides authoritative guidance for managers regarding that employee's capacities in relation to the particular hazards.

4.5 Transferring to a safe job - an integrated approach to complying with all relevant legislation

4.5.1 Policies

Transferring a pregnant employee to a different job will be necessary if the health and safety risks of their usual job cannot be adequately controlled. This should be covered by the policies and procedures adopted for your workplace (see chapter 2).

Any action taken in relation to risks to the employee should be non-discriminatory.

The industrial relations laws contain specific provisions about the transfer of a pregnant employee to a safe job including safeguarding the employee's pay and conditions. Discrimination legislation requires that any job transfers do not discriminate against pregnant (or potentially pregnant) employees.

The *Anti-Discrimination Act* operates concurrently with other legislation. Compliance with both the *Occupational Health and Safety Act* and the *Anti-Discrimination Act* is required to the fullest extent possible. The federal *Sex-Discrimination Act* must also be complied with.

It may be necessary to change an employee's working conditions or hours of work or transfer the employee to avoid exposure to risk. If this occurs then the adjustments or transfers should not involve less favourable treatment, such as loss of pay, opportunities or conditions (as indicated in chapter 3). This also applies to risks to her unborn or newborn child.

See appendix sections 9.2.2; 9.2.4 and 9.3 for more legal information

4.5.2 Temporary adjustment

An employer is required to transfer a pregnant employee to other appropriate work where it is necessary to avoid exposure to risk to the health and safety of the employee, or to her unborn or newborn child. The risk is to be assessed on the basis of a medical certificate supplied by the employee's doctor, in addition to the employer's general obligations to assess and control risk.

Where there is such an uncontrolled risk, the employer is to:
(a) temporarily adjust the employee's working conditions or hours of work to avoid exposure to that risk, or
(b) if adjustment is not feasible or cannot reasonably be required to be made, the employer is to transfer the employee to other appropriate work that will not expose her to that risk and which is as nearly as possible comparable in pay and status to her present work.

These provisions apply whether or not an employee is eligible to apply for maternity leave.

Industrial Relations Act 1996, s 70 - appendix 9.3.2.

If signs of injury and illness do occur the worker may also be eligible for workers compensation payments. These may be calculated to make up the difference between previous wages and the wages in the new position.

4.5.3 Additional leave

If it has not been feasible to reduce risk by altering either:
(a) the conditions;
(b) the employee's job; or
(c) transferring her to another job of comparable pay and status

then additional leave should be considered.

The employee is entitled to (unpaid) maternity leave, or any available paid sick leave, for as long as a medical practitioner certifies is necessary to avoid exposure to the risk.

It is unlawful for an employer to terminate employment because an employee is pregnant (see chapter 6).

Industrial Relations Act s 70 & 68 - see appendix 9.3.2

4.5.4 Exclusion from certain work activities on the basis of health and safety

Establishing that it was necessary to exclude a pregnant or breastfeeding woman from

particular work, in order to comply with OHS legislation, would usually require establishing that:

(a) steps to ensure the health and safety of employees in general would not ensure the health and safety of the pregnant or breastfeeding woman and foetus; and
(b) additional reasonable measures that would ensure her health and safety cannot be taken.

Further information is in appendix 9.3.

4.5.5 Applying for an exemption to anti discrimination laws

The Federal *Sex Discrimination Act* does not provide for an exemption for compliance with other laws. An action that could be shown to be necessary in order to comply with the OHS Act or other legislation could be unlawful under the federal *Sex Discrimination Act* (although not necessarily unlawful under the NSW *Anti-Discrimination Act*, which provides that activities necessary for compliance with other NSW Acts are exempt).

If measures taken to control risk involve discrimination, lawful implementation of them would require a temporary exemption from discrimination legislation. An example would be exclusion of women from a particular work area or job. This is done by writing to the Human Rights and Equal Opportunities Commission, or President of the Anti-Discrimination Board (see appendix 9.3.1 and address in chapter 7).

Before taking this course of action, you should take into consideration the decisions in pregnancy discrimination court cases. An employer has never successfully argued that a discriminatory action was *not* unlawful under the *Anti-Discrimination Act*, because the action was necessary to comply with OHS legislation. Courts have found that measures required to protect the health and safety of all employees would have been adequate to ensure the health and safety of the pregnant employee. The discriminatory action could not be justified on the basis that it was necessary to comply with the OHS Act. A court may find that suitable duties could be found in the workplace or enterprise.

Occupational health and safety defences have not been accepted in pregnancy discrimination matters under the *Sex Discrimination Act*.

Occupational health and safety policies that exclude women on the basis of sex, pregnancy or potential pregnancy from particular work are likely to contravene either Act, unless exemptions are obtained.

Anti-Discrimination Act s.126A; Sex Discrimination Act s.44 - see appendix 9.3.1

4.6 Types of hazards

In the following sections, the types of hazards that may be present in the workplace have been divided into three categories:
- biological (in section 4.7),
- chemical (in section 4.8), and
- physical (in section 4.9).

In these sections, the hazards are discussed in general terms. When interpreting this, remember that medical advice may be needed on the practical application of the risk

assessment factors and control measures, especially as pregnancy advances. Hazard specific advice is provided in chapter 5.

Chapter 8 contains a glossary of terms used.

4.7 Biological hazards

Biological hazards in pregnancy are any infectious agents capable of causing developmental defects, stillbirth, increased risk of miscarriage or infant mortality. Consequently it is important to control exposure to the pregnant worker.

4.7.1 Nature of the risk

The vast majority of infections in pregnancy have no effect on the foetus. However, the foetus may be harmed by some viruses, such as rubella (German measles); some bacteria, such as listeria, and some parasites such as toxoplasma.

If the foetus is infected in the womb this could lead to:

- no signs or symptoms of disease; or
- premature birth;
- acute infection or death before birth;
- birth defects, such as damage to the nervous system and developmental problems;
- persistent infection or miscarriage.

Babies may become infected from their mothers in the womb (across the placenta), during or after birth, or through breastfeeding or close personal contact between mother and child.

At particularly sensitive times of the pregnancy, the increased body temperature during the infection-related fever may be sufficient to cause an increased risk of malformation. Any infection resulting in high fever early in the pregnancy has the potential to harm the foetus.

For most employees the risk of infection is not higher at work than from living in the community. However, in certain occupations exposure to infections is more likely, for example, working in laboratories, health care, childcare, animal care, and dealing with animal products.

4.7.2 Managing the risk

The risk assessment should take into account:

- the types of infection likely;
- the possible sources of infection;
- the likelihood of infection;
- the number of different sources of infection that staff may come into contact with and how often contact may occur;
- the control measures in use to protect employees;
- the medical history of the employee;
- the history of previous infection or immunisation;
- the need for suitable information, instruction and training for employees, which will help prevent or reduce risk.

4.7.3 Control Measures

Most infection risks can usually be avoided or minimised by careful use of simple control measures including:

- preventing puncture wounds, cuts and abrasions, especially in the presence of blood and body fluids;
- avoiding the use of, or exposure to, sharp objects (needles, glass, metal, knives etc) where possible. If this is not possible, particular care in their handling, cleaning and disposal is needed;
- protecting all breaks in exposed skin by means of waterproof plasters and/or gloves;
- protecting the eyes and mouth with visor or goggles/safety spectacles and a mask when there may be splashing;
- avoiding contamination of people or their clothing by using waterproof/water-resistant protective clothing, or plastic apron, gloves etc;
- making sure staff wear rubber boots or plastic disposable overshoes when the floor or ground is likely to be contaminated;
- using good basic hygiene practices in the workplace, including hand-washing, and avoiding hand-to-mouth or hand-to-eye contact, smoking, eating, drinking, applying cosmetics or removing/inserting contact lenses, taking medicines etc;
- preventing exposure to aerosols containing infectious agents;
- controlling surface contamination by containment and appropriate decontamination procedures; and
- disposing of all contaminated waste safely.

4.7.4 Immunisation

Safe working procedures are the first line of defence against infections at work. However, in some specific cases, the risk assessment may show that immunisation (vaccination) is necessary. For example, it may be needed for certain laboratory and health care employees. Those who may come into direct contact with blood or body substances may be at a relatively high risk, while those who have indirect contact may be at a lower risk. However, this also depends on the routes of contact - for example indirect exposure could occur where aerosols or droplets are created. NSW Health has guidelines published in a circular: *Occupational Screening, Education and Vaccination of Health Care Workers Against Infectious Disease*.

Immunisation should only be carried out under the direction of a medical practitioner, who will know when immunisation is not advisable. For example, there are some vaccines that should not be given to women while they are pregnant. Immunisation should be seen only as a useful supplement to safe working procedures and the proper use of protective equipment and should not replace them. Imposition of fees or charges on employees for vaccinations may reduce employee take-up of vaccination and result in unsafe and/or harmful exposures to infections, and may amount to failure of an employer to meet the requirements of the OHS Act (Section 22).

Before pregnancy begins, it is in the interests of the employee and the employer to make sure that vaccinations are available and are used to provide protection against any infections. An employer should provide access to information on risks of infectious diseases and offer immunisation to all employees at risk.

4.7.5 Health care establishments

Some micro-organisms which cause congenital abnormalities are more commonly encountered in some hospitals than in the community. Pregnant women as a group are more susceptible to some infections.

Where pregnancy increases the risks to staff, the employer should advise pregnant or potentially pregnant women of the special risks associated with pregnancy and give them an opportunity to avoid patients with specific infections.

Suitable control measures are standard precautions (previously known as universal precautions). Standard precautions are work practices required for the basic level of infection control. These are recommended for the treatment and care of all patients, and apply to all body fluids, secretions and excretions. Standard precautions include good hygiene practices, use of protective barriers, and appropriate handling and disposal of sharps and waste.

Further advice can be found in the NHMRC document *Infection control in the health care setting: guidelines for the prevention of transmission of infectious diseases* (April 1996).

Further details of specific infectious substances are given in section 5.1.

4.8 Chemical hazards (hazardous substances)

Some of the substances used or produced in workplaces are classified as hazardous as they are known to be harmful to health. These include substances that may cause various toxic effects such as poisoning, cancer, fertility impairments, harm to unborn children, birth defects, genetic mutations, or other diseases. Biological or radiation hazards are not included in the classification of hazardous substances.

4.8.1 Toxicity (the hazard)

Toxicity is the capacity of a substance to produce damage to an organism. This usually refers to functional (or systemic) damage but may be developmental affecting tissue and the skeleton in the case of an embryo. The damage may be permanent or transient. There are three ways substances can enter the body. These are called routes of entry: substances may be *inhaled*, absorbed through the *skin* or *ingested* (swallowed or eaten). The risk assessment should take each route into account.

4.8.2 Chemicals of known and dangerous skin absorption and toxicity

Skin absorbtion is often an underestimated risk. Some substances can penetrate intact skin and become absorbed into the body, causing ill-health. However, it is often difficult to assess if exposure has occurred. Some examples are carbon disulphide, cyanides, dimethy sulphate, dioxane, methyl bromide, MOCA, organic mercury compounds, and polychlorinated biphenyls (PCBs).

The risks of health effects occurring will depend on the way that the substance is being used. Absorbtion through the skin can result from localised contamination, for example from a splash on the skin or clothing, or in certain cases from exposure to high atmospheric

concentrations of vapour. Look for skin absorbtion warnings on the label and MSDS (see section 4.8.5).

How to minimise or avoid the risk

Special precautions to prevent skin contact are needed. Where possible, engineering methods should be used to control exposure in preference to personal protective equipment. For example a process could be enclosed or redesigned so less aerosol is produced. Where engineering controls are not possible, personal protective equipment should be used which is suitable and fits the person wearing it (such as gloves, overalls or face shields).

4.8.3 Reproductive risks

Chemicals can influence reproductive function in both women and men and there are many points in the human reproductive process that are vulnerable to interference by them.

However, the developing individual is particularly susceptible to toxic effects at all stages of development involving: the fertilised egg, the embryo, the foetus and breastfeeding. In the same way nutrients are transferred from the mother to the embryo, foetus or infant, some chemical substances can also be transferred.

There are many factors that may cause birth defects. These include disease or malnutrition of the mother, genetic abnormalities (congenital malformations), some infections, or exposure of the embryo or foetus to chemicals.

4.8.4 Hazardous substances legislation

Chapters 4 and 6 of the *Occupational Health and Safety Regulation* deal with the use of hazardous substances in workplaces. These requirements are supported by a number of Codes of practice, standards and technical reports.

Manufacturers, suppliers, employers and employees all have responsibilities under the Regulation. The NSW *Code of Practice for the Control of Workplace Hazardous* Substances should be consulted as a guide to compliance with the Regulation.

4.8.5 Identifying the hazardous substances

The two basic information sources on hazardous substances are the container labels and material safety data sheets (MSDS).

Suppliers of hazardous substances have an obligation to ensure correct labelling - so labels on substances arriving in the workplace should be correct. Labels must provide certain specific information including identity of the substance, and key words such as “hazardous”, “poison”, “warning” or “caution”, and also with risk and safety information.

Within the workplace, all containers of hazardous substances must be labelled. Use the supplier label as a guide. An exception to this is where the substance decanted into a container and used immediately, and providing no residue remains, then no label is required.

Advice on labelling is provided in the *National Code of Practice for the Labelling of Workplace Substances* (note: this is expected to be revised from time to time).

The MSDS is the basic information source for all hazardous substances. The MSDS provides information on:

- the substances' trade names and chemical names (including ingredients in mixtures);
- health hazard information;
- precautions for use; and
- safe handling of the substance.

Material safety data sheets (MSDS) should be consulted to identify any particular risks to the pregnant or breastfeeding worker, who may intend to work or be working with the substance.

Copies of each MSDS must be kept in the chemical register for the workplace and be readily available to all workers. Suppliers of chemicals must provide MSDS for those classified as hazardous or dangerous.

4.8.6 Assessing risk from hazardous substances

The purpose of the assessment is to enable decisions to be made about selecting appropriate control measures. Monitoring and health surveillance may be required to protect the health of employees who may be exposed to hazardous substances to check on the effectiveness of control measures.

The assessment process makes a distinction between 'hazard' and 'risk'. If a substance is hazardous it has the potential to be harmful to health. The risk is the likelihood that harm will be caused in the actual circumstances of use of the substance. Decisions about appropriate action to protect employees will depend on the degree of risk to health that arises from the use of hazardous substances in the particular work.

There are three main steps involved in completing an assessment:

- Identification of hazardous substances
- Review of information about hazardous substances
- Identification of risks

Specific health effects from hazardous substances can be identified from Risk Phrases. These are used on labels and in the MSDS. Risk phrases (R-Phrases) convey a general description of the hazard of the substance. These phrases indicate the hazards present (including different types of health effects) with the normal, or reasonably foreseeable, handling or use of the substance.

See the resources in chapter 7 for further advice on risk assessment. There is a general Code of practice and guidance note for hazardous substances, and some substance specific Codes of practice.

Pregnancy and breastfeeding risks from hazardous substances

Substances labelled with the following Risk Phrases are hazardous substances that may pose specific risks to pregnant and breastfeeding women. The different categories of risk phrases are sub-classifications based on human and animal evidence.

R40: Irreversible effects (Category 3)
R45: Cancer (Category 1,2 or 3)
R46: Heritable genetic damage (Category 1 or 2)
R60: May impair fertility (Category 1 or 2)
R61: May cause harm to the unborn child (Category 1 or 2)
R62: Possible risk of impaired fertility (Category 3)
R63: Possible risk of harm to the unborn child (Category 3)
R64: May cause harm to breastfed babies

Examples are:
- benzene (R45, Carcinogen Category 1)
- toluene (R20)
- warfarin (R61, Reproduction Category 1; R48/25)
- ethylene glycol monoethyl ether (R60-61, Reproduction Category 2; R20/21/22)
- carbon disulphide (R62-63, Reproduction Category 3; R48/23; R36/38).

The terms "category" and "R" numbers (the mandatory risk phrases) are further explained in the NOHSC criteria for classification (see chapter 7).

4.8.7 Controlling the risk from hazardous substances

The need for specific control measures is determined from the risk assessment. However the type of control measures required will vary depending on the workplace and the processes involved. In some instances control measures may be quite specific because the exposure is confined to specific processes (eg anaesthetic gases), while in other instances it is difficult to prescribe specific control measures since exposure may be varied and spread over a number of different processes (eg when using lead). The MSDS provides general information on control measures.

Some specific chemical hazards particularly of concern to pregnant and breastfeeding mothers are discussed in more detail in the section on Chemical Hazards (section 5), in terms of identifying the hazard, assessing the risk and how to control the risk.

The actual risk to health can only be determined by assessing the extent of exposure to a particular substance in the work process. Although the substances listed in section 5.2 have the potential to endanger health or safety, there may be no risk in practice - for example, if exposure is below a level that causes harm.

4.9 Physical hazards

Known physical hazards are listed in section 5.3. These are manual handling, standing for long periods, travel, radiation, vibration and heat. These factors should be considered in the risk assessment process.

5. SPECIFIC HAZARDS AND RISKS TO PREGNANCY AND BABIES

This chapter is divided into the three types of hazards:
1. Biological (infectious microbes) - section 5.1,
2. Chemicals (hazardous substances) - section 5.2, and
3. Physical (including manual handling) - section 5.3.

If these hazards are present in your workplace you may need appropriate medical advice before reaching conclusions about risks and control measures.

5.1 Biological hazards - infectious microbes

The following sets out some of the infections that are known to present a risk to the foetus or newborn baby. Usually, there will be no greater chance of contracting in most kinds of workplaces than at home or in the community.

5.1.1 Chlamydia psittaci

There are several types and they have preferences for different animal hosts.

Sources
Infected birds, eg parrots (psittacosis), turkeys, pigeons and ducks (ornithosis), and sheep during lambing.

Disease in adults
Infections caught from birds are abrupt with fever, cough and often severe headache. This may lead to pneumonia. Infections caught from sheep may show no symptoms, or be a flu-like illness with headache, chills, fever, joint pains and dry cough, and sometimes light-sensitivity, vomiting, and sore throat.

Infection may be more severe in pregnancy, particularly after the third month. As well as the symptoms described above, the mother and baby may develop problems with kidney and liver function, and abnormal blood clotting. This severe disease is caught mainly from sheep. It can cause spontaneous abortion.

Duration
The incubation period varies between 5-21 days.

Effects on the foetus
Infection from sheep may result in the death of the foetus or premature delivery, which generally occurs 3-8 days after the symptoms first appear. If the pregnancy survives the acute infection, there appears to be no risk of long-term harm or birth defects.

Transmission to the foetus
Across the placenta.

Likelihood
Transmission across the placenta to the foetus can occur during serious infections. However, in pregnant women infection is often without obvious symptoms.

Examples of occupations at risk
Women who work with animals, such as: Agricultural workers, farmers, pet shop workers, and veterinary workers.

Control measures
Avoiding ewes, new-born lambs, and placentas at lambing time. Avoiding clothing and boots that have been in contact with infected animals.

5.1.2 Human cytomegalovirus (CMV)

Sources
Humans - particularly children. Transmission may occur through breast milk, saliva, sexual intercourse and blood.

Disease in adults
Usually no symptoms in healthy people. It may cause an illness with symptoms similar to glandular fever (infectious mononucleosis).

Duration
Acute illness in adults may last 2-3 weeks, then virus persists in a latent state.

Effects on the foetus
Usually no symptoms. A small number of babies may have symptoms at birth and can suffer long-term complications including damage to the nervous system, learning disability, and deafness.

Transmission to the foetus
Across the placenta.

Examples of occupations at risk
Those in close contact with children, eg nursery workers and health care workers, especially in children's wards.

Control measures
Paying scrupulous attention to hygiene, including handwashing. Particular care should be taken when handling nappies, excreta etc from babies and children. No vaccine is available at present, but many women are immune because they caught the infection in early life.

5.1.3 Hepatitis A.

Sources
Humans, and water or food contaminated by faeces.

Disease in adults
The severity of disease increases with age. Severe (fulminant) hepatitis is rare. In adolescents and adults symptoms are more severe and last longer than in children, who are often asymptomatic. Common symptoms and signs include fever, headache, jaundice, loss of appetite, nausea, vomiting and abdominal pain from a tender, enlarged liver.

Duration
There is an incubation period of 15-45 days with an average of about 28 days. There is no risk of transmission one week after jaundice and darkening of the urine have appeared. There is no persistent or latent infection (carrier state).

Effects on the foetus
Liver damage may occur.

Transmission to the foetus
The virus multiplies mainly in the liver and passes into the faeces through the bile duct. Most transmission to babies is by mouth contact with faecally-contaminated objects (faecal-oral route).

Likelihood
A mother may transmit the infection to the foetus but it is very rare.

Examples of occupations at risk
Workers in: child nurseries, primary schools, sewage, and health care (such as pediatric wards, intensive care, and emergency).

Control measures
Paying scrupulous attention to hygiene, especially handwashing. A vaccine is available for adults and children but it is not currently licensed for use in babies under one year old.

Hepatitis E is transmitted in a similar way to Hepatitis A and infections have been reported in the United Kingdom, but usually in travelers returning from abroad. The symptoms are similar to Hepatitis A and there is also no persistent or latent infection (carrier state) with Hepatitis E. However, there is a high death rate for pregnant women infected with the virus. There is no vaccine available.

5.1.4 Hepatitis B

Sources
Humans, contaminated needles, blood and body fluids such as genital secretions and laboratory specimens etc.

Disease in adults
Infection may cause acute inflammation of the liver (hepatitis), which may be life-threatening. A person showing no symptoms may still carry the infection (5% or fewer adults have chronic infection). These people can develop severe chronic hepatitis, cirrhosis and primary liver cancer.

Duration
The severity of the illness and the extent and duration of the jaundice can vary. A small proportion of patients develops severe (fulminant) hepatitis.

Effects on the foetus
Most babies infected at birth carry the infection, but show no obvious symptoms or the symptoms are mild and there is no apparent jaundice. Severe (fulminant) hepatitis in newborn babies has been reported but is very unusual.

Transmission to the foetus
The virus does not usually cross the placenta. It is thought that the mother passes the infection to her baby during delivery and just after by exposure to her blood.

Likelihood
Risk of transmission from a Hepatitis B infected mother to her baby may be as high as 90% depending on the stage of her infection. Infected babies will remain infectious and are at increased risk of developing chronic liver disease and liver cancer in later life. Hepatitis B antibodies and Hepatitis B vaccine given to a newborn immediately after birth are 85-95% effective in preventing them becoming carriers.

Examples of occupations at risk
Health care workers, dentists, laboratory workers, emergency and rescue workers, and other people exposed to human blood and body fluids.

Control measures
Avoiding injuries with sharp objects contaminated with blood and body fluids and direct contact with blood and body fluids. Using protective clothing. Ensuring that all employees who might be at occupational risk are immunised and blood tests show them to be immune.

Hepatitis C and D are transmitted in a similar way and require the same precautions. Immunity to Hepatitis B will also protect people against Hepatitis D, but no vaccine for hepatitis C is available. Hepatitis C infection from mother to foetus has been reported but is uncommon.

5.1.5 Human immunodeficiency virus (HIV) 1 and 2.

Sources
Humans, contaminated needles, blood and body fluids, laboratory specimens etc.

Disease in adults
Acquired immunodeficiency syndrome (AIDS) and related conditions.

Duration
Life-long, persistent infection.

Effects on the foetus
Infection may lead to AIDS and other diseases.

Transmission to the foetus
Across the placenta, during delivery and by breastfeeding.

Likelihood
The risk of transmission from an infected mother to foetus (excluding breastfeeding) is 12-25%. Recent studies have shown that anti-viral therapy (azidothymidine AZT) given to HIV infected women during pregnancy, at delivery, and to their babies, will reduce the transmission rate.

Examples of occupations at risk
Health care workers, dentists, laboratory workers, rescue workers and other people exposed to human blood and body fluids.

Control measures
Avoiding injuries with sharp objects contaminated with blood and body fluids and direct contact with blood and body fluids. Using protective clothing.

Guidance
The WorkCover NSW *Code of practice for health care workers and other people at risk of the transmission of Human Immunodeficiency Virus and other blood-borne pathogens in the workplace 1995* provides specific occupational health and safety requirements and guidance regarding HIV/AIDS.

5.1.6 Listeria monocytogenes.

Sources
Contaminated food (eg unpasteurised soft cheese, pate, prepared salads such as coleslaw, and microwave-ready meals), infected animals, and silage.

Disease in adults
The symptoms of infection are like mild flu, but can have serious consequences for the foetus.

Duration
The incubation period varies between a few days and 10 weeks. Duration of the infection also varies.

Effects on the foetus
If septicaemia and meningitis occur in the foetus the death rate is 50-100%. The foetus may be aborted or born prematurely. There can be long-term effects in many organs including the airways, eyes and nervous system.

Transmission to the foetus
Across the placenta, and during delivery.

Likelihood
Transmission can occur to the foetus during severe infection in the mother. Listeria may also invade the mother's genital area and either infect the foetus by travelling up into the womb (which is rare), or infect it during birth.

Examples of occupations at risk
Laboratory workers, food workers, farm workers, abattoir workers.

Control measures
Good work practices including making sure staff avoid infection through the mouth. Good hand hygiene is very important.

5.1.7 Human parvovirus B19

Sources
Humans - via respiratory secretions.

Disease in adults
Parvovirus causes Fifth disease (erythema infectiosum or slapped cheek syndrome). About 50% of infections show no symptoms. The most common disease is a mild upset with fever

in 15-30% and a characteristic rash. It can be confused with rubella. Joint problems are unusual in children, but common in adults, especially women.

Duration
The incubation period is usually 4-14 days, but may be as much as 20 days. Symptoms may continue for weeks and sometimes months.

Effects on the foetus
Foetal death and spontaneous abortion may occur in the second and third trimesters. In some cases, this is associated with severe fluid accumulation (less than 10% of exposed foetuses).

Transmission to the foetus
Across the placenta.

Likelihood
About a third of babies of infected women are infected in the womb.

Examples of occupations at risk
Health care workers, laboratory workers, teachers and child care workers.

Control measures
Basic good hygiene. Additional control measures may be needed where pregnant women are exposed at work to infected people in whom viral excretion may be prolonged because they do not have a fully working immune system or have certain other blood disorders.

5.1.8 Rubella virus

Sources
Humans, by close contact and by respiratory secretions.

Disease in adults
Usually mild and includes a faint reddish purplish rash, sometimes accompanied by mildly inflamed eyes and joint pains.

Duration
Acute illness lasts for less than one week in an adult.

Effects on the foetus
Many infected babies have no ill effects. However, a wide range of birth defects including deafness, eye disease (cataracts), heart defects, an abnormally small undeveloped head (microcephaly) and learning disability can occur.

Transmission to the foetus
Across the placenta.

Likelihood
Mass immunisation has reduced the risks of infection in pregnancy to a very low level. If non-immune mothers catch rubella in the first three months of pregnancy, approximately 80% of the babies will have some rubella-associated problems. Between 12 and 16 weeks of pregnancy the risk of harm falls to about 5% and harm rarely occurs after that.

Examples of occupations at risk
Laboratory workers, health care workers, especially in children's wards, nurseries etc.

Control measures
Rubella vaccine is given routinely to all children, and adults who have not had the infection. Screening for immunity is routine in antenatal clinics, so that those that are not immune can be offered vaccination after that pregnancy.

5.1.9 Toxoplasma gondii

Sources
Hand-to-mouth contact with the faeces of infected cats, contaminated soil, poorly washed garden produce, and by eating undercooked, infected meat (especially beef, lamb and pork).

Disease in adults
Primary infection often has no symptoms. However, symptoms can vary from persistent acute fever with enlarged lymph glands to very rare infection in the brain, muscle and eye, leading to death. If people do not have a properly working immune system (immunosuppression) the dormant infection can return with serious consequences.

Duration
Varies and may be lifelong.

Effects on the foetus
Most infected babies (90-95%) have no symptoms at birth, but some may develop eye damage in later life. Those with symptoms at birth may have accumulation of fluid in the brain (hydrocephalus), brain damage, inflammation of eyes and various non-specific signs.

Transmission to the foetus
Across the placenta.

Likelihood
The overall risk of transmission from an infected mother to the foetus is about 40%. This ranges from about 15% in the first trimester to about 60% in the later stages of pregnancy. The likelihood of an infected foetus being harmed is much higher when infection occurs in early pregnancy than in later pregnancy.

Examples of occupations at risk
Veterinary workers, cattery workers, farm/meat/abattoir workers, grounds maintenance staff, park keepers.

Control measures
Avoid handling infected meat, cat faeces, goats, and sheep at lambing time, or wear gloves and pay scrupulous attention to hygiene, including handwashing.

5.1.10 Varicella-zoster virus (VZV) (chickenpox)

Sources
Humans by direct contact, droplet infection or recently soiled materials such as handkerchiefs.

Disease in adults
Primary infection with VZV results in chickenpox. The severity varies but symptoms are generally more severe in adulthood. Following chickenpox the virus persists as a latent infection in the nervous system. It may return as shingles following reactivation of the virus.

Duration
Acute illness usually lasting 2-3 weeks, after which the virus persists in a latent state.

Effects on the foetus
Skin scarring; brain damage with resultant learning disability; limb abnormalities.

Transmission to the foetus
Across the placenta.

Likelihood
Infection in the foetus is a rare complication of chickenpox in pregnancy. There is no evidence of risk to the foetus if the mother has shingles.

Examples of occupations at risk
Health care workers, nursery workers, school teachers.

Control measures
Hospital occupational health departments may enquire routinely about chickenpox in staff and test those without a history for antibody to VZV. If women are not immune from past infection, contact with known cases of chickenpox or shingles present in the workplace should be avoided. A vaccine is available but medical advice should be sought.

5.1.11 Other microbes

A wide range of microbes cause infections in the human population and may also infect pregnant women. They may or may not have an adverse effect on the foetus. These include:

Borrelia burgdorferi (Lyme disease);
Coxiella burnetii (Q fever);
Campylobacter spp and Salmonella spp (gastroenteritis);
Lymphocytic choriomeningitis virus (LCM);
Mycobacterium tuberculosis (TB);
Treponema pallidum (syphilis).

Any severe infection, whatever the cause, may be detrimental to the health of the mother and child. This should be taken into account in setting up control measures to tackle the risks of infection in workplaces.

5.2 Chemical Hazards

In this section on specific hazards and risks, a number of specific chemical hazards are identified, their risk assessed (Nature of risk) and some control measures recommended (How to avoid the risk).

5.2.1 Carcinogens

Nature of the risk

The NOHSC document Approved Criteria for Classifying Hazardous Substances identifies carcinogenic substances and places them into three carcinogenic categories:

Category 1: Substances known to be carcinogenic to humans. Category 1 substances are assigned the risk phrase R45 (May cause cancer) or R49 (May cause cancer by inhalation)
Category 2: Substances that should be regarded as if they are carcinogenic to humans. Category 2 substances are assigned the risk phrase R45 (May cause cancer) or R49 (May cause cancer by inhalation)
Category 3: Substances that cause concern for humans owing to possible carcinogenic effects but in respect of which the available information is not adequate for making a satisfactory assessment. Category 3 substances are assigned the risk phrase R40 (Possible risk of irreversible effects)

Relevant legislation

The Hazardous Substances chapter of the NSW *Occupational Health and Safety Regulation* contains a list of scheduled carcinogenic substances: those that are prohibited from industrial use and those that are allowed for industrial use but will require more stringent specific control measures (see clause 158).

How to avoid risk

The use of the listed carcinogenic substances requires notification to WorkCover NSW, which has guidelines for this notification.

Control measures for listed carcinogenic substances include:

- the containment of scheduled carcinogenic substances within a sealed system during manufacture, storage and handling;
- a detailed written submission concerning the health and safety aspects of the use of the carcinogenic substance, provided to WorkCover NSW by the intended user.

Some carcinogenic substances, or processes using them, have specific guidance on recommended control measures. If carcinogenic substances are used, WorkCover NSW, suppliers and/or employers should be contacted for more information.

Examples of Codes of practice and guidance material on carcinogenic substances available are:

- *MOCA (or 4,4' - methylene bis (2-chloroaniline))*
  MOCA is used in the manufacture of polyurethane. There is a WorkCover NSW Guidance Note setting out procedures for the safe handling of MOCA (or 4,4' - methylene bis (2-chloroaniline)) - see below.
- *Vinyl Chloride*
  The NOHSC *National Code of Practice for the Safe Use of Vinyl Chloride* provides guidance on control measures and monitoring of exposure to vinyl chloride in the manufacture of vinyl chloride and its subsequent polymerisation to polyvinyl chloride (PVC). The Code of Practice is an Approved Code of Practice under the NSW *Occupational Health and Safety Act*.

- *Cytotoxic drugs*
  WorkCover NSW *Guidelines for Handling Cytotoxic Drugs and Related Waste in Health Care Establishments* gives information about ways of minimising occupational exposures to cytotoxic drugs and related waste in health care establishments.
- *Acrylonitrile*
  A *Code of Practice for the Safe Use of Acrylonitrile*. Australian Chemical Industry Council (ACIC). Melbourne, Victoria. September 1992. This is an example of industry developed Codes of practice or guidelines on the use of specific carcinogens, which may be developed from time to time, but have no legislative status.

Specific Legislation

Specific requirements on carcinogenic substances are in Chapter 6 Hazardous Substances of the *Occupational Health and Safety Regulation 2001*.

Guidance material

1. *Guidelines: Listed Carcinogenic Substances - Notification and Use*, WorkCover Authority of NSW 2001.
2. *WorkCover Authority of New South Wales guidance note for the safe use of 4,4' - methylene bis (2-chloroaniline) (MOCA),* Revised January 1995.
3. *A Code of practice for the Safe Use of Acrylonitrile*. Australian Chemical Industry Council (ACIC). Melbourne, Victoria. September 1992.
4. *National Code of Practice for the Control of Scheduled Carcinogenic Substances* (National Occupational Health and Safety Commission), 1995.

5.2.2 Carbon Monoxide

Nature of the risk

Carbon monoxide has acute toxicity. Carbon monoxide is absorbed via the lungs into the bloodstream, where it replaces oxygen by interacting chemically with haemoglobin becoming carboxyhaemoglobin. This reduces the oxygen carrying capacity of the blood, and the dissociation of oxyhaemoglobin is also affected so that the supply of oxygen to tissues is further reduced. The symptoms of exposure depend on the degree of saturation of the haemoglobin with carbon monoxide, which depends on the dose (amount inhaled).

Carbon monoxide readily crosses the placenta and can result in the foetus being starved of oxygen. Data on the effects of exposure to carbon monoxide on pregnant women are limited, but there is evidence of adverse effects on the foetus. Both the level and duration of maternal exposure are important factors in the effect on the foetus.

There is no indication that breastfed babies suffer adverse effects from their mother's exposure to carbon monoxide, nor that the mother is significantly more sensitive to carbon monoxide after giving birth

How to avoid risk

The amount of carboxyhaemoglobin in the blood depends on the following factors:
- concentration of carbon monoxide in inspired air;

- duration of exposure;
- degree of activity of exposed individual (respiration rate); and
- individual susceptibility.

Carbon monoxide has a cumulative effect, so it is important to ensure that persons are exposed to the lowest concentration of carbon monoxide that is reasonably practicable. In any case, exposure concentrations must not exceed the Exposure Standard for the workplace (refer to the NOHSC *Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment)*. Note that monitoring airborne concentration of carbon monoxide may be a useful check on the effectiveness of the engineering controls measures adopted.

Some precautionary control measures in order of importance include:
- substitution of processes/equipment
- total enclosure of processes/equipment
- effective ventilation
- safe systems of work
- personal protective equipment

In regard to safe systems of work, special care is needed for entry into confined spaces because of the high risk of carbon monoxide being present. The Confined Spaces part of the OHS Regulation (clauses 66-78) sets out the minimum standards required to ensure the health and safety of people working in confined spaces.

Specific Legislation

See the *Working in confined spaces and other provisions in Chapter 4: Working Environment* of the *Occupational Health and Safety Regulation*. An exposure standard applies to carbon monoxide.

OHS standards

AS 2865 Safe Working in a Confined Space. Standards Australia. 1995.

Other guidance material

1. *Toxic gas in confined spaces. WorkCover NSW, Sydney NSW. July 1997*.
2. *Guidance Note EH43: Carbon Monoxide. Health and Safety Executive. HMSO, London. First published 1984*.

5.2.3 Cytotoxic drugs

Cytotoxic drugs are therapeutic agents that are known to be toxic to cells principally through their action on cell reproduction and are primarily intended for the treatment of cancer. Examples of commonly used cytotoxic drugs are cyclophosphamide, methoxsalen and chlorambucil. These are used in health care and research.

Nature of the risk

Cytotoxic drugs are known to be highly toxic, and are considered to be carcinogens, mutagens or teratogens (see Glossary). Currently there is no established safe level of exposure to these drugs.

While health care workers involved in the handling of these drugs do not receive the doses patients do, there is concern that these personnel may be subjected to low level doses, unless suitable protective measures are in place. A single event exposure to a single drug is considered less of a risk than long term exposure to multiple drugs.

Exposure may occur through inhalation of aerosols or drug particles, skin absorption, ingestion, and needle stick injuries. Personnel likely to be involved are nurses and medical officers, pharmacists, laboratory staff, persons involved in cleaning and maintenance, and waste disposal staff including contracted staff. The greatest risk of exposure to cytotoxic drugs is during their preparation and administration.

Employees who are pregnant, breastfeeding or planning parenthood, and involved in the preparation or administration of cytotoxic drugs, should be informed of the risks of reproductive effects and possible effects on the foetus. Personnel required to perform these duties may elect not to do so. In such cases appropriate and suitable alternative duties must be provided.

Cyclophosphamide is a scheduled carcinogenic substance regulated by the OHS Regulation. Most cytotoxic drugs are also specifically covered under the NSW *Poisons and Therapeutic Goods Regulations* (administered by the NSW Department of Health).

How to avoid the risk

The publication by WorkCover NSW *Guidelines for Handling Cytotoxic Drugs and Related Waste in Health Care Establishments* gives information about the health hazards and ways of minimising occupational exposures to cytotoxic drugs and related waste. They apply to the clinical use of cytotoxic drugs and related waste in health care establishments. The guidelines may also be useful for, but do not specifically cover, the handling of cytotoxic drugs and related wastes in analytical or research laboratories, doctors' surgeries and home administration.

Under the Guidelines, health care establishment managers are responsible for ensuring that personnel who are designated to perform cytotoxic drug preparation procedures are provided with an accredited level of training, and ensuring that personnel have attained proficiency prior to undertaking preparation procedures. For advice on the accredited level of training required please see the WorkCover NSW *Handling cytotoxic drugs in health care establishments: Training Competencies*.

Specific Legislation

Some specific requirements for cytotoxic drugs, as part of the carcinogenic substances requirements, are in chapters 6 and 12 of the *Occupational Health and Safety Regulation 2001*.

Guidance material

1. *Guidelines for Handling Cytotoxic Drugs and Related Waste in Health Care Establishments*, WorkCover Authority of NSW, Sydney, Second edition 1995.

2. *Handling Cytotoxic Drugs in Health Care Establishments: Training competencies*, WorkCover Authority of NSW, Sydney, 1st edition 1995.

5.2.4 Lead and lead compounds

Lead exposure may occur in a wide variety of occupations. Soldering of electrical connections and firearms training are examples.

Nature of the risk

Occupational exposure to lead in the early 1900s, when exposure was poorly controlled, was associated with high frequencies of spontaneous abortion, stillbirth and infertility. More recent studies draw attention to an association between low-level lead exposure from non-occupational sources before the baby is born, and mild decreases in intellectual performance in childhood.

The effects on breastfed babies of their mothers' lead exposure have not been studied. However, lead can enter breast milk. Since it is thought that the nervous system of young children is particularly sensitive to the toxic effects of lead, the exposure of breastfeeding mothers to lead should be viewed with concern.

How to avoid risk

The OHS Regulation regulates exposure to lead (especially clauses 199-204). If women are working with lead, the employer should undertake a full assessment of the workplace including air monitoring. Workplace monitoring may be required. The Regulation sets the allowable Exposure Standard for lead in air. If the risk assessment indicates that a significant risk exists, the employer must carry out health surveillance of those exposed to inorganic lead. This includes the monitoring of concentrations of lead in blood (blood lead levels).

The Regulation adopts specific blood lead levels for females who are pregnant, breastfeeding, or of reproductive capacity, which differ from those females not of reproductive capacity. At these blood levels or above, employees must cease carrying out lead risk work. The blood levels are adopted to ensure the foetus is protected from injury, especially in the weeks before a pregnancy is confirmed or the child during breastfeeding.

Discrimination issues

It is legally required that if arrangements are made at the workplace that treat pregnant or potentially pregnant women differently, they are not treated less favourably. For example, they may be transferred from work with unsafe levels of lead exposure to other work without loss of pay or status, without that being discriminatory.

An exemption from the Human Rights and Equal Opportunity Commission (HREOC) may need to be obtained prior to removing a person from a lead risk job where other workers with the same or higher lead levels are not being removed, if an adverse consequence results (eg the alternative job is of lower pay, or of lower status or opportunity).

Specific Legislation

1. Specific requirements on lead are in the *Occupational Health and Safety Regulation 2001* (part 7.6).

Guidance material

1. *Lead Safe: A guide for health care professionals*. Lead Education Program. NSW Lead Reference Centre (LRC), Sydney, September, 1997
2. *National Code of Practice for the Control and Safe Use of Inorganic Lead at Work [NOHSC:2015(1994)]*, National Occupational Health and Safety Commission (previously known as Worksafe Australia), October 1994.

5.2.5 Anaesthetic agents

Nature of the hazard and risk

Hazard

Nitrous oxide, halothane, enflurane and isoflurane are anaesthetic agents commonly used in medical, dental and veterinary occupations. Other less commonly used anaesthetic agents include sevoflurane, methoxyflurane and desflurane. Nitrous oxide is a gas and so is readily inhalable. Halothane, enflurane, isoflurane, sevoflurane, methoxyflurane and desflurane are volatile liquids that are also easily inhaled.

Since the 1970s several studies have indicated an association between exposure to anaesthetic vapours (mainly nitrous oxide, enflurane, halothane and isoflurane) and increases in miscarriages and birth defects among theatre staff. However, there is no definite evidence to show that exposure to any of these anaesthetic agents in the workplace has caused reproductive health effects.

Nitrous oxide, enflurane, halothane and isoflurane have been shown to cause embryotoxic, foetotoxic or teratogenic effects (congenital abnormalities) in a number of animal species.

In regard to the effects of desflurane, sevoflurane and methoxyflurane, studies in animals are limited or inadequate.

Risk

Waste anaesthetic gases such as nitrous oxide, enflurane, halothane and isoflurane, have been found in high concentrations in operating rooms. In particular, levels of nitrous oxide can still be relatively high despite the operation of scavenging systems. Levels of enflurane and halothane vapour are usually low where properly maintained anaesthetic dispensing equipment and scavenging systems are in operation.

Use of anaesthetic gases outside operating theatres could be high and should closely assessed and monitored - for example, inhalation analgesia for pain relief during childbirth, paediatrics, dentistry and occasionally physiotherapy and acute wards using nitrous oxide/oxygen mixtures.

How to avoid risk

Exposure of pregnant workers to anaesthetic agents should be minimised or eliminated. The *Occupational Health and Safety Regulation* controls the exposure to nitrous oxide, enflurane and halothane. The employer should undertake a full assessment of workplaces where anaesthetic agents are used. Workplace air monitoring may be required as part of the

assessment of risk where it is necessary to obtain a quantitative estimate of exposure, or to determine the effectiveness of measures introduced to control exposure. Exposure Standards are set for nitrous oxide, enflurane and halothane, by reference to the *Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment* published by NOHSC Australia. If the level of nitrous oxide, enflurane or halothane in workplace air routinely approaches the relevant Exposure Standard, there should be a review of the control measures to ensure that exposure is controlled as far as practicable.

The following control measures should be considered as a minimum:

1. Anaesthetic equipment should be monitored and maintained when installed and then regularly monitored for effective functioning and any leaks. Such monitoring could involve the leak-testing of equipment, of air in workers' "personal breathing zones", and of the room air.
2. Waste gas should be controlled by ensuring the scavenging system includes securely fitting masks, sufficient flow rates, and properly vented vacuum pumps.
3. Leakage from anaesthetic delivery system should be prevented by eliminating loose-fitting connections and deformed slip joints, and replacing defective or worn seals, gaskets, breathing bags, and hoses.

   Some common leaks are: hose connections, disposable breathing circuits, ventilators, pop off valves, and vaporisers, insufficient inflated endotracheal tube cuffs, poorly fitted patient face masks, gas flow turned on before placing mask on patient, and vaporisers refilled in the "on" position.

4. High level of efficient, forced ventilation in the general area.

   Employers should increase air-flow and local ventilation if concentrations of nitrous oxide are above 10 ppm in a room. The Exposure Standard for nitrous oxide is 25 ppm, but an action level lower than the Exposure Standard has been set.

Guidance material

1. *NIOSH Alert. Request for Assistance in Controlling Exposures to Nitrous Oxide During Anaesthetic Administration [DHHS (NIOSH) 94 -100]*, US Department of Health and Human Services, National Institute for Occupational Safety and Health, Cincinnati, Ohio, May 25, 1994.
2. *NIOSH Hazard Controls. Control of Nitrous Oxide in Dental Laboratories. [DHHS (NIOSH) 96 - 107]*, US Department of Health and Human Services, National Institute for Occupational Safety and Health, Cincinnati, Ohio. January, 1996.
3. *Health Services Advisory Committee (HSAC). Anaesthetic agents: controlling exposure under COSHH*, Health and Safety Commission, HSE Books, 1995.

5.2.6 Mercury and mercury compounds

Nature of the risk

Inhalation of vapour is the main route for the entry of metallic mercury into the body. Mercury is volatile even at room temperature. The main ways organic mercury compounds are absorbed are through inhalation of vapour (many are volatile) or the skin. Exposure to

organic mercury compounds can involve mixed exposure to mercury vapour and the organic compound, as mercury compounds release mercury vapour.

Organic mercury compounds could have adverse effects on the foetus. Animal studies and human observations have demonstrated that exposure to these forms of mercury during pregnancy can slow the growth of the foetus, disrupt the nervous system, and cause the mother to be poisoned. Postnatal poisoning during lactation may occur from organic mercury.

There is no clear evidence of adverse effects on the developing foetus from studies of humans exposed to mercury and inorganic mercury compounds. There is no indication that mothers are more likely to suffer greater adverse effects from mercury and its compounds after birth. The potential for health effects in children from foetal exposure is uncertain.

Examples of work activities involving mercury and its derivatives which require special attention when assessing exposure include:

Inorganic mercury
- Manufacture of amalgam
- Dental work involving mercury
- Manufacture of pigments and antifouling paints
- Extraction of gold
- Laboratory work with mercury in closed spaces

Organic mercury
- Disinfectants
- Timber preservatives
- Use and manufacture of mercury-containing fungicides

How to avoid the risk

Consider replacing mercury by less hazardous substances. Wherever possible mercury should be handled in sealed systems and extremely strict hygiene rules should be applied. It is important to avoid the slightest contamination of work surfaces and floors as it easily vaporises. Where there is danger of mercury becoming volatile, local exhaust ventilation systems should be installed.

Under the Hazardous Substances chapter of the OHS Regulation, an employer must provide health surveillance for each employee who could be exposed to mercury or inorganic mercury compounds, if there is a risk to the health of the employee from the substance.

Volatile organic mercury compounds should be replaced with a lesser hazardous substance whenever possible. Controls recommended for mercury vapour should be also be applied to organic mercury compounds. In particular contamination of clothes and/or parts of the body should be avoided as it may be a dangerous source of breathing mercury. Special protective clothing should be used and changed after the workshift. Where work processes involve vapour and aerosols, respiratory protective equipment and adequate ventilation should be provided. Enclosed systems, together with adequate ventilation, can keep exposure to a minimum.

Specific Legislation

Some specific requirements on inorganic mercury are referred to in Chapter 6 of the *Occupational Health and Safety Regulation 2001*.

Guidance material

1. *Safety Guide on Inorganic Mercury Spillage Cleaning Procedures*, WorkCover Authority of New South Wales, 1995.
2. *New and expectant mothers at work: a guide for employers*. Health and Safety Executive. London 1994.
3. *Guidelines for Health Surveillance [NOHSC:7039(1995)] Mercury (Inorganic)*, National Occupational Health and Safety Commission (previously know as Worksafe Australia), October 1995 gives guidance to medical practitioners on providing health surveillance for exposure to inorganic mercury.

5.2.7 Organophosphate pesticides.

Nature of the risk

Organophosphate pesticides are widely used. Most do not cause reproductive effects, but are acutely toxic.

Absorption through the skin is the most important route of entry, and for this reason it is often difficult to detect and control exposure. The oral route of entry into the body is important in accidental ingestion. This may occur as a result of poor work practices and lack of personal hygiene. Inhalation is generally less important, and depends on the volatility of the compound, on the type of formulation, and on the technique of application (for example, spraying). Organophosphates can also be absorbed through mucous membranes and eyes.

Some examples of organophosphate pesticides are diazinon, chlorpyriphos, fenthion, malathion, mevinphos, dichlorvos, dimethoate and parathion.

Some high risk activities are:
- Mixing pesticides (especially handling concentrate)
- Marking for aerial spraying
- High volume spraying such as boom spraying
- Knapsack spray tank and other hand held equipment (eg where leakage and skin contact may occur)
- Dipping
- Jetting
- Re-entry of crops after spraying
- Enclosed spaces or confined spaces (eg pest control operations in buildings)

How to avoid risk

Control of exposure will depend on the activities undertaken. Two Codes of Practice provide advice on the protection of the health of workers using all types of pesticides (see below).

The NOHSC Guidance Note Guidelines for Health Surveillance [NOHSC:7039(1998)] Organophosphate pesticides gives guidance (particularly to medical practitioners) on providing health surveillance for exposure to organophosphate pesticides. Health surveillance is only necessary if indicated by the risk assessment.

Specific Legislation

Some specific requirements on organophosphate pesticides, including Health Surveillance requirements are in Chapter 6 of the *Occupational Health and Safety Regulation 2001*.

All pesticides must be approved for use and this is done nationally. The National Registration Authority (NRA), is the Commonwealth agency responsible for registering pesticides for specific use, including product labelling provisions. In NSW the *Pesticides Act 1999* controls pesticide use and labelling provisions such as instructions on the application of the pesticide and safe use precautions. Failure to comply is an offence. The *Pesticide Act* is administered by the NSW Environment Protection Authority.

Codes of Practice

1. *Code of Practice for the Safe Use of Pesticides and Herbicides in Non-agricultural* Workplaces, WorkCover Authority of NSW, Sydney, Sept 1998.
2. *Code of Practice for the Safe Use and Storage of Chemical and Pesticides in Agriculture*, WorkCover Authority of NSW, Sydney, Sept 1998.

Guidance Note

Guidelines for Health Surveillance: Organophosphate Pesticides (Revised Edition) [NOHSC: 7039(1998)], National Occupational Health and Safety Commission. Commonwealth of Australia, Canberra, April 1998.

5.3 Physical hazards (including manual handling)

5.3.1 Manual handling

Nature of the risk

Manual handling is the major cause of back and shoulder injuries in the workplace. Tasks that involve lifting, lowering, pushing, pulling, carrying or restraining a load can all result in injury. Where a task requires repeated or prolonged bending (particularly when the load is low-lying) there is a risk of a back injury even when the load is very small, because the trunk and upper body themselves are loads. Pregnancy will increase the load borne by a pregnant woman and therefore if manual handling risks are identified in the workplace, a manual handling risk assessment should be undertaken and hazards addressed. Pregnancy can also prevent the woman from getting close to the load, which can make manual handling more hazardous.

How to avoid the risk

The NOHSC *National Code of Practice for Manual Handling*, provides advice on the risk assessment. It is an approved Code of Practice in NSW.

While there are no weight limits in legislation, these should be determined for your work situation. When the health of the worker affects capacity to perform a task, the work system should be adapted to suit the worker (or the worker should be allocated other tasks). The Code of Practice contains a checklist to assist the risk assessment process. Questions in

the checklist relate to age, disability or other special factors that may affect task performance. Special factors include pregnancy (clause 4.44 of the Code of Practice). Relevant medical advice should be considered when duties are allocated. Employees have the right to seek advice from a medical practitioner of their own choice. Consultation with employees during the risk assessment process will help to ensure that workloads are acceptable and not excessively heavy or awkward.

Specific suggestions

The work surface may have to be raised by up to 170mm. While loads greater than 10 kgs are likely to be hazardous, the weight limit that can be safely handled depends on the physical strength of the woman and how she feels during pregnancy.

Legislation

Occupational Health and Safety Regulation, Chapter 2.

The legislation that previously specified weight limits that could be lifted unaided by women (s.36, *Factories, Shops and Industries Act*) was repealed. Weight limits were replaced by the risk assessment process in the Manual Handling provisions of the OHS *Regulation and the Code of Practice for Manual Handling*.

National Code of Practice for Manual Handling, National Occupational Health and Safety Commission 1990.

5.3.2 Standing for long periods.

Nature of the risk

Working in a standing position on a regular basis can cause sore feet, swelling of the legs, varicose veins, general muscle fatigue, lower back pain, stiffness in the neck and shoulders, and other health problems. During pregnancy, a woman's total blood volume can increase by 30-40% and the load on the heart increases. Blood tends to pool in deep veins in her legs which brings a risk of thrombosis (clotting) and varicose veins, and of fainting episodes if she spends long periods standing, especially in a hot environment.

The risk of having a small infant (birthweight lower than the 10th percentile for gestational age and gender) is increased among women who work at least six hours per day in a standing position.

Ergonomically unsuitable working conditions could produce a preterm birth. During pregnancy an increase in body weight occurs, together with changes in body weight distribution and in the fit between body dimensions and the workplace layout. These changes may cause alterations in working posture that may, in turn, have adverse consequences for the biomechanical load on the musculoskeletal system, and so increase the risk of musculoskeletal disorders. Pregnant workers stand further from the work surface than do non-pregnant workers, the hips are positioned more backwards, and in order to reach the task, they increase the flexion of the trunk, increase the antiflexion of the upper arms, and extend the arms more. Where the height of the work surfaces can be adjusted, the postural difference due to pregnancy will be less.

How to avoid the risk

Foot and leg pain and discomfort as well as low back pain can be reduced by ensuring that work stations are operable from both seated and standing positions.

Managers should also seek advice (from ergonomists, workers in occupational health and safety services and medical practitioners, as appropriate) for improved ergonomic conditions suited for pregnant workers under their management. These experts should recognise the consequences for the biomechanical load on the musculoskeletal system and the risk of development of health complaints caused by postural changes due to pregnancy.

Sitting or standing continuously for more than two hours may cause problems for a pregnant worker. Both constant sitting and constant standing can cause pain and discomfort. Sitting instead of standing and taking regular rest breaks when needed reduce physical stress. Improved ergonomic conditions and access to seating can improve the health, safety and wellbeing of pregnant employees.

5.3.3 Working with screen-based keyboard computer equipment.

Nature of the risk

From the many studies that have been conducted on the possible adverse effects of radiation from video display units (VDUs), none has found radiation emissions to be harmful to health, or to cause adverse pregnancy outcomes.

However, many full-time VDU users complain of visual discomfort, musculoskeletal discomfort of the neck, lower back and upper limbs, and psychosocial problems. These symptoms are not specifically associated with pregnancy. The likelihood of having such complaints increases with the duration of hours worked per day, the nature of the work, work schedules and workload, and work station design and layout, rather than specifically with VDU technology. Reference should be made to available guidance on VDU work generally.

Guidance material

Technical Report of the Study Group on Radiation and Visual Display Units, National Occupational Health and Safety Commission, June 1989.

Guidance Note for the Prevention of Occupational Overuse Syndrome in Keyboard Employment, National Occupational Health and Safety Commission, WAP89/006 1989.

5.3.4 Travel

Specific issues are sometimes raised about travel during pregnancy that relate to driving (especially wearing seat-belts) and travel by air.

During pregnancy, lap seat belts should be worn as tight as possible. The belt buckle should be fastened over the hip with the lap section as low as possible under the bulge of the abdomen to help prevent possible harm to the foetus if there is an accident. Frequent comfort stops on long trips may be necessary, for moving around, stretching, and relieving bladder pressure.

Airlines place limitations on pregnant women travelling by air and detailed information is available from airlines regarding the different rules for domestic and international travel.

Flight crew members may be exposed to some specific hazards, including exposure to infection from passengers, exposure to radiation, manual handling in confined spaces, prolonged standing and other hazards. Specialist technical and medical advice may be needed for a risk assessment.

It may be necessary to seek medical advice about travel during pregnancy. If possible, avoid long journeys in the last few weeks of pregnancy because labour could start early.

Guidance material

Healthy Motherhood, Pregnancy Care and Becoming a Parent, NSW Department of Health, HC publication No (HP) 82-001.

5.3.5 Ionising Radiation

Nature of the risk

Ionising radiation is produced by x-ray machines and is also emitted by radioactive substances. The potential for effects on a foetus depend on the time of irradiation relative to conception, and to the magnitude of the radiation exposure. Irradiation of the embryo in the first three weeks following conception is not likely to result in any long-term effects in the child. During the remainder of the pregnancy the levels of radiation to which occupationally exposed persons may be exposed will not lead to congenital malformations and the risk of carcinogenesis will be very small. However large doses of radiation have been shown to lead to congenital malformation, mental retardation or an increased risk of childhood or adult cancers

Employees who are pregnant and are involved in x-ray procedures or in the use of radioactive substances, should be informed of the possible effects on the foetus. Personnel required to perform these duties may elect not to do so. In such cases appropriate and suitable alternative duties must be provided (see section 4.5). In institutions where a Radiation Safety Officer (RSO) is available, the employee should seek advice from the RSO on the risks involved, based on an assessment of her duties and of her personal radiation records.

How to avoid the risk

Exposure to ionising radiation may occur during x-ray procedures or procedures involving radioactive substances. Personnel likely to be involved include radiographers, nuclear medicine technologists, radiation therapists, medical officers, nurses and laboratory staff. Exposure to external radiation can be minimised by wearing appropriate protective equipment (for example, a lead apron), working behind a protective barrier or maintaining a large distance from the source of the radiation (in a medical setting this would normally be the patient). Contamination of the skin with radioactive materials and internal exposure to radiation can be minimised by wearing appropriate protective equipment (including disposable gloves and a gown or laboratory coat). If the radioactive substance could be volatile or exist as an aerosol, the work should be performed in a fume cupboard or biological safety cabinet.

Employers must ensure that an appropriate monitoring system is in operation to ensure that the occupational exposure of the pregnant employee is below the 1 mSv effective dose limit

specified for members of the public. This monitoring may involve personal monitors and/or area monitoring of the workplace.

Specific NSW Legislation

Radiation Control Regulation 1993 (under the *Radiation Control Act 1990*).

Note 1 of Schedule 2 provides that: "In the case of an occupationally exposed person who is a pregnant woman, a supplementary dose limit should apply to the surface of the abdomen of 2 millisieverts for the remainder of the pregnancy and the intake of radionuclide should be limited to 1/20 of the annual limit on intake for that radionuclide."

This legislation is administered in NSW by the Environment Protection Authority.

National standards and guidelines

Recommendations for limiting exposure to ionizing radiation (1995) (Guidance note [NOHSC:3022(1995)])

National standard for limiting occupational exposure to ionizing radiation [NOHSC:1013(1995)]

Note 3 of Schedule 1: "When an employee declares that she is pregnant, the embryo or foetus should be afforded the same level of protection as required for members of the public, as specified in the *Recommendations*."

5.3.6 Shocks and vibration

Nature of the risk

Regular exposure to shocks, low frequency vibration or excessive movement, may increase the risk of a miscarriage. Examples would be driving or riding in off-road vehicles or earth moving equipment.

How to avoid the risk

Pregnant workers and those who have recently given birth should avoid work likely to involve uncomfortable whole body vibration, especially at low frequencies, or where the abdomen is exposed to shocks or jolts.

5.3.7 Extremes of heat

Nature of the risk

Pregnant women tolerate heat stress less well and may more readily faint or be liable to heat stress. Breastfeeding may be impaired by heat dehydration.

How to avoid the risk

Care should be taken when pregnant workers are exposed to heat, such as near furnaces. Rest facilities and access to refreshments would help.

6. TERMINATION OF EMPLOYMENT IN RELATION TO PREGNANCY AND CHILDBIRTH

Dismissal

It is against the law to dismiss an employee because she:
- is pregnant
- has given birth
- has applied for or is on parental leave
- may become pregnant,
- complains about an OHS matter

An employer who dismisses an employee for any of these reasons may be liable to a fine and/or to pay compensation and/or damages to the dismissed employee, and orders may be made for reinstatement.

An employee who thinks she has been unfairly dismissed because of any of these reasons has access to a range of remedies for a breach of her rights.

“Termination of employment” does not include declining to offer a further period of employment. However, declining to offer a future period of employment is likely to be covered by discrimination law if one of the reasons is pregnancy, potential pregnancy or breastfeeding. See section 3.1 on recruiting a pregnant woman, as this applies to short term contracts as well as ongoing employment. “Dismissal” includes threatened dismissal. “Constructive dismissal” occurs where the employer has effectively terminated the employment by making it impossible for the employee to continue in her employment. “Constructive dismissal” can be found to have occurred even where the employee has resigned.

Discrimination against a pregnant employee and the termination of employment are industrial matters which can be pursued be the employee’s union through an industrial dispute.

In a complaint about a dismissal claimed to be on the basis of a need to reduce or reorganise staffing for economic reasons, relevant issues include:
- whether staffing was in fact reduced;
- whether a replacement was hired to do the work formerly done by the dismissed pregnant employee;
- whether a position similar to the one held by the dismissed employee continued to exist;
- how the work formerly done by the dismissed employee was done after her dismissal;
- whether selection of employees for redundancy was done in a fair way; and
- whether pregnancy or taking maternity leave was part of the reason for selection of a particular employee for redundancy.

In a complaint about a dismissal claimed to be on the basis of poor performance, relevant factors include:

- whether the performance problems had been discussed with the employee;
- whether any records were kept about any discussions of performance; and
- whether the employee had been given an opportunity to respond to allegations about her (section 88).

A pregnant employee can be dismissed if her work is unsatisfactory. However, employers must adopt the same rules and take the same approach to a pregnant employee as are applied to other employees. If, for example, a pregnant woman is dismissed for lack of punctuality or absenteeism, it would be relevant to whether the dismissal is discriminatory if another employee has a worse attendance record. A pregnant employee should be treated no less favourably than any other employee in relation to discipline or dismissal for poor performance. It would be relevant whether there had been previous discussions with the employee about her poor performance prior to her pregnancy and/or application for maternity leave.

Taking sick leave with a medical certificate for pregnancy-related illness has been found not to be a valid reason for dismissal.

Dismissal on the basis of occupational health and safety risks

Employers should make an objective assessment of risk and seek a medical opinion if necessary. The general trend in case law is to require the employer to reduce the hazard rather than remove the pregnant employee. See also chapters 4 and 5 of this guide.

Relevant law - Industrial Relations Act s 68, OHS Act section 23 - see appendix 9.5

7. FURTHER ADVICE AND ASSISTANCE

Organisations

Information about regional offices of WorkCover NSW, the Department of Industrial Relations and the Anti-Discrimination Board can be obtained from head office enquiry numbers and local telephone directories.

Maternity leave
Women's Equity Bureau, NSW Department of Industrial Relations
tel: (02) 9243 8786.
Publication: *Maternity at Work*. (ISBN 0731352300)
Web site: www.dir.nsw.gov.au

Award Enquiry Service, NSW Department of Industrial Relations
tel: 13 16 28
Web site: www.dir.nsw.gov.au

Department of Employment and Workplace Relations (Federal)
tel: 1 300 363 264

Unfair dismissal
Industrial Relations Commission of New South Wales-Industrial Registry
tel: (02) 9258 0080
Web site: www.dir.nsw.gov.au includes information about unfair dismissals claims.

Discrimination
Anti-Discrimination Board,
tel: General Enquiry Service: (02) 9268 5544
Employers' Advisory Service: (02) 9268 5544
Toll free (calls outside Sydney): 1800 670 812
Web site: www.lawlink.nsw.gov.au/adb

Human Rights and Equal Opportunity Commission (Federal)
tel: (02) 9284 9600 or 1300 369 711
Web site: www.humanrights.gov.au
Address: PO Box 5218, Sydney, NSW 2000.

Occupational health and safety
WorkCover NSW
Information Centre: 13 10 50
Web site: www.workcover.nsw.gov.au

Breastfeeding
Australian Breastfeeding Association
Helpline tel: (02) 9639 8686, or
Southern NSW / ACT helpline 02 6258 8928
Web site: www.breastfeeding.asn.au

A publication is available from the above organisation, which includes a checklist of workplace provisions, outline of a breastfeeding and work information kit and sources of further information (including booklets and a tape).

Unions and employer representatives
Labor Council of NSW
tel: (02) 9264 1691
Web site: www.council.labor.net.au

Australian Business Limited
tel: 13 26 96
Web site: www.australianbusiness.com.au

Australian Industry Group
tel: (02) 9466 5566
Web site: www.aigroup.asn.au

Employers First
tel: 9264 2000
Web site: www.employersfirst.org.au

Publications

Occupational health and safety information - general guidance:

New and Expectant Mothers at Work, HSE Books, London. This UK HSE Executive guide published in 1995 covers a range of hazards and ways of addressing them and references to other sources of information in addition to those provided in this guide.

Healthy Motherhood, Pregnancy Care and Becoming a Parent, NSW Department of Health, HC Publication No. (HP) 82-001.

Occupational and Environmental Reproductive Hazards: A guide to Clinicians. M Paul (ed) 1993. Sydney: Williams and Wilkins. (for medical doctors only)

Pregnancy Guidelines. Human Rights and Equal Opportunities Commission.

Biological hazards

Infection control in the health care setting: guidelines for the prevention of transmission of infectious diseases (NHMRC, April 1996).

Occupational screening, education and the vaccination of health care workers against infectious diseases (NSW Health circular, September 2000).

NSW Legislation

Occupational Health and Safety Regulation 2001
This regulation adopts a number of the the National Occupational Health and Safety Commission's regulatory packages.

Hazardous substances package:
Code of Practice for the Control of Workplace Hazardous Substances WorkCover Authority of NSW, 12 July 1996.

Approved Criteria for Classifying Hazardous Substances [NOHSC:3011(1999)], National Occupational Health and Safety Commission (previously known as Worksafe Australia).

List of Designated Hazardous Substances [NOHSC:1005(1999)], National Occupational Health and Safety Commission (previously known as Worksafe Australia).

Adopted National Exposure Standards for Atmospheric Contaminants in the Occupational Environment [NOHSC:1003(1995)], National Occupational Health and Safety Commission (previously known as Worksafe Australia), May 1995. This is published in a single document with the guidance note (below).

Guidance Note on the Interpretation of Exposure Standards for Atmospheric Contaminants in the Occupational Environment [NOHSC:3008(1995)], National Occupational Health and Safety Commission, May 1995.

National Code of Practice for the labeling of workplace substances [NOHSC: 3013 (1994)], National Occupational Health and Safety Commission, March 1994. Note: it is expected that a revised Code of practice will be published in late 2002.

National Code of Practice for the preparation of material safety data sheets [NOHSC:2011 (1994)], National Occupational Health and Safety Commission, March 1994. Note: it is expected that a revised Code of practice will be published in late 2002.

The OHS standards on Approved Criteria, Designated List, and National Exposure Standards published by NOHSC are regulations in NSW. The NOHSC documents are reviewed and updated by the National Commission from time to time, so make sure you are referring to the latest edition. Proposed changes are released for public comment prior to any amendments. Amendments to national documents are published in the *Chemical Gazette* (published by the Commonwealth of Australia).

Guidance notes

Guidance Note for the Assessment of Health Risks Arising from the Use of Hazardous Substances [NOHSC:3017(1994)], National Occupational Health and Safety Commission (previously known as Worksafe Australia), March 1994.

Guidance Note for the Control of Workplace Hazardous in the Retail Sector [NOHSC:3017(1994)], National Occupational Health and Safety Commission (previously known as Worksafe Australia), May 1994.

Carcinogenic substances

National Code of Practice for the Control of Scheduled Carcinogenic Substances [NOHSC:2014(1995)], National Occupational Health and Safety Commission (previously known as Worksafe Australia) October 1995.

Manual handling

The NOHSC *National Standard for Manual Handling 1990* is adopted as a code of practice in NSW. The OHS Regulation requires employers to identify, assess and control risks arising from manual handling in the workplace. Risk assessment and control must be done in consultation with the employees who carry out the task, and the consultation should provide the opportunity to contribute to decision making in a timely fashion. The risk assessment must take into account a number of specified factors related to the work, workplace and the worker. Factors related to the worker include pregnancy, which is listed under Special Needs in section 4.44 of the Code of practice.

Guidance Material - manual handling

S. Morrissey, (1998), *Work Place Design Recommendations for the Pregnant Worker*, International Journal of Industrial Ergonomics, vol. 21, pages 383-395.

Ionising Radiation - National standards and guidelines

Recommendations for limiting exposure to ionizing radiation (1995) (Guidance note [NOHSC:3022(1995)]).

National standard for limiting occupational exposure to ionizing radiation [NOHSC:1013(1995)].

8. GLOSSARY - OCCUPATIONAL HEALTH AND SAFETY TERMS

Term	Definition
Acute toxicity	A toxic effect that occurs immediately or shortly after a single exposure (as distinct from chronic toxicity).
Cancer	A malignant tumour that can spread to other organs of the body (as distinct from a benign tumour, which cannot). Although leukaemia and some other malignant diseases are not solid tumours, they meet other defining criteria for cancer and can be, and often are, included under this definition.
Carcinogen	Carcinogens are chemicals or other agents that can cause the formation of a cancer. A cancer is a malignant tumour that can spread to other organs of the body (as distinct from a benign tumour which cannot).
Chronic toxicity	A toxic effect that occurs after repeated or prolonged exposure (as distinct from acute toxicity). Chronic effects may occur some time after exposure has ceased.
Cytotoxic drug	Therapeutic agents that are known to be toxic to cells principally through their action on cell reproduction and are primarily intended for the treatment of cancer.
Dermal	Relating to the skin.
Exposure standard	An airborne concentration that should not be exceeded of a particular substance in a person's breathing zone, published in the *Exposure Standards for Atmospheric Contaminants in the Occupational Environment*, published by the National Occupational Health and Safety Commission, which are updated from time to time. These include long-term, short-term and peak limits for each listed substance. Other sources of this information are the MSDS for each substance.
Hazard	An intrinsic capacity to cause harm, associated with an agent or process.
Inhalation	Breathing in.
Injury	This includes an illness.
Label	A set of information on a container that identifies the substance in the container, identifies if the substance is classified (eg dangerous or hazardous) and provides basic information about the safe use and handling.

Material Safety Data Sheets (MSDS)	A document that describes the properties and uses of a substance, including health hazard information, precautions for use and safe handling information.
Mutagen	An agent capable of producing a mutation.
Mutation	A change in the genetic material of cells.
Neoplasm	See definition of tumour.
Oral	Ingested or administered via the mouth.
Risk	Risk is the likelihood (probability) that a hazard will cause harm in the circumstances of the work. Risk to health or safety depends upon the nature of the hazard, in the context of the work environment, processes, work practices, and the nature of adverse outcomes. Quantitative risk assessment includes factors such as the number of people exposed and the level and frequency of exposure.
Risk Phrase (R-Phrase)	Means a phrase that describes the hazards of a substance. It is referred to in the *Code of practice for the labelling of workplace substances*, and other publications, published by NOHSC.
Safety Phrase (S-Phrase)	Means a phrase that describes the procedures for the safe handling or storage of a substance, or the use of personal protective equipment in conjunction with a substance. This is provided in the *Code of practice for the labelling of workplace substances*, and other publications published by NOHSC.
Teratogen	An agent capable of causing abnormalities in a developing foetus, that is, causing birth defects.
Toxicity	Toxicity is the capacity of an agent to produce damage to an organism. This usually refers to functional (systemic) damage but may be developmental in respect of tissue and skeleton in the case of an embryo. The damage may be permanent or transient, and includes a variety of health effects.
Tumour	A swelling or enlargement or an abnormal mass of tissue in that the growth of cells in uncontrolled. A tumour can be either benign (not malignant) or malignant (cancerous). A tumour may also be called a ‘neoplasm’.

9. APPENDIX

Summary of laws covering Discrimination, industrial relations, and health and safety

Abbreviations of the relevant laws are:
Sex Discrimination Act 1975 (of the Commonwealth) - SD Act.
Anti-Discrimination Act 1984 (NSW) - AD Act.
Industrial Relations Act 1996 (NSW) - IR Act.
Occupational Health and Safety Act 2000 (NSW) - OHS Act.

9.1 Recruitment

9.1.1 Anti-discrimination law and pregnancy

It is an offence under the SD Act to discriminate directly or indirectly against a woman on the basis of pregnancy or potential pregnancy, in relation to arrangements for determining who should be offered employment, or the terms or conditions on which employment is offered (ss.14(1) and (2)).

Where the position is a temporary one requiring the completion of a project within a specified time, it may be lawful for the employer to refuse to employ a pregnant applicant if a man who was unable to attend work for a similar part of the contract period would have been rejected for recruitment.

The SD Act also prohibits discrimination on the ground of potential pregnancy ss.14(1) and (2). The Act says that potential pregnancy includes the fact that a woman is or may be capable of bearing children; or the fact that the woman has expressed a desire to become pregnant; or the fact that the woman is likely, or is perceived as being likely, to become pregnant (s.4B).

The NSW AD Act does not prohibit discrimination in recruitment or in terms of offers of employment, where a woman knew, or could reasonably have been expected to know, she was pregnant at the time of application or interview for the job (ss.25(1A)). This exception (in ss.25(1A)) applies to a person entering the employer's employment for the first time, not to an ongoing employee seeking access to promotion, transfer or other advantage.

The SD Act and AD Act provide exemptions for employment in relation to religious institutions, such as private schools. Note that courts have defined "employee" in broad terms for the purposes of discrimination legislation.

9.2 Employment conditions

9.2.1 Anti-discrimination law - during employment

Under the AD Act it is unlawful to discriminate against someone on the grounds of sex (defined as including pregnancy) in arrangements for determining who is to be offered employment, or the terms on which employment is offered, unless the woman applicant was pregnant when she applied, or was interviewed, for employment (sections 25(1) & 25(1A)). Discrimination would therefore be unlawful against someone who was not pregnant at the time of interview but became pregnant prior to being offered or commencing employment.

It is also unlawful for an employer to discriminate on the ground of sex (including pregnancy) in relation to the terms and conditions of employment afforded the employee, access to opportunities for promotion, transfer or training, or any other benefits associated with employment (NSW AD Act s.25(2)(a) and (b)).

Under the SD Act (ss.5, 7, 7B, 7D), it is unlawful to discriminate against someone on the grounds of sex, pregnancy or potential pregnancy in arrangements for determining who will be offered employment, determining who will be offered employment, or the terms and conditions on which employment is to be offered. It is also unlawful to discriminate on the grounds of sex, marital status, pregnancy or potential pregnancy in the terms and conditions of employment the employer affords the employee, by denying access to opportunities for promotion, transfer or training, or to any other benefits associated with employment, by dismissing the employee or subjecting the employee to any other detriment (SD Act ss.14(1) and (2)).

In overall terms, then, it is unlawful under both Acts to discriminate against an employee on the grounds of her sex or pregnancy in relation to her access to any employment terms, conditions, benefits or opportunities.

Note that courts have defined "employee" in broad terms for the purposes of discrimination legislation.

Discrimination is defined in the NSW SD Act section 24 in the following way:

24. What constitutes discrimination on the ground of sex

(1) A person (**"the perpetrator"**) discriminates against another person (**"the aggrieved person"**) on the ground of sex if, on the ground of the aggrieved person's sex or the sex of a relative or associate of the aggrieved person, the perpetrator:

(a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person of the opposite sex or who does not have such a relative or associate of that sex, or

(b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the opposite sex, or who do not have such a relative or associate of that sex, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

(1A) For the purposes of subsection (1) (a), something is done on the ground of a person's sex if it is done on the ground of the person's sex, a characteristic that appertains

generally to persons of that sex or a characteristic that is generally imputed to persons of that sex.

(1B) For the purposes of this section, but without limiting the generality of this section, the fact that a woman is or may become pregnant is a characteristic that appertains generally to women.

(2) For the purposes of subsection (1), the circumstances in which a person treats or would treat another person of the opposite sex are not materially different by reason of the fact that the persons between whom the discrimination occurs:

(a) are a woman who is pregnant and a man, or
(b) are not of the same marital status.

9.2.2 Maternity leave

9.2.2.1 Entitlements under the Industrial Relations Act (NSW)

A female employee who is employed on a full time or part time basis (other than a seasonal employee), and who has had at least 12 months continuous service with her employer, is entitled to maternity leave. Continuous service is service under one or more unbroken contracts of employment, including any period of authorised leave or absence and any period of part time work (ss 53 & 57 IR Act).

Casual employees are also entitled to maternity leave if they have:
- worked for the employer on a regular or systematic basis for 12 months; and
- have a reasonable expectation of on-going employment on that basis with the employer.

If an employee has worked permanently for less than 12 months but their total employment as a permanent and casual employee for the one employer has been for at least 12 months, she is entitled to maternity leave. For the duration of the casual component of the employee's service, she must have been employed on "an unbroken regular and systematic basis".

When the employer becomes aware that the employee is pregnant, the employer must inform the employee of her entitlement to maternity leave and her obligations to give the required notices relating to her maternity leave (ss 67(1)(a) & (b)). The employer cannot rely on the employee's failure to give the required notices unless the employer has given this information to the pregnant employee (s 67(1))

Under section 67(2), the employer must keep for six years records of:
- each maternity leave that has been granted; and
- all notices and documents given to the employer in connection with each maternity leave.

If a business has been transferred to a new owner and the person's employment continues, the period of service with the former employer counts as service with the new employer (IR Act ss 101-104).

The requirement for 12 months continuous service is to be met before the employee commences maternity leave, but does not have to be met before the employee can give notice of and apply for maternity leave.

Maternity leave is an entitlement of up to 52 weeks unpaid leave. It is to be taken in an unbroken period, which is not to extend beyond one year after the birth of the child. However, an employee may interrupt her maternity leave by returning to work on a full time, part time or casual basis with the agreement of her employer. The total period of leave cannot be extended beyond 52 weeks by such a return to work. The employee has the right to return to her former position (IR Act ss 54, 55, 56, 63).

It is not compulsory for a pregnant woman to take maternity leave. There is no minimum period of maternity leave, and if maternity leave is taken, there is no requirement for a specific period to be taken before or after the birth. *It is the employee's responsibility to apply for maternity leave.*

Employee's right to change the period of maternity leave and return to work

The employee may cancel her maternity leave before she starts the leave, by giving her employer written notice that she is withdrawing her leave application (IR Act s.61(1)(a)). Parental leave applied for, but not commenced, is automatically cancelled if the pregnancy concerned terminates other than by the birth of a living child (IR Act s.61(1)(b)).

If the pregnancy terminates, other than by the birth of a living child or the child dies after the maternity leave has commenced, the employee is entitled (but not required) to resume work within two weeks of the employee's written notice to the employer that she intends to resume work and the reason for intending to resume work.

She may also *shorten* the period of her maternity leave with the agreement of her employer and by giving her employer at least 14 days written notice before the leave is to come to an end (s.65).

An employee can *extend* the period of her maternity leave (up to the maximum period of 52 weeks) once only, by giving her employer 14 days written notice of the extension (s.64(1)). The employee may extend her maternity leave either before or after she commences her leave (s.64(3)). The period of leave can be extended beyond the maximum 52 weeks period only with the employer's agreement (IR Act s.64(2)).

When the employer becomes aware that the employee is pregnant, the employer must inform the employee of her entitlement to maternity leave, and her obligations to give the required notices relating to her maternity leave. *The employer cannot rely on the employee's failure to give the required notices as a means of denying maternity leave unless the employer has given this information to the pregnant employee* (IR Act s 67(1)).

9.2.2.2 Replacing an employee while she is on maternity leave

An employer may replace an employee who is on maternity leave for the period of the maternity leave. This includes a replacement for an employee who has been temporarily promoted or transferred in order to replace an employee proceeding on maternity leave and also a pregnant employee transferred to a safe job (under s.70). The replacement employee must be informed before being employed in the position, about the temporary nature of the employment and the rights of the employee on maternity leave to return to work (IR Act s.69).

An employer is not required to replace an employee on maternity leave. In some organisations, duties are shared among othe°r employees or work is re-scheduled or deferred.

9.2.2.3 Further periods of maternity leave

A woman who has met the 12 month continuous service requirement for eligibility for maternity leave is eligible to take further maternity leave without any further service requirement. She is not required to have a further 12 months service before being eligible for further maternity leave.

9.2.2.4 Continuity of service

Maternity leave does not break an employee's continuity of service but does not count as service for the purpose of calculating entitlements under s.59 (IR Act), such as long service leave, annual leave etc. The date on which annual entitlements (for example, annual or sick leave) will therefore be later by the amount of maternity leave taken. For example, someone who had been entitled to five days sick leave as of 1 May each year, and who takes 26 weeks maternity leave, would in future years accrue her sick leave entitlements on 30 October.

9.2.2.5 The pregnant employee's responsibilities

The employee must provide the following notices of her intention:

(a) her intention to take maternity leave at least 10 weeks prior to taking the leave, and provide the dates on which it is proposed to start and finish the maternity leave;
(b) at least four weeks written notice of her proposed starting and ending dates for her maternity leave prior to taking the leave;
(c) a certificate from her medical practitioner confirming that she is pregnant and the expected date of birth, prior to taking the leave;
(d) a statutory declaration stating, if applicable, the period of any paternity leave sought or taken by her spouse, prior to taking the leave;
(e) any change in the information relating to the taking of the maternity leave, within two weeks after the change.

An employee does not fail to comply with the requirements to provide these notices and documents if the failure was caused by the child being born (or the pregnancy otherwise terminating) before the expected date of birth.

If required by her employer, an employee applying for parental leave must give the employer a statutory declaration, or agreement, that for the period of the leave the employee will not engage in any conduct inconsistent with the employee's contract of employment. For example, taking employment with a competitor organisation during maternity leave, under some circumstances, could be conduct inconsistent with the employee's contract of employment (s 58(6)).

However, an employee on maternity leave may undertake some work with another employer in circumstances where this would not be inconsistent with her contract of employment.

The provisions of the IR Act set out the minimum entitlements of employees to maternity leave (s 56). Awards, enterprise agreements or contracts of employment (including employment policies in particular organisations) may provide more generous maternity leave entitlements (including periods of paid leave, longer periods of leave, specific guaranteed entitlements to return part time, or to take broken periods of maternity leave).

9.2.3 OHS law

The OHS Act requires employers to ensure the health, safety and welfare of their employees (s 8(1)). This includes providing adequate facilities for the welfare of employees while at work. Details of meeting this requirement are provided in the *Occupational Health and Safety Regulation 2001*.

Employers and self employed persons (eg contractors) must also ensure that other persons at their place of work are not exposed to risks to health and safety (ss 8(2) and 9).

The objects of the Act, which assist interpretation, include promoting a safe and healthy work environment that is adapted to their physiological and psychological needs (s 3(c)). This includes the context of securing the welfare of people at work, in addition to their health and safety (s 3(a)).

Suppliers of plant and substances must provide information to ensure they are safe and without risks to health when properly used. A supplier includes a person who designs, manufactures plant or substances (or assembles, installs or erects plant).

The general duty to consult about OHS and welfare matters is in s 13 of the Act. Sections 14 to 18 prescribe the broad content of consultation and how it is to be done.

Section 22 provides that an employer must not charge employees for those things done pursuant to a statutory requirement.

The OHS Regulation provides that all hazards must be identified, and all risks assessed and controlled.

9.2.4 Accommodating needs of pregnant and breastfeeding employees

9.2.4.1 Industrial Relations Act

In certain circumstances, the employer must adjust the pregnant employee's working conditions or hours, transfer her to a safe job or provide her with maternity leave (s.70). This also applies when breastfeeding.

Section 70 applies whenever the present work of a female employee is, because of her pregnancy or breastfeeding, a risk to the health or safety of the employee or of her unborn or newborn child. The assessment of such a risk is to be made on the basis of a medical certificate supplied by the employee and of the obligations of the employer under the OHS Act.

Entitlements to sick leave (including access to sick leave for attending medical appointments) are provided in awards and agreements and as terms of contracts of employment, and pregnant employees have the same entitlements to take their sick leave as other employees.

9.2.4.2 Discrimination Law

Pregnant employees must not be discriminated against in their access to equipment, clothing, leave etc (SD Act s.25(2)(a) and (b)).

9.3 Transfer to a safe job - how the laws interact

9.3.1 Anti-discrimination law

An otherwise discriminatory action an employer takes that is necessary to comply with the OHS Act would not contravene the AD Act because s.54(1) of the AD Act provides that the Act does not apply to anything done that is necessary to comply with another law.

Under the SD Act, there is no exemption for acts done to comply with other laws. An action that could be shown to be necessary in order to comply with the OHS Act or other legislation and therefore not unlawful under the AD Act could still be unlawful under the SD Act. If there were a conflict of law between the SD Act and other legislation, principles of statutory interpretation would be relevant to determining the SD Act's application. Generally, compliance with all the legislation relating to employment and pregnancy to the extent possible would be required.

In pregnancy discrimination cases an employer has never successfully argued that a discriminatory action was not unlawful under the AD Act because it was necessary to comply with occupational health and safety legislation. It has been found that measures required to protect the health and safety of employees at work (as required by OHS Act) would have been adequate to ensure the health and safety of the pregnant employee, so the discriminatory action could not be justified on the basis of being necessary to comply with the OHS Act.

Occupational health and safety defences have not been accepted in pregnancy discrimination matters under other discrimination legislation. In disability discrimination cases where occupational health and safety concerns have been at issue (for example, *Kitt v Tourism Commission 1987 EOC 92-196; Hawes v NSW Ambulance Service* 1994 EOC 92-586) it has been established that very strong evidence is needed to succeed in an argument that it is necessary for health and safety reasons to do something that otherwise would be discriminatory. In *HJ Heinz Co Aust Ltd v Turner* 1 July 1998, the Court of Appeal upheld the employer's right to impose work practices designed to secure the safety of a category of employees.

Exclusion of women from particular work on the basis of sex or pregnancy would often mean women are being less favourably treated and if so, would amount to direct discrimination. Placing pregnant employees on alternate duties, for example, could involve loss of opportunities for promotion, training, higher/other duties opportunities, financial loss (allowances, shift penalties, extra travel cost), extra travel time, less work satisfaction, and/or expose them to resentment and harassment from fellow workers.

"Reasonableness" is relevant in considering indirect discrimination where there are requirements or conditions that disadvantage pregnant women (SD Act) or that pregnant women do not or cannot comply with and that a substantially greater proportion of people who are not pregnant do or can comply with, and that are not reasonable (AD Act). A key consideration in relation to "reasonableness" is its objective basis - that is, that the basis on which the actions taken are assessed and weighed up. It is a matter of fact and degree rather than a subjective opinion.

"Reasonableness" is not a relevant legal consideration in relation to direct discrimination (on the basis of sex, pregnancy (or potential pregnancy, under the SD Act)), so if women are

treated less favourably on the basis of sex, pregnancy (or potential pregnancy, under the SD Act), it will be unlawful discrimination.

Applications for exemptions from the AD Act may be made to the President of the Anti-Discrimination Board, under section 126.

Applications to the Human Rights and Equal Opportunity Commission for temporary exemptions are provided for by section 44 (SD Act), but first check if the permanent exemptions in sections 13 and 30 to 43 apply to you. Special provisions in section 7(d) may also apply. To apply for an exemption you must write to the Commission stating your case. Telephone the Commission for advice - there are guidelines to assist your application.

9.3.2 Industrial Relations (IR) Act

Where an employee is pregnant or breast feeds a child, an employer is required to transfer the employee to other appropriate work if it is necessary to avoid exposure to risk to the health and safety of the employee or her unborn child, or child.

The risk is to be assessed objectively, on the basis of a medical certificate supplied by the employee and the employer's obligations under the OHS Act (IR Act s.70(1)).

Where there is such a risk, the employer is to temporarily adjust the employee's working conditions or hours of work to avoid exposure to that risk (s.70(2)). If adjustment is not feasible or cannot reasonably be required to be made, the employer is to transfer the employee to other appropriate work that will not expose her to that risk and which is as nearly as possible comparable in pay and status to her present work (IR Act s.70(3)).

Provisions under the IR Act that require an employer to temporarily adjust an employee' s conditions or hours, and to transfer an employee to other appropriate work, apply whether or not the employee employee is eligible or applying for maternity leave.

If it is not feasible either to alter the conditions or the employee's job or to transfer her to another job of comparable pay and status, the employee is entitled to (unpaid) maternity leave or any available paid sick leave for as long as a medical practitioner certifies is necessary to avoid exposure to the risk (IR Act s.70(4)).

It is unlawful for an employer to terminate an employee's employment because she is pregnant (IR Act s.68(1)).

9.4 Return to work

9.4.1 Industrial Relations Act

An employee who returns to work after a period of maternity leave (including special maternity leave) is entitled to be employed in the position she held before she took the leave (s.66(1)(a)).

If the position no longer exists (for example, because of a genuine restructuring) but there are other positions available that the employees is qualified for and is capable of performing, she is entitled to be employed in an available position that is as nearly as possible comparable in status and pay to her former position (s.66(2)).

If the employee worked part time because of her pregnancy before going on maternity leave, she is entitled to return to the position she occupied prior to the part time position s.66(1)(b). Similarly, if the employee was transferred to a safe job before going on maternity leave, she is entitled to return to the position she held before the transfer (IR Act s.66(1)(c)).

An employee returning to work after a period of special maternity leave or sick leave has the same entitlement to return to her former position as other employees returning from maternity leave (s.66(3)). It is an offence for an employer to fail to make available to the employee the position to which she is entitled (IR Act s.66(4)).

The legislation provides an entitlement to return to a position, not a job. The right to return to the former position exists at the point of return. If an employee accepts a different position at that point freely and without duress, even on a temporary basis, there is no further entitlement to return to the former position.

An employee returning to work after maternity leave may have an entitlement to work part time, under an industrial instrument or under a part time work agreement under the IR Act. Part 5, Chapter 2 of the IR Act contains the provisions regarding part time agreements, under which an employee may with the agreement of the employer work part-time.

9.4.2 Discrimination law

The AD Act was amended in 2000 to include carer's responsibilities as a ground of discrimination. These amendments commenced in 2001. Employees can bring complaints of discrimination if employers discriminate directly or indirectly against them on the basis of their carer's responsibilities. Examples would include a refusal to consider part time or other flexible working arrangements. *Employers have a defence to a discrimination claim for refusal to hire or for termination of an employee if they can prove that the person's caring responsibilities meant that they were unable to carry the essential requirements of the position and the accommodation of the person's caring responsibilities would cause the employer unjustifiable hardship.*

9.5 Termination

9.5.1 Discrimination Law

Generally, it is unlawful to terminate a woman's employment because she is or is likely to become pregnant. Pregnancy or potential pregnancy need only be one of the reasons for dismissal for unlawful discrimination to be found (AD Act s.4A; SD Act s.8).

Under the *NSW Anti-Discrimination Act* it is not unlawful to dismiss a woman if she is pregnant when she applies for or is interviewed for employment, or a pregnant employee who knew she was pregnant at the time of her application or interview for employment but did not inform the employer (AD Act s.25(2A)).

An employer will breach the Anti-Discrimination Act by dismissing a woman who was pregnant when she applied to or was interviewed by the employer if she did not know and could not reasonably be expected to have known she was pregnant (AD Act s.25(2A)).

Most employees will be able to bring a complaint regarding dismissal on the ground of sex,

pregnancy or potential pregnancy under the SD Act, which does not have these exceptions regarding dismissal of someone who knew she was pregnant at the time of application or interview.

Under the federal *Sex Discrimination Act*, it is unlawful to dismiss someone on the basis of family responsibilities (SD Act s.14(3A)).

9.5.2 Restructuring, retrenchments affecting the pregnant employee's position

It is not unlawful for employers to restructure or abolish the positions of pregnant employees or employees on maternity leave. The employee's pregnancy cannot, however, lawfully be any part of the basis for abolition or restructure of the position or selection of who is to be appointed to positions, or for retrenchment/redundancy etc. *Employees who are absent on maternity leave should not have more limited opportunities (for consultation, applying for jobs, obtaining information etc.) than other employees.*

9.5.3 Industrial Relations Act

It is an offence for an employer to terminate an employee's employment because she is pregnant, has given birth, or has applied for or is absent on maternity leave. It is sufficient to establish that one of those reasons was a factor in the termination (IR Act s.68(2)). Otherwise the rights of an employer in relation to termination of employment are not affected by the maternity leave provisions (IR Act s.68(1))

The prohibition on termination of employment because of pregnancy applies whether or not an employee is eligible for or takes any maternity leave.

The rights of pregnant employees regarding temporary adjustment of working conditions or hours, and transfer to a safe job (s.70) also apply irrespective of whether an employee has applied for or is eligible for maternity leave.

Section 99 of the IR Act provides that it is an offence to dismiss an employee who is not fit for employment as a result of an injury within six months of the injury. An injury is defined as one for which the employee is eligible for workers compensation.

9.5.4 Redress

An employee who is dismissed because of her pregnancy, or because she has given birth or is absent on parental leave, could also apply under the unfair dismissal provisions to the NSW Industrial Relations Commission for an order that she be reinstated, re-employed, paid remuneration or otherwise compensated (unfair dismissals provisions, Chapter 2, Part 6, IR Act) if she is covered by a NSW industrial instrument (award or agreement). Employees earning more than $62 200 a year and not covered by an industrial instrument cannot apply under this Part (s.83). Reinstatement provisions also apply to workers dismissed when eligible for workers compensation, within six months of the injury.

The Industrial Relations Commission (IRC) has jurisdiction in relation to unfair dismissal only where an employee has been dismissed. "Termination of employment" does not include declining to offer a further period of employment. "Dismissal" includes threatened dismissal (s.83(5)(a)). "Constructive dismissal" occurs where the employer has effectively terminated the employment by actions of the employer that make it impossible for the employee to continue in her employment (in legal terms, to perform the contract of employment). "Constructive dismissal" can be found to have occurred even where the

employee has resigned. In some unfair dismissal cases, industrial tribunals have considered employers removing entitlement to maternity leave by changing a pregnant employee's employment status (from full time to part time; from permanent to casual) as effectively being "constructive dismissal" and an unfair termination of employment.

Discrimination against a pregnant employee and the termination of employment are industrial matters (s.6) which, for example, can be pursued by the employee's union through an industrial dispute (provisions regarding industrial disputes are in Chapter 3 of the *Industrial Relations Act*).

In a complaint about a dismissal claimed to be on the basis of a need to reduce or reorganise staffing for economic reasons, the IRC might investigate:

- whether staffing was in fact reduced;
- whether a replacement was hired to do the work formerly done by the dismissed pregnant employee;
- whether a position similar to the one held by the dismissed employee continued to exist; and
- how the work formerly done by the dismissed employee was done after her dismissal.

The Commission might also consider whether selection of employees for redundancy was done in a fair way and whether pregnancy or taking maternity leave was part of the reason for selection of a particular employee for redundancy.

In a complaint about a dismissal claimed to be on the basis of poor performance, the IRC may consider:

- whether the performance problems had been discussed with the employee;
- whether any records were kept about any discussions of performance; and
- whether the employee had been given an opportunity to respond to allegations about her (s.88).

In limited circumstances, incapacity because of pregnancy to carry out the duties required of the position could provide a valid basis for dismissal. However, account would be taken of the availability of alternative work and the employer's obligation where there is a risk to health or safety of the employee or of her unborn or newborn child:

a) to temporarily adjust hours or conditions;
b) to transfer the employee to other appropriate work; or
c) to grant the employee maternity leave (or any available sick leave) for the period certified by a medical practitioner as necessary to avoid exposure to the risk.

The *Industrial Relations Act* does prohibit dismissing someone because of her pregnancy, or taking maternity leave as outlined above.

Taking sick leave, with a medical certificate, for pregnancy-related illness has been found not to be a valid reason for dismissal. Dismissal of workers on workers compensation benefits within six months of the injury is prohibited by the IR Act (s99).

9.5.5 Occupational Health and Safety Act

Section 23 of the Act prohibits dismissal, or alteration of employment conditions, on the basis that an employee makes a complaint about health or safety, is an OHS representative, a committee member, or exercises a function under the Act (such as a power granted as an OHS representative). A function includes a power, authority or duty under the Act.

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