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Guide to Assist Law Firms in Developing Pregnancy and Parental Leave Policies for Associates

August 2009

The Law Society of
Upper Canada

Barreau
du Haut-Canada

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Introduction

This guide was developed by the Law Society of Upper Canada, in collaboration with the firms participating in the Law Society of Upper Canada's Justicia Project . The guide is intended as a tool to assist firms when they develop internal policies on pregnancy and parental leave for their associates in Ontario. The guide does not provide legal advice and is not meant to be the ultimate or ideal policy. Firms have no obligation to adopt all or any part of the sample policy options.

The guide is drafted to apply to a legal environment composed of partners, associates and other staff, not subject to a collective agreement. Firms are encouraged to adapt and tailor their policy to reflect their own structure and culture. For example, where a workplace is governed by a collective agreement, the firm should design its policies to take that into account.

Law firm policies also vary based on a variety of factors, such as firm culture, size of firm, practice areas, existing policies, jurisdictions in which offices are located and economic considerations. The guide provides assistance to firms by outlining the types of issues that could be considered when developing pregnancy and parental leave policies for associates, identifying legal obligations, providing language that firms may wish to use in their policy and presenting information about firm practices.

Firms are free to cut and paste any section of the sample policy. Firms may also wish to add to the sample policy or delete any sections.

We thank Justicia firm participants for their engagement in this project and the tremendous amount of work undertaken to develop this guide.

Reasons to Adopt a Policy

Firms in the Justicia Project have committed to reviewing their policies relating to pregnancy and parental leave and/or to considering the adoption of policies in areas such as pregnancy and parental leave and flexible work arrangements, to enhance the retention of women in private practice. Of the participating firms in the Justicia Project, the following represents the percentage of firms that have pregnancy and parental leave policies.

Percentage of firms with pregnancy and parental leave policies

	% of out of GTA and Ottawa firms with policies	% of small and medium firms with policies	% of large firms with policies	% of all firms with policies
Pregnancy leave policy for associates	50%	79%	100%	88%
Parental leave policy for associates	30%	59%	81%	68%
Pregnancy leave policy for partners	50%	39%	91%	60%
Parental leave policy for partners	0%	17%	50%	31%

Although a majority of law firms in the Justicia Project have adopted pregnancy leave policies for both associates and partners, and a majority of firms have adopted parental leave policies for associates, some law firms still use an ad hoc approach to providing pregnancy and parental leave and benefits to associates and partners. There are numerous reasons for law firms to develop and implement pregnancy and parental leave policies, including,

- increasing transparency, objectivity, fairness and consistency in decision making;
- providing an internal procedure to process requests for leaves and benefits;
- enhancing a firm wide acceptance that pregnancy and parental leaves are positive practices;
- showing that the law firm’s management is committed to advancing inclusiveness and diversity at the firm and to providing the appropriate support to new parents;
- communicating the firm’s commitment to potential recruits, to staff and lawyers of the firm, and to clients;

- ensuring that the firm complies with its statutory obligations, including its obligations under the *Employment Standards Act (ESA)*, the *Employment Insurance Act (EIA)* and the Ontario *Human Rights Code* (the *Code*), and similar legislation in other applicable jurisdictions¹.

¹ This Guide only applies to Ontario. Therefore, it discussed legal obligations under the *ESA*, *EIA*, the *Code* and the Law Society of Upper Canada *Rules of Professional Conduct* only.

Issues to Consider When Drafting Policies

Economic considerations vs value of policy

While economic considerations are important to take into account when developing a firm pregnancy and parental leave policy for associates, the value of providing pregnancy and parental leave and benefits to associates should also be recognized.

Catalyst Canada notes that numerous studies across industries show that “the exit of employees impacts organizations in terms of out-of-pocket expenses, loss of intellectual capital, and, ultimately, an organization’s bottom line”², and studies with the legal profession shows “the average total cost of an associate’s departure at \$315,000, approximately twice the average associate’s salary.”³ Many lawyers who have a choice of employment opportunities say that a top priority is finding a firm where the environment respects and supports family and personal commitments.⁴

Policies to support women during their childbearing years and to assist women and men in balancing the demands of their career and family responsibilities, provide long-term benefits for law firms, and contribute to the promotion of equality, human dignity and respect.

Firm structure

When drafting a pregnancy and parental leave policy, a firm should take into account applicable legislation and common law, and may wish to consider market and economic conditions, the culture and structure of the firm, firm size, practice areas, other firm policies, contractual agreements with associates and the jurisdictions in which offices are located.

Benefits

In drafting a pregnancy and parental leave policy for associates, a firm may also consider whether it will provide benefits beyond those provided under the *EIA* and *ESA*. A pregnancy and parental leave policy could, for example, include the following:

- provisions for compensation during the leave;
- extension of leave period beyond the *EIA* and *ESA* requirements;
- broadening the eligibility criteria for leaves and benefits;
- provisions for benefits during the leave.

It is a good practice to outline in a pregnancy and parental leave policy for employees minimum entitlement to pregnancy and parental leave and benefits, and a process to request a leave and

²*Beyond a Reasonable Doubt: Building the Business Case for Flexibility* (Toronto: Catalyst Canada, 2005) at 9 [the *Business Case* study]. Catalyst refers to the NALP Foundation for Law Career Research and Education, *Keeping the Keepers*, 2003 and Abraham Sagie, Assa Biranti, and Aharon Tziner, “Assessing the Costs of Behavioral Psychological Withdrawal: A New Model and Empirical Illustration” (2002) 51 *Applied Psychology: An International Review* 67-89.

³ *Ibid.* at 9.

⁴ *Beyond a Reasonable Doubt: Lawyers State Their Case on Job Flexibility* (Toronto: Catalyst Canada, 2006) at 6.

benefits. In addition, associates who are eligible under the pregnancy and parental leave policy may have unique needs related to the arrival of the child. Firms may wish to provide individualized support and accommodation to ensure that the associate maintains a productive practice when returning from the leave.

Who is covered by the policy

Firms will likely consider whether to apply the policy apply only to associates, or to also apply it to articling students, partners or other employees. Because equity partners are not covered under the *ESA* or the *EIA*, and because they are not in an employment relationship with the firm, their situation is unique and firms may wish to adopt a separate policy for equity partners. On the other hand, firms may wish to apply their associates' policy to articling students. Under the *ESA*, articling students are treated like employed duly qualified practitioners of law, or licensed lawyers.⁵ A firm could extend the policy to make it applicable to other employees of the firm, such as paraprofessionals, assistants and accountants. If the firm decides to take that approach, it should ensure that the policy is consistent with the *ESA* and the *EIA*, which often apply differently to different types of professions. For example, some sections of the *ESA* do not apply to duly qualified practitioners of law, but do apply to paraprofessionals.

Importance of management support

It is the general view of the Justicia participants that the successful implementation of a law firm policy is contingent on the support of the firm's partners and management. It is their leadership and attitude that influence the values and goals of the firm.

⁵ S. 2(1(a)(ii) of *Exemptions, Special Rules and Establishment of Minimum Wage*, Ont. Reg. 285/01 (as amended up to and including Ont. Reg. 443/08) provides for the exemption of duly qualified practitioners of law from Parts VII to XI of the *ESA*. Section 2(1)(e) extends the same exemption to a person employed "as a student in training for an occupation mentioned in clause (a)", which includes a person employed as a duly qualified practitioner of law.

General Legal Rights and Obligations

The following outlines general legal obligations in the employment context that relate to pregnancy and parental leave and benefits.

Note: The general legal rights and obligations are only up-to-date as at the date of writing. When drafting a policy, one should ensure that he or she takes into account up-to-date legislation and jurisprudence. Firms may wish to work with lawyers who have a good understanding of the *Ontario Human Rights Code*, the *Rules of Professional Conduct*, the *ESA* and the *EIA*, to develop their policy. Also, if a firm is developing a policy that applies to out-of-Ontario jurisdictions, lawyers knowledgeable with applicable laws of other provinces should be consulted.

Human Rights Obligations

Law firms and legal organizations have legal obligations under provincial and/or federal human rights legislation and case law, and lawyers are bound by rules that promote human rights under the Law Society's *Rules of Professional Conduct*. The following provides a general overview of these obligations under the *Ontario Human Rights Code*⁶ and the *Rules of Professional Conduct*.

Ontario Human Rights Code and Rules of Professional Conduct

The *Code* applies to everyone in Ontario with respect to services, goods and facilities, occupancy, contracts, employment, vocational associations and accommodations⁷, unless the *Canadian Human Rights Act* applies.⁸ All employment relations, including those governed by a collective agreement, are subject to the *Code*. Therefore, law firms in Ontario are subject to the *Code*, and the *Code* applies to all employees of the law firm, including associates, salaried lawyers, in-house counsel, and articling students.

Human rights legislation expressly prohibits discrimination based on pregnancy and the Supreme Court of Canada has clearly established that discrimination because a woman is, or may become, pregnant is discrimination on the ground of sex and is illegal.⁹ Discrimination in

⁶ *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19 [the *Code*]

⁷ Part I, s. 1, 2, 3, 4, 5, and 6 of the *Code*.

⁸ The *Canadian Human Rights Act*, R.S.C. 1985, C. H-6 applies to federally regulated employers or service providers. It is intended to apply to matters coming within the legislative authority of Parliament. This includes federal departments, agencies and crown corporations, chartered banks, airlines, television and radio stations, inter-provincial communications and telephone companies, First Nations and other federally regulated industries. The Act also applies to some private sector employers under federal jurisdiction. Lawyers employed by the federal government or salaried or in-house lawyers employed directly by federally-regulated industries, would for example be covered by the *Canadian Human Rights Act* and not the *Code*.

⁹ *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219 (S.C.C.). The *Code* states "The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant". *Code*, *supra* note 6, s. 10(2).

employment on the grounds of sex, sexual orientation, marital status and family status is also prohibited under the *Code*.¹⁰

No associate should be subjected to discrimination solely because he or she has taken a pregnancy or parental leave. It may be discriminatory, for example, to refuse to advance or to pay someone at a higher year level only because the person took one or more pregnancy or parental leaves. However, taking leaves may also mean that an associate has not acquired the experience or skills to be competent to move up to a higher year level at the same progression as other associates. It is a good practice to develop a process that allows associates to request delaying their promotion to higher year levels in order to acquire the required skills and experience.

The *Rules of Professional Conduct* apply to member lawyers of the Law Society of Upper Canada. Rule 5.04 places a special responsibility on lawyers to adhere to the tenets of human rights law and in particular to respect the obligation not to discriminate because of, for example, sex, sexual orientation, marital status or family status.¹¹

A significant number of complaints made to the Discrimination and Harassment Counsel Program each year are complaints of discrimination or harassment on the basis of pregnancy. Of the breakdown of sex discrimination complaints between 2003 and 2008, 24 of the 175 (14%) complaints related to pregnancy.¹²

In addition to Rule 5.04, lawyers should be mindful of their professional responsibility to provide legal services to clients in a manner that is conscientious, diligent, timely and cost-effective and to manage their practice effectively. Not only do lawyers have the right to be treated without discrimination because of pregnancy, sex or family status, they also have an obligation to manage their practice to ensure that the provision of services during pregnancy or parental leaves continues to be offered effectively. Both firms and individual lawyers have a duty to clients to ensure on-going seamless high quality client service.

Firms Have a Duty to Accommodate

The *Code* and the *Rules of Professional Conduct* impose a duty to accommodate, to the point of undue hardship, differences that arise based on the enumerated grounds in the *Code*. In determining whether an accommodation would constitute "undue hardship", the firm must take into consideration the cost, outside sources of funding, and health and safety factors.¹³ In

¹⁰ *Code*, *supra* note 6, s. 5(1).

¹¹ Rule 5.04(1) states " A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the *Code*), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other members of the profession or any other person". *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000).

¹² The *Report of Activities of the Discrimination and Harassment Counsel, July 1, 2008 to December 31, 2008 and Summary of Data Since January 1, 2003* (Toronto: Law Society of Upper Canada).

¹³ Section 11(2) of the *Code*, *supra* note 6.

order to constitute undue hardship, the cost must be quantifiable; related to the accommodation; and so substantial that it would alter the essential nature of the firm, or so significant that it would substantially affect its viability

In determining undue hardship, the onus is on the firm to prove that the accommodation would constitute undue hardship; there is no onus on the employee, or associate, requesting the accommodation to prove that it can be accomplished without undue hardship.

The Human Rights Commission has provided the following examples of how to accommodate employees during the pre-natal and post-natal periods, short of undue hardship:¹⁴

An employee may be temporarily relocated or re-assigned to alternative duties.

A flexible work schedule may be provided to accommodate medical appointments, including treatment for infertility, as well as breastfeeding needs.

Where required, a quiet environment may be provided for pregnant employees to rest during breaks.

Special equipment may also be provided to a pregnant lawyer, such as a special chair or a special computer screen.

Accommodation for breastfeeding may mean allowing a care-giver to bring the child into the workplace so the mother may breastfeed, making scheduling changes to permit time to express milk or breastfeed at work or to reach home in time to breastfeed, and providing a comfortable, dignified and appropriate area so that women can breastfeed, or express and store breast milk at work.

Employment Standards Act, 2000

Duly qualified practitioners who are employees, including associates and articling students, are subject to Part XIII ("Benefit Plans") and Part XIV ("Leaves of Absence")¹⁵ but exempt from Parts VII to XI of the *ESA*.¹⁶ Subject to these exceptions, the *ESA* applies to an employee and his or her employer if the employee's work is performed in Ontario, or the work performed outside of

¹⁴ *Policy on Discrimination because of Pregnancy and Breastfeeding* (Toronto: Human Rights Commission, revised 2008).

¹⁵ *Exemptions, Special Rules and Establishment of Minimum Wage*, O. Reg. 285/01 (amended to O. Reg. 443/08) exempts members of the legal profession from Parts VII to XI of the *ESA*. Section 3(2) of the *ESA*, exempts employees whose employment is within the legislative jurisdiction of the Parliament of Canada. Section 3(4) exempts Crown employees from many portions of the Act, however, they are subject to Parts XIII ("Benefit Plans") and XIV ("Leaves of Absence").

¹⁶ Part VII is Hours of Work and Eating, Part VIII is Overtime Pay, Part IX is Minimum Wage, Part X is Public Holidays, and Part XI is Vacation with Pay. *ESA, ibid.*

Ontario is a continuation of work performed in Ontario. Lawyers who are partners or sole practitioners are unlikely to be covered under the *ESA*.

The *ESA*, sets out the minimum threshold for employment standards. It is expressly prohibited to contract out of the standards of the *ESA*. In addition, s. 5(2) of the *ESA* provides that “where a provision in an employment contract or a provision of another Act directly relates to the same subject as an employment standard established under the *ESA*, and offers a greater benefit to an employee than the standard sets out in the *ESA*, then the employment contract or the other Act applies, and the employment standard in the *ESA* does not apply.”¹⁷

Part XIV of the *ESA* governs leaves of absence from the workplace, including pregnancy and parental leaves. The purpose of the legislation is to protect an employee’s position while on leave. An employer is statutorily obligated to grant qualifying employees a pregnancy and/or parental unpaid leave if such is requested. The employer has no obligation to provide for paid leaves under Part XIV of the *ESA*.

Pregnancy Leave

Entitlement to a pregnancy leave under the *ESA* is automatic unless the employee’s due date falls fewer than 13 weeks after she began employment.¹⁸ If also entitled to parental leave, an employee’s pregnancy leave will be 17 weeks in length.¹⁹ An employee who is not entitled to parental leave is entitled to pregnancy leave that ends the later of either 17 weeks after the pregnancy leave began or six weeks after a birth, stillbirth or miscarriage.²⁰

Section 46(4) – (6) of the *ESA* provides procedures for giving notice and changing the date of the notice, along with contingent procedures in the event of unforeseen complications related to the pregnancy.²¹

Parental Leave

An employee who is a parent and who has been employed by his or her employer for at least 13 weeks is entitled to take a parental leave.²² A parental leave may be taken following either the birth of a child or the coming of the child into the employee’s custody, care and control for the first time.²³

¹⁷ See sections 5(1) and (2) of the *ESA*, *ibid.*

¹⁸ S. 46(1) of the *ESA*, *ibid.*

¹⁹ S. 47(1)(a) of the *ESA*, *ibid.*

²⁰ S. 47(1)(b)(i) and (ii) of the *ESA*, *ibid.*

²¹ S. 47(3) – (5) of the *ESA*, *ibid.*, provides: “An employee may end her leave earlier than the day set out in subsection (1) by giving her employer written notice at least four weeks before the day she wishes to end her leave”.

²² Employees who have step children coming into their custody, care and control may be eligible for parental leave under s. 48(1). The definition of “parent” is found in s. 45 of the *ESA*, *ibid.*, which states that “parent” includes “a person with whom a child is placed for adoption and a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own, and “child” has a corresponding meaning.”

²³ S. 48(1) of the *ESA*, *ibid.*

The length of the parental leave is contingent on whether or not the employee took a pregnancy leave. When that is the case, the parental leave is limited to 35 weeks. If no pregnancy leave has been taken, the employer must allow the employee to take up to 37 weeks of leave of absence.²⁴

If an employee has taken a pregnancy leave, she must commence her parental leave when the pregnancy leave ends, unless the child has not yet come into her custody, care and control for the first time.²⁵

In the event that an employee has not taken pregnancy leave, the commencement of parental leave is restricted to no later than 52 weeks after the day the child is born or comes into the custody, care and control of the employee for the first time.²⁶

As with pregnancy leaves, procedures for parental leaves, such as giving notice, changing the date of notice and dealing with unexpected arrivals of the child, are prescribed.²⁷

An employee may not terminate his or her employment before the end of the parental leave or when it expires without giving the employer at least four weeks written notice, unless the employee is constructively dismissed.²⁸

Employment Insurance Act²⁹

The following is a brief summary of the *EIA*. Further information about the *EIA* is available online at www.hrsdc.gc.ca. The *EIA* applies in Ontario to employees who meet minimum hour requirements of employment, but does not apply to self-employed workers. Therefore, lawyers who are equity partners or sole practitioners are unlikely to be eligible for parental/pregnancy benefits under the *EIA*. If the policy applies to non-equity partners, the firm may wish to consider whether the relationship with non-equity partners is one that would be considered an “employment” relationship under the *ESA* and the *EIA*.

The *EIA* provides three types of special benefits relevant to birth mothers and/or new parents: pregnancy, parental and illness benefits.³⁰

To be entitled to pregnancy, parental or illness benefits an employee must show that she or he has accumulated 600 insured hours in the last 52 weeks or since the last claim.

²⁴ S. 49(1) of the *ESA*, *ibid.*

²⁵ S. 48(3) of the *ESA*, *ibid.*

²⁶ S. 48(2) of the *ESA*, *ibid.*

²⁷ S. 48(4) of the *ESA*, *ibid.*, sets out that the employer is entitled to written notice at least two weeks before the leave is to begin. S. 48 (5) and (6) govern the procedures for changing the date of the commencement of the leave while s. 49(2) and (3) explain how an employee can amend the final date of the leave.

²⁸ *Ibid.* s. 49(4) and (5).

²⁹ S.C. 1996, c. 23.

³⁰ In certain circumstances, pregnancy, parental and illness benefits can be combined with compassionate care benefits. Compassionate care benefits are paid to persons who have to be away from work temporarily to provide care or support to a family member who is gravely ill with a significant risk of death. This could include a newborn.

Pregnancy benefits³¹ are available to birth mothers only. Parental benefits³² are available in addition to pregnancy benefits. Either or both parents of a newborn child or of an adopted child may be eligible for parental benefits. A birth mother may be eligible for illness benefits in addition to pregnancy and parental benefits.

A claimant may be eligible to receive benefits for up to a maximum of 65 weeks, or 71 weeks if the claimant is also eligible for compassionate care benefits.³³ Maximum weekly benefit is 55% of the maximum yearly insurable earning divided by 52.³⁴ Maximum weekly earnings are set out in s. 14 of the *EIA*.³⁵

Pregnancy Benefits

Pregnancy benefits are payable to the birth mother or surrogate mother for a maximum of 15 weeks.³⁶ Because there is a two-week waiting period for which no benefits are paid under the *EIA*³⁷, for a 17 week pregnancy leave under the *ESA*, an employee can receive a maximum of 15 weeks of EI benefits. The mother can start collecting pregnancy benefits the earlier of 8 weeks before the week she is expected to give birth or on the week she gives birth.³⁸ Pregnancy benefits can be collected within 17 weeks of the actual or expected week of birth, whichever is later.³⁹

If the child is hospitalized, the 17 week limit can be extended for every week the child is in the hospital up to 52 weeks after the week of the child's birth.⁴⁰

Parental Benefits

Parental benefits are payable either to the biological or adoptive parents while they are caring for a new-born or an adopted child, up to a maximum of 35 weeks.⁴¹ Parental benefits can be claimed by one parent or shared between the two partners but will not exceed a combined maximum of 35 weeks. If an employee has received pregnancy benefits, the employee can

³¹ S. 22 of the *EIA*, *ibid*.

³² S. 23 of the *EIA*, *ibid*.

³³ S. 12(3) and s. 23 of the *EIA*, *ibid*. Section 12(3) states that the maximum periods for the payment of special benefits are as follows: pregnancy, 15 weeks; parental, 35 weeks; illness, 15 weeks; and compassionate care, 6 weeks. As a result, the combined total for pregnancy, parental and illness benefits is 65, but adding in compassionate care makes it 71 weeks.

³⁴ S. 17 of the *EIA*, *ibid*. The maximum yearly insurable earning is determined in accordance with a formula established under s. 4 of the *EIA*. The calculation of the maximum yearly insurable earning is made annually and the maximum weekly benefit varies accordingly. As of January 1, 2009, the amount of maximum yearly insurable earnings is \$42,30, and therefore the maximum weekly benefit is \$447. However, even that is not invariable, as low income families, at less than \$25,921 per year, may be eligible for a higher rate.

³⁵ S. 14(1.1) (a) of the *EIA*, *ibid*, states the maximum weekly insurable earnings is \$750 if the claimant's benefit period begins during the years 1997 to 2000; and s. 14(1.1)(b) states if the claimant's benefit period begins in a subsequent year, the maximum yearly insurable earnings divided by 52.

³⁶ S. 12(3) of the *EIA*, *ibid*.

³⁷ Section 13 of the *EIA*, *ibid*.

³⁸ S. 22(2)(a) of the *EIA*, *ibid*.

³⁹ S. 22(2)(b) of the *EIA*, *ibid*.

⁴⁰ S. 22 (6) – (7) of the *EIA*, *ibid*.

⁴¹ S. 12(3) and 23 of the *EIA*, *ibid*.

continue to receive parental benefits without a second waiting period. If the employee did not take a pregnancy leave, but takes a parental leave, the employee will receive 35 weeks of benefits under the *EIA*.

Parental benefits are payable for each week of unemployment in the period that begins with the week in which the child or children are born or the child or children are placed for adoption. The period ends 52 weeks after the week in which the child or children are born or the child or children come into their care, custody or control for the first time. If the child or children are hospitalized during that period, the period is extended by the number of weeks during which the child or children are hospitalized, to a maximum of 104 weeks.⁴²

Illness Benefits

Under the *EIA* a pregnant woman may be entitled to receive up to 15 weeks of illness benefits in addition to pregnancy and parental benefits.⁴³ There are special rules governing claims for pregnancy and illness benefits in the event of termination of pregnancy, depending on the point in the pregnancy at which the pregnancy terminates.

Income Benefit Supplements

Employers may now establish plans for making supplementary payments to employees for pregnancy, parental and compassionate care leave, and such payments are excluded from consideration as earning, provided that the amount of the income supplement,

- (a) when combined with the portion of the claimant's weekly benefit rate from that employment does not exceed the claimant's normal weekly earnings from that employment; and
- (b) does not reduce the claimant's accumulated sick leave or vacation leave credits, severance pay or any other accumulated credits from that claimant's employment.

The Service Canada website⁴⁴ states that, unlike Supplementary Unemployment Benefit Plans (SUB), plans to supplement EI benefits for pregnancy, parental and compassionate care benefits do not have to be submitted for approval to Human Resources and Social Development Canada. However, written records have to be kept to show the effective date of the income supplement plan and to demonstrate that the plan meets the two conditions mentioned above. As a result, law firms that offer supplements to EI benefits for pregnancy, parental and compassionate care, should maintain written plans that contain the two conditions stated above.

The old weekly limitation on the amount of the supplement plus the EI benefit, which was 95% of normal gross weekly earnings, still applies to SUB plans, but does not apply to plans providing supplements to pregnancy, parental and compassionate care benefits. The supplement plus the

⁴² S. 23(2) – (4) of the *EIA*, *ibid*.

⁴³ S. 23 of the *EIA*, *ibid*.

⁴⁴ www.servicecanada.gc.ca/eng/ei/employers/supplements.shtml#supplement

El benefit can equal 100% of the employee's normal weekly salary, not just for the two week waiting period, but for the whole period for all three kinds of leave, without jeopardizing the amount of the El benefit.

Sample Policy Options

Commentary	<p>The sample policy options address the most common legal work environment: a firm composed of partners, associates, articling students and other staff or a professional corporation, not subject to a collective agreement. Where a workplace is governed by a collective agreement, modifications may need to be made to the policy.</p> <p>The sample policy options are only up-to-date as at the date of writing. When drafting a policy, one should ensure that he or she takes into account up-to-date legislation and jurisprudence. Firms may wish to work with lawyers who have a good understanding of the <i>Ontario Human Rights Code</i>, the <i>Rules of Professional Conduct</i>, the <i>ESA</i> and the <i>EIA</i> to develop their policy.</p>
Legal Considerations	<p>Further information about the <i>EIA</i> is also available on-line at www.hrsdc.gc.ca and information about the <i>ESA</i> is available on-line at www.labour.gov.on.ca</p>

**PREGNANCY AND PARENTAL LEAVE POLICY FOR ASSOCIATES OF [NAME OF FIRM]
("THE FIRM")**

Commentary

The sample policy options presented below are drafted to apply to associates who are employees of law firms located in an Ontario office. It is assumed that the *Employment Standards Act (ESA)* and the *Employment Insurance Act (EIA)* apply. A separate Guide has been drafted to apply specifically to equity partners who are not considered "employees of the firm" under the *ESA* and the *EIA*. If the policy applies to non-equity partners, the firm may wish to consider whether the relationship with the non-equity partners is one that would be considered an "employment" relationship under the *ESA* and the *EIA*.

If a firm has adopted a policy for partners, it is encouraged to communicate that policy to their associates to make them aware of benefits available once a partner.

A firm could extend its pregnancy and parental leave policy to other employees of the firm, such as paraprofessionals, assistants and accountants. If the firm decides to take that approach, it should ensure that the policy is consistent with the *ESA* and the *EIA*, which often apply differently to different types of professions. For example, some sections of the *ESA* do not apply to duly qualified practitioners of law, but do apply to paraprofessionals.

Firms may also wish to apply its pregnancy and parental leave policy to articling students. Under the *ESA*, articling students are treated like employed duly qualified practitioners of law (licensed lawyers).

Statement and Governing Legislation

Commentary

Although not mandatory, firm policies often include an introductory section that outlines the statement of principles and commitment of the firm, along with the relevant governing legislation. Such introductory section provides context for the policy and emphasizes a firm's commitment to equality and principles of human rights.

Firms may adapt the text of the section "Statement and Governing Legislation" to reflect the firm's commitment and principles.

1. The firm is committed to advancing inclusiveness and diversity. It is important that it provide the appropriate support to new parents. This policy outlines the role of the firm in assisting associates to transition their practice prior to, during and after their leave, and the role of the associate in ensuring continued excellence in client service and practice management.
2. The firm is bound by the Ontario *Human Rights Code* and the Law Society of Upper Canada's *Rules of Professional Conduct*, which prohibit sexual discrimination based on enumerated grounds, including sex/pregnancy, marital status, family status and sexual orientation. **[Firms that develop a policy applicable to out-of-Ontario jurisdictions should refer to the applicable human rights legislation and rules of professional conduct.]**
3. The firm is also bound by legal obligations under the Ontario *Employment Standards Act, 2000 (ESA)* and the federal *Employment Insurance Act (EIA)*, which outline minimum pregnancy and parental leave and benefit entitlements for employees, including associates, who have met the eligibility requirements specified in those Acts. **[Firms that develop a policy applicable to out-of-Ontario jurisdictions should refer to the applicable legislation.]**
4. This policy outlines the pregnancy and parental leave and benefit entitlements of associates that are provided by the firm in addition to their rights under the *ESA* and the *EIA*. **[Firms that develop a policy applicable to out-of-Ontario jurisdictions should refer to the applicable legislation.]**
5. This policy also outlines the obligations of the firm and associates to ensure continued high quality client services during an associate's absence.

Definitions

Commentary

It is not necessary to include a "Definitions" section within a firm policy. However, definitions are often helpful for the reader and may enhance transparency and consistency. Examples of definitions are provided above.

6. **"Income benefits supplement"** is income provided by the firm to the associate in addition to *EIA* benefit payments to bring the associate's income during a leave to a total that approaches his or her salary.

Legal Considerations

See section of the Guide entitled *General Legal Rights and Obligations* for a description of legal obligations.

7. **“Parent”** includes a biological mother or father, or a person with whom a child is placed for adoption or a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own, and "child" has a corresponding meaning.

Commentary

The definition of “parent” is consistent with the *ESA*. Appropriate legislation in other applicable jurisdictions should also be considered.

8. **“Spouse”** means either of two persons who are married to each other, or either of two persons who live together in a conjugal relationship outside marriage.

Commentary

The definition of “spouse” is based on the legal definition of “spouse” in the *Family Law Act* and the *ESA*. Appropriate legislation in other applicable jurisdictions should also be considered.

Application of Policy

9. This policy applies to all eligible associates of the offices of the firm located in Ontario.

Commentary

The firm could adopt a policy that applies to offices outside of Ontario. However, if that is the case, the firm should be mindful of legislation applicable in different provinces when developing its policy.

Pregnancy Leave and Benefits

Eligibility and Entitlement

10. Options:

- a. Option 1: The firm allows **[insert number of weeks. For consistency with *ESA*, period should not be shorter than 17 weeks.]** weeks pregnancy leave to associates who are pregnant or who have given birth.
- b. Option 2: The firm allows **[insert number of weeks. For consistency with *ESA*, period should not be shorter than 17 weeks.]** weeks pregnancy leave to associates who are pregnant or who have given birth, and who have been employed at least 13 weeks at the firm.
- c. Option 3: The firm allows **[insert number of weeks. For consistency with *ESA*, period should not be shorter than 17 weeks.]** weeks pregnancy leave to associates who are pregnant or who have given birth, and who have been employed at least **[insert length of minimum period at firm. To ensure consistency with *ESA*, period should not exceed 13 weeks at the firm].**

Commentary

A law firm must comply with the *ESA* requirements, but does not have an obligation to provide benefits that go beyond or are broader than the *ESA*. At a minimum, employers must allow eligible employees 17 weeks for pregnancy leave.

The *ESA* also specifies that, to be eligible for a pregnancy leave, employees must have been employed at the firm at least 13 weeks before the child's expected birth date.

The sample options above reflect the following approaches:

Option 1: Allows the firm to choose the length of leave that would be most appropriate for the firm. It also adopts a more generous approach than the *ESA* by waiving the eligibility criteria of the *ESA* (see explanation below).

Option 2: Allows the firm to choose the length of leave that would be most appropriate for the firm and it adopts the eligibility criteria of the *ESA* of having been employed at the firm at least 13 weeks. (see explanation below).

Option 3: Allows the firm to choose the length of leave that would be most appropriate for the firm and to choose the eligibility criteria. Please note

	<p>that should firms choose option 3, they should ensure that the length of leave and eligibility criteria reflect the minimum <i>ESA</i> criteria (see explanation below).</p>
<p>Legal Considerations</p>	<p>It should be noted that if the firm allows associates to take a leave even if she has not worked at the firm for 13 weeks (options 1 or 3), the associate’s leave is not taken under the <i>ESA</i>. The employer is under no obligation in that case to provide pregnancy leave as prescribed by the <i>ESA</i> and could provide for a shorter pregnancy leave period.</p> <p>Under the <i>EIA</i>, an employee has to have 600 hours of insurable employment in the last 52 weeks (although, one could add together periods of insurable employment with different employers for EI purposes, which is not the case under the <i>ESA</i> with respect to the 13 weeks). Therefore, if the employer decides to waive the <i>ESA</i> service criterion, the employee could be entitled to pregnancy and/or parental leave under the employer’s policies, while not be eligible for EI benefits.</p> <p>Also note that an employee who works fewer than full-time hours might have worked for 13 weeks for <i>ESA</i> purposes, without having accumulated the 600 hours of insurable employment in the last 52 weeks required to establish eligibility for EI benefits.</p>
<p>Firm Practices</p>	<p>Findings of the Justicia survey of “out of GTA and Ottawa” law firms indicate that 50% (5 of 10 firms) of the firms have a pregnancy leave policy for associates. Of the 5 firms, 3 indicate that full-time associates are eligible under the pregnancy leave policy no matter the length of time at the firm.</p> <p>Findings of the Justicia survey of firms with under 100 lawyers (medium firms) indicate that 79% of medium firms have a pregnancy leave policy for associates. Of those, 58% indicate that full-time associates are eligible under the pregnancy leave policy no matter the length of time at the firm.</p> <p>Findings of the Justicia survey of firms with over 100 lawyers (large firms) indicate that all large firms have a pregnancy leave policy for associates. Half of participating large firms indicate that full-time associates are eligible under the pregnancy leave policy no matter the length of time at the firm.</p>

11. Associates may begin a pregnancy leave no earlier than either 17 weeks before the child’s due date or the day on which she gives birth, whichever comes first. Associates may begin a pregnancy leave no later than either the child’s due date, or the day on which she gives birth [**whichever comes first**]. [**Once started, the pregnancy leave has to be taken all at one time.**]

Legal Considerations

The sample clause above is consistent with the *ESA*. A firm may wish to allow associates to work until the baby is born, notwithstanding the fact that the due date comes first.

Under the *ESA*, this provision does not apply with respect to a pregnancy that ends with a still-birth or miscarriage. The applicable provision for miscarriage or stillbirth is described below.

Some Justicia participants have indicated that it might be a good practice to provide some flexibility by allowing a birth mother to return to work for brief periods, for example to supervise files. Although under the *ESA*, once an associate has started her pregnancy leave she must take it all at once, firms may adopt a more generous and flexible approach by allowing associates to interrupt and resume their pregnancy leave. If this is the approach that firms wish to take, the following phrase should be deleted: [Once started, the pregnancy leave has to be taken all at one time.]. If firms take that approach, it is important to clearly indicate that an associate is not expected to work during the leave and that the leave entitlement will be respected.

If a firm allows associates to interrupt and resume their pregnancy leave, the firm may also wish to include a note in the policy to warn associates that such brief returns to work may have an impact on their EI benefits.

12. If an associate has a miscarriage or stillbirth, she is eligible for pregnancy leave as described in this policy if it occurred no more than 17 weeks before the due date. The latest date for commencing the leave in that case is the date of the miscarriage or stillbirth.

Legal Considerations

This is a minimum entitlement under the *ESA*. Consistent with this principle, if a firm provides pregnancy leave that is longer than the minimum *ESA* entitlement to birth mothers, firms may wish to also provide equivalent pregnancy leave entitlements to associates who have a miscarriage or stillbirth.

Income during Pregnancy Leave

13. The firm will continue to provide the associate with the equivalent of **[insert percentage of salary]** of her salary during the **[insert length]** week pregnancy leave period, either as income or as a income benefits supplement to *EI* benefits.

Legal Considerations

Firms do not have an obligation to provide income or an income benefits supplement to their associates during pregnancy leaves.

The amount and duration of benefits can be highly variable. The income or income benefits supplement will sometimes cover the difference between EI benefits and a set percentage of an employee's earnings.

There may be some cases where an associate is not eligible for EI benefits. Firms may wish to provide income to the associate during that period. The most likely reasons for not being eligible for the benefits would be that the employer has waived the service criterion under the *ESA* or the employee works less than full-time hours and meets the service criterion under the *ESA* but not the *EIA* threshold.

Also see information about the establishment of plans for making supplementary payments to employees for pregnancy, parental and compassionate care leave in the section entitled *General Legal Obligations and Rights*, the *Employment Insurance Act*.

Firm Practices

Some firms provide income in the form of an income benefit supplement only when the associate is also receiving EI, while others provide income even if the associate is not eligible for EI.

Of the 21 firms that have shared their pregnancy leave policies for associates, most provide an income of 100% for the two week waiting period and an income benefits supplement of between 93 and 100% of salary for a period of between 14 and 16 weeks.

A few firms provide a full salary for the period of between 15 and 18 weeks, which would likely mean that an associate who is not receiving EI benefits would still be entitled to receive 100% of her salary during the leave.

Of the 10 respondents of "out of GTA and Ottawa" law firms that answered the Justicia survey, 20% (2 firms out of 10) of respondents indicate that the pregnancy leave policy provides an income benefit supplement or income for pregnancy leaves. One firm provides a 4 months paid leave while the other firm provides that associates receive income replacement for 17

weeks at 75% of annual salary to a maximum of \$20,000 payable over the length of the leave.

Of the 23 respondents of medium Justicia firms, 78% of respondents indicate that their pregnancy leave policy provides an income benefit supplement or income for pregnancy leaves. Sixteen respondents of the 19 respondents who commented on the amount indicate that their firm provides an income benefit supplement or income to between 95% and 100% for a period of between 16 and 18 weeks.

Of the 22 respondents of large Justicia firms, 95% of respondents indicate that their pregnancy leave policy provides an income benefit supplement or income for pregnancy leaves. Eighteen of the 22 noted that their firm provides an income benefit supplement or income to 100% of the salary for a period of 17 weeks.

A 2 week full income combined with between 14 and 16 weeks of income benefit supplement at between 93% and 100% salary appears to be the most common practice adopted by large and medium Justicia firms.

Parental Leave and Benefits

Eligibility and Entitlement

14. Options:

- a. Option 1: An associate who is a parent, as defined under this policy, is eligible for a parental leave.
- b. Option 2: An associate who is a parent, as defined under this policy, is eligible for a parental leave if the associate has been employed at the firm at least 13 weeks.
- c. Option 3: An associate who is a parent, as defined under this policy, is eligible for a parental leave if the associate has been employed at the firm [**insert length of time for eligibility. For consistency with the *ESA*, length of time should not exceed 13 weeks**].

Commentary

These sample clauses are consistent with the *ESA*, which outlines the entitlement to parental leaves without pay to eligible parents. A parent includes “the birth parent of a child, an adopting parent, whether or not the adoption has been legally finalized, and a person who is in a relationship of some permanence with a parent of a child and who plans on treating the

child as his or her own.”

The *ESA* provides that employees are eligible to parental leaves if they have been employed at least 13 weeks before the date the leave is going to start. Option 1 proposes a more generous entitlement by waiving the “13 week period of employment prior to the leave” as criteria for eligibility for parental leaves.

Option 2 reflects the *ESA* requirement while option 3 provides some flexibility in eligibility.

It should be noted that if the firm adopts an approach where the associate is eligible to take a leave even if he or she has not worked at the firm for 13 weeks (options 1 or 3), the associate’s leave is not taken under the *ESA*. The employer is under no obligation in that case to provide parental leave as prescribed by the *ESA*.

However, if the associate does not have 13 weeks of service, it is possible that he or she may not meet the corresponding criterion for EI pregnancy/parental benefits, which is 600 hours of insurable employment in the last 52 weeks (although, one could add together periods of insurable employment with different employers for EI purposes, which is not the case under the *ESA*).

Also, an associate who works fewer than full-time hours might have worked for 13 weeks for *ESA* purposes, but might not have accumulated the 600 hours of insurable employment in the last 52 weeks required to establish eligibility for EI benefits.

15. The firm allows parental leaves for the following period: **[insert length of leave. Period should not be shorter than 35 weeks.]** weeks if the person has taken a pregnancy leave, and **[insert length of leave. Period should not be shorter than 37 weeks.]** weeks otherwise. **[Once an associate has started parental leave, he or she must take it all at once.]** A birth mother who takes a pregnancy leave must usually begin her parental leave right after the pregnancy leave ends.

Commentary

A law firm must comply with the *ESA* requirements, but does not have an obligation to provide benefits that go beyond or are broader than the *ESA*. Therefore, a parental leave for eligible associates must be at least 35 weeks if the associate has taken a pregnancy leave and 37 weeks if the associate has not taken a pregnancy leave.

The sample clause allows the firm to choose the length of leave that would

	be most appropriate while noting the minimum <i>ESA</i> requirement.
Legal Considerations	<p>Under the <i>ESA</i>, law firms have an obligation to provide eligible associates with at least 35 weeks if the associate has taken a pregnancy leave and 37 weeks if the associate has not taken a pregnancy leave</p> <p>Some Justicia participants indicated that it may be a good practice to provide some flexibility in the policy by allowing associates to return to work for brief periods, for example to supervise files, while on parental leave. Although under the <i>ESA</i>, once an associate has started her or his parental leave she or he must take it all at once, firms may adopt a more generous and flexible approach by allowing associates to interrupt and resume their parental leave. If this is the approach that firms wish to take, the following phrase should be deleted: [Once started, the parental leave has to be taken all at one time.]. As mentioned in the legal considerations under the pregnancy leave section, if firms take that approach, it is important to clearly indicate that an associate is not expected to work during the leave and that the leave entitlement will be respected.</p> <p>If a firm allows associates to interrupt and resume their parental leave, the firm may also wish to include a note in the policy to warn associates that such interruptions and resumption of work may have an impact on their EI benefits.</p> <p>The <i>ESA</i> provides that if the child has not come into her care for the first time by the time the pregnancy leave ends (for example, because the child was hospitalized and remains in the hospital), she may either commence her parental leave when the pregnancy leave ends or choose to return to work. If she returns to work, she can start her parental leave any time within 52 weeks of the birth or the date the child first came home. Under the <i>ESA</i>, all other parents must begin their parental leave no later than 52 weeks after the child is born or the date the child first came into their care, custody and control. The parental leave does not have to be completed within this 52 week period, but it has to start during that period. This is the minimum entitlement under the <i>ESA</i> and law firms may wish to add provisions to that effect in their policy to inform associates of entitlements.</p>

- 16. An associate who has a miscarriage or stillbirth, or whose spouse has a miscarriage or stillbirth, is not eligible for parental leave, **[but the associate is eligible for compassionate leave in accordance with the firm’s policies]**.

Legal Considerations	Under the <i>ESA</i> , parental leaves do not apply when a woman, or the spouse of a woman, has a miscarriage or stillbirth. The firm may wish to list the firm policies, if any that would apply in those situations.
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Income during Parental Leave

17. The firm will continue to provide the associate with the equivalent [**insert percentage of salary**] of her or his salary during [**insert length**] weeks of the parental leave period, either as income or as income benefits supplement to *EIA* benefits.

Commentary	The sample clause above may be used if a firm decides to offer income or an income benefits supplement to associates during a parental leave, but firms do not have such an obligation under the <i>ESA</i> .
Legal Considerations	<p>The amount and duration of benefits can be highly variable. The income or income benefits supplement will sometimes cover the difference between EI benefits and a set percentage of an employee’s earnings. It often ranges between 93% and 100%.</p> <p>There may be some cases where an associate is not eligible for EI benefits, and firms may in those cases provide income to the associate. The most likely reasons for not being eligible for the benefits would be that the employer has waived the service criterion under the <i>ESA</i> or the employee works less than full-time hours and meets the service criterion under the <i>ESA</i> but not the <i>EIA</i> threshold.</p> <p>Please see information about plans for making supplementary payments to employees for pregnancy, parental and compassionate care leave in the General Legal Rights and Obligations section of this guide.</p>
Firm Practices	<p>Of the 21 firms that have shared their policies on pregnancy/parental leave for associates, 10 offer the minimum legal obligation of 35 or 37 weeks without pay. Otherwise, there does not appear to be a clear trend as far as providing parental leave benefits to associates. The following practices are noted:</p> <p><u>Income during parental leave, when the associate has not taken a</u></p>

pregnancy leave. The following are examples

- 100% of salary for up to 17 weeks to the primary caregivers, otherwise 2 weeks at 100% of salary
- 100% of salary or top-up for 17 weeks (man or woman)
- 1 month full pay for each year at the firm, to a maximum of 4 months
- 4 weeks at full pay
- full pay for the 2 week waiting period and 100% income benefits replacement for 15 weeks for adoption
- 18 weeks at full pay for adoption if the associate is the primary caregiver

A few firms provide income during parental leave in addition to pregnancy leave income. The following are examples:

- income benefits replacement to 90% for 15 weeks in addition to pregnancy leave (pregnancy benefits are at full pay for 2 week waiting period and 93% income benefits replacement for 15 weeks). If no pregnancy leave taken, 100% of salary during the 2 weeks waiting period.
- full pay for 10 weeks in addition to 17 weeks at full pay for pregnancy leave. If only parental leave, full pay for 6 weeks.
- 95% of income benefits replacement for 17 weeks in addition to pregnancy leave which is at full pay during waiting period and 95% of income benefits replacement for 7 weeks

Process to Request Pregnancy and/or Parental Leave

Notice of Leave

18. An associate must provide the **[insert position, such as a practice group leader]** and/or the **[insert position such as the director of human resources]** with adequate notice before beginning a pregnancy leave or a parental leave so that the firm and the associate may address professional and client obligations. The firm may request a certificate from a medical practitioner stating the child's due date.

Legal Considerations

Under the *ESA*, employees must provide their employer (or the firm in this case) with two weeks' written notice before beginning a pregnancy leave. The notice letter includes the starting date for the pregnancy and if the employer requests it, a certificate from a medical practitioner stating the child's due date. An employee who fails to give the required notice does not lose her right to a pregnancy leave. The failure might occur because the employee did not know she had to give notice, or because the employee was unable to under the circumstances.

An associate is not required to tell the firm when she will be returning to work. If the associate does not specify a return date, the firm is to assume that she will take the full pregnancy leave.

A firm cannot require an associate to return early from a pregnancy leave that is taken under the *ESA*, as the *ESA* specifies the minimum entitlement of leave. A firm cannot require an associate to prove, through medical documentation, that she is fit to return to work. The decision to return to work during the *ESA* pregnancy leave is the associate's.

A firm may wish to specify who will receive the notice. It is good practice to adopt a procedure that is applicable to the firm's structure and culture. For example, the notice could be provided to the chair of an associates committee, the practice group leader, the director of human resources, the regional managing partner, the mentor, the executive committee or the department manager.

Change of Start or End Date

19. An associate may change the start date or the end date of the leave by giving a new written notice to the firm at least **[insert number of weeks]** weeks before the day the requested change will happen.

Legal Considerations

Under the *ESA*, an associate who has given notice to begin the pregnancy or parental leave may begin the leave earlier than was set out in the notice if the associate gives the firm a new written notice at least two weeks before that earlier day; or on a later day than was set out in the notice, if the associate gives the firm a new written notice at least two weeks before the day set out in the original notice. An associate who fails to give the required notice does not lose her or his right to a parental leave. The failure might occur because the associate did not know she or he had to give notice, or because the associate was unable to under the circumstances.

Under the *ESA*, an associate who has given notice to end her pregnancy or

parental leave may end the leave on an earlier day than was set out in the notice, if the associate gives the firm a new written notice at least four weeks before the earlier day; or on a later day than was set out in the notice, if the associate gives the firm a new written notice at least four weeks before the day indicated in the original notice.

This is the minimum requirement under the *ESA*, but firms may adopt a more flexible approach.

Process When Birth Mother Must Stop Working Earlier than Planned

20. If a pregnant employee must stop working 17 weeks or less before her due date due to a complication caused by her pregnancy, or because of a birth, still birth or miscarriage, she must provide the [insert position, such as a practice group leader] and/or the [insert position such as the director of human resources] with adequate notice so that the firm and the associate may address professional and client obligations. The firm may request a medical certificate supporting the associate's inability to work and stating the child's due date, or a medical certificate stating the due date and the actual date of birth, stillbirth or miscarriage.

Legal Considerations

In those cases, the *ESA* indicates that the employee must give the employer, within two weeks after stopping work,

- (a) a written notice of the day the pregnancy leave began, or is to begin; and
- (b) on the request of the employer, a certificate from a legally qualified medical practitioner stating, in the case of an employee who stops working because of a complication caused by her pregnancy, that she is unable to perform the duties of her position because of the complication and stating the due date; and in other cases, the due date and the actual date of the birth, still-birth or miscarriage.

Pregnancy, Parental and Illness Benefits under the *EIA*

21. Associates may be eligible for pregnancy, parental or illness benefits under the *EIA* and are encouraged to contact their Service Canada Centre for further information about their entitlements.

22. An associate who experiences a pregnancy-related illness earlier than 17 weeks before her due date, or after the pregnancy /parental leave, may avail herself of the firm’s policies applicable to that situation.

Commentary

The two clauses outlined above provide some direction to associates who may be seeking information about EI benefits and pregnancy-related illness benefits. Such information does not have to appear in a policy, and could be provided separately to associates when they request information about pregnancy and parental leaves benefits.

The law firm should review the interaction between the firm’s policies and the provisions in the EI legislation regarding pregnancy, parental and illness benefits.

Reinstatement

23. An associate absent on pregnancy/parental leave is entitled to be reinstated upon her or his return to active employment to the most recently held position, if it still exists, or to a comparable position, if it does not exist.

Commentary

The *ESA* provides a right to reinstatement upon the conclusion of the leave to the position the employee most recently held. If the position no longer exists, then the employee is entitled to a “comparable position”. The factors used in jurisprudence to determine a “comparable position” include the following: duties and responsibilities, working conditions such as hours of work, salary, benefits, quality of work environment, prestige and status, location of job, job security and advancement. In the context of a law firm, this could include the associate’s level of responsibility, number and quality of files, lawyers with whom the associate works and reports to inside the firm, the practice group, the types of clients, the area of practice and the quality of the work.

Under the *ESA*, an employer cannot terminate, penalize or dismiss an employee because he or she became eligible to take, plans to take or takes a pregnancy or parental leave. An employee who wishes to resign before her or his return to work would have to give the firm at least four weeks’ written notice of his or her intention. This requirement does not apply if the employer constructively dismisses an employee.

Transition Back to Work

24. To ensure a smooth transition back to work, an associate on leave should contact the **[insert the firm’s human resources department or the relevant department]** and the **[insert position such as the practice group leader]** at least **[insert number]** weeks in advance of her or his return so that appropriate arrangements can be made.

Commentary

Under the *ESA*, an employee can tell the employer when she or he will return to work after her or his leave, but he or she does not have to. Firms are encouraged to adopt procedures that will be most applicable to the firm, taking into account the smooth transition back to work. It is good practice to include the contact person or position that will assist the associate’s return to work.

Given that the firm will need to plan for the associate’s return, both with respect to internal matters and client files, it is suggested that associates give firms as much notice as possible regarding their return.

Benefits and Vacations

Benefits

25. An associate on pregnancy/parental leave continues to participate in the **[insert list of group benefit plans]** and receive **[insert list of benefits]** unless they elect in writing not to do so.

Legal Considerations

The *ESA* provides that employees earn seniority and credit for length of service and length of employment while on pregnancy and parental leave. The employer must continue to pay its share of the premiums to certain benefits plans, such as the pension plans, life and extended health insurance plans, accidental death plans and dental plans that were offered before the leave, unless the employee informs the employer in writing that he or she will not continue to pay his or her own share of the premiums.

The firm may wish to list the benefits plans to which it will continue to contribute.

26. Access to the **[insert the employee assistance program]** continues and an associate is encouraged to use these services to assist with family life transitions, return to work transitions, childcare issues and any other concerns that may arise.

Commentary

Not all firms have employee assistance programs. If the firm has a program, it may insert the title of the employee assistance program used by the firm and indicate that the associates will remain eligible for the program.

Pension

27. An associate on pregnancy/parental leave continues to take part in **[insert information about the pension plan]** and the firm will match the contribution, unless the associate elects in writing not to do so.

Legal Considerations

The employer must continue to pay its share of the premiums for the pension plan, unless the employee informs the employer in writing that he or she will not continue to pay his or her own share of the premiums.

Vacation Entitlement and Pay

Commentary

Firms are not obligated to include a clause addressing the accrual of vacation in their policy. However, if a firm includes such a clause, it should be aware that this is a complex area of law and firms are strongly encouraged to consider the wording and intent of their current vacation and other policies, and to consult an employment lawyer to determine what their legal obligations are regarding the accrual of vacation time and pay for associates during a pregnancy or parental leave.

Compensation

Salary/Year Level

Commentary

It is important for firms to align their pregnancy and parental leave policy with other firm policies that address compensation issues and year end promotions. In developing a clause that addresses compensation or year level of an associate upon the return from a leave under the pregnancy and parental leave policy, firms are encouraged to provide a process by which associates' compensation and year level will be adjusted based on the performance review and compensation level prior to the leave. Firms may wish to use terminology most commonly used by the firm and take into account factors such as,

- the firm's compensation system
- compensation rates prior to the leave
- experience and competency (including legal skills development, client development skills, practice skills development and leadership skills development)
- client expectations for associates at particular year level or billing rates
- performance reviews
- progress toward partnership
- length of the leave and any previous leaves
- retroactivity of the salary increase
- the effective date of salary increase
- billing rates
- billable and non billable contributions to the firm

Firms may consult **Appendix 1** of the guide for template clauses.

Firms are reminded that the *ESA* was drafted with the intent that qualified employees who avail themselves of the right to take a pregnancy and/or parental leave are not disadvantaged in doing so.

This is a complex area of law and firms are strongly encouraged to consult an employment lawyer to determine what their legal obligations are

regarding pay for, and advancement of, associates upon return pregnancy or parental leave.

Firms may also consider adopting the following practice: If there is a leave of absence for pregnancy or parental benefits, the firm annualizes the billings and billable hours for the time during which the benefits are paid. These annualized billings and billable hours will be calculated from the monthly average achieved by the associate during a 12 months period prior to the commencement of the leave. Note that an associate would be winding down his or her practice immediately prior to the commencement of the leave and that period may not reflect the billings and billable hours typically maintained by the associate.

Bonuses

Commentary

It is a good practice to list the relevant criteria, such as described below, considered by the firm when making decisions about bonus entitlement. This increases transparency, consistency and predictability.

If a firm pays bonuses to associates, in considering the level of bonus when a person has taken a pregnancy and/or parental leave, the firm may wish to take into account the same criteria applicable to all associates, such as

- a minimum required period of work during the year or during the bonus period before the associate may be eligible for a bonus
- experience and competency gained during the year or during the bonus period (including legal skills development, client development skills, client service, practice skills development and leadership skills development)
- performance reviews
- productivity and economic contributions to the firm during the period covered by the bonus
- progress toward partnership
- length and timing of the leave
- the effective date of the bonus
- billing rates (if the bonus is based in part on an associate's billings and billable hours, billings and billable hours for affected period may be

annualized by the firm after a review of all the facts. These annualized billings and billable hours may be calculated from the monthly average achieved by the associate during the 12 months immediately prior to the commencement of the leave. The aim of the annualization is to present the statistics as they would have been if no pregnancy or parental leave had occurred)

- billable and non billable contributions to the firm

Template bonus clauses are presented at **Appendix 2** of the guide.

Bonuses are considered earnings under the *EIA*. When it is determined that a payment is either a paid or payable earning, the claimant must allocate those earnings. Earnings are considered "paid" when the claimant has actually received and accepted the payment. Earnings are "payable" when the employer is required to pay the claimant and he or she can legally demand payment. For EI purposes, earnings are only considered payable when the obligation of the employer or other person to pay the earnings is immediate and not when the obligation to pay occurs at a later date. This means that only earnings that are payable immediately will be allocated for EI benefit purposes. Because bonuses paid during the leave period when the associate is receiving EI may have an impact on the amount of EI benefits, firms may wish to specify that no bonuses will be paid during a leave period.

Reviews and Billings

Performance Reviews

Commentary

It is not mandatory to include a section on performance reviews within the policy, but firms are encouraged to do so to enhance transparency and consistency of practices. The following two options were developed and both options are equally acceptable.

28. Options:

- a. Option 1: - If the associate is on leave during a performance review, reasonable efforts will be made for the performance review to be conducted during [**insert length of time**] prior to the leave, or alternatively within [**insert length of time**] months following the return, as may be appropriate. The review covers the

associate's performance prior to the leave, but does not necessarily include a review of the performance during the period preceding and following the leave during which the associate may be reasonably expected to be ramping down and ramping up his or her practice.

Commentary

Some firm representatives are of the view that firms should be strongly encouraged to complete performance reviews before the leave commences and to use that review when assessing any subsequent annual increments in pay. This approach provides the associate who is taking a leave with a sense of her or his performance prior to the leave and his or her standing for subsequent assessments of annual increments in pay.

Option 2: The purpose of a performance review is to provide constructive feedback to associates while also allowing the associate to provide his or her feedback to the firm. If an associate is on leave during a performance review, reasonable efforts will be made to accommodate the associate to allow him or her to participate in the performance review. The **[insert appropriate position such as partner , supervising lawyer, team leader or director of associates]** will communicate with the associate to identify how best to accommodate the associate on leave, such as allowing the associate to attend the review in person, to participate by phone or waiting until the associate returns from leave. If the associate cannot participate in the performance review during the leave, the firm will make every effort to conduct the review immediately upon the return from the leave.

Commentary

Firms are encouraged to provide a process by which the associate's performance will be fairly reviewed by the firm. This would include fairness and flexibility when undertaking the performance review of an associate that requires time to ramp down his or her practice prior to the leave, and ramp up his or her practice following the leave. There may be differences in ramp down and ramp up periods due to factors such as areas of practice, the associate's client base, the type of leave and the associate's performance and needs.

Some firms may have structured or institutionalized performance review periods that make it difficult administratively to rearrange the period of performance reviews to conduct the reviews prior to the leave of the associate. However, depending on timing of the performance review and

the leave, it may be helpful for a superior to maintain written notes about the associate's performance. This might be helpful, for example, when the associate has not been reviewed for an extended period of time and will not be reviewed because he or she will be on leave during the review. The purpose of including notes in the file without having a formal review is to ensure that the performance of the associate prior to the leave is documented.

Billing Rates

Commentary

Although a sample clause on the impact of pregnancy and parental leaves on billing rates is presented below, some Justicia participants were of the view that billing rates are firm business decisions and should not be included in policies on pregnancy and parental leaves, as the leave is not in and of itself determinative of the billing rate of the associate. Billing rates are often set based on a myriad of factors not linked to the performance review process.

Each firm should decide whether to include a clause that addresses the impact of pregnancy or parental leaves on billing rates.

29. [The firm reserves the right to determine the appropriate billing rate of the associate to clients at the end of a pregnancy or parental leave. Billing rates are determined in part by the experience and the number of years of practice.]

Commentary

If firms include a section to address billing rates in a pregnancy and parental leave policy, the firm is also encouraged to include provisions that outline the factors that will be taken into account to determine billing rates at the end of a pregnancy or parental leave, and the length of leave that will not be considered a break in practice for the purpose of determining billing rates. This allows for transparency, consistency and predictability. Because billing rates may have an impact on an associate's revenue generation and profitability, the billing rate may also impact on performance reviews, progression within the firm and consideration for admission to partnership. It is important for firms to clearly indicate how a leave impacts on billing rates, the factors that are taken into account to determine billing rates and to maintain some flexibility to consider the impact of billing rates on the

unique circumstances of the associates.

Eligibility for Admission to Partnership

Commentary

These sample policy options recognize that admission to partnership is ultimately a business decision made by the partners of the firm. However, it is suggested that in drafting their pregnancy and parental leave policies, firms adopt the following best-practices:

- Recognize that any associate considered for partnership will be required to meet the firm’s requirements for admission to partnership.
- Recognize that the fact that an associate has taken one or more pregnancy and /or parental leaves will not, **in and of itself**, delay consideration for admission to partnership when those requirements have been met.
- List the criteria enumerated in the partnership agreement or attach the relevant sections of the partnership agreement, if any, in the pregnancy and parental leave policy. If the firm does not have a partnership agreement with eligibility criteria, the firm is encouraged to adopt such criteria and make them available to associates. This information is useful for associates to know what will be expected of them when applying to join the partnership. Factors to be taken into account should be listed, such as,

legal and practice skills;

current and potential client base;

business case;

professional excellence;

self-sustainability;

profile in the profession;

billable and non-billable contribution to the firm over time;

firm/practice group demographics.

- Firms are encouraged to establish processes that would allow the firm,

in consultation with the associate, to make arrangements to extend the period required to apply for partnership. Taking one or more leaves may also result in an associate not acquiring the experience or skills to be eligible for partnership at the same progression as other associates. A process could also be in place to allow associates to request delaying their application to partnership in order to acquire the further skills and experience.

Firms may wish to consider whether factors for eligibility to partnership that rely on an associate's experience and years of practice may more fairly assess the qualification for eligibility to partnership than relying on year of call.

A firm may wish to specify how to address cases where an associate who has taken a leave of absence under this policy is made a partner during the leave. Issues such as whether to apply the policy for associates or partners, or whether to use an individualized approach in those cases should be considered.

Firm Practices

Some firms have adopted clauses that are similar to the following:

The associate's billings and billable hours for the affected period will be annualized by the firm after a review of all the facts and with the agreement of the associate concerned. These annualized billings and billable hours will be calculated from the monthly average achieved by the associate during a 12 month period prior to the commencement of the leave. The aim of the annualization is to present the statistics as they would have been if no pregnancy or parental leave had occurred. Note that an associate would be winding down his or her practice immediately prior to the commencement of the leave and that period may not reflect the billings and billable hours typically maintained by the associate.

Firm Support to Associates and Responsibilities of Associates

30. When a request for leave is made, the [insert name of position or committee] will work with the associate to ensure that client matters are professionally managed. At least [insert timeline] before the leave, the firm and the associate will determine how best to provide assistance to ensure that high quality services continue to be offered to clients and the needs of the parent are met. The firm will always act in a manner that recognizes the privacy, confidentiality, comfort, autonomy and dignity of the associate. Both the firm and the associate will cooperate in the process, show willingness to be flexible and be responsible for ensuring that the client's needs are met. The firm and the associate will discuss and agree upon issues such as,

Commentary

Firms are also encouraged to develop new parent tool kits for associates who will become parents. Justica firm representatives and the Law Society have developed a template for the new parent tool kit. It is available on-line on the Justica web portal. If the firm has developed the new parent tool kit, it may wish to refer to the kit in the pregnancy and parental leave policy.

Firms may wish to use the terminology that is most commonly used by the firm and adopt a process that reflects the firm's structure and culture.

- a. staffing requirements that would ensure continuity of service during the leave;
- b. the process by which client files, if applicable, are transferred and handled during the leave of absence;

Commentary

A number of law firm policies provide that associates deliver a memorandum to the managing partner or practice group leader identifying each file in her or his caseload and the designated lawyers who will be handling these matters during the leave period. The leave-taking associate is responsible for timely advice to clients and designated lawyers confirming each matter transferred.

- c. the process by which the associate's responsibilities, if applicable, are transferred and handled during the leave, such as committee responsibilities and pro bono responsibilities;
- d. the process by which an associate, if she or he wishes to, will continue to have up-to-date information on the development of files;

Commentary

The purpose of a pregnancy or parental leave is to allow associates to take time off for family responsibilities. Therefore, firms may not want associates to continue having responsibilities relating to files.

A firm's policy should be drafted to clearly indicate that this clause applies only if the associate wishes to continue to have information on the

development of files.

Associates and firms should also be mindful that if an associate continues to work during the leave, this may impact the eligibility of the associate to EI benefits.

- e. the process by which an associate, if she or he wishes to, will continue to participate in firm activities while on leave;

Commentary

The associate should inform the firm about his or her wishes to remain involved with firm activities during the leave. The following information could be provided to the firm: preferred method of communication during the leave and activities that the associate wishes to be informed about. Examples of those include professional development opportunities, law firm bulletins, social events, client development activities, business development activities, women's events, committee meetings, group meetings and partnership meetings.

Some associates are also interested in coming into the office during the review process.

- f. the process for the return of ongoing client files, or for the ramp up of the practice, upon the return to work;
- g. support or assistance that may be required by the associate upon return from the leave, such as professional development or continuing legal education, availability of rooms to breastfeed, flexibility of work schedule, opportunities to work from home;

Commentary

In Ontario, women are legally protected from discrimination and harassment because of sex, including pregnancy and breastfeeding. Nursing mothers have the right to breastfeed a child in a public area. It is good practice to provide mothers with enough flexibility to breastfeed or express milk for their child. Where possible and practicable, firms should make rooms available to breastfeed.

- h. flexible work arrangements;

Commentary	Firms may wish to adopt a separate flexible work arrangement policy for all associates, or employees, which would also be applicable to those returning from pregnancy or parental leaves.

- i. timelines for partnership consideration;
- j. other reasonable accommodation requested by the associates returning to work after pregnancy/parental leave;

Commentary	It is helpful for firms to provide direction and support to associates going on leave and returning from leave. Firms are encouraged to adopt processes most applicable to their structure, culture and business.
Firm Practices	<p>A number of policies provided by Justicia firms specify the firm support provided before, during and following pregnancy and parental leaves. The following are examples of firm support and processes provided in policies:</p> <p><u>Example 1</u> - The associate must make appropriate arrangements to ensure files are adequately transferred. The practice group leaders will assist with reintegration into practice upon return from leave.</p> <p><u>Example 2</u> - It is the responsibility of the associate to develop a memorandum directed to the appropriate individuals in the firm, outlining the background and status of outstanding matters and identifying the designated lawyers who will be handling the matters during the leave. The department head must approve the memorandum. The associate, wherever possible, must meet with the designated lawyer to review matters and to contact each client affected by the leave.</p> <p><u>Example 3</u> - The firm assists associates with reintegration into practice. The firm recognizes that each associate must be considered individually in order to determine the support required to ensure that they will return to a productive career while balancing work and life demands. Where the associate requires a family status or marital status accommodation upon return, he or she may request it from the firm and negotiate appropriate arrangements. The associate who requests the accommodation will</p>

cooperate and discuss the process for the return of client files upon return to work, workload issues and possibility of reduced workload or hours, required support (space to breastfeed, flexibility of work schedule, opportunities to work from home) and other reasonable accommodation. If alternate work arrangements are negotiated, the firm and the associate will agree on the following: length of alternate work arrangement; expectations in terms of workload and billable and non-billable hours; proposed work schedule, indicating the days when the associate will be available; use of firm's facilities and resources including office space and secretarial support and other administrative matter; economic consequences of the arrangement to the firm; impact of arrangement on the associate's compensation.

Appendix 1

Compensation and Year Level upon Return from Leave

Template Clauses

The following template clauses were developed to assist firms in developing their own policies. All of the following options are acceptable, and firms are encouraged to develop their own clause based on their culture and structure.

Option 1: The firm adopts an experiential progression approach to salary, billing rates, year level and partnership consideration. Compensation, billing rates, year level and partnership consideration are individually assessed, based on the following factors: **[insert factors such as the performance of the associate while not on leave, the years of active practice, the practical experience and legal skills, the quality of services offered to clients and the lawyers' performance reviews]**. When making such a determination, the firm will rely on the views of **[insert appropriate committee or position]**.

Commentary

Some firms may wish to consider a threshold number of billable hours when evaluating the experience of associates. The suggestion, however, is that firms should focus on the skills and competencies of the associates rather than the number of billable hours per se.

Option 2: Associates who take a leave under this policy will be entitled to the salary and will return to the year level she or he would have been entitled to if actively at work during the period of pregnancy/parental leave. If the firm reviews compensation and year levels while the associate is on leave, any applicable salary adjustments for associates of the same **[level of experience or year of call]** will be, upon return from the leave, retroactive to the date of the adjustment.

Option 3: Associates who take a leave under this policy will be entitled to the salary or year level she or he would have been entitled to if actively at work during the period of pregnancy/parental leave. If the firm reviews compensation and year levels while the associate is on leave, any applicable salary or year level adjustments for associates of the same **[level of experience or year of call]** will be effective on the date of the return from the leave.

Option 4: Associates who take a **[insert number of months, e.g. 6 months]** leave under this policy will be entitled to the salary and return to the year she or he would have been entitled to if actively at work during that period of pregnancy/parental leave. If the

firm reviews salary and year levels while the associate is on the **[insert number of months e.g. 6 months]** leave, any applicable salary and year level adjustments for associates of the same **[level of experience or year of call]** will be, upon return from the leave, retroactive to the date of the adjustment. Salary or year level for longer leaves will be discussed on an individualized basis, in consultation between the **[insert appropriate position]**, and the associate. The following factors will be taken into account to establish the salary level of associates on leave for the period exceeding **[insert number of months, e.g. 6 months]: [insert factors such as the performance of the associate while not on leave, the years of active practice, the practical experience and legal skills, the quality of services offered to clients and the associates' performance reviews]**.

Option 5: Salary increases and year levels are subject to the discretion of the **[name of committee]**.

Appendix 2

Bonuses - Template Clauses

The following template clauses were developed to assist firms in developing their own policies. All of the following options are acceptable, and firms are encouraged to develop their own clause based on their culture and structure.

Option 1: Associates who take a leave under this policy will be considered for a bonus for any year or part year for which the firm pays bonuses and in which the associate worked leading up to or after the leave. In considering the level of bonus, the firm will take into account the same criteria, such as **[list the applicable criteria]**, applicable to all associates. The firm will consider the **[applicable criteria]** during the period prior to the leave to make a decision regarding eligibility for a bonus. The bonus will be prorated based on the number of months that the associate worked at the firm during the bonus period in question. The same principles apply if the period of leave straddles the second bonus period.

Option 2: Associates who take a leave under this policy will be considered for a bonus for any year or part year for which the firm pays bonuses and in which the associate worked leading up to or after the leave. In considering the level of bonus, the firm will take into account the same criteria, such as **[list the applicable criteria]**, applicable to all associates. The firm will consider the **[applicable criteria]** during the period prior to the leave to make a decision regarding eligibility for a bonus. The same principles apply if the period of leave straddles the second bonus period.

Option 3: Associates who take a leave under this policy will be considered for a bonus for any year or part year for which the firm pays bonuses and in which the associate worked for at least **[insert length of time]** during the bonus period. In considering the level of bonus, the firm will take into account the same criteria, such as **[list the applicable criteria]**, applicable to all associates. The firm will consider the **[applicable criteria]** during the period prior to the leave to make a decision regarding eligibility for a bonus. The bonus will be prorated based on the number of months that the associate worked at the firm during the bonus period in question. The same principles apply if the period of leave straddles the second bonus period.

Option 4: Associates who take a leave under this policy will be considered for a bonus by using the same criteria, such as **[list the applicable criteria]**, as the criteria applicable to associates who have worked less than the full bonus period, such as **[insert lateral hires, medical leaves, and other applicable situations]**. The bonus will be prorated based on the number of months that the associate worked at the firm during the bonus period in question. The same principles apply if the period of leave straddles the second bonus period.

Appendix 3

Admission to Partnership - Template Clauses

The following template clauses were developed to assist firms in developing their own policies. All of the following options are acceptable, and firms are encouraged to develop their own clause based on their culture and structure.

Option 1 - It is understood that each associate will be required to meet the firm's requirements for admission to partnership, such as **[list the firm's requirement]**. The fact that an associate has taken one or more pregnancy and/or parental leave will not, in and of itself, delay consideration for admission to partnership when those requirements have been met.

Option 2 – The firm relies on experience and years of practice to make partnership decisions. It is understood that each associate will be required to meet the firm's requirements for admission to partnership, such as **[list the firm's requirement]**. The firm will consult with the associate who has taken one or more pregnancy and/or parental leaves to agree on the period required by the associate to be eligible to be considered for partnership. The progression of the associate towards the eligibility for partnership will be based on the agreement between the associate and the firm.

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