

General Employment Protections for Pregnant Employees in Israeli Law

The WOMEN'S WORK LAW, 5714-1954, provides a female employee who is pregnant with the right to maternity leave and protections from having her position terminated due to the pregnancy, as well as other benefits. In addition, a female employee is protected against discrimination by the EQUAL OPPORTUNITY AT WORK LAW, 5748-1998. An employee (male or female) also has a judicially recognized right to argue against the reasons for her (or his) termination. All of these can come into play when terminating an employee who is pregnant or recently gave birth, as was the case in L.A. (Nat'l) 627/06 *Mory v. M.D.P. Yellow Ltd.* (March 16th, 2011) [Nevo Publishing Ltd.], which is referenced to in the discussion below.

A. Maternity Leave

The extent of the leave granted to a pregnant employee depends on how long the employee worked at the office (in the same place or for the same employer). If the worker was employed by the employer / place for at least 12 months prior, then she is entitled to maternity leave for a total of 26 weeks, seven or less of which can be taken prior to the approximate birth date, and 14 of which are to be taken afterwards (WOMAN'S WORK LAW § 6(b)(1-2)). If the employee worked less than 12 months prior, then she is only entitled to 14 weeks maternity leave, 7 or less of which she can take prior to giving birth and the rest afterwards (*id.*, §6(b)(5)). Under certain circumstances these periods can be lengthened, such as if the worker is hospitalized for two weeks straight, has twins (an extra three weeks (*id.*, §6(c)) or in other cases detailed in the law (*See id.*, §§6-7A). During the period the employee is on maternity leave, an employer is prohibited from employing the employee (*id.*, §8).

B. Protection against Termination

In order to protect a female employee from being terminated as a result of her having been absent for so long due to the pregnancy or of the employer fearing that the recent pregnancy / newborn child will interfere with the employee's ability to work, or from some other pregnancy-related reason, the Law prohibits an employer from terminating an employee when she is pregnant or just prior to maternity leave (*id.*, §9(a)), while she is on maternity leave (*id.*, §9(c)(1)), or for sixty days following maternity leave (*id.*, § 9(c)(1a)).¹ Furthermore, absentia due to maternity leave is not to harm the seniority of the worker with the employer (*id.*, § 6(i)).

The granting of the 60-day post-maternity leave protection from termination is said to aim at allowing the employee to return to work, acclimate and reintegrate herself into the work place. *See Mory, supra*, ¶ 21 (explaining that "[t]he purpose is to prevent the employer from blocking the return of the employee to work, to ensure the employee's right to return to work at the end of her maternity leave, and in order to accomplish this, to give her a real chance to return and integrate and prove her capabilities even after extended absence from work").

¹ This concept of a post-maternity leave buffer period was added in 1998 under WOMEN'S WORK LAW (AMEND. NO. 15) 5758-1998. It was originally 45 days, but was lengthened to 60 days in WOMEN'S WORK LAW (AMEND. NO. 33) 5767-2007.

Note that except for circumstances detailed in the law – e.g., the employer is bankrupt or no longer operates – the 60-day protection is practically absolute. Even if the employer wants to terminate the employee for completely justified reasons having nothing to do with the pregnancy or the fact that the employee is a woman or a parent, the employer is prohibited from doing so during the 60-day period. *See id.* ¶ 22 (“The provisions of the Law are categorical. No discretion whatsoever is permitted to the employer, other than returning the employee to work, except in exceptional circumstances detailed in the Women’s Work Law”).

Although it does not specifically state it in the Law, it would probably be a violation of the Law to inform an employee on maternity leave that she will be terminated following the 60-day period. In *Mory, supra*, for instance, the plaintiff was informed whilst she was on maternity leave that her position would be terminated. She was offered the choice of either working through the statutory period, which was at the time 45 days, or not working and accepting compensation for that time. The employer claimed that since the plaintiff had accepted the compensation offer she had consented to the termination. The National Labor Court rejected this argument, on the grounds that the employee was presented with a false choice since in any case she would be terminated at the end of the statutory period. This meant, the Court stated, that “the renewed integration of the employee in her work, even after the 45-day period, was not an actual possibility from the employer’s perspective.” *Id.* ¶30. The Court’s statement on this point not only rejected the argument that the employee had consented, but also implied that the employer must offer the employee a real opportunity to reintegrate herself into her position. A pre-determined decision to terminate the employee – even if the actual date of termination is to be after the statutory period, would violate that obligation and the Law’s purposes.

Similarly, compensation of the employee’s salary for the statutory period is not a sufficient remedy for terminating an employee during the 60-day period. The reason for this is that the goal of the law is not ensure that the employee is economically provided for, rather to eliminate potential unfair obstacles to the reintegration of the employee who has taken maternity leave. Thus while compensation for early termination in a regular situation is permissible – even required, this is not the case for terminating an employee returning from maternity leave during the 60-day period, since it has a completely different purpose. *See e.g., id.*, ¶ 27 (rejecting the lower court’s analogy to the requirement of compensation for early-termination).

C. Right to Argue against Termination

An employee, male or female is also provided with the right to present arguments against the reasons why he or she is being terminated.²

“In order to fulfill the right to argue in its entirety, the company [is] required to notify the employee in advance of its intention to terminate her, and to give her sufficient time to prepare for the discussion and prepare her arguments against the termination. The company [is] required to provide the employee

² Apparently this is based on case law, not a particular piece of legislation. *See Mory, supra*, ¶ 33.

with the opportunity to try and convince her supervisors to change the negative decision” (*Mory, supra*, ¶ 35).

Thus, in *Mory, supra*, when the employer called the employee in for a meeting and only at the meeting informed her of her termination, without giving advance notice of the meeting’s purpose, the employer infringed employee’s right to argue against her termination, since there was no way for her to prepare a real response. *See id.*, ¶¶33-35.

D. Prohibition against Sexual Discrimination – THE EQUAL OPPORTUNITY AT WORK LAW, 5748-1988

In addition to the above prohibitions, an employer who terminates a pregnant employee may also be violating THE EQUAL OPPORTUNITY AT WORK LAW, which prohibits sex-based discrimination.³ The law states:

“An employer shall not discriminate between employees or demands of work based on *sex*, sexual orientation, personal status, *pregnancy*, fertilization treatments, in vitro fertilization treatments, *parenthood*, age, race, religion, nationality, country of birth, perspective, party or reserve duty service . . . in any of the following:

- (1) Hiring;
- (2) Work conditions;
- (3) Advancement;
- (4) Training or continuing professional education program;
- (5) Termination or termination compensation;
- (6) Benefits and payments in connection with severance”

(*Id.* §2(a)) (emphasis added).⁴

The level of discrimination needed to constitute a violation of the law is minimal. In the case of hiring, discrimination can be found in the advance knowledge that an interviewee is a woman. *See Mory, supra*, ¶ 39 citing L.A. 129-3/56 *Sharon Pluktin and Bros. v. Eisenberg Brothers Ltd.*, 33 P.D.L. 481. With regards to termination, if the employee’s sex, role as a parent, or pregnancy is even one of the considerations or reasons behind the termination, the law will have been violated. *See Mory, supra*, ¶ 41. In *Mory*, the defendants’ protestations that seeing the high quality of work of the plaintiff’s substitute, made them realize the poor quality of the plaintiff’s work, had the reverse affect. Instead of convincing the Court that the termination had nothing to do with the pregnancy, the Court held that because the plaintiff’s pregnancy and maternity leave triggered this realization, the plaintiff was being discriminated against on the basis of her having been pregnant. *See id.* ¶ 50.

Another factor which eases the burden on the employee alleging discrimination in hiring or firing is the fact that the burden of proof is placed on the employer. *See* EQUAL OPPORTUNITY AT WORK LAW § 9(a). According to the Law, in a

³ Prior to the approval of this law, the courts prohibited discrimination on their own, and then under Basic Law: Human Dignity and Liberty. *See Mory, supra*, ¶ 36.

⁴ It should also be noted that the law also states that “it is not considered discrimination under this Section if it is required by nature or existence of the job or position” (§ 2(c)).

termination-discrimination suit, once the employee makes out a prima facie case against the employer by proving “that there was no reason based on his behavior or actions for his dismissal,” the employer then carries the burden of proof in contradicting the employee’s claims and proving that no discrimination was present. *See id.* §9(a)(2); *Mory, supra*, ¶ 40 (citing EQUAL OPPORTUNITY AT WORK LAW § 9 (a)(2) and L.A. 25-3/33 *Committee of Staff Persons of Daily Air and Bros. v. Edna Hazin and Bros.*, 4 P.D.L. 365, at p. 372 (where this principle was judicially established prior to the enactment of the law)).