




**Pregnancy and Maternity Rights:
Gaps and Good Practices
in the EU Member States**

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Law v. Practice
cultural stereotypes



Public sector v. Private sector
Small v. Larger enterprises
Health and Safety v. Equality



**Access to employment - recruitment
process and monitoring**



Legal difficulties

- o Implementing the law
- o The problem of proof

Practical difficulties

Good practice:

- Monitoring
- Enhanced damages and redresses



Dismissal /pressure to resign

Practices contrary to the law

- “Mobbing”
- Forced resignation
- White resignation
- First choice for dismissal
- Termination during trial period
- Change of employment contract to precarious contract
- The impact of the economic crisis

Good practice:

- Systematic monitoring
- Pre-authorisation for the dismissal or the resignation of pregnant and new mothers/parents



Non-renewal of the fix-term contract of employment

- Very common in practice contrary to EU law
- Lack of clarity of national law
- Impact of the economic crisis

Good practices:

- Disseminating CoJ case law
- Pressure from national Courts
- Monitoring



The right to return

- Article 15 of Directive 2006/54

In practice, lack of effectiveness of this provision
Impact of long periods of leave

Good practice:

- Involvement of national courts
- Requiring employers provides adequate training



Rights accrue during Maternity Leave

Holiday and maternity leave

Case C-342/01 *Gomez*: a worker must be able to take her annual leave during a period that does not overlap with her maternity leave

Problem of school teachers

Promotions





Health & Safety considerations

Directive 92/85 create two types of obligations:

- (1) Health and Safety
- (2) Sex equality

- Cases C-66/96 *Høj Pedersen* and C-207/98 *Mahlburg*: obligations regarding health and safety cannot be taken into consideration in such a way as to be detrimental to pregnant workers
- **In practice**: Health and Safety has been used as way of excluding women from the workplace.



Right to paid maternity leave

- Principle of equal pay (Article 157 TFEU) v. the right to an allowance (Article 11(3) of Directive 92/85)

- Should bonuses be taken into consideration when calculating maternity pay?
- Case C-194/08 *Gassmayr* and C-471/08 *Parviainen*
- Common practise: no payment of specific bonuses attached to the salary for performance reasons: eg presence bonus, productivity bonus, meal or transportation bonus,
- Common exclusion of the Christmas Bonus

Good Practice:

- Harmonisation and simplification of the policy regarding bonuses



The role of fathers

Paternity leave
Recast Directive 2006/54 Article 16
Member States: overall very minimalistic

Gap in EU law

Parental leave
Framework Directive 2010/18
Variable implementations

Gap of EU law: the leave is unpaid
Good practices:
Involving fathers or other carers





Goods and Services

- ☐ Insurance
- ☐ Financial services
- ☐ Airline requirements
- ☐ Home birth



General lack of interest / debate

Good Practice:
the involvement of the equality bodies in some
Member States



Is there space for self-regulation?

Commercial companies

Professional bodies






Pregnancy and maternity discrimination


Brussels, 26 November 2012
Prof. dr. Petra Foubert
Law School, Hasselt University, Belgium





2 different approaches


- Issues of pregnancy and maternity can be approached from 2 angles:
 - Discrimination angle
 - Health and safety angle
- The relationship between these 2 angles is not always 'pure'







Relevant EU legislation


- Pregnancy and maternity in the workplace
 - Equal treatment/ non-discrimination:
 - ✓ Dir. 2006/54/EC (recast directive)
 - Health and safety:
 - ✓ Dir. 92/85/EEC (pregnancy directive)
- Pregnancy and maternity in the access to and supply of goods and services
 - Equal treatment/ non-discrimination:
 - ✓ Dir. 2004/113/EC







Equal treatment

- Dir. 2006/54/EC
- Prohibition of discrimination on grounds of sex in relation to employment-related matters
- A number of provisions explicitly relate to pregnancy and maternity
- ➤ Some of these provisions are based on ECJ case law




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Dir. 2006/54/EC

- Art. 2:
Any less favourable treatment of a woman related to pregnancy or maternity leave (Dir. 92/85/EEC) = direct discrimination
- Art. 15:
- Right to return to job upon return from maternity leave
- ➤ Art. 28:
No prejudice to (national/ EU) provisions concerning the protection of women, particularly as regards pregnancy and maternity




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Equal treatment

- Dir. 2004/113/EC
- Prohibition of discrimination on grounds of sex in relation to the provision of goods and services which are available to the public
- ➤ A number of provisions explicitly relate to pregnancy and maternity



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Dir. 2004/113/EC

➤ Art. 4:



- Pregnancy/ maternity discrimination = direct discrimination
- No prejudice to more favourable provisions concerning protection of women as regards pregnancy and maternity

➤ Art. 5:

- costs related to pregnancy/ maternity shall not result in differences in individuals' premiums and benefits



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Health and safety



➤ Many MS had protective legislation for women workers long before E(EE)C came into existence

➤ 1987: European Commission examined this legislation for compatibility with predecessor of recast Directive (76/207)

➤ Commission distinguished between '*anomalous provisions*', '*humanitarian provisions*' and '*health and safety provisions*'




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Health and safety

➤ Status of what Commission called '*health and safety measures*' remained rather unclear

➤ EU contributed to this situation by the adoption of Dir. 92/85/EEC '*on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)*'




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Dir. 92/85/EEC

- Approach = health and safety
- No link with equal treatment directives: i.e. problematic
- Pregnancy/ maternity = relevant trait for categorisation, as opposed to a specific derogation from equal treatment directives
- Risk of discrimination of women workers




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Dir. 92/85/EEC

- 2 types of protective measures:
 - Restrictive/ negative protective measures: pregnant workers are excluded from certain jobs/ working conditions/...
 - Enhancing/ positive protective measures: require employers to give pregnant workers special treatment (e.g. maternity leave)




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Dir. 92/85/EEC

- 2008: Commission proposal for directive amending dir. 92/85/EEC:
 - Art. 157 TFEU (ex art. 141 TEC) added to legal basis
 - Maternity leave:
 - 18 weeks (EP: 20 weeks)
 - 6 of which to be taken after childbirth (compulsory) (EP: fully paid)
 - 12 other weeks (non-compulsory): before or after childbirth (EP: no prejudice to existing laws providing compulsory leave before childbirth)




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Parental and paternity leave?

- Dir. 2010/18/EU (revised parental leave directive)
- Paternity leave:
 - Commission proposal for directive amending dir. 92/85/EEC

EP suggested: right to two weeks of fully paid paternity leave



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KNOWLEDGE IN ACTION
