

Equality for Breastfeeding Women

Guidance for the Employment and Related Sectors



平等機會委員會
EQUAL OPPORTUNITIES COMMISSION

April 2021

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1. Introduction

- 1.1 The Equal Opportunities Commission (EOC) is Hong Kong's statutory body responsible for the implementation and enforcement of the anti-discrimination ordinances, namely the Sex Discrimination Ordinance (Cap. 480) (SDO), the Disability Discrimination Ordinance (Cap. 487) (DDO), the Family Status Discrimination Ordinance (Cap. 527) (FSDO) and the Race Discrimination Ordinance (Cap. 602) (RDO).
- 1.2 The EOC works towards the elimination of discrimination on the grounds of sex, marital status, pregnancy, breastfeeding, disability, family status and race; the elimination of sexual harassment; the elimination of harassment on grounds of breastfeeding, as well as the elimination of harassment and vilification on the grounds of disability and race. The EOC also promotes equality of opportunities between men and women, between persons with and without a disability and irrespective of family status and race.
- 1.3 Amendments have been made to the four anti-discrimination Ordinances by the Government, following the EOC's Discrimination Law Review of the existing anti-discrimination Ordinances and recommendations for reform. The EOC welcomes the amendments, as they improve the protection from discrimination and harassment in many aspects.

Purpose and content of the Guidance

- 1.4 This EOC Guidance is provided to assist employers, employees and other relevant persons in workplaces to understand the amendments to the Sex Discrimination Ordinance (SDO), which prohibit discrimination and harassment against breastfeeding women. It is intended to provide practical guidance on both the legal effect of the new provisions, as well as good practices employers and employees can take to promote equality for breastfeeding women in workplaces.
- 1.5 The provisions prohibiting breastfeeding discrimination and harassment come into force on **19 June 2021**.¹ They prohibit breastfeeding discrimination and harassment in a number of sectors, including employment and related sectors; education; the

¹ [The provisions regarding breastfeeding discrimination and victimisation were implemented by the Discrimination Legislation \(Miscellaneous Amendments\) Ordinance 2020](#), and the provisions regarding breastfeeding harassment were implemented by the [Sex Discrimination \(Amendment\) Ordinance 2021](#)

provision of goods, facilities and services; the disposal or management of premises; clubs; and the Government.

- 1.6 This Guidance has been produced for the employment and related sectors, as it is one of the key aspects of public life in which equality for breastfeeding women is relevant. Separate EOC Guidance has been produced in relation to breastfeeding discrimination and harassment in other relevant sectors where the breastfeeding discrimination and harassment provisions apply: the provision of goods, facilities and services; education; the disposal or management of premises; clubs and the Government. The Guidance relating to the other breastfeeding provisions is available on the EOC website.²
- 1.7 In addition, the EOC has produced Guidance relating to all the other amendments to the anti-discrimination Ordinances, which came into force previously on **19 June 2020**.³ That Guidance also explains both the legal effect of the new provisions, as well as good practices that relevant stakeholders are recommended to take to promote equality and prevent discrimination.

Application of the Guidance

- 1.8 This Guidance applies to employment at an establishment in Hong Kong, unless the employee does his or her work wholly or mainly outside Hong Kong.⁴
- 1.9 The Guidance applies to all employment and related sectors in both the public and private sectors. It applies to employers and employees; principals and contract workers; principals and commission agents; partners in partnerships;⁵ barristers, pupils and tenants of barristers' chambers; persons residing and persons working at premises; common workplaces; the activities of employment agencies; trade unions; qualifying bodies and training bodies.
- 1.10 The terminology used in the Guidance depends on the particular legal relationship being discussed. References to "employment" situations are intended to cover employment and previously mentioned related sectors, unless specified otherwise.
- 1.11 The distinction between Sections 3 and 4 of the Guidance should be noted. Section 3 explains the legal provisions relating to breastfeeding discrimination and harassment under the SDO in relation to the employment sector. Section 4 provides good practices

² [Equality for breastfeeding women: Guidance relating to the provision of goods, facilities, services, education, premises, clubs, and the Government, EOC](#)

³ [Guidance on amendments to the anti-discrimination Ordinances, EOC](#)

⁴ For the meaning of "establishment in Hong Kong", please see section 14 of the SDO

⁵ Where the partnership firm consists of not less than 6 partners: see section 15 of the SDO

on what employers can do to promote equality for breastfeeding women in employment.

- 1.12 Employers and other relevant persons must comply with the obligations under the SDO, and are encouraged to follow the recommended good practices. In all cases, reference should be made to the provisions of the SDO for the exact terms of the law.
- 1.13 Throughout the Guidance examples are provided to explain the meaning of concepts under the SDO, such as direct and indirect breastfeeding discrimination, breastfeeding harassment, and victimisation. The examples are provided for illustrative purposes only. Readers should be mindful that each case bears its own uniqueness and should refrain from sole and direct application of any example to a particular situation.
- 1.14 The Guidance aims to provide practical guidance but it is not a substitute for legal advice. Relevant stakeholders to which the new provisions apply should consult legal practitioners for appropriate advice on the requirements under the four anti-discrimination Ordinances and the possible legal implication(s) of particular issues or situations.
- 1.15 In applying the Guidance, employers may take into consideration the size and structure of their organisations. Small businesses, for example, may reasonably consider whether more simplified facilities or arrangements for breastfeeding would be appropriate based on their particular resources. However, small businesses must still ensure that their policies and practices comply with the requirements of the SDO.
- 1.16 It should also be noted that other Guidance relating to the SDO (for example in relation to protections from pregnancy and maternity discrimination) and the FSDO (where a mother cares for her child) may also be relevant, depending on the facts of a situation. The other Guidance is available on the EOC website.⁶

⁶ [The Code of Practice on Employment under the Sex Discrimination Ordinance; the Code of Practice on Employment under the Family Status Discrimination Ordinance; EOC Resource Centre for the Ordinances](http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=resource_centre_sdo)
http://www.eoc.org.hk/eoc/graphicsfolder/showcontent.aspx?content=resource_centre_sdo

2. Benefits of breastfeeding and numbers of women breastfeeding

- 2.1 The diverse health benefits of breastfeeding for both the babies and their mothers are well documented globally. It is also relevant to note that, given more families in Hong Kong are aware of those benefits, there are growing numbers of women in Hong Kong who breastfeed their children after giving birth.
- 2.2 Breast milk promotes healthy development, and protects the infant against infectious and chronic diseases. Exclusive breastfeeding reduces infant mortality due to common childhood illnesses, such as diarrhoea or pneumonia, and helps for a quicker recovery during illness.⁷
- 2.3 A longer duration of breastfeeding also contributes to the health and well-being of mothers: it reduces the risk of ovarian and breast cancer and helps space pregnancies, given exclusive breastfeeding of babies under six months has a hormonal effect, which often induces a lack of menstruation.⁸
- 2.4 In order to maximise the health benefits of breastfeeding, the World Health Organization (WHO) recommends that women exclusively breastfeed their newborn babies for the first six months of life; and that they continue to breastfeed with complementary solid foods up to two years of age or beyond.⁹
- 2.5 There are also benefits to businesses of creating breastfeeding friendly workplaces. Breastfeeding friendly measures in workplaces can encourage women to return to work sooner, and reduce the turnover of female employees, as they are more likely to remain with that employer. Furthermore, studies have indicated that as breastfed children are healthier, the parents take less leave to care for their sick children.¹⁰ As a result, the productivity of female employees may be increased where effective breastfeeding policies in workplaces are introduced.
- 2.6 Given more women in Hong Kong are aware of the benefits of breastfeeding, and the implementation of a series of supportive measures by the Department of Health, the percentage of mothers breastfeeding their new born increased from 66% in 2004 to more recently 87.5% in 2018.¹¹ The figures from 2018 also indicate that 46.5% of

⁷[World Health Organization, Maternal New born Child and Adolescent Health](#)

⁸[World Health Organization, Infant and Young Child Feeding](#)

⁹ Ibid

¹⁰[Employer's Guide to Establishing Breastfeeding Friendly Workplace](#), June 2015, Department of Health, Family Health Service, page 3

¹¹[Employer's Guide to Establishing Breastfeeding Friendly Workplace](#), June 2015, Department of Health, Family Health Service, page 1

women are breastfeeding at six months, and 26.1% are breastfeeding at 12 months.¹² This highlights that with increasing numbers of women breastfeeding after giving birth, it is of particular importance to promote equality, as well as prevent discrimination and harassment for those women who wish to breastfeed or express milk after returning to work.

¹² [Breastfeeding Survey 2019](#), Department of Health, Table 1, page 3

3. Provisions on breastfeeding equality for women in the employment sector

3.1 This section explains the content of the legal provisions of the SDO relating to breastfeeding discrimination and harassment in the employment and related sectors.

(a) Meaning of breastfeeding for the purpose of the SDO

3.2 The SDO affords the protection from breastfeeding discrimination and harassment in a number of situations. These apply to:

- ▶ A woman who is engaging in the act of breastfeeding a child;
- ▶ A woman who is engaging in an act of expressing breast milk; and
- ▶ A woman who feeds a child with her breast milk, but is not doing so at the time the relevant act of discrimination is committed.¹³

3.3 The protection from discrimination and harassment against breastfeeding women would include various scenarios where a woman is breastfeeding or expressing milk for a child, even if the child may not be her biological child.¹⁴

3.4 The SDO does not prescribe a time limit within which a woman is protected from breastfeeding discrimination and harassment. As a result, employers should consider each request to breastfeed or continue breastfeeding based on the particular circumstances of the case.

3.5 Under the SDO, a woman is protected from breastfeeding discrimination and harassment, as long as an act of breastfeeding or expressing milk is at least one of the reasons for which the woman is treated less favourably, even if it is not the dominant or substantial reason.¹⁵

Example: treatment for more than one reason

An employer does not allow an employee to take any time off work to express milk for her newborn baby. The employer does this for two reasons: 1) the employer does not think it is appropriate to take any time off to express milk; and 2) is concerned that other staff members will ask for more time off. The first reason would be sufficient to make the less favourable treatment amount to discrimination. For the purpose of constituting

¹³Section 8A(2) of the SDO

¹⁴It would cover for example situations where a woman is breastfeeding her baby by adoption, surrogacy procedure, or any other situation where a woman is breastfeeding a child.

¹⁵Section 4 of the SDO

discrimination, the fact that one of the reasons for the treatment was that she was breastfeeding would be sufficient to be the reason for the treatment.

(b) Prohibited conduct relating to discrimination and harassment against breastfeeding women

3.6 The SDO prohibits several types of conduct relating to breastfeeding: direct discrimination; indirect discrimination; harassment on grounds of breastfeeding; victimisation; discriminatory practices; and instructions and pressure to discriminate. Some examples of such unlawful conduct are provided below.

(i) Direct discrimination

3.7 Direct discrimination means treating a breastfeeding woman less favourably than another person (a woman not breastfeeding or a man) in comparable circumstances, because the woman is breastfeeding.¹⁶

Example: Direct discrimination

Lucy returns to work after giving birth to her child and taking maternity leave. Her employer is a small company with five employees and has no breastfeeding policy in place. She takes the advice of her doctor to breastfeed her baby, and requests to express milk during her lunch break in an unused room at the office. The employer refuses her request, and says the room can only be used for purposes other than breastfeeding. This is likely to be direct breastfeeding discrimination.

(ii) Indirect discrimination

3.8 Indirect discrimination consists of:

- ▶ applying a requirement or condition to all employees, irrespective of whether they are breastfeeding women or not;
- ▶ the proportion of breastfeeding women who can comply with it is considerably less than the proportion of non-breastfeeding persons who can comply with it;
- ▶ the requirement or condition is not justifiable; and
- ▶ the requirement or condition is to the detriment of the breastfeeding woman because she cannot comply with it.¹⁷

¹⁶ Section 8A(1)(a) of the SDO

¹⁷ Section 8A(1)(b) of the SDO

Example: indirect discrimination

An accounting firm has 20 partners and a requirement that if any partners wish to take additional breaks during their working hours, they must still ensure that the number of billable working hours they do per day is the same as all other partners. This requirement has a disproportionate detrimental impact on two partners who are breastfeeding women. This may be unlawful indirect breastfeeding discrimination, unless the accounting firm can justify the requirement.

(iii) Harassment

3.9 There are two forms of unlawful harassment of breastfeeding women. This applies where a person harasses a woman on the ground that the woman is breastfeeding by:

- ▶ Unwelcome conduct towards the breastfeeding woman

When a person engages in unwelcome conduct, which a reasonable person, having regard to all the circumstances, would anticipate that the woman would be offended, humiliated or intimidated by that conduct.

- ▶ Creating a hostile or intimidating environment

A person, alone or with others, engages in conduct which creates a hostile or intimidating environment for the woman.¹⁸

3.10 Conduct includes making a statement to a woman or in her presence, whether the statement is made orally or in writing.¹⁹

Example: harassment

A technology company in Hong Kong decides that it is going to install a nursing room in its office for breastfeeding female employees in order to ensure it has better family friendly facilities for its staff. The company announces the plans in a staff meeting. At the meeting several male staff members make jokes at the back of the room that they should call the room “Cow Milking Room” for all the “cows” at the office. A breastfeeding female employee overhears the comments and feels very intimidated and shocked by them. This is likely to be unlawful harassment of the breastfeeding female employee by creating a hostile environment.

¹⁸ Section 2A(1) of the SDO

¹⁹ Section 2A(2) of the SDO

(iv) Victimisation

3.11 Victimisation occurs where a person (the discriminator) treats another person (the person victimised) less favourably than other persons in comparable circumstances because the person victimised or a third person has done or intends to do, or is suspected to have done or to intend to do, the following:

- ▶ bringing proceedings against the discriminator or any other person under the SDO;
- ▶ giving evidence or information in connection with proceedings brought by any person against the discriminator or any other person under the SDO;
- ▶ otherwise doing anything under or by reference to the SDO in relation to the discriminator or any other person; or
- ▶ alleging that the discriminator or any other person has committed an act which is unlawful under the SDO.

Example: victimisation

Barbara is employed as an accountant for a retail company in Hong Kong. When she returns from maternity leave, and asks to have two 20-minute breaks during the working day to express milk for her baby, the supervisor informs her she cannot express milk as “breastfeeding women should either quit work or work the same hours as everyone else”. Barbara considers this to be direct breastfeeding discrimination and makes a complaint against her supervisor to her employer and the EOC. After she has made the complaint, she is immediately fired because she made the complaint. This is likely to be unlawful victimisation.

(v) Discriminatory practices

3.12 The SDO also prohibits discriminatory practices relating to breastfeeding women. A discriminatory practice means the application of a requirement or condition which:

- ▶ results in an act of discrimination, that is, unlawful indirect breastfeeding discrimination in employment; or

- ▶ would likely result in such an act of discrimination if the persons to whom it is applied were not all of the same sex.²⁰

3.13 Proceedings relating to a breach of this provision can only be brought by the EOC.²¹

Example: discriminatory practices

An employer implements a policy that all employees must work six consecutive hours per day without breaks. This requirement or condition may indirectly discriminate against breastfeeding women, who may wish to have flexible working arrangements, such as taking lactation breaks during the work day or working fewer consecutive hours per day while they are breastfeeding. It may therefore be an unlawful discriminatory practice, unless it can be justified.

(vi) Instructions and pressure to discriminate

3.14 It is also unlawful for a person to make instructions to discriminate, or to pressure another person to discriminate.

3.15 It is unlawful for a person:

- ▶ who has authority over another person; or
- ▶ in accordance with whose wishes that other person is accustomed to act, to instruct, or procure or attempt to procure that other person to do any unlawful act, including breastfeeding discrimination.²²

3.16 It is also unlawful to induce, or attempt to induce a person to commit an unlawful act, including breastfeeding discrimination, by:

- ▶ providing or offering to provide the person with any benefit; or
- ▶ subjecting or threatening to subject the person to any detriment.²³

²⁰ Section 42(1) of the SDO

²¹ Section 42(3) of the SDO

²² See section 44 of the SDO

²³ See section 45 of the SDO

(c) Scope of protection in relation to the employment and related sectors

(i) Protections from direct and indirect breastfeeding discrimination

3.17 The SDO provides protection from breastfeeding discrimination in a range of employment situations.

3.18 In relation to employers, it is unlawful to discriminate on the ground of breastfeeding:

- ▶ in the arrangements made for the purpose of determining who should be offered employment;
- ▶ in the terms on which a woman is offered employment; or
- ▶ by refusing or deliberately omitting to offer a woman that employment.²⁴

3.19 In situations where a woman is already employed by the employer, it is also unlawful for an employer to discriminate against a breastfeeding employee:

- ▶ in the way it affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford access to them;
- ▶ in the terms of employment afforded to her; or
- ▶ by dismissing her or subjecting her to any other detriment.²⁵

3.20 The prohibition on breastfeeding discrimination in employment applies to all forms of prospective or existing employment relationships, including, for example, the employment of foreign domestic helpers.²⁶

3.21 It is also unlawful to discriminate on the ground of breastfeeding in relation to contract workers. This applies where a person does work for a principal, but that person is employed by a contractor or sub-contractor of the principal. In such situations, it will be unlawful for the principal to discriminate on the ground of breastfeeding against the contract worker:

- ▶ in the terms on which the principal allows the woman to do the work;
- ▶ by not allowing her to do it or continue doing it;

²⁴ Section 11(1) of the SDO

²⁵ Section 11(2) of the SDO

²⁶ Foreign domestic helpers are entitled to the same maternity protection under the Employment Ordinance (EO) as other employees in Hong Kong. They are also protected from discrimination on the ground of pregnancy, and discrimination on the ground of breastfeeding. For details of the maternity protection under the EO, please refer to the “A Concise Guide to the Employment Ordinance” issued by the Labour Department (LD) which could be downloaded from LD’s website (<https://www.labour.gov.hk>).

- ▶ in the way the principal affords her access to any benefits, facilities or services or by refusing or deliberately omitting to afford access to them; or
- ▶ subjecting her to any other detriment.²⁷

3.22 Similarly, it is unlawful for a principal to discriminate against a commission agent who does work for the principal on a commission basis.²⁸

3.23 The SDO also prohibits breastfeeding discrimination in partnerships, where the firm consists of not less than six partners. It is unlawful in relation to a position as a partner in a firm, to discriminate against a breastfeeding woman:

- ▶ in the arrangements the firm makes for the purpose of determining who should be offered that position;
- ▶ in the terms on which the firm offers her that position; or
- ▶ by refusing or deliberately omitting to offer her that position.

3.24 In a situation where the woman already holds a position as a partner, it is unlawful for the firm to discriminate on the ground of breastfeeding:

- ▶ in the way the firm affords her access to any benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them; or
- ▶ by expelling her from that position or subjecting her to any other detriment.²⁹

3.25 The SDO prohibits a number of forms of breastfeeding discrimination in relation to barristers' chambers. It is unlawful for:

- ▶ a barrister or barrister's clerk, in relation to any offer of pupillage or tenancy, to discriminate against a breastfeeding woman in the arrangements which are made for the purpose of determining to whom it should be offered, in respect of any terms on which it is offered, or by refusing or deliberately omitting to offer it to her;
- ▶ a barrister or barrister's clerk, in relation to a breastfeeding woman who is a pupil or tenant in the chambers, to discriminate against that woman in respect of any terms applicable to her as a pupil or tenant, in the opportunities for training or gaining experience which are afforded or denied to her, or by terminating her pupillage or by subjecting her to any pressure to leave the chambers or other detriment; and

²⁷ Section 13(2) of the SDO

²⁸ Section 20(2) of the SDO

²⁹ Section 15 of the SDO

- ▶ any person in relation to the giving, withholding or acceptance of instructions to a barrister, to discriminate against a breastfeeding woman.³⁰

Example: breastfeeding discrimination in barristers' chambers

Wendy applies for a tenancy in a barristers' chambers and notifies the Head of chambers that she has a new born baby and wants to express milk at the chambers, and asks if facilities are available for her to do so. The Head of chambers tells her they do not allow breastfeeding or expressing milk in the chambers and her application is rejected. This is likely to be unlawful direct breastfeeding discrimination.

3.26 The SDO also prohibits breastfeeding discrimination by employment agencies, where breastfeeding women wish to use or are using their services to find employment. It is unlawful for an employment agency to discriminate against a breastfeeding woman:

- ▶ in the terms on which the agency offers to provide any of its services;
- ▶ by refusing or deliberately omitting to provide any of its services; or
- ▶ in the way it provides any of its services.³¹

3.27 It is also important to note that an employed woman is protected from breastfeeding discrimination, irrespective of whether the employer knew the breastfeeding status of the employee when she was employed. This is relevant, for example, in situations where a woman starts new employment after giving birth to a baby and wishes to breastfeed or express milk at the new workplace.

(ii) Protections from breastfeeding harassment

3.28 The SDO also provides protection from breastfeeding harassment in a range of employment situations.

3.29 In relation to employment, it is unlawful for:

- ▶ an employer to harass a woman on grounds she is breastfeeding, who is seeking to be employed by the employer;
- ▶ an employer to harass a woman on grounds she is breastfeeding, who is employed by the employer; and

³⁰ Section 36 of the SDO

³¹ Section 19(1) of the SDO

- ▶ a person who is employed by another person to harass a woman on grounds she is breastfeeding, who is seeking to be or is employed by that second mentioned person.³²

3.30 In relation to contract work, it is unlawful for:

- ▶ a principal to harass a woman on grounds of breastfeeding, who is a contract worker; and
- ▶ a contract worker to harass a woman on grounds of breastfeeding, who is a fellow contract worker.³³

3.31 In relation to partnerships, it is unlawful for a partner in a firm to harass a woman on grounds of breastfeeding, who is seeking to be, or who is, a partner in the firm.³⁴

3.32 In relation to the work of commission agents, it is unlawful for:

- ▶ a principal to harass a woman on grounds of breastfeeding, who is a commission agent; and
- ▶ a commission agent to harass a woman on grounds of breastfeeding, who is a fellow commission agent.³⁵

3.33 In relation to barristers' chambers, it is unlawful for:

- ▶ a barrister or barrister's clerk to harass on grounds of breastfeeding a woman in the course of offering to provide to her pupillage or tenancy in the chambers, or who is a pupil or tenant in the chambers;
- ▶ any person, in the course of giving, withholding or acceptance of instructions to a barrister, to harass on grounds of breastfeeding a woman who is a barrister.³⁶

3.34 It is unlawful for a person who is seeking to be, or who is, employed by a woman at an establishment in Hong Kong, to harass the woman on grounds of breastfeeding.³⁷

3.35 In relation to persons residing a premises, it is unlawful for a person residing in any premises to harass a woman on grounds of breastfeeding, who is:

³² Section 23(1) to (3) of the SDO

³³ Section 23(4) and (5) of the SDO

³⁴ Section 23(6) of the SDO

³⁵ Section 23(9) and (10) of the SDO

³⁶ Section 40(6) of the SDO

³⁷ Section 23(11) of the SDO

- ▶ employed by another person at an establishment in Hong Kong, whether or not that other person also resides in those premises, or those premises are that establishment; and
- ▶ carrying out in those premises all or part of her work in relation to her employment, whether or not she also resides in those premises.³⁸

3.36 There is also protection from breastfeeding harassment in relation to common workplaces. It is unlawful for a workplace participant to harass another female workplace participant on grounds of breastfeeding, at the workplace of both persons.³⁹

3.37 A “*workplace*” is defined as a place:

- ▶ At which the person works as a workplace participant; or
- ▶ That the person attends as a workplace participant.⁴⁰

3.38 A “*workplace participant*” is defined as:

- ▶ An employee;
- ▶ An employer;
- ▶ A contract worker;
- ▶ A principal of a contract worker within the meaning of sections 13(1) of the SDO, 13(1) of the DDO and 15(1) of the RDO;
- ▶ A commission agent;
- ▶ The principal of a commission agent within the meaning of sections 20(1) of the SDO, 20(1) of the DDO and 22(1) of the RDO;
- ▶ A partner in a firm;
- ▶ An intern; or
- ▶ A volunteer.⁴¹

3.39 Some of the workplace participants are defined in the legislation to explain in more detail their meaning.

³⁸ Section 23(12) of the SDO

³⁹ Section 23A of the SDO

⁴⁰ See section 23A(2) of the SDO

⁴¹ See section 23A(2) of the SDO

3.40 An “intern” is defined as “a person who is engaged by another person for an internship but is not an employee of that other person”.⁴² An “internship” is defined as:

“(a) a period of work the completion of which is required for attaining a professional or academic qualification and includes a pupillage; or

(b) any other period of work that is usually described as an internship.”⁴³

3.41 As an internship is defined to include a pupillage in a barristers’ chambers, the meaning of “pupillage” is also relevant. The Ordinances state that:

“pupil, pupillage, tenancy and tenant have the meanings commonly associated with their use in the context of a set of barristers’ chambers.”⁴⁴

3.42 A “volunteer” is defined as “a person who performs volunteer work other than in the capacity of an employer or employee”.⁴⁵

Example: breastfeeding harassment in a common workplace

Yan-wing is an employee of a company that rents office space in a co-working space. Yan-wing agreed with her employer that she could express milk at work for her baby. The employer agreed that Yan-wing can put her breast milk in the staff kitchen fridge, as long as it is marked as breastmilk. Tak-hing is a contract worker doing contract work for another company in the co-working space. The kitchen is a shared space for all companies renting space on that floor of the building. Tak-hing, being a workplace participant, sees the breastmilk in the kitchen fridge and makes jokes on three occasions in front of Yan-wing and other persons working there, that Yan-wing’s breastmilk “must taste much better than cow’s milk”. Such conduct is likely to be unwelcome conduct, which would likely offend, humiliate or intimidate Yan-wing and therefore constitutes unlawful breastfeeding harassment in a common workplace.

(d) Liability of employers and principals

3.43 According to the SDO, an unlawful act done by a person in the course of his or her employment may make both that person and his or her employer liable. Employers are legally responsible for the actions of their employees, done in the course of their

⁴² Section 23A(2) of the SDO

⁴³ Section 23A(2) of the SDO

⁴⁴ Section 36(4) of the SDO

⁴⁵ Section 23A(2) of the SDO

employment, whether or not they were done with the employer's knowledge or approval.⁴⁶

3.44 An employer will not be held liable for the actions of an employee, if the employer can prove that they took reasonably practicable steps to prevent the employee from doing the act or acts of discrimination.

3.45 Further, any acts done by a person as an agent for another person with the authority of that person (for example an employment agency acting on behalf of an employer), shall be treated as being done by both those persons.

(e) Liability of persons engaging interns and volunteers

3.46 In relation to protections from breastfeeding harassment, not only the interns and volunteers are liable for any unlawful acts, but also the persons who engage the interns and volunteers. This is similar to the concept of vicarious liability of employers and principals as described above.

3.47 The provisions state that an act done by an intern or volunteer in the course of an internship or performing volunteer work is to be treated as an act done:

- ▶ By the intern or volunteer; and
- ▶ By the person who engaged the intern or volunteer, whether or not the act was done with the knowledge or approval of the person.⁴⁷

3.48 The provisions apply to any proceedings relating to the SDO, but do not apply for the purposes of any criminal proceedings.⁴⁸

3.49 Where proceedings are brought under the SDO against the person engaging the intern or volunteer, there is a defence where they prove that they took reasonably practicable steps to prevent the intern or volunteer:

- ▶ From doing the act; or
- ▶ From doing acts of that description in the course of the internship or performing the volunteer work.⁴⁹

⁴⁶ Section 46(1) of the SDO

⁴⁷ Section 46A(3) and (6) of the SDO

⁴⁸ Section 46A(2) of the SDO

⁴⁹ Section 46A(4) and (7) of the SDO

(f) Aiding unlawful acts

- 3.50 A person who knowingly aids another person to do an unlawful act under the SDO relating to breastfeeding, shall be treated for the purposes of the SDO as himself/herself doing the unlawful act.⁵⁰ In relation to breastfeeding harassment, interns or volunteers are also liable where they knowingly aid another person to do an unlawful act. They will be treated as having done the unlawful act themselves.⁵¹ This includes situations where the person who engages the intern or volunteer is liable for an act of the intern or volunteer, as the intern or volunteer is deemed to aid doing the act by the person engaging him/her.⁵²
- 3.51 An employee or agent for whose act the employer or principal is liable for the purpose of vicarious liability, shall be deemed to aid the doing of the act by the employer or principal.⁵³
- 3.52 An exception applies and a person will not be liable for aiding another to do unlawful acts where he/she:
- ▶ acts in reliance on a statement made to him/her by that other person that, by reason of any provision of the SDO, the act which he/she aids would not be unlawful; and
 - ▶ it is reasonable for him/her to rely on the statement.⁵⁴
- 3.53 A person who knowingly or recklessly makes such a statement, which in a material respect is false or misleading, commits an offence.⁵⁵

(g) Special measures

- 3.54 The breastfeeding provisions, similar to other protected characteristics where discrimination is prohibited, also allow for special measures to be provided in order to ensure that breastfeeding women have equal opportunities in different aspects of life, including employment.⁵⁶ Such special measures are lawful.
- 3.55 There are three categories of acts that are lawful in these circumstances:
- ▶ acts to ensure that breastfeeding women have equal opportunities with others;

⁵⁰ Section 47(1) of the SDO

⁵¹ Section 47(1) of the SDO

⁵² Section 47(2A) and (2B) of the SDO

⁵³ Section 47(2) of the SDO

⁵⁴ Section 47(3) of the SDO

⁵⁵ Section 47(4) of the SDO

⁵⁶ See section 48 of the SDO

- ▶ providing goods or access to services, facilities or opportunities to meet breastfeeding women’s special needs relating to employment; and
- ▶ providing breastfeeding women with grants, benefits or programmes, whether directly or indirectly, to meet their special needs in relation to employment.

3.56 Special measures should be reasonably intended to ensure that breastfeeding women have equal opportunities with other people. In considering whether a measure comes within the provisions of special measures, relevant factors include the following:

- ▶ Whether there is an existing inequality of resources and opportunities that needs to be redressed, or whether the beneficiary of the measure has special need that needs to be met;
- ▶ Whether it is rationally connected to the aim of redressing the inequality or meeting the special need; and
- ▶ Whether it is proportional to the aim of redressing the inequality or meeting the special need.⁵⁷

3.57 A special measure applied should be temporary in nature and should be discontinued once the special need no longer exists. In the context of breastfeeding women, where they finish breastfeeding, it would no longer be appropriate to provide for their special needs.

Example: special measure

An employer has introduced a breastfeeding policy that includes offering breastfeeding employees payment to attend two sessions for medical advice, with a consultant or midwife to help them with any of their special needs during the period they are breastfeeding. This is likely to constitute a lawful special measure to meet the special needs of breastfeeding women relating to employment, but only for the period they are breastfeeding.

(h) Acts done for the purposes of protecting women

3.58 Among the general exceptions set out in the SDO, an exception expressly applies to breastfeeding discrimination, where an act is done for the purpose of protecting women. In relation to an act done in the context of employment and related sectors, it will not be unlawful if it is necessary to be done by a person in order to comply with a

⁵⁷ See *EOC v Director of Education* [2001] 2 HKLRD 690

requirement of an existing statutory provision concerning the protection of women.⁵⁸ These are statutory provision having effect for the purpose of protecting women as regards pregnancy, maternity, breastfeeding, or other circumstances giving rise to risks specifically affecting women.⁵⁹

- 3.59 For example, in the context of pregnancy, a relevant statutory provision under the Employment Ordinance provides that where a pregnant employee produces a medical certificate with an opinion that she is unfit to handle certain types of work injurious to pregnancy, she may request her employer to refrain from giving her such work during her pregnancy. An employer in those circumstances shall not allocate that type of work, or shall remove her from that existing type of work, subject to the possibility of seeking further medical advice.⁶⁰
- 3.60 Similarly, it may be necessary for a person to treat a breastfeeding woman less favourably (for example by temporarily changing their employment position) for the purpose of complying with a requirement of an existing statutory provision concerning the protection of women. This will not constitute unlawful discrimination under the SDO.

⁵⁸ Section 57(1)(a)(i) of the SDO

⁵⁹ Section 57(2)(a)(i), (ia) and (ii) of the SDO

⁶⁰ Section 15AA of the Employment Ordinance (Cap. 57)

4. Good practices to promote equality and prevent discrimination and harassment

4.1 It is important for employers, employees and those in related sectors to understand what types of good practices can be put in place to promote equality, as well as prevent discrimination and harassment of breastfeeding employees and other forms of workers. This section explains two aspects. Firstly, it explains such good practices, with case studies to illustrate the good practices. Secondly, it helps employers, employees or other workers to better understand how the law may operate in the relevant areas of policy or practice, with examples of possible situations of discrimination or harassment. Such examples of possible discrimination or harassment should not be interpreted as a definitive statement of the law, and employers or employees should seek legal advice on their particular circumstances.

(a) Supporting breastfeeding women in employment

4.2 Where women return to work after taking maternity leave, they may wish to continue breastfeeding or expressing milk for their children at work. As described previously, breastfeeding is good for both the health of the baby and the mother.

4.3 Where a female employee requests to breastfeed/express milk at work, there are a number of issues that an employer should consider to enable her to do so, including:

- ▶ discussing with her in advance of returning to work what her needs are and what adjustments she requests the employer to make;
- ▶ ensuring that when she returns to work all staff members treat her equally and do not discriminate against her because she is breastfeeding;
- ▶ ensuring that she has appropriate facilities to enable her to either breastfeed or express milk; and
- ▶ making adjustments to her working conditions, for example by allowing her to take breaks to breastfeed or express milk.

4.4 In addition, it would also be beneficial for employers to develop and implement a policy of supporting breastfeeding employees. Such policies would also help to prevent discrimination and harassment.

(b) Developing and implementing a breastfeeding policy

(i) Good practice

4.5 It is a good practice for an employer to develop and implement a written policy on breastfeeding, which sets out:

- ▶ the employer's position on supporting breastfeeding employees;
- ▶ that any discrimination or harassment against breastfeeding employees by other employees and contract workers will not be tolerated, and appropriate action will be taken if such instances arise;⁶¹
- ▶ a simple procedure for making and processing a request to breastfeed or express milk;
- ▶ the facilities to be made available for employees to breastfeed or express milk;
- ▶ how requests for changes in working conditions (for example breaks to breastfeed or express milk) will be considered and what types of adjustments may be considered and made; and
- ▶ the position of the employer on how changes in working conditions will or will not affect the employees' pay or related benefits, such as bonuses (for example changing from full-time to part-time employment temporarily)

4.6 The policy could be incorporated as part of the pregnancy and maternity policies, as well as the policies relating to preventing discrimination and harassment.

4.7 The employer should develop the policy in consultation with all staff members in order that they have an opportunity to provide their views. Once it has been agreed, the policy should be disseminated to all management and other staff members with an explanation of the policy. Training should also be provided to all the staff members who are responsible for implementing the policy.

4.8 In small businesses with few staff members, although a written policy should be developed, there may not be a need to be as comprehensive as for larger businesses. However, smaller businesses must still ensure that their policies and practices comply with the SDO.

⁶¹ An equivalent policy can be developed in situations where persons are not employees but in similar employment situations, such as partnerships and barristers in chambers.

Good practice case study: developing a breastfeeding policy

XYZ Limited has 10 employees who all work at the same office in Hong Kong. One of the employees, Karen, requests to express milk for her baby at work after she returns from maternity leave. This is the first occasion any employee has asked to express milk at the company, but another female employee who is pregnant has stated that she also intends to request to express milk at work after maternity leave. The employer, having read about the benefits of breastfeeding, decides to develop a written breastfeeding policy, and arranges for all staff members to be trained about those benefits and how to avoid possible discrimination and harassment.

(ii) Possible discrimination or harassment

- 4.9 Both the employer and employees must not discriminate against or harass prospective or existing female employees or contract workers on grounds that they are breastfeeding. As described previously in this Guidance, an employer will be held liable for the actions of employees, unless the employer took reasonably practicable steps to prevent the discrimination or harassment.⁶²

Example: direct discrimination and vicarious liability of employer

Jenny agreed with her employer that she could breastfeed at work after she returned to work from maternity leave. The employer agrees that Jenny can take two 30-minute breaks during her working day to express milk. The employer has a written policy relating to breastfeeding employees, but it has not disseminated the policy to all staff members and has not provided any training to staff on the policy. Jenny's direct line manager is Paul. He disapproves of women breastfeeding at work and taking time off at work to express milk. He decides not to give Jenny a pay increment for that year because of Jenny taking time off to express milk. The employer becomes aware of Paul's conduct but fails to take any action to prevent the refusal of an increment. Paul's conduct is likely to be direct breastfeeding discrimination, and the employer is also likely to be liable for that conduct as he/she did not take any reasonably practicable steps to prevent it.

⁶² Section 46(3) of the SDO

Example: breastfeeding harassment of a contract worker

Summer started work as a contract worker for a public relations agency. She informed the agency when she started that she has a newborn baby and requested to express milk for her baby at the office. The agency agreed and allows her to take two 20-minute breaks during the day to express milk. However, when Nick – one of the employees of the agency – saw Summer with the breastfeeding pumps at her desk, he made comments to her that “I bet you could make a lot of money selling your breastmilk”, and “But I can’t believe you are allowed an extra 40 minutes off to express milk when you could do that at home”. Summer felt humiliated and intimidated by Nick’s conduct, and such conduct is likely to be unlawful breastfeeding harassment. Nick will be liable and it is likely the agency will also be liable for the actions of its employee, unless the agency took reasonably practicable steps to prevent the harassment.

(c) Providing appropriate facilities or alternative arrangements

(i) Good practice

4.10 Where a female employee requests to breastfeed or express milk at work, an employer should consider what facilities are available, or could be adapted to enable her to do so. Alternatively, the employer should consider what alternative arrangements can be made.

4.11 The location for breastfeeding or expressing milk should be private, hygienic, and safe. There are a number of options which may be used or considered, depending on the resources of the employer, such as:

- ▶ a dedicated baby care room for breastfeeding or expressing milk;
- ▶ an existing multi-purpose room for employees (for example one that can also be used by staff feeling unwell);
- ▶ an existing room that can temporarily be adapted for breastfeeding (for example a meeting room);
- ▶ setting up a screen or curtain in a secluded corner of a room and using appropriate signage such as “*Mummy’s breastfeeding break, please wait*”; and
- ▶ allowing an employee to visit nearby community baby care facilities to express milk.⁶³

⁶³ Employer’s Guide to Establishing Breastfeeding Friendly Workplace, June 2015, Department of Health, Family Health Service, page 5, <http://www.fhs.gov.hk/english/breastfeeding/30031.pdf>

- 4.12 Toilets and bathrooms are never suitable facilities for breastfeeding employees, as they may not be hygienic and therefore could risk the health of the child and mother.
- 4.13 Many employers are small businesses in Hong Kong, and may not have appropriate facilities for expressing milk given the small and often congested offices or working environment. In such circumstances, the employer should agree viable alternatives with the employees. This could, for example, involve (as stated above) allowing the employee to visit nearby community care facilities; allowing the employee to go home briefly if they live nearby to breastfeed or express milk; or coming to an agreement with a neighbouring business (which does have appropriate facilities) on allowing the employee to use the neighbouring facilities.
- 4.14 The following facilities should be provided where possible, subject to the resources of the employer:
- ▶ a chair with back rest for breastfeeding mothers to sit down when expressing milk;
 - ▶ a small table for placing the equipment needed during milk expression;
 - ▶ a power socket for any electrical equipment (for example electrical breast pump);
 - ▶ other sanitary facilities, such as soap, and sink with running water so that the equipment and hands can be washed; and
 - ▶ a refrigerator for storing the breast milk: this may be the same refrigerator as used by other staff, for example in the pantry/kitchen.⁶⁴

Good practice case study: providing appropriate facilities

Mary, a breastfeeding mother, is an employee of ABC Limited which operates a small business in an industrial estate. Neither the office of ABC Limited nor any other offices in the building has a babycare room for expressing milk. However, ABC Limited does have a storeroom, which is clean, quiet, and can be made private and adapted for breastfeeding purposes when required by Mary. Both the employer and Mary are pleased with and agree to those arrangements.

⁶⁴ Employer's Guide to Establishing Breastfeeding Friendly Workplace, June 2015, Department of Health, Family Health Service, page 6, <http://www.fhs.gov.hk/english/breastfeeding/30031.pdf>

Good practice case study: making alternative arrangements

Cynthia returns to work after maternity leave and requests to breastfeed her child. She works in a small open plan office in Chai Wan, which has no appropriate room or space that is suitable to be adapted for breastfeeding.

Cynthia lives close to the office and asks her manager to allow her to return home at lunchtime to feed her baby who is cared for by Cynthia's foreign domestic helper during the day. She also requests if she can extend her lunch break by 15 minutes to allow her to breastfeed. The manager considers this request and allows it, given there are no suitable facilities at the office and she lives close by.

(ii) Possible discrimination relating to facilities or alternative arrangements

4.15 Where an employer or partnership firm fails to provide appropriate facilities to enable a female employee or partner to breastfeed, or fails to allow alternative arrangements, that may amount to unlawful discrimination, unless they can demonstrate that the failure to provide the facilities or alternative arrangements is justified.

Example: direct discrimination – refusal to provide facilities

Tina, who is a partner in a law firm, returns to work after taking agreed maternity leave. The firm has more than six partners so it must comply with the SDO.⁶⁵ She requests to express milk at the office and asks that a meeting room be temporarily adapted when she needs to express milk, with a removable sign on the door to give her privacy and alert other staff members. The meeting room is suitable for breastfeeding, and the firm allows the room to be used for other purposes, such as having lunch, and prayers by staff members with religious beliefs. The firm, however, refuses Tina's request, stating that the workplace is not for breastfeeding and that she cannot use the meeting room to breastfeed under any circumstances. This may be direct breastfeeding discrimination.

Example: indirect discrimination – refusal to allow alternative arrangements

Maggie works as a receptionist in a medium-sized office (with 30 staff members) and after she returns to work from maternity leave, she asks to express milk. As she is aware that the office does not have an appropriate room to express milk, she requests that she be allowed to go to the adjoining shopping centre, which is five minutes away and has a public baby care

⁶⁵ Section 15 of the SDO

room. She requests to do so once a day at 11am for 30 minutes, as that is physically the easiest time for her to express milk. The employer refuses and says that no staff is allowed to leave the office except at lunch hours. This may be indirect breastfeeding discrimination, unless the employer can prove that the requirement is justified. The requirement may, for example, be unjustified if there is another staff member that can perform Maggie's duties as a receptionist while she takes a break to express milk.

(d) Considering requests to adjust working conditions

4.16 There are a number of possible ways in which adjustments could be considered and implemented where an employee requests to breastfeed after returning from maternity leave, or is otherwise breastfeeding, such as where the employee adopts a baby. These can include such adjustments as:

- ▶ requesting additional breaks to express milk, or extending existing breaks, such as lunch breaks;
- ▶ requesting flexible working arrangements, such as altering the start and end times of work;
- ▶ requesting changes to working conditions, such as reducing from full-time to part-time work, or changing working patterns (for example reducing working hours per day or not doing shift work); and
- ▶ requesting a temporary alternative role, if the existing role may present a threat to the health of the mother or baby.

4.17 If an employer has received a request by an employee to make an adjustment to working conditions while they are breastfeeding, the employer should discuss with the employee whether this will have any effect on the salary or other entitlements of the employee, and the agreement reached should be recorded in writing where applicable. This is discussed further below in relation to the examples of possible adjustments.

4.18 It should also be remembered that such requests for changes in working conditions will likely be of a temporary nature during the period of breastfeeding. In addition, there should be an opportunity to review the changes or conditions and to adapt to the particular needs of the employee. For example, after six months, babies usually start eating solid food, so an employee may wish to reduce the number of breaks for expressing milk after that time. However, it is an individual choice of mothers as to how long they wish to breastfeed, and increasing numbers of women breastfeed for at least one year (see Section 2 on Benefits of breastfeeding).

4.19 Good practices in relation to these different types of adjustments to working conditions are discussed further below. The Guidance also provides examples of what may constitute discrimination in the context of such issues of adjustments to working conditions.

(d)(i) Additional or extended breaks and impact on entitlements

Good practice

4.20 Employers should consider requests by breastfeeding employees for additional breaks or extended breaks, and whether such breaks are reasonable, depending on the nature of the business, the number of employees, the nature of the role of employees and other relevant factors.

4.21 The Department of Health recommends that employers should allow lactation breaks to express milk within one year after delivery (two 30-minute lactation breaks or one hour in total for an eight-hour working day). It further notes that when the child reaches the age of one and he/she is already eating a variety of solid food, most breastfeeding mothers only need one lactation break a day.⁶⁶ After that period, employers should consider any request of employees to continue breastfeeding, taking into account the particular situation and needs of an employee.

4.22 Where additional or extended breaks are requested to express milk and the length of time is consistent with the above Department of Health Guidance, the Department of Health Guidance recommends that those breaks are counted as paid working hours.⁶⁷

4.23 It is therefore recommended that an employer in such circumstances should not reduce the salary of an employee. The same approach should be taken in relation to the amount of bonuses, such that it is recommended that annual bonuses should not be reduced in similar circumstances, unless there is justification.

Good practice case study: additional breaks

Amy works as a waitress at a restaurant and asks her manager for two additional short breaks (20 minutes each) in order to express breast milk for her six-month-old baby. While one of the breaks would occur at off-peak times, the other break would be during peak hours. The manager initially wants to turn down Amy's request. However, they agree to start the second break half an hour earlier, so as to avoid the peak hours. Both are happy with this arrangement.

⁶⁶Employer's Guide to Establishing Breastfeeding Friendly Workplace, June 2015, Department of Health, Family Health Service, page 2 and 8, <http://www.fhs.gov.hk/english/breastfeeding/30031.pdf>

⁶⁷Ibid page 4

Possible discrimination relating to requests to take additional or extended breaks and impact on entitlements

- 4.24 Where an employer refuses to allow a breastfeeding employee to take additional or extended breaks to breastfeed or express milk without justification, possible indirect discrimination arises. For example, employers may have requirements or conditions of employment that only defined and limited periods are allowed for breaks (such as lunch). Although such policies may often apply to all staff members, they may indirectly discriminate against breastfeeding employees who wish to breastfeed or express milk outside of, for example, designated lunch hours. The crucial issue will be whether the employer has a reasonable justification for the requirement or condition, and for not permitting breastfeeding employees more time to breastfeed or express milk by providing additional or extended breaks. This will depend on the particular nature of the employment, the resources of the employer and other relevant factors.
- 4.25 An issue may arise where employers reduce an employee's salary or end-of-year bonus, on the ground that the additional or extended breaks taken to breastfeed or express milk has led to lower productivity. Apart from deviating from recommended practice, this may amount to indirect breastfeeding discrimination. Where the additional time taken to breastfeed or express milk is consistent with the above Department of Health Guidance, it is recommended that those breaks be counted as paid working hours.
- 4.26 It is important to also note that there is no obligation for a woman who is a candidate for an employment position to inform a prospective employer that she is breastfeeding. However, if a breastfeeding woman is offered a position, the prospective employee may wish to notify the employer so that appropriate arrangements can be made, for example, to discuss and agree breaks to breastfeed or express milk.

Example: reduction in salary

Janice is full-time staff of a company, who is paid monthly. She returns to work after giving birth to her child, and makes a request to her employer to extend her lunch break and take one additional break for expressing milk. She normally works 40 hours a week excluding breaks, and requests that she extends her lunch break by 30 minutes, and that she be able to take an additional 30 minutes at 4pm. Her employer tells her she can take the additional time off, but that her monthly salary will be reduced by a proportionate amount reflecting the reduction in her working hours, that is, based on working 35 hours rather than 40 hours per week. Though the employer says that all employees who request to have same or similar time off would be treated the same, the reduction in salary may constitute indirect breastfeeding discrimination and be unlawful. A reduction in salary is unlikely to be justified, where only reasonable time periods are taken to express milk, and an employee has otherwise completed their working hours.

Example: refusal to pay bonus

A company has a bonus policy for all employees, which entitles them to a 10% additional bonus per annum where they have worked satisfactorily. One factor in determining whether the employees have work satisfactorily is whether they have fully complied with the working conditions, including the numbers of hours worked per week. Siu-Mei returns to work after maternity leave and requests to take two additional 20-minute breaks per day to express milk.

Although the employer allows her to take the breaks, one year later the employer decides not to give the 10% bonus to Siu-Mei solely because of the extra time off she has taken to express milk. This is despite the fact that she has otherwise performed excellently, as indicated in her written appraisal. The refusal to pay the bonus is likely to be indirect breastfeeding discrimination and unlawful.

Example: no knowledge of breastfeeding status

Tze-wei left her previous employer while she was pregnant. After she gave birth she applied for and was successful in obtaining new full-time employment in a small trading business. She starts working three months after giving birth to her baby and asks her new employer if she can take two breaks of 30 minutes per day to express milk. The employer tells her she cannot take additional breaks as the policy of the company is that no one can take additional breaks in the company, and that in addition, she did not tell the employer or provide proof she had a newborn child and was breastfeeding during the interview. This is likely to be indirect breastfeeding discrimination. The fact that Tze-wei did not notify the employer that she was breastfeeding would not be justification for refusing additional breaks.

(d)(ii) Flexible working arrangements

Good practice

4.27 Flexible working arrangements can assist employees in a number of situations, including those with childcare responsibilities. For example, by allowing a father to start work one hour earlier than other colleagues, but finish one hour earlier, it may enable him to pick up his child from school in the late afternoon.

4.28 Flexible working can also benefit breastfeeding mothers and requests for such flexible working by breastfeeding employees should be considered by employers, especially since such adjustments relating to breastfeeding are temporary.

4.29 It should be noted that such flexible arrangements normally involve changes to daily start and end times of work, working from home some of the time, or the days of the week worked. Where this does not involve any changes in the numbers of hours worked per week, or only involves breaks for breastfeeding consistent with the Department of Health Guidance referred to above (two 30-minute lactation breaks or one hour in total for an eight-hour working day), it is recommended that there should be no reduction in the salary of the employee.

Good practice case study: flexible working

The normal working hours of a business with five employees are from 9am to 6:30pm, Monday to Friday. One of the employees, Maggie, requests to breastfeed when she returns to work after maternity leave. Maggie requests that she temporarily changes her working hours to commence work at 9:30am and finish at 7pm, in order that she can breastfeed her child at home before going to work. During the day her child is cared for by Maggie's mother. The employer considers the request and the business needs of the company. As the adjustment would not disrupt the work of the company, the employer is pleased to make the adjustment.

Possible discrimination in refusing to provide flexible working arrangements

4.30 A refusal by an employer to allow flexible start and end times for breastfeeding employees may also constitute indirect discrimination, unless it can be justified.

Example: refusal to allow later start time

Wendy works as a baker in a bakery where she is the only baker. There is only one other employee who is the manager of the bakery. When Wendy returns to work after maternity leave, she requests to start one hour later than normal (at 7am) so that she can breastfeed her child before she goes to work.

The employer states that it is not possible to start later, as the bread must be baked and ready when the bakery opens at 8am. Starting at 7am would therefore significantly and adversely affect the amount of bread produced for the peak time of selling bread, which is early in the morning.

However, the employer does say she will allow Wendy to take breaks to express milk during the day and finish work 30 minutes earlier than normal so that she can breastfeed her child after work.

The refusal to allow a later start time is therefore unlikely to be unlawful indirect discrimination, as it is likely to be justified in these particular circumstances.

4.31 In small businesses where there is only one employee responsible for daily operations, the employer may need to consider other possible temporary arrangements to allow an employee who is breastfeeding to be able to breastfeed or express milk.

Example: request to close shop for short period to allow employee to express milk

Kitty is employed as the only employee in a small retail shop selling clothes in a shopping centre. After she has a baby, she requests that her employer allow her to close the shop for 20 minutes during the working day when it is quieter at 11am, so that she can express milk for her baby. The shop will not be closed at any other time and is open from 9:30am until 7pm. Her employer agrees that it is quieter at 11am but still does not want to close the shop, and tells Kitty she cannot express milk at all. The refusal to allow the shop to be closed for a short period to allow Kitty to express milk may be indirect breastfeeding discrimination. Relevant factors to take into account would be, for example, whether the employer is being reasonable in not allowing the shop to be closed for a short period to allow Kitty to express milk, and whether the short period of closure would have significant detrimental economic impact on the shop's business.

(d)(iii) Changes in working conditions

Good practice

4.32 In some types of situations or working environments it may be appropriate for employers to consider requests for changes to working conditions. For example, such reasonable changes may be reduced work from full-time to part-time temporarily, or changes from doing night to day shifts. This may be important in order to avoid potential health problems for the mother or child, and to enable the employee to continue to breastfeed.

4.33 Employers should also consider whether a change in working conditions would have any impact on the salary of the employee, which will depend on the nature of the change requested. For example, if an employee requests to change from full-time work to part-

time work temporarily while she is breastfeeding, the employer may consider agreeing with the employee an adjusted salary in an amount proportionate to the reduction in working time.

- 4.34 If an employee was requesting a change from doing night shifts to doing day shifts, consideration should be given as to how that may or may not affect salary. For example, if an employee was doing the same number of hours during the day shifts as night shifts and the salary was the same for day shifts, it would not be appropriate to reduce their salary. However, in the same circumstance where the numbers of hours worked for day and night shifts was the same, but the salary for working day shifts was significantly less than for night shifts, it may be justifiable to temporarily and proportionately adjust the salary while the employee was working day shifts and breastfeeding.

Good practice case study: change from full-time to part-time work

Melody has been advised by her doctor to breastfeed for at least 12 months because there is a strong history of eczema in her family. She returns to work when her baby is three months old and asks to work part-time for nine months in order to continue breastfeeding around working hours. Her normal full-time work involves working five days a week with two days of holiday (Saturdays and Sundays). She requests to reduce her work to four days per week (from Monday to Thursday). The employer and employee agree that for that period of nine months, her salary would be adjusted to take into account the change from full-time to part-time work.

Good practice case study: change from night to day shifts

Huen Yee works as a security guard at a housing estate. She normally works night shifts. However when she returns to work from maternity leave, she requests to breastfeed her baby and to temporarily change her working conditions to day-time shifts. This is because night feeding increases her supply of milk. The employer considers the roster of the other security guards. As they can make adjustments to swap night shifts temporarily, and the salary of a security guard working day shifts is the same as a security guard working night shifts, the employer agrees to the request, and without any change in salary.

Possible discrimination by refusal to provide change in working conditions

- 4.35 A refusal to allow changes to working conditions, such as changing to part-time work, or temporary changes to working hours may also constitute indirect discrimination against breastfeeding employees, unless it can be justified. Below are two examples,

the second one being a decided case from the United Kingdom relating to breastfeeding discrimination.

Example: refusal to allow part-time work

Ms Wong has been advised by her doctor to breastfeed for at least 12 months because there is a strong history of eczema in her family. Medically it is well established that breastfeeding helps to reduce eczema in babies. She returns to work when her baby is six months old and asks to work part-time for six months in order to continue breastfeeding around her working hours. The employer refuses without providing any explanation. This may be unlawful indirect breastfeeding discrimination, unless the refusal to work part-time can be justified by the employer.

Example: refusal to allow reduced working shifts

In England, two of Easyjet's female cabin crew, who were breastfeeding mothers, requested (at the recommendation of their doctors) to have their shifts reduced to a maximum of eight hours. This would enable them to express their milk on either side of their shifts (and thereby avoid any medical complications associated with going for long periods without breastfeeding or expressing milk). Easyjet did not carry out a risk assessment and, ignoring the medical recommendations of the doctors of both women, rejected their request for a bespoke, restricted roster. After receiving complaints, Easyjet offered the women alternative ground duties limited to a fixed period of six months, after which point they suggested breastfeeding becomes a woman's "choice".

The Employment Tribunal ruled that Easyjet's refusal to offer shorter shifts beyond six months amounted to indirect sex discrimination: a refusal to allow the eight-hour shift appears gender neutral, but in practice would disadvantage breastfeeding mothers, who can only be female, hence it has a particularly negative impact on female staff compared to male. Easyjet made a number of arguments attempting to objectively justify the practice, including the possibility of flight delays outside their control which could extend working times, and the disruption to colleagues that bespoke rostering arrangements for breastfeeding staff could cause. However, these arguments were not accepted by the Tribunal, and as a result the refusal to offer shorter shifts was found to constitute unlawful indirect discrimination.⁶⁸

⁶⁸ *McFarlane & Ambacher v Easyjet Airline Co. Ltd*, 4 October 2016, Cases No: 1401496/2015 and 3401933/2015 <https://www.unitelegalservices.org/media/1806/mcfarlane-ambacher-v-easyjet-airline-company-limited-2016.pdf>

(d)(iv) Alternative roles

Good practice

- 4.36 If the inherent nature of the employment position involves possible health risks to a pregnant or breastfeeding mother or her child, it may be necessary for an employer to consider temporary alternative roles within the business, if they are available.
- 4.37 For example, some types of work may involve exposure to ionising radiation. These include work in which women are working with unsealed radioactive materials.⁶⁹ In such cases, it is appropriate for the employer to revisit the risk assessment, which should have been carried out for a pregnant or breastfeeding worker before she starts her work involving ionising radiation, in order to determine what measures should be put in place to protect the baby.
- 4.38 If possible, temporary alternative roles with the same or similar terms and conditions should be arranged by the employer. This would be important to avoid any possible indirect discrimination against an employee who is breastfeeding.

Good practice case study: alternative roles

Mei-ling works as a nurse in a section of a Hong Kong hospital treating patients with cancer. Mei-ling is normally involved in nursing patients who have been injected with radioactive materials for cancer treatment. After considering the risks and potential dose received by the baby based on the working conditions and duties of Mei-ling, while Mei-ling was pregnant she was temporarily given different nursing tasks to restrict the dose received by the baby.

When Mei-ling returned to work after maternity leave, she requested to be assigned with tasks that would suit a breastfeeding mother. Concerned about the possible intake or contamination of radioactive materials due to the handling of unsealed radioactive materials that may also affect children of breastfeeding women, she requests her employer to temporarily assign her to do different nursing tasks that do not involve the handling of radioactive materials, but are at the same level and seniority of work (that is same nature or complexity for a person of her seniority and experience). The employer agrees after thoroughly re-assessing the possible relevant health risks arising from Mei-ling's work. No changes are made to the terms or conditions of the employment, including salary.

⁶⁹ See for example "Working safely with ionising radiation Guidelines for expectant or breastfeeding mothers", produced by the Health and Safety Executive in the United Kingdom, 2005, <http://www.hse.gov.uk/pUbns/indg334.pdf>. Although this Guidance applies to the United Kingdom, similar issues regarding safety of employees working in Hong Kong, for example at hospitals, could arise.

Possible discrimination by refusal to provide alternative role

4.39 Where there is a direct risk to the safety of a breastfeeding mother and her child because of the working conditions, it may be discrimination to refuse to provide a temporary alternative role.

Example: refusal to provide an alternative role

In the previous good practice example relating to alternative roles (see page 32), Mei-ling normally worked as a nurse in a section of a Hong Kong hospital treating patients with cancer. She was temporarily allowed to do different nursing roles while she was breastfeeding.

The same employer hospital refuses her request, saying that they have a policy that for all staff they cannot change roles temporarily. Although this policy applies to all staff members, it may indirectly discriminate against pregnant or breastfeeding staff members who may need to change roles temporarily for health and safety reasons. As a result, the refusal may constitute unlawful indirect discrimination unless the employer can justify the policy.

5. Making a complaint and the role of the EOC

- 5.1 Where any woman believes that she has been discriminated against or harassed on the ground of breastfeeding in employment or related sectors, she can lodge a complaint with the employer, principal or other relevant person.
- 5.2 The woman may also lodge a complaint in writing with the EOC within 12 months from the time of the incident. On receiving the complaint, the EOC will investigate into the matter and attempt conciliation. If the case cannot be resolved through conciliation, the complainant can apply for legal assistance from the EOC. The complainant can also consider applying for legal aid from the Legal Aid Department or use her own resources to initiate legal proceedings before the District Court within 24 months from the time of the incident
- 5.3 For further information relating to making a complaint to the EOC, please see below.

How to contact the EOC and make a complaint:

Anyone who feels that he/she has been discriminated against, harassed or vilified as specified in the four anti-discrimination Ordinances may lodge a complaint **in writing** to the EOC and submit the complaint to the EOC through one of the following channels:



Letter by Mail



[Online form on the EOC website](#)



Fax



In person at the EOC office



Telephone (for enquiries only)



SMS service (For enquiries by people with hearing impairment/speech difficulties)

Enquiry related to anti-discrimination ordinances: [On-line Enquiry Form](#)

Complaint related to anti-discrimination ordinances: [On-line Complaint Form](#)

Enquiry and complaint related to EOC's services: [On-line Form](#)

Contact the EOC

Tel: (852) 2511 8211 (for general enquiries only)

Fax: (852) 2511 8142

Address: 16/F, 41 Heung Yip Road, Wong Chuk Hang, Hong Kong.

Email: eoc@eoc.org.hk (for general enquiries only)

SMS service: 6972566616538 (For enquiries by people with hearing impairment/speech difficulties)

(For enquiries and complaints about discrimination under the anti-discrimination Ordinances, please make use of the above online forms.)

6. Further resources

Department of Health, Employers' Guide to Establishing Breastfeeding Friendly Workplace:

<http://www.fhs.gov.hk/english/breastfeeding/30031.pdf>

Department of Health, An employee's Guide to Combining Breastfeeding with Work:

<http://www.fhs.gov.hk/english/breastfeeding/20038.pdf>

UNICEF Hong Kong, "Say Yes to Breastfeeding"

<http://www.sayvestobreastfeeding.hk/en/>

World Health Organization, Maternal Newborn Child and Adolescent Health

http://www.who.int/maternal_child_adolescent/topics/child/nutrition/breastfeeding/en/ht
tp://www.who.int/maternal_child_adolescent/topics/child/nutrition/breastfeeding/en/

World Health Organization, Infant and Young Child Feeding

<http://www.who.int/en/news-room/fact-sheets/detail/infant-and-young-child-feeding>