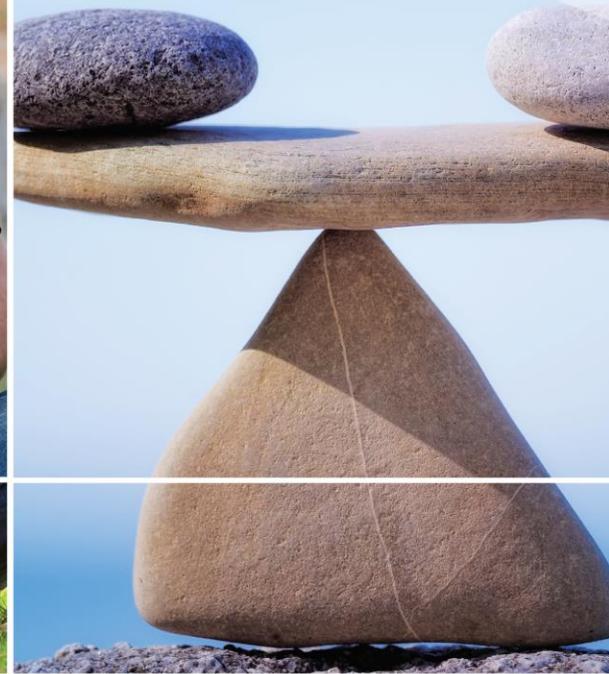




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AlbertaJusticiaProject

Maternity and Parental Leave

Developing Pregnancy and Parental Leave Policies for Associates
Guide for Law Firms

DEVELOPING PREGNANCY AND PARENTAL LEAVE POLICIES FOR ASSOCIATES GUIDE FOR LAW FIRMS

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Introduction

This guide was developed by the Law Society of Alberta, in collaboration with the firms participating in the Alberta 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 Alberta. 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. 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 Code (ESC)*,¹ the *Employment Insurance Act (EIA)*,² the *Alberta Human Rights Act (AHRA)*³ and similar legislation in other applicable jurisdictions.⁴

¹ RSA 2000, c E-9 [ESC].

² SC 1996, c 23 [EIA].

³ RSA 2000, c A-25.5 [AHRA].

⁴ This Guide applies only to Alberta. Therefore, it only discusses legal obligations under the *ESC*, *EIA*, the *AHRA* and the Law Society of Alberta's *Code of Conduct*.

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”⁵, 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.”⁶ 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.⁷

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 *ESC*. 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 *ESC* 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 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

⁵ *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.

⁶ *Ibid* at 9.

⁷ *Beyond a Reasonable Doubt: Lawyers State Their Case on Job Flexibility* (Toronto: Catalyst Canada, 2006) at 6.

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 want to consider whether to apply the policy only to associates, or also to articling students, partners or other employees. Because equity partners are not covered under the *ESC* 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.⁸ On the other hand, firms may wish to apply their associates' policy to articling students. Under the *ESC*, articling students are treated like employed lawyers. A firm could also 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 *ESC* and the *EIA*, which often apply differently to different types of professions. For example, some sections of the *ESC* do not apply to lawyers, but do apply to paraprofessionals.⁹

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.

⁸ See *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39, in which the Supreme Court of Canada found that an equity partner was not entitled to human rights protection. The Court stated at para 38 that "the structure and protections normally associated with equity partnerships mean they will rarely be employment relationships for purposes of human rights legislation," but noted at para 46 that a partner of a firm may qualify as an employee "where the powers, rights and protections normally associated with a partnership [are] greatly diminished." The definition of "employee" is more narrow under the *ESC* than it is under the *Alberta Human Rights Act* (The Joint Committee for Gender & Equality in the Legal Profession, "Guidelines for Drafting and Implementing Pregnancy and Parental Leave Policies," Law Society of Alberta (amended 2010).

⁹ Subsection 2(2)(h) of the *Employment Standards Regulation*, AR 14/1997, exempts active members of the Law Society and students-at-law from application of s 14(1)(a), and Part 2, Divisions 3 & 4, of the *ESC*, *supra* note 1 .

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 the firm should ensure that it takes into account up-to-date legislation and jurisprudence. Firms may wish to work with lawyers who have a good understanding of the *Alberta Human Rights Act*, the *Code of Conduct*, the *ESC* and the *EIA*, to develop their policy. Also, if a firm is developing a policy that applies to out-of-Alberta 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 of Alberta's *Code of Conduct*.¹⁰ The following provides a general overview of these obligations under the *AHRA* and the *Code of Conduct*.

Alberta Human Rights Act and Code of Conduct

The *AHRA* applies to everyone in Alberta with respect to publications and notices, goods, services, accommodations, and facilities, tenancy, employment, and trade union membership,¹¹ unless the *Canadian Human Rights Act* applies.¹² All employment relations, including those governed by a collective agreement, are subject to the *AHRA*. Therefore, law firms in Alberta are subject to the *AHRA*, and the *AHRA* applies to all employees of the law firm, including articling students, associates and salaried lawyers.

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 gender discrimination and is illegal.¹³ Discrimination in employment on the grounds of gender, marital status, family status and sexual orientation is also prohibited under the *AHRA*.¹⁴

¹⁰ The Law Society of Alberta, *Code of Conduct*, Edmonton: Law Society of Alberta, 2012.

¹¹ *AHRA*, *supra* note 3, ss 3, 4, 5, 6, 7, 8, and 9.

¹² The *Canadian Human Rights Act*, RSC 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 therefore be covered by the *Canadian Human Rights Act* and not the *AHRA*.

¹³ *Brooks v Canada Safeway*, [1989] 1 SCR 1219. See also subsection 44(2) of the *AHRA*, *supra* note 3, which states that "[w]henver this Act protects a person from being adversely dealt with on the basis of gender, the protection includes, without limitation, protection of a female from being adversely dealt with on the basis of pregnancy."

¹⁴ *AHRA*, *supra* note 3, s 7(1).

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 *Code of Conduct* applies to member lawyers of the Law Society of Alberta. Rule 6.3 places a special responsibility on lawyers to adhere to the tenets of human rights law and, in particular, to "not discriminate against any person".¹⁵ Therefore, lawyers must not sexually harass or discriminate on the basis of gender, marital status, family status or sexual orientation, or on any other ground.

In addition to Rule 6.3, 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, gender 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 *AHRA* and the *Code of Conduct* impose a duty to accommodate, to the point of undue hardship,¹⁶ differences that arise based on the enumerated grounds in the *AHRA*. In determining whether an accommodation would constitute "undue hardship", the firm must take into consideration the financial costs of the accommodation; the size and resources of the firm; the impact of accommodation on operations; the morale of other employees; whether accommodation will cause a substantial interference with the rights of other individuals or groups at the firm; the interchangeability of the work force and facilities; and, health and safety concerns.¹⁷ In 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.

¹⁵ Rule 6.3 of the *Code of Conduct*, *supra* note 10, states: "A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws."

¹⁶ See *Ontario (Human Rights Commission) v Simpsons-Sears Ltd*, [1985] SCJ No 74; *Hydro-Quebec v Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, [2008] SCJ No 44.

¹⁷ Alberta Human Rights Commission Interpretive Bulletin, "Duty to accommodate" (February 2010), online: https://www.albertahumanrights.ab.ca/publications/bulletins_sheets_booklets/bulletins/Pages/duty_to_accommodate.aspx.

The Human Rights Commission provides the following examples of how to accommodate employees during the pre-natal and post-natal periods, short of undue hardship:¹⁸

- **Changing a pregnant employee's job duties if her pregnancy prevents her from performing parts of her job.**
- **Providing a flexible work schedule to accommodate the needs of an employee who is pregnant or breastfeeding. This may include time off for medical appointments, arranging for an employee to work from home, flexible hours, providing a quiet space for breastfeeding or allowing a female employee to arrange her scheduled breaks to breastfeed her child.**
- **Ensuring that female employees are permitted to have their infants brought in to breastfeed in the workplace or to take time to breastfeed outside the workplace.**
- **Ensuring that a pregnant employee has full access to any earned benefits such as illness or vacation leave.**
- **Ensuring that a pregnant employee has equal access to workplace opportunities.**
- **Making other reasonable changes in the workplace that have been recommended by the doctor of a pregnant or breastfeeding employee.**

Employment Standards Code (ESC)

Articling students and employed lawyers, including associates, are exempt from s. 14(1)(a) and Part 2, Divisions 3 & 4 of the *ESC*.¹⁹ Subject to these exemptions, the *ESC* applies to articling students and associates, but does not apply to equity partners.²⁰

The *ESC* sets out the minimum threshold for employment standards. Employers and employees are expressly prohibited from contracting out of the standards of the *ESC*.²¹

Part 2, Division 7, of the *ESC* governs pregnancy and parental leaves.²² The purpose of the legislation is to protect an employee's position while on leave. An employer is statutorily obligated to grant qualifying employees an unpaid pregnancy and/or parental leave if one is requested. The employer is not obligated to provide paid leaves under the *ESC*.

¹⁸ Alberta Human Rights Commission Interpretive Bulletin, "Rights and responsibilities related to pregnancy, childbirth and adoption" (September 2010), online: https://www.albertahumanrights.ab.ca/publications/bulletins_sheets_booklets/bulletins/Pages/pregnancy_PDF.aspx, at 6.

¹⁹ *Employment Standards Regulation*, *supra* note 9. Section 14(1)(a) of the *ESC* relates to the keeping of employment records for regular and overtime hours of work, and Part 2, Divisions 3 & 4, relates to hours of work, overtime, and overtime pay.

²⁰ *Supra* note 9.

²¹ Section 4 of the *ESC*, *supra* note 1, provides that "[a]n agreement that this Act or a provision of it does not apply, or that the remedies provided by it are not to be available for an employee, is against public policy and void."

²² The *ESC* refers to "maternity" leave, while the *EIA* refers to "pregnancy" leave. For consistency's sake, and to avoid confusion, this guide will refer only to "pregnancy" leaves, but it is understood that this term includes "maternity" leaves under the *ESC*.

Pregnancy Leave

A pregnant employee who has been employed by her employer for at least 52 consecutive weeks is automatically entitled to pregnancy leave under the *ESC*.²³ The employee is entitled to a pregnancy leave period of not more than 15 weeks, beginning any time during the 12 weeks immediately before her estimated due date.²⁴ An employee must take at least 6 weeks immediately following the birth of her child, unless the employer agrees to an earlier return to work and the employee provides a medical certificate indicating that resumption of work will not endanger her health.²⁵

An employee who wishes to take pregnancy leave must give her employer at least 6 weeks' written notice advising when she intends to start her pregnancy leave. The employer may request a medical certificate certifying that the employee is pregnant and estimating the delivery date.²⁶ The employee is entitled to begin her pregnancy leave on the date specified in her notice.²⁷ If the employee fails to provide her employer with the necessary notice, she is still entitled to pregnancy leave if, within 2 weeks after her last day of work, she provides her employer with a medical certificate indicating she is not able to work due to a medical condition arising from her pregnancy, and giving the estimated or actual date of delivery.²⁸

Subject to the employer's duty to accommodate, if the employee's pregnancy interferes with her job performance during the 12 weeks immediately before her estimated due date, the employer can give the employee written notice requiring her to start pregnancy leave.²⁹

Parental Leave

An employee who has been employed by his or her employer for at least 52 consecutive weeks is entitled to take a parental leave.³⁰ A parental leave may be taken following either the birth or the adoption of a child.³¹ The employee is entitled to a maximum of 37 consecutive weeks.³² Parental leave can be shared between two parents, but the total combined leave cannot exceed 37 weeks.³³

If an employee has taken a pregnancy leave, she must commence her parental leave immediately following the last day of her pregnancy leave.³⁴

If the employee does not take pregnancy leave, the parental leave can begin at any time, but it must be completed within 52 weeks of the date the baby is born or the adopted child is placed with the parent.³⁵

²³ *ESC*, *supra* note 1, s 45.

²⁴ *Ibid*, s 46(1).

²⁵ *Ibid*, s 46(2).

²⁶ *Ibid*, s 47(1).

²⁷ *Ibid*, s 47(2).

²⁸ *Ibid*, s 48.

²⁹ *Ibid*, s 49.

³⁰ *Ibid*, s 50(1).

³¹ *Ibid*.

³² *Ibid*, s 50.

³³ If the employer employs both parents, it is only required to provide parental leave to one employee at a time (*Ibid*, s 50(3)).

³⁴ *Ibid*, s 50(1)(a).

³⁵ *Ibid*, s 50(1)(b)(c).

An employee must give the employer at least 6 weeks' written notice of the date he or she will start parental leave, unless the medical condition of the birth mother or child makes this impossible or the date of the child's placement with the adoptive parent was not foreseeable.³⁶ If the employee is not able to comply with the usual notice requirements, he or she must provide written notice at the earliest possible time of the date the employee will start or has started parental leave.³⁷ Notice of pregnancy leave is deemed notice of parental leave, unless the notice specifies that it is not notice of parental leave.³⁸ Employees who intend to share parental leave must advise their respective employers of this intention.³⁹

An employee must give the employer at least 4 weeks' written notice of the date on which the employee intends to resume work, and, in any event, not later than 4 weeks before the end of the leave period.⁴⁰ An employee who does not wish to resume employment after pregnancy or parental leave must give the employer at least 4 weeks' written notice of his or her intention to terminate employment.⁴¹

No employer may terminate or lay off an employee who has started her pregnancy leave or is entitled to or has started parental leave,⁴² unless the employer suspends or discontinues its business.⁴³ When the employee resumes work, the employer must reinstate the employee in the position she or he occupied when the leave began, or provide the employee with alternative work of a comparable nature at not less than the same wage and benefits.⁴⁴

Employment Insurance Act (EIA)

The following is a brief summary of the *EIA*. Further information about the *EIA* is available on-line at www.servicecanada.gc.ca/eng/sc/ei/benefits/maternityparental.shtml. The *EIA* applies in Alberta and across Canada to employees who meet minimum hours of employment requirements, but does not apply to self-employed workers. Therefore, associates will automatically be eligible for the following benefits under the *EIA*, provided they have worked the required number of hours in the qualifying period. Self-employed individuals can register to access special employment insurance benefits,⁴⁵ so equity partners or sole practitioners must register to be eligible for 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 *ESC* and the *EIA*.

The *EIA* provides three types of benefits relevant to birth mothers and/or new parents: pregnancy,⁴⁶ parental,⁴⁷ and illness benefits.⁴⁸

³⁶ *Ibid*, s 51(1).

³⁷ *Ibid*, s 51(2).

³⁸ *Ibid*, s 51(4).

³⁹ *Ibid*, s 51(5).

⁴⁰ *Ibid*, s 53(1).

⁴¹ *Ibid*, s 53(8).

⁴² *Ibid*, s 52(1).

⁴³ *Ibid*, s 52(2).

⁴⁴ *Ibid*, s 53(7).

⁴⁵ *EIA*, *supra* note 2, Part VII.1.

⁴⁶ *Ibid*, s 22.

⁴⁷ *Ibid*, s 23.

⁴⁸ *Ibid*, s 21.

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, unless she or he is registered for benefits as a self-employed individual.

Pregnancy benefits are available to birth mothers only. Parental benefits 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.

Under ordinary circumstances, a claimant may be eligible to receive benefits for up to a maximum of 50 weeks.⁴⁹ Benefits are paid at a rate of 55 percent of a claimant's weekly earnings.⁵⁰ Maximum weekly earnings are set out in s. 14 of the *EIA*.⁵¹

Pregnancy Benefits

Pregnancy benefits are payable to the birth mother or surrogate mother for a maximum of 15 weeks.⁵²

The mother can start collecting pregnancy benefits up to 8 weeks before she is expected to give birth or at the week she gives birth.⁵³ Pregnancy benefits can be collected within 17 weeks of the actual or expected week of birth, whichever is later.⁵⁴

If the infant 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.⁵⁵

Parental Benefits

Parental benefits are payable either to the biological or adoptive parents while they are caring for a newborn or an adopted child, up to a maximum of 35 weeks.⁵⁶ Parental benefits can be claimed by one parent or shared between two parents, but will not exceed a combined maximum of 35 weeks. If an employee has received pregnancy benefits, the employee can 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.⁵⁷

Parental benefits for biological parents are payable from the child's birth date, and for adoptive parents from the date the child is placed with them. Parental benefits are only available within the 52 weeks from the date the child is placed with the parent.⁵⁸ If the child is hospitalized, the

⁴⁹ Section 12(3), *ibid*, states that pregnancy benefits are available for a maximum of 15 weeks, and parental benefits are available for a maximum of 35 weeks. If the birth mother is eligible for illness benefits, she may receive these for an additional maximum of 15 weeks.

⁵⁰ *Ibid*, s 14(1).

⁵¹ Section 14(1.1) (a), *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".

⁵² *Ibid*, s 12(3)(a).

⁵³ *Ibid*, s 22(2)(a).

⁵⁴ *Ibid*, s 22(2)(b).

⁵⁵ *Ibid*, ss 22 (6) and (7).

⁵⁶ *Ibid*, s 12(3)(b).

⁵⁷ *Ibid*, s 23(4.1).

⁵⁸ *Ibid*, s 23(2).

period is extended by the number of weeks the child is hospitalized,⁵⁹ to a maximum of 104 weeks.⁶⁰

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 if she is unable to work due to "illness, injury or quarantine".⁶¹

Income Benefit Supplements

The employer can supplement or "top-up" the employee's employment insurance benefits, without a reduction of the employee's benefits under the *EIA*. The employer's supplement is not deemed to be earnings, provided the following two conditions are met:

- (a) the combined employment insurance benefits and income supplement cannot exceed the employee's normal weekly earnings; and
- (b) the income supplement does not reduce the employee's accumulated sick leave or vacation leave credits, severance pay or any other accumulated credits from the claimant's employment.⁶²

The employer is not required to obtain formal approval for a plan to supplement EI pregnancy, parental, or parents of critically ill children benefits.⁶³ However, the employer must maintain written records to show the effective date of the income supplement plan and to demonstrate that the plan meets the two conditions mentioned above.⁶⁴ As a result, law firms that supplement pregnancy, parental and parents of critically ill children benefits should maintain written plans that contain the two conditions stated above.

A supplement of pregnancy, parental and parents of critically ill children benefits can be as much as the difference between the applicable EI benefit received and the employee's normal weekly salary, without jeopardizing the amount of the EI benefit. In other words, the supplement plus the EI benefit can equal 100% of the employee's normal weekly salary.⁶⁵

⁵⁹ *Ibid*, s 23(3).

⁶⁰ *Ibid*, s 23(3.1).

⁶¹ *Ibid*, s 21.

⁶² *Employment Insurance Regulations*, SOR/96-332 [*EIR*], s 38(1).

⁶³ Service Canada, "Supplemental Unemployment Benefit Program" (3 January 2014), online:

<https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/supplemental-unemployment-benefit.html>.

However, if the employer wants to supplement the EI benefits of an employee who is unable to work due to "illness, injury or quarantine", the employer must register a Supplemental Unemployment Benefit (SUB) plan that meets the requirements of s 37 of the *EIR*.

⁶⁴ Service Canada, "Supplementing maternity, parental, compassionate care or parents of critically ill children benefits", online:

<https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/ei-employers-maternity-parental-benefits.html>.

⁶⁵ *EIR*, *supra* note 62. For an employee receiving illness benefits, the combined weekly payments received from an SUB plan and the weekly benefit cannot exceed 95% of the employee's normal weekly earnings (*EIR*, s 37).

Sample Policy Options

Commentary

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.

The sample policy options are only up-to-date as at the date of writing. When drafting a policy, the firm should ensure that it takes into account up-to-date legislation and jurisprudence. Firms may wish to work with lawyers who have a good understanding of the *Alberta Human Rights Act*, the *Code of Conduct*, the *ESC* and the *EIA* to develop their policy.

Legal Considerations

Further information about the *EIA* is also available on-line at www.servicecanada.gc.ca and information about the *ESC* is available on-line at work.alberta.ca.

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 Alberta office. It is assumed that the *Employment Standards Code (ESC)* 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 *ESC* 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 *ESC* 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 *ESC* and the *EIA*, which often apply differently to different types of professions. For example, some sections of the *ESC* do not apply to active members of the law society (i.e., practising lawyers), but do apply to paraprofessionals.

Firms may also wish to apply their pregnancy and parental leave policy to articling students. Under the *ESC*, articling students are treated like practising 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 vary the text of the section “Statement and Governing Legislation” and governing principles.

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.

The firm is bound by the *Alberta Human Rights Act* and the Law Society of Alberta's *Code of Conduct*, which prohibit sexual discrimination based on enumerated grounds, including gender/pregnancy, marital status, family status and sexual orientation. **[Firms that develop a policy applicable to jurisdictions outside of Alberta should refer to the applicable human rights legislation and rules of professional conduct in those jurisdictions.]**

The firm is also bound by legal obligations under Alberta's *Employment Standards Code (ESC)* 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 jurisdictions outside of Alberta should refer to the applicable legislation in those jurisdictions.]**

This policy outlines associates' entitlement to pregnancy and parental leave, and benefits, provided by the firm, as well as associates' rights under the *ESC* and the *EIA*. **[Firms that develop a policy applicable to jurisdictions outside of Alberta should refer to the applicable legislation in those jurisdictions.]**

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 below.

"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.

Commentary

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

"Parent" includes a biological mother or father, or a person with whom a child is placed for adoption, and "child" has a corresponding meaning.

Commentary

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

Application of Policy

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

Commentary

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

ARTICLE ONE – Pregnancy Leave – Eligibility and Entitlement

1. The following are options based on clauses found in law firm policies. A firm can choose the most relevant option or draft its own clause:

Option 1: The firm allows [**insert number of weeks. For consistency with ESC, period should not be shorter than 15 weeks.**] weeks' pregnancy leave to associates who are pregnant or who have given birth.

Option 2: The firm allows [**insert number of weeks. For consistency with ESC, period should not be shorter than 15 weeks.**] weeks' pregnancy leave to associates who are pregnant or who have given birth, and who have been employed at least 52 weeks at the firm.

Option 3: The firm allows [**insert number of weeks. For consistency with ESC, period should not be shorter than 15 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 ESC, period should not exceed 52 weeks at the firm**].

Commentary

A law firm must comply with the *ESC* requirements, but does not have an obligation to provide benefits that go beyond or are broader than the *ESC*. At a minimum, employers must allow eligible employees 15 weeks for pregnancy leave.

The *ESC* also specifies that, to be eligible for a pregnancy leave, employees must have been employed at the firm at least 52 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 *ESC* by waiving the eligibility criteria of the *ESC* (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 *ESC* of having been employed at the firm at least 52 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 that should firms choose option 3, they must ensure that the length of leave and the eligibility criteria reflect the minimum *ESC* criteria (see explanation below).

Legal Considerations

It should be noted that if the firm allows an associate to take a leave even if she has not worked at the firm for 52 weeks (options 1 or 3), the associate's leave is not taken under the *ESC*. The employer is under no obligation in that case to provide pregnancy leave as prescribed by the *ESC* and could provide for a shorter pregnancy leave period.

Under the *EIA*, 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 *ESC* with respect to the 52 weeks). Therefore, if the employer decides to waive the *ESC* service criterion, the employee could be entitled to pregnancy and/or parental leave under the employer's policies, but not be eligible for EI benefits.

Also note that it is possible for an employee who works part-time hours to work 52 weeks for *ESC* purposes without accumulating the 600 hours of insurable employment required to establish eligibility for EI benefits.

Associates may begin a pregnancy leave no earlier than 12 weeks before the estimated date of delivery. An associate who takes pregnancy leave must take a period of at least 6 weeks immediately following the date of delivery, unless she and the firm agree to shorten the period by the associate giving the firm a medical certificate indicating that resumption of work will not endanger the associate's health.

Legal Considerations

The sample clause above is consistent with the *ESC*. An associate who wishes to take pregnancy leave must give the firm at least 6 weeks' written notice advising when she intends to start her pregnancy leave.

The associate is entitled to begin her pregnancy leave on the date specified in her notice. If the employee fails to provide the firm with the necessary notice, she is still entitled to pregnancy leave if, within 2 weeks after her last day of work, she provides the firm with a medical certificate indicating she is not able to work due to a medical condition arising from her pregnancy, and giving the estimated or actual date of delivery.

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 to, for example, supervise files. 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.

It is also important to note that if an associate returns to work within the 6-week period immediately after her delivery date, she is entitled, without further notice to the firm, to a period of leave sufficient to meet the 6-week requirement which would be charged against her remaining pregnancy (and/or parental leave) entitlement.

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.

ARTICLE TWO – Income during Pregnancy Leave

2. 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 an 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 *ESC* or the employee works less than full-time hours and meets the service criterion under the *ESC* but not the *EIA* threshold.

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

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.

ARTICLE THREE – Parental Leave – Eligibility and Entitlement

3. The following are options based on clauses found in law firm policies. A firm can choose the most relevant option or draft its own clause:

Option 1: An associate who is a parent, as defined under this policy, is eligible for a parental leave.

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 for at least 52 weeks.

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 ESC, length of time should not exceed 52 weeks]**.

Commentary

These sample clauses are consistent with the *ESC*, which outlines the entitlement to parental leaves without pay to eligible parents. The *ESC* does not expressly define "parent", but is clear that parental leave is at least available to biological and adoptive parents.

The *ESC* provides that an employee is eligible for a parental leave if he or she has been employed at least 52 weeks before the date the leave is to start.

Option 1 proposes a more generous entitlement by waiving the 52-week period of employment prior to the leave as criteria for eligibility for parental leave. Option 2 reflects the *ESC* 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 52 weeks (Options 1 or 3), the associate's leave is not taken under the *ESC*. The employer is under no obligation in that case to provide parental leave as prescribed by the *ESC*.

However, if the associate does not have 52 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 *ESC*).

Also, an associate who works part-time hours might have worked for 52 weeks for *ESC* purposes, but might not have accumulated the 600 hours of

insurable employment in the last 52 weeks required to establish eligibility for EI benefits.

The firm allows parental leaves for the following period: **[insert length of leave. Period should not be shorter than 37 weeks.]** . **[Once started, the parental leave has to be taken all at one time.]** **[A birth mother who takes a pregnancy leave must begin her parental leave immediately after the pregnancy leave ends.]**

Commentary

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

The sample clause allows the firm to choose the length of leave that would be most appropriate while noting the minimum *ESC* requirement.

Legal Considerations

Under the *ESC*, law firms have an obligation to provide eligible associates with at least 37 weeks of parental leave.

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 *ESC*, 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.

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.

Under the *ESC*, parental leave must begin and end within the 52 week period after the child's birth or after the child is placed with the adoptive parent for the purpose of adoption. This is the minimum entitlement under the *ESC* and law firms may wish to add provisions to that effect in their policy to inform associates of entitlements.

ARTICLE FOUR – Income during Parental Leave

4. 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 *ESC*.

Legal Considerations

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%.

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 *ESC* or the employee works less than full-time hours and meets the service criterion under the *ESC* but not the *EIA* threshold.

Please see information about plans for making supplementary payments to employees for pregnancy, parental, and parents of critically ill children leave in the *General Legal Rights and Obligations*.

ARTICLE FIVE – Process to Request Pregnancy and/or Parental Leave

5. 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 *ESC*, employees must provide their employer (or the firm in this case) with 6 weeks' written notice before beginning a pregnancy leave. The notice must specify the start date of the pregnancy leave and, if the employer requests it, include a certificate from a medical practitioner stating the estimated date of delivery.

An associate is not required to tell the firm when she will be returning to work from a pregnancy leave. 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 or parental leave that is taken under the *ESC*, as the *ESC* specifies the minimum entitlement of leave. Outside of the required 6 week pregnancy leave period following the child's birth, 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 *ESC* pregnancy or parental leave is that of the associate.

Under the *ESC*, an employee must give the employer at least 6 weeks' written notice of the date the employee will start parental leave unless the medical condition of the birth mother or child makes it impossible to comply with this requirement or the date of the child's placement with the adoptive parent not foreseeable. If the employee cannot comply with the written notice requirement, the employee must give the employer written notice at the earliest possible time of the date the employee will start or has started parental leave. Written notice of pregnancy leave is deemed to be notice of parental leave unless the notice specifically states that it is not notice of parental leave.

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.

ARTICLE SIX – Process When a Birth Mother Must Stop Working Earlier than Planned

6. If a pregnant employee must stop working 12 weeks or less before her due date due to a complication caused by her pregnancy, or because of a birth, 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.

Legal Considerations

In those cases, the *ESC* indicates that the employee must give the employer, within two weeks after stopping work, a medical certificate

- (a) indicating that she is not able to work because of a medical condition arising from her pregnancy; and giving the estimated or actual date of pregnancy.

ARTICLE SEVEN – Pregnancy, Parental and Illness Benefits under the EIA

7. 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.

An associate who experiences a pregnancy-related illness earlier than 12 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 leave 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.

ARTICLE EIGHT – Reinstatement and Transition Back to Work

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

Commentary	<p>The <i>ESC</i> 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 employer must provide the employee with alternative work of a "comparable nature". The factors used in jurisprudence to determine a whether the work is of a "comparable nature" include the following: duties and responsibilities, working conditions such as hours of work, 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.</p> <p>In addition, the returning employee is entitled to not less than the earnings and other benefits that he or she had accrued when the pregnancy or parental leave started.</p> <p>Under the <i>ESC</i>, an employer cannot terminate, penalize or dismiss an employee because she or he 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 her or his intention.</p>
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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	<p>An employee is required to provide the employer with at least 4 weeks' written notice of the date on which she or he intends to resume work or, in any event, not later than 4 weeks before the end of the parental leave period to which the employee is entitled. An employee is not entitled to resume work until the date specified in the notice. If the employee fails to provide at least 4 weeks' notice before the end of the leave period to which he or she is entitled, the employee is not entitled to resume work unless the failure to</p>
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provide the notice resulted from unforeseeable or unpreventable circumstances.

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.

ARTICLE NINE – Benefits and Vacations

9. 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

While the *ESC* provides only that reinstatement is to the wage and benefit level that had accrued to the employee at the time that pregnancy or parental leave started, the employer has additional human rights obligations.

If the firm provides benefits to an associate during sick leave or disability leave, an associate on the health-related portion of pregnancy leave must also receive those benefits. In addition, an associate's seniority should continue to accrue during pregnancy or parental leave. An associate should not be disadvantaged in relation to employment status because of pregnancy or parental leave.

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

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.

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.

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.

ARTICLE TEN – Compensation and Year Level

10. The following are options based on clauses found in law firm policies. A firm can choose the most relevant option or draft its own clause:

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 associate’s 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 they 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 they 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 they 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 associate’s performance reviews**].

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

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 are reminded that the *ESC* 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 from 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-month period prior to the commencement of the leave. Note that an associate would be winding down her or his practice immediately prior to the commencement of the leave and that that period may not reflect the billings and billable hours typically maintained by the associate.

ARTICLE ELEVEN – Bonuses

11. The following are options based on clauses found in law firm policies. A firm can choose the most relevant option or draft its own clause:

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.

Commentary

It is a good practice to list the relevant criteria, such as those 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 the 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

Bonuses are considered earnings under the *EIA*, which must be allocated. 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.

ARTICLE TWELVE – 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.

12. The following are options based on clauses found in law firm policies. A firm can choose the most relevant option or draft its own clause:

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 her or his 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 her or his 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 her or his 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 her or him 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 her or his practice prior to the leave, and ramp up her or his 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 she or he 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.

ARTICLE THIRTEEN – 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.

13. [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.

ARTICLE FOURTEEN – Eligibility for Admission to Partnership

14. The following are options based on clauses found in law firm policies. A firm can choose the most relevant option or draft its own clause:

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 leaves 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.

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 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 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 her or his practice immediately prior to the commencement of the leave and that that period may not reflect the billings and billable hours typically maintained by the associate.

ARTICLE FIFTEEN – Firm Support to Associates and Responsibilities of Associates

15. 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 associate 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 clients' needs are met. The firm and the associate will discuss and agree upon issues such as:
- 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;
- e. the process by which an associate, if she or he wishes to, will continue to participate in firm activities while on leave;

Commentary

Firms are also encouraged to develop new parent tool kits for associates who will become parents. Justicia firm representatives and the Law Society have developed a template for the new parent tool kit. If the firm has developed a 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.

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 associate's eligibility for EI benefits.

Commentary

The associate should inform the firm about her or his 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 Alberta, women are legally protected from discrimination and harassment because of gender, 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 associate 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.

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:

Example 1 - 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.

Example 2 - 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.

Example 3 - 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, she or he may request it from the firm and negotiate appropriate arrangements. The associate who requests the accommodation will 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 the firm's facilities and resources including office space and secretarial support and other administrative matters; economic consequences of the arrangement to the firm; impact of the arrangement on the associate's compensation.