

Pregnancy and Breastfeeding Discrimination

What is discrimination?

Discrimination means direct or indirect discrimination because of a legally protected attribute, including a characteristic that a person with that attribute generally has, or that is generally connected to a person with that attribute.

Direct discrimination

Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.

For example, an employer demotes a pregnant person to a lower-paying role once their pregnancy is announced.

Indirect discrimination

Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice—

- that has, or is likely to have, the effect of disadvantaging persons with an attribute; and
- that is not reasonable.

For example, an employer does not provide appropriate facilities for breastfeeding parents who wish to express or store breastmilk in the workplace.

When are employees protected against pregnancy and breastfeeding discrimination?

Federal and state anti-discrimination laws make it unlawful to discriminate against a person because of their pregnancy or breastfeeding status in the area of employment, which covers employees and independent contractors. They protect workers from discrimination at all stages of employment, including:

- **before employment**, including how positions are advertised, how interviews are conducted, whether employment is offered and on what terms;
- **during employment**, including being given less favourable terms or conditions of employment, being demoted, denied training opportunities, promotion, transfers, performance pay or other employment-related benefits; and
- **at the end of employment**, including being selected for redundancy or dismissed.

When will my employer be liable for discrimination?

If a person engages in discriminatory conduct during employment, the employer is vicariously liable for the discriminatory conduct unless the employer took reasonable precautions to prevent their employee from engaging in discriminatory conduct.

About this Fact Sheet

This Fact Sheet discusses state and federal laws that protect workers from discrimination based on pregnancy or breastfeeding status. It is designed to help you identify your rights and to take the most appropriate action if you believe you have been discriminated against in employment because of your pregnancy and breastfeeding status.

Disclaimer

This Fact Sheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information. This Fact Sheet is designed for employees and prospective employees in Victoria, Tasmania and Queensland only. If you are not from these states, you should obtain advice about your specific case as soon as possible.

When will my employer be liable for discrimination? (cont.)

It is also unlawful to victimise a person, for example, dismissing or threatening to dismiss an employee because they made a complaint about discrimination.

Conduct is discriminatory if pregnancy or breastfeeding status is among the reasons for the conduct – it does not need to be the only reason.

Note: In determining whether a person discriminates, the person's motive is irrelevant.

The employer may have a defence if the employee cannot perform the inherent requirements of their job (for example, the ability to drive a vehicle for a person employed as a driver), or where the requirement, condition or practice is reasonable. Other exceptions and exemptions may apply.

What action can I take?

If you have been dismissed from your job or other discriminatory conduct has occurred because of your pregnancy or breastfeeding status, you may be able to make a **state or federal discrimination complaint**. The process for lodging a complaint in each jurisdiction is set out below.

There are significant differences between the state and federal jurisdictions, including in relation to costs. Additionally, time limits have been listed below but may not be strictly applied in some circumstances. For further assistance, contact JobWatch, your union, or a lawyer before deciding which jurisdiction to choose.

Victoria

If you have been discriminated against in employment because of your pregnancy or breastfeeding status in Victoria, you have **12 months** from the date of the discriminatory conduct to lodge a complaint under the *Equal Opportunity Act 2010 (Vic)* with the Victorian Civil and Administrative Tribunal (VCAT).

If the complaint is accepted, the VCAT will conduct a conciliation process aimed at settling the matter by agreement between the parties. If a conciliation does not settle the matter, the complainant may have the matter dealt with by VCAT at arbitration. It is also possible to lodge the complaint initially with the Victorian Equal Opportunity and Human Rights Commission to make use of the voluntary conciliation process they offer, aimed at settling the matter by agreement between the parties.

Queensland

If you have been discriminated against in employment because of your pregnancy or breastfeeding status in Queensland, you have **12 months** from the date of the discriminatory conduct to lodge a complaint under the *Anti-Discrimination Act 1991 (Qld)* with the Queensland Human Rights Commission (QHRC).

If the complaint is accepted, the QHRC will conduct a conciliation process aimed at settling the matter by agreement between the parties. If a conciliation does not settle the matter, the complainant may have the matter dealt with by the Queensland Industrial Relations Commission at arbitration.

Note: You cannot make both state and federal claims at the same time. Once you have lodged a complaint in a state jurisdiction, you cannot lodge a complaint under federal anti-discrimination law about the same conduct. However, you may be able to lodge a complaint in the federal jurisdiction and then change to the state jurisdiction. Legal advice and representation is strongly recommended.

Victorian Civil and Administrative Tribunal (VCAT)

Phone: 1300 018 228

Website:

vcat.vic.gov.au

Victorian Equal Opportunity and Human Rights Commission (VEOHRC)

Phone: 1300 292 153

Website:

humanrights.vic.gov.au

Queensland Human Rights Commission (QHRC)

Phone: 1300 130 670

Website:

qhrc.qld.gov.au

Queensland Industrial Relations Commission (QIRC)

Phone: 1300 592 987

Website:

qirc.qld.gov.au

Tasmania

If you have been discriminated against in employment because of your pregnancy or breastfeeding status in Tasmania, you have **12 months** from the date of the discriminatory conduct to lodge a complaint under the *Anti-Discrimination Act 1998 (Tas)* with the Anti-Discrimination Commissioner (Equal Opportunity Tasmania).

If the complaint is accepted, the Commissioner will conduct a conciliation process aimed at settling the matter by agreement between the parties. If a conciliation does not settle the matter, the Commissioner may refer the matter to the Tasmanian Civil and Administrative Tribunal for investigation and/or arbitration.

Australia-wide

The *Sex Discrimination Act 1984* (SD Act) prohibits discrimination in employment on the basis of pregnancy or breastfeeding status. The Australian Human Rights Commission (AHRC) oversees the SD Act and other federal anti-discrimination laws.

To start a complaint, it is necessary to first file a complaint with the AHRC. You have **24 months** from the date of the discriminatory conduct to file your complaint at the AHRC. If the claim is accepted, the AHRC will conduct a conciliation to try to settle the dispute by agreement. It is mandatory for the parties to attend the AHRC conciliation.

If your complaint is not settled at the AHRC conciliation, the AHRC will 'terminate' your complaint. You would then have **60 days** from the date your complaint is terminated to file an application in the Federal Circuit and Family Court of Australia or Federal Court of Australia. Note that compared to state tribunals, the federal courts are considerably more formal, and the unsuccessful party is more likely to be liable for the other party's costs. Legal advice and representation are strongly recommended.

What other action can I take?

If you have been dismissed from your job or other discriminatory conduct has occurred because of your pregnancy or breastfeeding status you may be able to make one of the following claims under the *Fair Work Act 2009*:

- An **unfair dismissal claim** to the Fair Work Commission (FWC).
Please see JobWatch's Unfair Dismissal Fact Sheet for more information.
- a **General Protections Dispute claim** if unlawful adverse action was taken against you because of your pregnancy or breastfeeding status.
Please see JobWatch's General Protections Dispute – Termination claim and General Protections Dispute - Non-Termination claim Fact Sheets for more information.

Note that only national system employees are eligible to make these claims. In general, the national system applies to any employees covered by a nationally-registered collective agreement and:

- Most Victorian employees other than those providing essential services of core state government functions,
- Most Queensland employees other than state and municipal government employees, and
- Most Tasmanian employees other than state government employees.

Equal Opportunity Tasmania

Phone: 1300 305 062
Website:
equalopportunity.tas.gov.au

Tasmanian Civil and Administrative Tribunal

Phone: 1800 657 500
Website:
tascat.tas.gov.au

Australian Human Rights Commission (AHRC)

Phone: 1300 656 419
Website:
humanrights.gov.au

Note: you only have 21 days from the date that your dismissal took effect to file your unfair dismissal or General Protections Dispute - Termination claim with the Fair Work Commission. Strict eligibility requirements apply.

If you were not dismissed but other unlawful adverse action was taken against you for discriminatory reasons, you have 6 years from the date of the adverse action taking place to file a General Protections Dispute - Non-Termination claim.

What other action can I take? (cont.)

If you are not eligible for these claims, you may be eligible to make a claim under the unlawful termination provisions in the *Fair Work Act 2009* (**21 day time limit**). For further assistance, contact JobWatch, your union, or a lawyer.

Generally, you must choose only one of discrimination, unfair dismissal, or General Protections Dispute claims, because you can only make one claim at a time in relation to the same conduct. In some circumstances it may be possible to file a claim about a dismissal and a claim about discriminatory conduct that occurred prior to that dismissal.

Flexible working arrangements

If you have been employed for 12 months or more (on a regular and systematic basis if you are a casual) and you have parental or carer responsibilities, you may request a change in working arrangements to accommodate this.

The employer should provide a written response to the request within 21 days. The employer may refuse the request only on reasonable business grounds, and has obligations relating to discussing the request with you, making a genuine effort to find alternative arrangements.

If you don't agree with the employer's response and can't find a solution at the workplace level, you have the option of filing a dispute with the Fair Work Commission, who can hear and make orders about disputes about flexible working arrangement requests.

Employers may have additional obligations in relation to requests for flexible working arrangements under an applicable Modern Award. Contact the Fair Work Ombudsman for more information.

Further information

Depending on your situation, you should also see our other Fact Sheets:

- Parental Leave
- Carer, Parent and Family Discrimination
- Sex Discrimination
- Unfair dismissal
- General Protections Dispute - Termination claims
- General Protections Dispute - Non-Termination claims
- Constructive dismissal

These Fact Sheets are available at www.jobwatch.org.au.

Note - pregnant employees are entitled to move to a 'safe job' if it isn't safe for them to do their usual job because of their pregnancy (for example, a scuba diving instructor could request to move to a customer service role renting out scuba diving equipment). There is the potential of 'no safe job leave' if there are no suitable alternative jobs. Notice and evidence requirements apply. For further assistance, contact JobWatch, your union, or a lawyer.

Where to get help

JobWatch's free and confidential Telephone Information Service

P: (03) 9662 1933 (Melb Metro), 1800 331 617 (Regional Vic, Qld, Tas)

W: jobwatch.org.au

Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission	1300 799 675
Victorian Equal Opportunity and Human Rights Commission (VEOHRC)	1300 292 153
Victorian Civil and Administrative Tribunal (VCAT)	1300 018 228
Queensland Human Rights Commission (QHRC)	1300 130 670
Equal Opportunity Tasmania	1300 305 062
Australian Human Rights Commission (AHRC)	1300 656 419
Community Legal Centres Australia	02 9264 9595
ACTU Worker Information line (for referral to a union)	1300 362 223
Law Institute of Victoria's Legal Referral Service	03 9607 9311
Queensland Law Society (for referral to a lawyer)	1300 367 757
Law Society of Tasmania (for referral to a lawyer)	03 6234 4133

Acknowledgements

JobWatch acknowledges and is grateful for the financial and other support it has received from the Victoria Law Foundation, the Commonwealth of Australia Attorney-General's Department, the Victorian State Government and Victoria Legal Aid.

JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.