

FACTSHEET: MATERNITY LEAVE

This factsheet, part of the employee leave section of the Employers' Guidebook gives more detail on maternity leave and the legal requirements of employers to pay their employees maternity leave under Vanuatu law.

1. WHAT IS THE MAIN LAW COVERING MATERNITY LEAVE?

Sections 36 – 37 of the Employment Act [Cap 160] (the Act) provide the law on annual leave entitlements for employees. Section 36 of the Act was amended in 2008 and 2009.

This means the Act has changed since it was last consolidated and published in 2006. An unofficial update of section 36 can be found in the *tools* section of this chapter.

2. ARE ALL FEMALE EMPLOYEES ELIGIBLE TO CLAIM MATERNITY LEAVE?

Unlike annual leave and sick leave, which require employees to have worked for a certain amount of time before being eligible to claim leave, there is no minimum time an employee must have worked for you before she is entitled to claim maternity leave.

Maternity leave is also available to all employees regardless of whether they are part time, full time or casual, but regular, staff. Whilst there is no case law on this point, this interpretation is in accordance with the plain meaning of the words in the Act. We know from past experience that when this issue has been referred to the Labour Office the Labour Office will require maternity leave to be paid regardless of how long the employee has been in employment.

Bizniz recently employed a woman on a full-time basis and after just three months in the job she has supplied a medical certificate confirming her pregnancy and she is asking for maternity leave. Does Bizniz have to pay her maternity leave?

Yes under the law Bizniz is required to pay her maternity leave at the prescribed rate for up to 12 weeks.

3. ARE MEN ENTITLED TO PATERNITY LEAVE? HOW ABOUT WOMEN WHO ADOPT BABIES?

There is no entitlement for men to take paternity leave. Nor does maternity leave apply to women who adopt babies.

4. HOW MUCH MATERNITY LEAVE MUST I GIVE MY EMPLOYEES?

The amount of maternity leave is 12 weeks. The law says that up to 6 weeks must be taken before the woman gives birth and 6 weeks must be taken after the woman gives birth (section 36(1)).

This wording means that it is compulsory for a woman to take leave.

However, if the employee wants to work up to the date where she gives birth then she can do so providing she produces a medical certificate which certifies she is safely able to work during the 6 weeks prior to giving birth (section 36(2A)).

The period of leave can be extended by up to 3 weeks if a doctor certifies that the woman is unfit to return to work after giving birth (section 37).

In practice many employers choose to allow the woman to decide when the 12 weeks will be taken, as some women prefer to work up to their date of birth and take most leave after the child is born.

Grey area: Some women want to return to work soon after giving birth. Whilst this is not permitted in law, section 6 permits any arrangement that is more favourable to the employee. If the employee wants to return to work this may be covered by section 6.

NB This is the *minimum* amount of maternity leave. Employers can choose to give more maternity leave if they want to.

Bizniz has an employee who is currently on maternity leave and wants to return to work early. Is this possible (or even advisable)?

Under the law it is **not** possible for an employee to return to work from maternity leave early. It is, however, fairly common practice in Vanuatu. In such a circumstance it would be appropriate as a good employer and in respect to any potential liability that Bizniz requests that she obtains a medical certificate confirming her ability to return to work. It would also be a good idea if she puts her request to return to work early to Bizniz in writing.

5. HOW MUCH DO I HAVE TO PAY MY EMPLOYEES WHILE THEY ARE ON MATERNITY LEAVE?

The amount of payment that must be given to the employee whilst he or she is on maternity leave is 66% of the employee's usual salary or wage (section 36(2)).

The law is not clear on what should happen if the employee's wage varies depending on the number of hours worked. In this situation the approach taken to calculating annual leave rates should be applied and the amount of payment should be based on the average daily pay over the past 12 months (section 31).

In practice VNPF contributions are paid on remuneration given to employees whilst they are on maternity leave.

6. WHAT MEDICAL CERTIFICATES MUST THE EMPLOYEE PROVIDE?

An employee must produce a medical certificate showing her estimated date of giving birth (section 36(1)).

7. IS THE EMPLOYEE ENTITLED TO A NURSING ALLOWANCE WHEN SHE RETURNS TO WORK AFTER GIVING BIRTH?

Employees who are nursing are entitled to take 1 hour twice a day until the child is 2 years old to nurse. This time must be paid (section 36(3)).

There is no requirement in law that the employee proves she is nursing via a medical certificate, although an employer could require this in an employment contract.

If employees are paid a salary, rather than an hourly wage, employers should be particularly conscious to ensure that workloads are reduced appropriately to take into account the nursing allowance.

Mary has returned to work after having a baby. Her usual hours of work are 7.30 am – 4.30 pm. She wants to work from 8.30 am to 3.30 pm to allow her to nurse her baby before she comes to work and at the end of the day. Does Bizniz have to allow this? Does Bizniz have to pay for the 2 hours Mary does not work?

The law does not say anything about how the hours taken for nursing are to be set. Common sense suggests that, as the purpose of the nursing allowance is to feed the baby employers should accommodate hours off that facilitate this. In this situation shortening the work day to reduce times between nursing sessions of the baby appears to be practical and sensible.

For the first two years Bizniz will have to pay for the 2 hours that Mary does not work, but takes as a nursing allowance.

8. ARE THERE LIMITATIONS ON TERMINATING A WOMAN'S EMPLOYMENT WHILE SHE IS PREGNANT?

The law prevents employers from terminating a woman whilst she is absent on maternity leave (section 37).

There is no provision in the Act preventing an employer from terminating a woman's employment prior to her commencing maternity leave. Good employers should, however, be aware that terminating a woman's employment whilst she is pregnant is against the spirit of the Act. As such a good employer should only terminate a pregnant woman's employment if there is a work performance related reason to do so.

9. ARE THERE RESTRICTIONS ON THE POSITION THE WOMAN MUST RETURN TO?

Women who return from maternity leave must be placed in the same position, or given a higher position (section 36(4)). It is not possible to demote a woman whilst she is on maternity leave.

10. WHAT RECORDS DO I NEED TO KEEP ABOUT MATERNITY LEAVE?

There are no laws that require you to keep leave records. However good employers should keep records of leave because records:

- help you to make sure that you are providing leave in accordance with the law; and
- allow you to check that employees are not abusing leave provisions by taking too much leave.

A simple form for recording maternity leave is included the *tools* section of this chapter.