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Guide to Assist Law Firms in Developing Pregnancy and Parental Leave Policies for Partners

January 2010

The Law Society of
Upper Canada

Barreau
du Haut-Canada

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Introduction

This Guide was developed by the Law Society of Upper Canada, in collaboration with the firms participating in the Law Society of Upper Canada's Justicia Project. The Guide is intended as a tool to assist firms when they develop internal policies on pregnancy and parental leave for their partners. The Guide provides general advice. The Guide is not legal advice and is not meant to be the ultimate or ideal policy. Firms have no obligation to adopt all or any part of the sample policy options.

The Guide is drafted to apply to equity partners who are not employees of law firms. The Guide assumes that the *Employment Standards Act (ESA)* and the *Employment Insurance Act (EIA)* do not apply in those cases. The term partner in the Guide refers to equity partners.

A separate Guide is available for associates who are considered "employees of the firm" under the *ESA* and the *EIA*. Please refer to the *Guide to Assist Law Firms in Developing Pregnancy and Parental Leave Policies for Associates* when developing a policy for employed lawyers or articling students of the firm.

A firm could also extend this policy to make it applicable to other types of partners, such as non-equity partners, income partners or special partners. If that is the case, firms should consider whether the non-equity partner is tantamount to an employee of the firm and covered under the *ESA* and the *EIA*.

The Guide is drafted to apply to a legal environment composed of partners, associates and other staff, not subject to a collective agreement. Firms should tailor their policy to reflect their own structure and culture. For example, where a workplace is governed by a collective agreement, the firm should design its policies to take that into account.

Law firm policies also vary based on a variety of factors, such as firm culture, size of firm, practice areas, existing policies, jurisdictions in which offices are located and economic considerations. The Guide provides assistance to firms by outlining the types of issues that should be considered when developing pregnancy and parental leave policies for partners,

identifying legal obligations, providing language that firms may wish to use in their policy and presenting information about firm practices.

Firms are free to cut and paste any section of the sample policy options. Firms may also wish to add to the sample policy options or delete any sections.

We thank Justicia firm participants for their engagement in this project and the tremendous amount of work undertaken to develop this Guide.

Reasons to Adopt a Policy

Firms in the Justicia Project have committed to reviewing their policies relating to pregnancy and parental leave and/or to considering the adoption of policies in areas such as pregnancy and parental leave and customized work arrangements, to enhance the retention of women in private practice. Of the participating firms in the Justicia Project, the following represents the percentage of firms that have pregnancy and parental leave policies.

Percentage of firms with pregnancy and parental leave policies

	% of out of GTA and Ottawa firms with policies	% of small and medium firms with policies	% of large firms with policies	% of all firms with policies
Pregnancy leave policy for associates	50%	79%	100%	88%
Parental leave policy for associates	30%	59%	81%	68%
Pregnancy leave policy for partners	50%	39%	91%	60%
Parental leave policy for partners	0%	17%	50%	31%

Although a majority of law firms in the Justicia Project have adopted pregnancy leave policies for both associates and partners, and a majority of firms have adopted parental leave policies for associates, some law firms still use an ad hoc approach to providing pregnancy and

parental leave and benefits to associates and partners. There are numerous reasons for law firms to develop and implement pregnancy and parental leave policies, including,

- increasing transparency, objectivity, fairness and consistency in decision making;
- providing an internal procedure to process requests for leaves and benefits;
- enhancing a firm wide acceptance that pregnancy and parental leaves are positive practices;
- showing that the law firm's management is committed to advancing inclusiveness and diversity at the firm and to providing the appropriate support to new parents;
- communicating the firm's commitment to potential recruits, to staff and lawyers of the firm, and to clients;
- ensuring that the firm complies with its statutory obligations, including its obligations under the *Employment Standards Act (ESA)*, the *Employment Insurance Act (EIA)* and the *Ontario Human Rights Code (the Code)*, and similar legislation in other applicable jurisdictions.¹

¹ This Guide applies only to Ontario. . Therefore, it discussed legal obligations under the *ESA*, *EIA*, the *Code* and the Law Society of Upper Canada *Rules of Professional Conduct* only.

Issues to Consider when Drafting Policies

Economic considerations vs. value of policy

While economic considerations are important to take into account when developing a firm pregnancy and parental leave policy for partners, the value of providing pregnancy and parental leave and benefits to partners should also be recognized.

Policies to support women during their childbearing years and to assist women and men in balancing the demands of their career and family responsibilities, provide long-term benefits for law firms, and contribute to the promotion of equality, human dignity and respect.

Firm structure

When drafting a pregnancy and parental leave policy, the firm should take into account applicable legislation and common law, and may wish to consider market and economic conditions, the culture and structure of the firm, firm size, practice areas, other firm policies, contractual and partnership agreements, and the jurisdictions in which the policy will apply.

Partnership agreement

When drafting a policy for partners, a firm should ensure consistency with other firm policy, more specifically its partnership agreement.

Benefits

The *EIA* and the *ESA* do not apply to equity partners and therefore firms do not have to follow the minimum legal requirements provided under the *EIA* and *ESA*. However, firms should consider including clauses to address the following:

- provisions for compensation during the leave;
- length of leave;
- eligibility criteria for leaves and benefits;
- benefits during the leave;
- a process to request a leave.

It is a good practice to outline in a pregnancy and parental leave policy the minimum entitlement to pregnancy and parental leaves and benefits, and a process to request a leave and benefits. In addition, partners who are eligible under the pregnancy and parental leave policy may have unique needs related to the arrival of the child. Firms may wish to provide

individualized support and accommodation to ensure that partners maintain a productive practice when returning from the leave.

Importance of management support

The successful implementation of a law firm policy is contingent on the support of the firm's partners and management. It is their leadership and attitude that influence the values and goals of the firm.

General Legal Rights and Obligations

The following outlines general legal obligations that relate to pregnancy and parental leaves and benefits for partners.

Note: The general legal rights and obligations are only up-to-date as at the date of writing. When drafting a policy, one should ensure that he or she takes into account up-to-date legislation and jurisprudence. Firms may wish to work with lawyers who have a good understanding of the *Ontario Human Rights Code*, the *Rules of Professional Conduct*, the *ESA* and the *EIA*, to develop their policy. Also, if a firm is developing a policy that applies to out-of-Ontario jurisdictions, lawyers knowledgeable with the applicable laws of those jurisdictions should be consulted.

Human Rights Obligations

The most significant legal obligations relating to pregnancy and parental leaves for partners fall under human rights legislation, as the *ESA* and the *EIA* do not apply to self-employed lawyers, including equity partners. However, law firms may wish to consider the minimum legal obligations applicable under the *EIA* and the *ESA*, that apply to associates. Firms will likely wish to adopt a fair approach with partners when compared with the approach used with associates.

Law firms and legal organizations have legal obligations under provincial and/or federal human rights legislation and case law, and lawyers are bound by rules that promote human rights under the Law Society's *Rules of Professional Conduct*. The following provides a general overview of these obligations under the *Ontario Human Rights Code* and the *Rules of Professional Conduct*.

Ontario Human Rights Code and Rules of Professional Conduct

The *Code* applies to everyone in Ontario with respect to services, goods and facilities, occupancy, contracts, employment, vocational associations and accommodations², unless the *Canadian Human Rights Act* applies.³ All employment relations, including those governed by a

² Part I, s. 1, 2, 3, 4, 5, and 6 of the *Code*, R.S.O. 1990, c. H. 19 [the *Code*].

³ The *Canadian Human Rights Act*, R.S.C. 1985, C. H-6 applies to federally regulated employers or service providers. It is intended to apply to matters coming within the legislative authority of Parliament. This includes federal departments, agencies and crown corporations,

collective agreement, are subject to the *Code*. Therefore, law firms in Ontario are subject to the *Code*, and the *Code* applies to all employees of the law firm, including associates, salaried lawyers, in-house counsel, and articling students. The *Code* also applies to contractual agreements, and to the relationship between partners in a firm.

Human rights legislation expressly prohibits discrimination based on pregnancy and the Supreme Court of Canada has clearly established that discrimination because a woman is, or may become, pregnant is discrimination on the ground of sex and is illegal.⁴ Discrimination in employment on the grounds of sex, sexual orientation, marital status and family status is also prohibited under the *Code*.⁵

The *Rules of Professional Conduct* apply to member lawyers of the Law Society of Upper Canada. Rule 5.04 places a special responsibility on lawyers to adhere to the tenets of human rights law and in particular to respect the obligation not to discriminate because of, for example, sex, sexual orientation, marital status or family status.⁶

A significant number of complaints made to the Discrimination and Harassment Counsel Program each year are complaints of discrimination or harassment on the basis of pregnancy. Of the breakdown of sex discrimination complaints between 2003 and 2008, 24 of the 175 (14%) complaints related to pregnancy.⁷

In addition to Rule 5.04, lawyers should be mindful of their professional responsibility to provide legal services to clients in a manner that is conscientious, diligent, timely and cost-effective and to manage their practice effectively. Not only do lawyers have the right to be treated without discrimination because of pregnancy, sex or family status, they also have an obligation to manage their practice to ensure that the provision of services during pregnancy

chartered banks, airlines, television and radio stations, inter-provincial communications and telephone companies, First Nations and other federally regulated industries. The Act also applies to some private sector employers under federal jurisdiction. Lawyers employed by the federal government or salaried or in-house lawyers employed directly by federally-regulated industries, would for example be covered by the *Canadian Human Rights Act* and not the *Code*.

⁴ *Brooks v. Canada Safeway*, [1989] 1 S.C.R. 1219 (S.C.C). The *Code* states "The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant". *Code*, *supra* note 2, s. 10(2).

⁵ *Code*, *supra* note 2, s. 5(1).

⁶ Rule 5.04(1) states " A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the *Code*), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other members of the profession or any other person". *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000).

⁷ *The Report of Activities of the Discrimination and Harassment Counsel, July 1, 2008 to December 31, 2008 and Summary of Data Since January 1, 2003* (Toronto: Law Society of Upper Canada).

or parental leaves continues to be offered effectively. Both firms and individual lawyers have a duty to clients to ensure on-going seamless high quality client service.

Firms Have a Duty to Accommodate

The *Code* and the *Rules of Professional Conduct* impose a duty to accommodate, to the point of undue hardship, differences that arise based on the enumerated grounds in the *Code*. In determining whether an accommodation would constitute "undue hardship", the firm must take into consideration the cost, outside sources of funding, and health and safety factors.⁸ In order to constitute undue hardship, the cost must be quantifiable; related to the accommodation; and so substantial that it would alter the essential nature of the firm, or so significant that it would substantially affect its viability

In determining undue hardship, the onus is on the firm to prove that the accommodation would constitute undue hardship; there is no onus on the employee or partner, requesting the accommodation to prove that it can be accomplished without undue hardship.

The Human Rights Commission provides the following examples of how to accommodate during the pre-natal and post-natal periods, short of undue hardship:⁹

A lawyer may be temporarily relocated or re-assigned to alternative duties.

A customized work schedule may be provided to accommodate medical appointments, including treatment for infertility, as well as breastfeeding needs.

Where required, a quiet environment may be provided for pregnant lawyers to rest during breaks.

Special equipment may also be provided to a pregnant lawyer, such as a special chair or a special computer screen.

Accommodation for breastfeeding may mean allowing a care-giver to bring the child into the workplace so the mother may breastfeed, making scheduling changes to permit time to express milk or breastfeed at work or to reach home

⁸ Section 11(2) of the *Code*, *supra* note 6.

⁹ *Policy on Discrimination because of Pregnancy and Breastfeeding* (Toronto: Human Rights Commission, revised 2008).

in time to breastfeed, and providing a comfortable, dignified and appropriate area so that women can breastfeed, or express and store breast milk at work.

Employment Standards Act, 2000

Employed lawyers are subject to Part XIII (“Benefit Plans”) and Part XIV (“Leaves of Absence”)¹⁰ but exempt from Parts VII to XI of the *ESA*.¹¹ Therefore, the *ESA* does not apply to equity partners and imposes no minimum obligations relating to pregnancy and parental leaves.

Please refer to the *Guide to Assist Law Firms in Developing Pregnancy and Parental Leave Policies for Associates* for a discussion about the *ESA* as it applies to associates.

***Employment Insurance Act*¹²**

The *EIA* applies in Ontario to employees who meet minimum hour requirements of employment, but does not apply to self-employed workers. Therefore, equity partners are not eligible for parental/pregnancy benefits under the *EAI*.

Please refer to the *Guide to Assist Law Firms in Developing Pregnancy and Parental Leave Policies for Associates* for a discussion about the *EIA* as it applies to associates.

¹⁰ *Exemptions, Special Rules and Establishment of Minimum Wage*, O. Reg. 285/01 (amended to O. Reg. 401/03) exempts members of the legal profession from Parts VII to XI of the *ESA*. Section 3(2) of the *ESA*, SO 2000, c. 41, exempts employees whose employment is within the legislative jurisdiction of the Parliament of Canada. Section 3(4) exempts Crown employees from many portions of the Act, however, they are subject to Parts XIII (“Benefit Plans”) and XIV (“Leaves of Absence”).

¹¹ Part VII is Hours of Work and Eating, Part VIII is Overtime Pay, Part IX is Minimum Wage, Part X is Public Holidays, and Part XI is Vacation with Pay. *ESA, ibid.*

¹² S.C. 1996, c. 23.

Sample Policy Options

Commentary

The sample policy options presented below are drafted to apply to equity partners who are not employees of law firms. The sample policy options assume that the *Employment Standards Act (ESA)* and the *Employment Insurance Act (EIA)* do not apply in those cases. A separate Guide, the *Guide to Assist Law Firms in Developing Pregnancy and Parental Leave Policies for Associates*, is available for associates who are considered “employees of the firm” under the *ESA* and the *EIA*.

A firm could also extend this policy to make it applicable to other types of partners, such as non-equity partners, income partners or special partners. If that is the case, firms should consider whether such a partner is considered an employee of the firm for the purposes of the *ESA* or the *EIA*.

The sample policy options address the most common legal work environment: a firm composed of partners, associates, articling students and other staff, not subject to a collective agreement. Where a workplace is governed by a collective agreement, modifications may need to be made to the policy.

The sample policy options are only up-to-date as at the date of writing. When drafting a policy, one should ensure that he or she takes into account up-to-date legislation and jurisprudence. Firms may wish to work with lawyers who have a good understanding of the Ontario *Human Rights Code* and of other relevant legislation to develop their policy.

PREGNANCY AND PARENTAL LEAVE POLICY FOR PARTNERS OF [NAME OF FIRM] ("THE FIRM")

Statement and Governing Legislation

Commentary

Although not mandatory, firm policies often include an introductory section that outlines the statement of principles and commitment of the firm, along with the relevant governing legislation. Such introductory section provides context for the policy and emphasizes a firm`s commitment to equality and principles of human rights.

Firms may vary the text of the section "Statement and Governing Legislation".

1. The firm is committed to advancing inclusiveness and diversity at the firm. It is important that it provide the appropriate support to new parents. This policy outlines the role of the firm in assisting partners to transition their practice prior to, during and after their leave, and the role of the partner in ensuring continued excellence in client service and practice management.
2. The firm is committed to fulfilling its legal obligations, including its obligations under the Ontario *Human Rights Code* and the Law Society of Upper Canada's *Rules of Professional Conduct*, which prohibit sexual discrimination based on enumerated grounds, including sex/pregnancy, marital status, family status and sexual orientation.
3. This policy also outlines the obligations of firms and partners to ensure continued high quality client services during a partner's absence.

Definitions

Commentary

It is not necessary to include a “Definitions” section within a firm policy. However, definitions are often helpful for the reader and may enhance transparency and consistency.

4. **“Partners”** under this policy are equity partners who are defined as such in the Partnership Agreement and are not employees covered under the *Employment Standards Act, 2000* (“ESA”) or the *Employment Insurance Act* (“EIA”).

Commentary

A firm should use terminology that is most commonly used by the firm, such as “partner” or “equity partner”. Most respondents to the Justicia survey of firms indicate that they have “equity partners”. Thirty-two percent (32%) of respondents of the survey of medium firms and 29% of respondents of the survey of large firms indicate that they do not have “income partners”.

If the policy applies to non-equity partners, the firm may wish to consider whether the relationship with the non-equity partners is one that would be considered an “employment” relationship under the *ESA* and the *EIA*.

5. **“Parent”** includes a biological mother or father, or a person with whom a child is placed for adoption or a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own, and “child” has a corresponding meaning.
6. **“Parental Leave”** means, for the purpose of this policy, a leave taken by a partner who is a parent, as defined by this policy, when a child is born or first comes into his or her care.

7. **“Pregnancy Leave”** means, for the purpose of this policy, a leave of absence taken by a partner in connection with the birth of a child.
8. **“Spouse”** means either of two persons who, are married to each other, or either of two persons who live together in a conjugal relationship outside marriage.

Commentary

To make the sample policy options consistent with the sample policy options for associates, we use the definition of “spouse” in the *Family Law Act* and the *ESA*, and the definition of “parent” that is consistent with the *ESA*. Appropriate legislation in other jurisdictions should also be considered if the policy applies to offices outside of Ontario.

The *ESA* and *EIA* do not apply to partners and therefore the terms pregnancy and parental leave are not legally defined in this context. As a result we have defined the terms “pregnancy leave” and “parental leave” for the purpose of this sample policy.

Application of Policy

9. This policy applies to all partners of the firm working in offices of the firm located in Ontario.

Commentary

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

Firm Practices

The findings of the Justicia survey of medium firms indicate that 37% of participating medium firms have a pregnancy leave policy for partners,

17% of participating medium firms have a parental leave policy for partners and 30% (3 of 10 respondents) of “out of GTA and Ottawa” firms have a pregnancy leave policy for partners.

The findings of the Justicia survey of large firms indicate that 91% of participating firms have a pregnancy leave policy for partners and half indicate that their firm has a parental leave policy for partners.

Eligibility and Entitlement

Pregnancy Leave - Eligibility

Commentary

Law firms have adopted various approaches in their policies to provide pregnancy leaves for partners. Some policies address requests for leaves of absences, including pregnancy leaves, on a case-by-case basis. Most policies reviewed, however, recognize the importance of providing support for pregnancy leaves, including clarity and certainty regarding the extent of such support. Most policies provided by Justicia firms include the maximum length of leave entitlement, along with a full description of the compensation entitlement.

Firm Practices

The firm policies provided by Justicia participants indicate the following practices relating to pregnancy leaves for partners:

- 17 week leave at full draw, full bonus and profit sharing entitlement, and full share of profit allocation for the period
- Female partners are entitled to pregnancy and parental leave up to a maximum of six continuous months. The partner will continue to receive her share of income for a maximum of four continuous months.
- A partner may take up to 6 months of pregnancy leave. The

partner's budgeted monthly draw will continue for the duration of the pregnancy leave.

- Full compensation for 16 weeks of pregnancy leave.
- Pregnancy leave for up to 17 weeks at full income.
- Pregnancy leave for up to 17 weeks at full income, subject to conditions of return to the partnership.
- Maximum of six month paid leave and remains at full draw and other benefits.
- For the first 17 weeks, the partner receives full monthly and quarterly draws.

Two "out of GTA and Ottawa" firms indicate that they provide pregnancy leaves to their partners with no prior service requirement at the firm. One respondent indicates that the pregnancy benefits are based on 60% of average monthly draw for a period not to exceed 6 months. Another respondent notes that pregnancy benefit payments to partners are considered to be payments in lieu of any firm disability or sickness benefits payable.

Thirty-seven percent (37%) of respondents of the Justicia survey of medium firms indicate that their firm provides a pregnancy leave policy for partners, and the findings of the survey indicate that there is little consistency in the length of pregnancy leave and amount of draw provided by medium firms. One firm provides profit sharing for 3 months, one provides full draw for 4 months, three firms provide full draw for 17 weeks, while another provides 60% of the average monthly draw for a period not to exceed 6 months. A number of respondents of medium firms mention that they deal with the draw and length of leave on a case by case basis. Most participating medium firms (85%) that have pregnancy policies for partners allow pregnancy leaves without imposing conditions such as minimum length of time at the firm.

The findings of the Justicia survey of large firms indicate that there is some consistency in the length of pregnancy leave and amount of draw provided by large firms. Twelve respondents out of 21 respondents of the large firm survey indicate that the policy specifies how a leave affects the partner's draw or compensation. All of the 12 respondents indicate that their firm provides full draw to partners for a period of between 16 weeks and 6 months. Ninety-one percent (91%) of large firms with a pregnancy policy for partners allow partners to take the leave without imposing conditions such as minimum length of time at the firm.

10. The following are options based on clauses found in law firm policies. A firm can choose the most relevant option or draft its own clause:
- a. Option 1: A partner may take up to **[insert length of leave]** of pregnancy leave.
 - b. Option 2: Requests for a pregnancy leave will be dealt with on a case-by-case basis in a manner that recognizes the importance of supporting partners during pregnancy leaves. All pregnancy leave arrangements will be decided following a consultation between the partner requesting a leave and **[insert position or committee]**. The approval of a pregnancy leave and the terms and conditions will be approved by **[insert position or committee]**.

Commentary

In option 1, the firm indicates the length of pregnancy leave it wishes to provide to partners. This approach enhances transparency and consistency.

The firm may also consider whether it wishes to impose conditions for eligibility, such as a minimum length of service at the firm, or a requirement that the partner return to the firm following the leave; and whether it wishes to establish timeline for taking the leave.

One policy includes, for example, a clause in which the compensation of the partner during the pregnancy leave is reduced in cases where a partner has been at the firm for a brief period of time prior to the pregnancy leave. The clause reads “A partner who has been with the firm as a lawyer for less than one year prior to the commencement of the pregnancy leave shall be entitled during the period of the pregnancy leave to receive one month’s income. All other partners shall be entitled to receive full income.”

Another policy includes the following clause with conditions: “The provision of draws and all allocation of income during the pregnancy leave is conditional upon i) the partner returning to practice at the end of the leave period, on the same full or part-time basis in effect at the commencement of the leave; ii) remaining a partner of the firm on that basis for a period of twelve months; and iii) the partner undertaking to repay to the firm any draw and allocation of income paid during the pregnancy leave period in the event of non-compliance by the partner with the foregoing conditions.”

In option 2, an individualized approach to pregnancy leave is used. If that is the approach taken by the firm, the policy should include a fair process to consider the request, including a consultation with the partner requesting the leave.

Firms may also wish to include provisions about timeline and temporary interruptions of the leaves. Examples of options include,

Option 1 – A partner may temporarily interrupt a pregnancy leave to return to practice. In that case, the partner must resume the leave within **[insert period of time]**, and the leave period will continue to run from the date at which the partner has resumed the leave.

Option 2 – A partner may temporarily interrupt a pregnancy leave to return to practice. In that case, the period of the leave continues to run while the partner works and the last day of the leave remains unchanged.

Option 3 - Once started, the pregnancy leave should be taken all at one time, unless the partner and the firm agree to allow interruptions of the leave. Such request will be made to **[insert appropriate position or committee such as the Executive Committee]** and be agreed upon by the committee and the partner.

Pregnancy – Compensation during Leave

Commentary

Most firm policies reviewed allow partners on pregnancy leaves to receive their full share of income for a period of time, as specified in the policy. As mentioned above, some impose conditions to the receipt of full share of income.

11. The following are options based on clauses found in law firm policies:
- a. Option 1: Partners shall continue to receive their **[insert description of compensation, such as profit allocation, bonus, and/or other]** during their pregnancy leave.
 - b. Option 2: Partners shall continue to receive their **[insert description of compensation, such as profit allocation, bonus, and/or other]** during their pregnancy leave. A partner who has been at the firm for less than **[insert length of time]** prior to the commencement of the pregnancy leave shall be entitled during the period of her pregnancy leave to receive **[insert length of time]** months **[insert description of compensation, such as profit allocation, bonus, and/or other]**.
 - c. Option 3: Partners shall continue to receive their **[insert description of compensation, such as profit allocation, bonus, and/or other]** during their pregnancy leave. The receipt of **[insert description of compensation, such as profit allocation, bonus, and/or other]** during the pregnancy leave is conditional upon i) the partner returning to practice at the end of the leave period, on the same full or part-time basis in effect at the commencement of the leave; ii)

- remaining a partner of the firm on that basis for a period of **[insert length of time]**; and iii) the partner undertaking to repay to the firm any **[insert description of compensation, such as profit allocation, bonus, and/or other]** paid during the pregnancy leave period in the event of non-compliance by the partner of these conditions.
- d. Option 4: Partners shall continue to receive their **[insert description of compensation, such as profit allocation, bonus, and/or other]** during their pregnancy leave. Partners taking pregnancy leaves are expected to return to full-time practice with the firm. In the event that a partner who has taken a pregnancy leave resigns within **[insert amount of time]** of the end of such leave, the partner shall repay the amounts paid to the partner during such pregnancy leave.

Commentary

Firms do not have a legal obligation to provide compensation to their partners for pregnancy leaves. However, firms may wish to provide compensation to partners for pregnancy leaves, in part to ensure fairness when compared to associates' benefits.

In drafting its policy, the firm should consider whether to include all components of a partner's compensation, such as bonuses, draws, profit sharing percentages, periodic distribution of profit, benefits and future share allocation and corresponding compensation. The policy should be consistent the compensation scheme in the partnership agreement.

Firm Practices

Of the nine firms that provided their policies on pregnancy leaves for partners, 7 are from large firms. Seven firms provide full draw for pregnancy leaves. The period of leave when full draw is provided is as follows: 16 weeks (2 firms), 17 weeks (3 firms and one firm if the partner has been at the firm for 1 year) and 6 months (3 firms).

Two “out of GTA and Ottawa” firms indicate that they provide pregnancy leaves to their partners no matter the length of time at the firm. One respondent indicates that the pregnancy benefits are based on 60% of average monthly draw for a period not to exceed 6 months. Another respondent notes that pregnancy benefit payments to partners are considered to be payments in lieu of any firm disability or sickness benefits payable.

Thirty-seven percent (37%) of respondents of the Justicia survey of medium firms indicate that they have a pregnancy leave policy for their partners. The findings of the survey of medium firms indicate that there is little consistency in the length of pregnancy leave and amount of draw provided by medium firms. One firm provides profit sharing for 3 months, one provides full draw for 4 months, three firms provide full draw for 17 weeks, while another provides for 60% of the average monthly draw for a period not to exceed 6 months. A number of medium firms mention that they deal with the draw and length of leave on a case by case basis. Most participating medium firms (85%) that have pregnancy policies for partners allow pregnancy leaves for equity partners without imposing conditions for eligibility such as length of time at firm.

Ninety-one percent (91%) of respondents of the Justicia survey of large firms indicate that they have a pregnancy leave policy for partners. The findings of the Justicia survey of large firms indicate that there is some consistency in the length of pregnancy leave and amount of draw provided by large firms. Most participating large firms (13 firms) provide full draw to partners for a period of between 17 weeks and 6 months. Ninety-one percent (91%) of large firms with a policy allow leaves for partners without imposing conditions for eligibility such as length of time at the firm.

Parental Leave – Eligibility

Commentary

Law firms do not have a legal obligation to provide parental leaves for partners. However, a firm may wish to provide comparable benefits to partners and associates. The *ESA*, which applies to associates, provides that eligible employees are entitled to 35 weeks of parental leave if they have taken a pregnancy leave and otherwise 37 weeks.

Law firms have adopted various approaches in their policies to provide parental leave entitlements for their partners. A number of policies address requests for parental leaves on a case-by-case basis. Some policies include the maximum length of leave entitlement, along with a full description of the compensation entitlement.

The following are options based on clauses found in law firm policies.

12. Options:

- a. Option 1: Partners, including those who have taken a pregnancy leave, who are new parents are entitled to take up to **[insert length of time for parental leave]** of parental leave.
- b. Option 2: Partners who are new parents and have not taken a pregnancy leave are entitled to take up to **[insert length of time for parental leave]** of parental leave.
- c. Option 3: Requests for a parental leave will be dealt with on a case-by-case basis in a manner that recognizes the importance of supporting partners during parental leaves. All parental leave arrangements will be decided following a consultation between the partner requesting a leave and **[insert position or committee]**. The approval of a parental leave and the terms and conditions will be approved by **[insert position or committee]**.

Commentary

A firm that provides parental leave entitlements should ensure that they are provided to both birth and adopting parents. Case law has indicated that adoptive parents and birth parents should be equally treated when providing parental leaves.

Firms may also wish to consider whether parental leaves will be available to partners who have taken a pregnancy leave. Pregnancy leaves are seen as serving a different purpose than parental leave as they enable women to prepare for childbirth, to recover physiologically and to have a period of time to take care of their families. Firms may wish to allow birth mothers to take a parental leave in addition to a pregnancy leave (option 1).

Firm Practices

Nine firms in the Justicia project provided their partners' pregnancy and parental leave policies as precedents to assist in the development of model policy options. Seven of those firms are large firms. The policies provided do not adopt a consistent approach to parental leave benefits. The following are examples of approaches:

- one firm provides an adoption leave at full draw for 17 weeks (which is consistent with the pregnancy leave and benefits in the policy);
- one firm provides a pregnancy and parental leave for women at 4 months full draw in total (includes both pregnancy and parental leaves) and an additional 2 months at no draw. The firm also provides 37 weeks for men with a proportional reduction in compensation (the firm also allows a leave in addition to pregnancy for 6 additional months at no draw);
- one firm provides a leave at full draw for 6 weeks for men and

women who have not taken pregnancy leaves, and 6 months of leave at no draw for women in addition to pregnancy leave;

- one firm provides pregnant women with 16 weeks at no draw in addition to the 16 weeks at full draw for the pregnancy leave;
- one firm provides a leave of 18 weeks at no draw;
- one firm provides full draw for 1 month for paternity and adoption. The firm also provides pregnancy leaves at full draw for 6 months;
- one firm provides a pregnancy leave of 6 months at full draw;
- one firm provides an adoption leave at full draw for 17 weeks that can be extended to 35 weeks with no monthly draw for additional leave (which is consistent with the pregnancy leave and benefits in the policy) and paternity leave on a case by case basis.

The respondents to the Justicia survey of “out of GTA and Ottawa” firms indicate that they do not have parental leave policies for partners.

Seventeen percent (17%) of respondents of the Justicia survey of medium firms indicate that their firm provides a parental leave policy for partners. Those with parental leave policies all indicate that they apply to both men and women. There is very little information about compensation for partners during a parental leave in the findings of the Justicia survey of medium firms. Seventeen percent (17%) of respondents of the medium firm survey indicated that they have a parental policy for partners.

Half of the respondents of the Justicia survey of large firms indicate that their firm provides a parental leave policy for partners. Not all parental leave policies in large firms apply to men and women. Seventy-five percent (75%) apply to both men and women, while 17% apply to women only and 8% apply to men only. The findings of the Justicia survey of large firms do not show a consistent approach regarding the length of the parental leave or the amount of financial compensation such as draw.

Often, respondents indicate that decisions are made on a case by case basis.

Parental Leave – Compensation during Leave

Commentary

Firm policies use different approaches to parental leaves for partners. Some provide for full compensation during the leave, some adopt an ad hoc approach to parental leaves and compensation and some allow for parental leaves with a reduction in compensation.

13. The following are options based on clauses found in law firm policies. A firm can choose the option most appropriate to its culture and structure, or draft its own clause:
- a. Option 1: A partner's [**insert description of compensation, including profit allocation, bonus, and/or other**] will continue for the duration of the parental leave.
 - b. Option 2: A partner's [**insert description of compensation, including profit allocation, bonus, and/or other**] will continue for the duration of the parental leave, but with a consequent proportionate reduction in [**insert description of compensation, including profit allocation, bonus, and/or other**]. Such reduction in [**insert description of compensation, including profit allocation, bonus, and/or other**] will be approved by [**insert position or committee**].
 - c. Option 3: The terms and conditions of a partner's [**insert description of compensation, including profit allocation, bonus, and/or other**] during a parental leave will be established on a case-by-case basis at the discretion of [**insert position or committee**]. Decisions will be made following a consultation between the partner requesting a leave and [**insert position or committee**]. The

approval of the parental leave terms and conditions will be approved by **[insert position or committee]**.

- d. Option 4: Partners shall continue to receive their **[insert description of compensation, such as profit allocation, bonus, and/or other]** during their parental leave. A partner who has been at the firm for less than **[insert length of time]** prior to the commencement of the parental leave shall be entitled, during the period of her or his parental leave, to receive **[insert length of time]** months of his or her **[insert description of compensation, such as profit allocation, bonus, and/or other]**.
- e. Option 5: Partners shall continue to receive their **[insert description of compensation, such as profit allocation, bonus, and/or other]** during their parental leave. The receipt of **[insert description of compensation, such as profit allocation, bonus, and/or other]** during the parental leave is conditional upon i) the partner returning to practice at the end of the leave period, on the same full or part-time basis in effect at the commencement of the leave; ii) remaining a partner of the firm on that basis for a period of **[insert length of time]**; and iii) the partner undertaking to repay to the firm any **[insert description of compensation, such as profit allocation, bonus, and/or other]** paid during the parental leave period in the event of non-compliance by the partner of these conditions.
- f. Option 6: A partner taking a parental leave is expected to return to full-time practice with the firm. In the event that a partner who has taken a parental leave resigns within **[insert amount of time]** of the end of such leave, the partner shall repay the amounts paid to the partner during such parental leave.

Commentary

Firms do not have a legal obligation to provide compensation to their partners for parental leaves. In drafting its policy, the firm may wish to consider whether to include all components of a partner's compensation, such as bonuses, draws, profit sharing

percentages, periodic distribution of profit, benefits and future share allocation and corresponding compensation. The policy should be consistent with the compensation scheme in the partnership agreement.

Extension of Leaves

Commentary

Firms may adopt a process based on the structure and culture of the partnership and of the firm to consider extension requests. Providing a process to address these requests, even if on an ad hoc basis, is helpful as it enhances consistency, transparency and fairness.

14. Options:

- a. Option 1: Partners may request an extension to a pregnancy or parental leave to the **[insert position or name of committee such as Executive Committee]** of the firm. The **[insert position or name of committee such as Executive Committee]**, after consulting with the partner who is requesting the leave, has the discretion to grant, deny or vary the request.
- b. Option 2: A partner may take up to **[insert length of period]** of further leave. A partner taking further leave will receive **[insert level of compensation if any]** during the period of further leave.

Compensation Review, Billing and Performance

Compensation Consideration Following Leave

Commentary

A clause in the policy that specifies how the performance of the partner will be assessed if a pregnancy or parental leave is taken is important, as it provides for consistency, transparency and fairness. Depending on the nature of the partner’s practice, such as area of practice, types of clients, and other relevant factors, the period of one month to wind down the practice and to ramp up the practice may vary. Firms are encouraged to take that into account when drafting their policy

Firm Practices

Findings of the Justicia survey of large firms show that 57% of respondents with pregnancy leave policies for partners and 58% of respondents with parental leave policies for partners address the impact of the leave on the partner’s draw or compensation.

Findings of the Justicia survey of medium firms show that 50% of respondents with pregnancy leave policies for partners and 50% of respondents with parental leave policies for partners address the impact of the leave on the partner’s draw or compensation.

One respondent of the Justicia survey of “out of GTA and Ottawa” firms indicates that the firm policy for partners specifies how the pregnancy leave affects the partner’s draw or compensation.

15. Options:

- a. Option 1: In considering the partner's compensation in a fiscal year when a pregnancy or parental leave has happened, the firm will consider the partner's statistics regarding hours, billings and cash received and will assess the performance based on the partner's pre and post-leave performance. The aim is to present the statistics as they would have been if no leave had occurred. The firm is aware that a partner who is taking a leave will have to wind down his or her practice prior to the leave and ramp up his or her practice upon the return from the leave. The firm will not take into account the practice of the partner during **[insert length of time]** prior to the leave or **[insert length of time]** following the leave, when assessing the partner's performance. The period to wind down and to ramp up the practice may be adjusted by agreement between the partner and the partnership. Consideration should be given to the partner's type of practice and other relevant circumstances
- b. Option 2: In considering the partner's compensation in a fiscal year when a pregnancy or parental leave has happened, the firm will annualize the billings and billable hours of that partner using the average monthly billings and average billable hours achieved by that partner during the twelve months immediately preceding the date of commencement of the leave. The aim is to present the statistics as they would have been if no leave had occurred. The firm is aware that a partner who is taking a leave will have to wind down his or her practice prior to the leave. The firm will not take into account the practice of the partner during the month prior to the leave, when annualizing the billings and billable hours. The period of one month to wind down the practice may be adjusted by agreement between the partner and the partnership. Consideration should be given to the partner's type of practice and other relevant circumstances.
- c. Option 3: A partner taking either pregnancy or parental leave will not suffer any adverse impact during the compensation process. The partner's **[insert description of compensation, including profit allocation, bonus, and/or other]**, as applicable, will be unaffected by either pregnancy and parental leave. During either leave, the partner's personal fees rendered and billable hours will be adjusted on a prorated basis for purposes of all year-end financial reports or other reports considered by the **[insert committee]** in setting compensation.

Billing Hours and Rates

Commentary

Although a sample clause on the impact of pregnancy and parental leaves on billing rates is presented below, some Justicia participants were of the view that billing rates are firm business decisions and should not be included in policies on pregnancy and parental leaves, as the leave is not in and of itself determinative of the billing rate of the partner. Billing rates are often set based on a myriad of factors not linked to the performance review process.

Each firm should decide whether to include a clause that addresses the impact of pregnancy or parental leaves on billing rates.

If firms include a section to address billing rates in a pregnancy and parental leave policy, the firm is also encouraged to include provisions that outline the factors that will be taken into account to determine billing rates at the end of a pregnancy or parental leave, and the length of leave that will not be considered a break in practice for the purpose of determining billing rates. This allows for transparency, consistency and predictability. Because billing rates may have an impact on a partner's revenue generation and profitability, the billing rate may also impact on progression within the firm and partnership level. It is important for firms to clearly indicate how a leave impacts on billing rates, the factors that are taken into account to determine billing rates and to maintain some flexibility to consider the impact of billing rates on the unique circumstances of the partners.

16. [A partner who takes a leave under this policy will not be expected to increase her or his productivity or billable hours to compensate for the absence from practice. The firm reserves the right to determine the appropriate billing rate of the partner to clients at the

end of a pregnancy or parental leave. Billing rates are determined in part by the experience and the number of years of practice.]

Process for Requesting Pregnancy and/or Parental Leave

Commentary

Justicia participants indicated that it is important for firms to adopt policies that include processes to request pregnancy and parental leaves. This enhances transparency, consistency and fairness.

The firm should use the terminology that is most commonly used by the firm and adopt a process for requesting the leave that reflects the firm's structure and culture. Firm policies that include processes may specify, for example, that the request will be provided to the practice group leader, the director of human resources, the regional managing partner, to the mentor, the executive committee and the department manager and that the person or committee will make decisions about the request.

17. A partner may request a pregnancy or parental leave by giving reasonable notice to his or her **[insert position such as Practice Group Leader]** and the **[insert position such as Director of Human Resources]** of his or her intention to take a leave under this policy and the expected date of return to work. Pregnancy and parental leave requests will be considered and approved by **[insert position such as Practice Group Leader]**.
18. The partner may advise the **[insert position such as Practice Group Leader]** and the **[insert position such as Director of Human Resources]** of any changes to the start date or end of the leave by providing the firm with a reasonable notice of the change.

Notice of Return to Work

19. To ensure a smooth transition back to work, partners on leave should provide reasonable notice to the **[insert position such as Managing Partner of the firm]** of their return so that appropriate arrangements can be made.

Commentary

The firm should use the terminology that is most commonly used by the firm and adopt a process for requesting the leave that reflects the firm's structure and culture. Firm policies include processes that may specify, for example, that the notice will be provided to the practice group leader, the director of human resources, the regional managing partner, to the mentor, the executive committee and the department manager.

Benefits

General

20. Partners on pregnancy/parental leave continue to participate in the **[insert benefits]** unless they elect in writing not to do so.

Commentary

The firm may wish to list the benefits, such as the pension plans, life and extended health insurance plans, accidental death plans and dental plans that were offered before the leave.

21. Access to the **[insert the title of the assistance programs for partners]** continues and partners are encouraged to use these services to assist with family life transitions, return to work transitions, childcare issues and any other concerns that may arise.

Commentary

Not all firms have an assistance program for partners. If the firm does, it may wish to make reference to it in this section.

Pregnancy Related Illness

22. A partner who experiences a pregnancy-related illness before or after her pregnancy leave may avail herself of the firm’s policies applicable to that situation.

Commentary

The firm may wish to list the applicable policies.

Firm Support to Partners and Responsibility of Partners

23. When a request for leave is made, the [insert name of position or committee] will consult with the partner, at least [insert timeline] month before the leave, to determine how best to provide assistance to ensure that high quality services are offered to clients and the needs of the parent are met. The firm will always act in a manner that recognizes the privacy, confidentiality, comfort, autonomy and dignity of the partner. The partner and the firm will cooperate in the process, show willingness to be flexible and be responsible for ensuring that the client’ needs are met. The firm will discuss and agree upon issues such as,

Commentary

Firms are encouraged to develop new parent tool kits for partners who will become parents. Justica firm representatives and the Law Society have developed a template for the new parent tool kit. It is available on-line on the Justica web portal. If the firm has developed the new parent tool kit, it may wish to refer to the kit in the pregnancy and parental leave policy.

The firm should use the terminology that is most commonly used by the firm and adopt a process that reflects the firm's structure and culture.

- a. the process by which client files, if applicable, are transferred and handled during the leave of absence;

Commentary

A number of law firm policies provide that partners deliver a memorandum to the managing partner or practice group leader identifying each file in her or his caseload and the designated lawyers who will be handling these matters during the leave period. The leave-taking partner, in consultation with other partners responsible for files, is responsible for timely advice to clients and designated lawyers confirming each matter transferred.

- b. the process by which the partner's responsibilities, if applicable, are transferred and handled during the leave, such as committee responsibilities and pro bono responsibilities;
- c. the process by which a partner, if she or he wishes to, will continue to have up-to-date information on the development of files;

Commentary

Firm's should be mindful that the purpose of a pregnancy or parental leave is to allow partners to take time off for family responsibilities. Therefore, firms may not wish to have partners to continue having responsibilities relating to files.

A firm's policy should be drafted to clearly indicate that this clause applies only if the partner wishes to continue to have information on the development of files.

- d. the process by which a partner, if she or he wishes to, will continue to participate in firm activities while on leave;

Commentary

The partner should inform the firm about his or her wishes to remain involved with firm activities during the leave. The following information could be provided to the firm: preferred method of communication during leave and activities that the lawyer wishes to receive notices of. Examples of those include professional development opportunities, law firm bulletins, social events, client development activities, business development activities, women’s events, committee meetings, group meetings and partnership meetings.

- e. the process for the return of ongoing client files, or for the ramp up of the practice, upon the return to work;
- f. support or assistance that may be required by the partner upon return from the leave, such as availability of rooms to breastfeed, flexibility of work schedule, opportunities to work from home;

Commentary

In Ontario, women are legally protected from discrimination and harassment because of sex, including pregnancy and breastfeeding. Nursing mothers have the right to breastfeed a child in a public area. Firms should provide mothers with enough flexibility to breastfeed or express milk for their child. Where possible, firms should make rooms available to breastfeed.

- g. customized work schedules;

Commentary	Firms may wish to adopt separate customized work arrangement for all partners which would also be applicable to those returning from pregnancy or parental leaves.

- g. other reasonable accommodation requested by the partner returning to work after pregnancy/parental leave;
- h. staffing requirements that would ensure continuity of service during the leave.

Commentary	It is important for firms to provide direction and support to partners going on leave and returning from leave. Firms should adopt processes most applicable to their structure, culture and business.
Firm Practices	<p>A number of policies provided under the Justicia project specify the firm support provided before, during and following pregnancy and parental leaves. The following are examples of firm support and processes provided in policies:</p> <p>Example 1 - The lawyer must make appropriate arrangements to ensure files are adequately transferred. The practice group leaders will assist with reintegration into practice upon return from leave.</p> <p>Example 2 - It is the responsibility of the lawyer to develop a memorandum directed to the appropriate individuals in the firm, outlining the background and status of outstanding matters and identifying the designated lawyers who will be handling the matters during the leave. The department head must approve the memorandum. The lawyer, wherever possible, must meet with the designated lawyer to review matters and to contact each client affected by the leave.</p>

Example 3 - The firm assists lawyers with reintegration into practice. The firm recognizes that each lawyer must be considered individually in order to determine the support required to ensure that they will return to a productive career while balancing work and life demands. Where the lawyer requires a family status or marital status accommodation upon return, he or she may request it from the firm and negotiate appropriate arrangements. The lawyer who requests the accommodation will cooperate and discuss the process for the return of client files upon return to work, workload issues and possibility of reduced workload or hours, required support (space to breastfeed, flexibility of work schedule, opportunities to work from home) and other reasonable accommodation. If alternate work arrangements are negotiated, the firm and the lawyer will agree on the following: length of alternate work arrangement; expectations in terms of workload and billable and non-billable hours; proposed work schedule, indicating the days when the lawyer will be available; use of firm's facilities and resources including office space and secretarial support and other administrative matter; economic consequences of the arrangement to the firm; impact of arrangement on staff member's compensation.

Example 4 - A partner who plans to take a leave has a positive obligation to properly manage her practice to ensure that the necessary steps have been taken to appropriately transition her client and practice obligations prior to her leave. She must contact her local office managing partner and department manager at least 2 months prior to the leave to settle on a plan which must address the following: file transition and client management leading up to, during and upon return from leave; her intentions and expectations regarding firm involvement, for example continued participation of firm committees, firm events, client industry and practice team events while on leave; matters relating to the firm support to ensure seamless client service and to aid with the transition to leave; communication internally and externally with clients regarding leave; clarification of any concerns relating to the compensation process; and any other matters affecting client service or personal performance in

light of the leave. During the leave, the partner must have a further meeting with her local office managing partner and department manager at least one month prior to the return to address: the return date, file and client list and anticipated work load and transition issues, anticipated opportunities within the department or client or industry teams for involvement in new matters, communication internally and externally with clients regarding return to work, and matters relating to firm support to ensure seamless client service and to aid with the transition back from leave. After returning from the leave, the lawyer must meet with local office managing partner and department manager one month after returning to review the transition back to active practice and any additional support required. Further periodic meetings will be held as required.

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