



# Parents and Pregnancy

## YOUR RIGHTS, YOUR OBLIGATIONS

Guidelines on protections from discrimination on the basis of pregnancy and marital and/or family status in employment, housing and services under *The Human Rights Code*

## Introduction

*The Human Rights Code* (“*The Code*”) prohibits discrimination on the basis of pregnancy and/or marital or family status in areas such as employment, housing and the provision of services.

This guideline sets out the Manitoba Human Rights Commission’s interpretation of protections from discrimination under *The Human Rights Code* with respect to pregnancy and parenting. It is subject to the specific language of *The Code* and to interpretations by adjudicators and the courts.

Protection from discrimination on the basis of pregnancy extends to the possibility of pregnancy and to circumstances related to pregnancy. Protection from discrimination related to parenting falls under the “marital or family status” protections under *The Code*.

Employers, landlords and service providers can be held responsible for the discriminatory actions of their employees.

## ***The Human Rights Code***

*The Code* is administered by the Manitoba Human Rights Commission and is the provincial law that protects individuals and groups in Manitoba from discrimination. It sets out a process for filing a human rights complaint. There is no charge for filing a human rights complaint or for seeking advice about a human rights concern.

*The Code* has special status over all other laws of the Province of Manitoba. This means, for example, that it is not enough if an employer meets the requirements of *The Employment Standards Code* if the result still unreasonably discriminates against an employee based on her pregnancy.

# EMPLOYMENT

It is illegal under *The Code* to treat a person or group differently, to their disadvantage, in employment on the basis of pregnancy or marital or family status, unless the discrimination is based on a bona fide (“in good faith”) and reasonable requirement or qualification for the employment. Discrimination on the basis of pregnancy or marital and/or family status is prohibited with respect to hiring, wages (including fringe benefits), terms and conditions of employment, lay-offs, suspensions, dress codes, employee benefit plans, training, promotions and seniority.

It is also discrimination under *The Code* to fail to reasonably accommodate a special need that is based on pregnancy or circumstances related to pregnancy, or on marital or family status. An example of such a special need is the need of an employee who is a nursing mother to express milk or breastfeed her child.

Harassment on the basis of pregnancy or marital and/or family status is also contrary to *The Code*. For example, it is contrary to *The Code* to harass an employee who parents a child with a same-sex partner on the basis of that employee’s family status and sexual orientation, or to harass an employee who takes a parental leave on the basis of that employee’s family status.

## Employment standards, rules and policies

If a standard, rule or policy an employer is using might have a discriminatory effect based on a protected characteristic such as sex, (including pregnancy) or marital and family status, adopting an alternative approach that avoids or limits the discriminatory effect, such as individual testing or a more individually sensitive standard, will help to ensure compliance with *The Code*.

Employers must ensure that any standards, policies or rules they adopt for the employment:

- are rationally connected to the performance of the job;
- are adopted in an honest and good faith belief that they are necessary to the fulfillment of a legitimate work-related purpose; and
- are reasonably necessary to accomplish the work-related purpose.

Employers must also reasonably accommodate any special needs that are based on protected characteristics under *The Code*, such as pregnancy or family status.

Employees must reasonably participate in the accommodation process. An accommodation offered by an employer may be reasonable even if it is not the employee's preferred accommodation. For more information on reasonable accommodation, please see our reasonable accommodation guidelines.

### **What aspects of employment does *The Code* apply to?**

*The Code* prohibits unreasonable discrimination in all aspects of full-time, part-time, permanent, casual or probationary employment, regardless of whether or not the discrimination is intentional.

The prohibition against discrimination in employment applies to both paid and unpaid or volunteer employment, and to employers, employment recruiters and agencies, trade unions and occupational associations.

### **Employment recruitment practices**

It is contrary to *The Code* to discriminate on the basis of pregnancy or marital and/or family status in job postings, advertising, application forms, interviews and hiring. For example, for most employment opportunities, it is contrary to *The Code* for an employer to ask a female applicant if she is pregnant, or to ask questions such as whether, or when, she plans to have children.

The narrow exception is where it is a genuine qualification relevant to job performance that the successful applicant is not pregnant, and reasonable accommodation of pregnancy or the possibility of pregnancy would create an undue hardship to the employer. This may be because, for example, the employment is a short-term job with an essential duty that exposes the employee to a substance that poses a real and serious risk of harm to a pregnant women and/or her developing fetus, even if protective clothing or all other possible accommodations have been made.

### **Can employers ask questions about an applicant's family responsibilities?**

Employers can determine whether a job applicant can do the job. They must, however, focus their questions on the skills and qualifications that are necessary to perform the essential duties of the job, while keeping in mind their duty to reasonably accommodate the special needs of employees that are based on protected characteristics.

If, for example, an essential duty of a job is that the employee start work at 6:00 a.m., employers can ask an applicant if he or she is available to begin work at that time – and not if they have children, and if so, what their childcare arrangements are.

Questions on job application forms may raise concerns under *The Code*. For example, requesting information on an employment application form that may reveal the age, sex, and marital or family status of an applicant is discouraged unless the requested information is necessary to a determination of whether or not the applicant has the necessary skills and abilities to carry out the essential duties of the job.

### **Employment agency referrals**

It is contrary to *The Code* for an employment agency to discriminate in the selection or referral of employment candidates, including on the basis of pregnancy or marital or family status.

For further information please see Manitoba Human Rights Commission pre-employment inquiries guidelines.

### **Working conditions**

It is discrimination under *The Code* to discriminate in working conditions on the basis of sex or marital or family status. For example, it is contrary to *The Code* to unreasonably deny a training opportunity to a pregnant employee on the basis of her pregnancy.

### **Wages and employee benefits, including sick leave**

*The Code* prohibits discrimination in “any aspect” of employment, including “salary, commissions, vacation pay ...and employer contributions to pension funds or plans, long-term disability plans and health insurance plans”.

Employers, trade unions, employers’ organizations, and occupational, professional or trade associations are prohibited from negotiating or agreeing to an agreement that discriminates on the basis of pregnancy or family status, without *bona fide* (“in good faith”) and reasonable cause.

Courts have determined that the provision of maternity benefits to pregnant women and not to other parents is not discrimination, given the demands of pregnancy, childbirth, breastfeeding and the post-partum period.

In jobs with sick leave benefits, it is discrimination to deny those benefits to an employee who is sick during pregnancy, regardless of whether her illness is pregnancy-related or related to the health and well-being of the fetus, and regardless of the stage of her pregnancy. During the health-related portion of maternity leave (the recovery period following birth), employees should also be compensated at substantially the same level as for other health-related leaves, such as sick leave or disability leave.

It is contrary to *The Code* for an employer to provide lesser entitlements to employment-related benefits, such as extended health, dental or pension benefits, to women on maternity leave or to employees on parental leave than are provided to employees who are on other types of leave, without reasonable cause.

### **Accumulation of seniority while on maternity and parental leave**

Employees on maternity or parental leave continue to have the status of being an employee. In employment that considers seniority as a factor for determining promotions, lay-offs and employment recall, denying accrual of seniority to employees who are on maternity or parental leave may result in a human rights violation, as it may result in a less favourable position for them in times of lay-off or employment recall.

### **Promotions and dismissals**

It is contrary to *The Code* to unreasonably deny a promotion to an employee on the basis that she is pregnant or may become pregnant or based on an employee's family status. *The Code* also requires that an employer reasonably accommodate special needs related to pregnancy with respect to the start date of a promotion, to the point of undue hardship.

It is also a violation of *The Code* to dismiss an employee on the basis of her pregnancy, without reasonable cause. If an employee's pregnancy is an operating reason for the termination of her employment, the dismissal may violate *The Code*, even if performance issues or other reasons form part of the employer's decision.

## Part-time workers and employee benefits

Employers who treat part-time employees less favourably than full-time employees with respect to workplace policies or employee benefits, without reasonable cause, may be violating *The Code*. Such policies or practices can result in human rights complaints alleging unreasonable discrimination on the basis of sex (female) and family status (mother or daughter/relative), as women are still more likely than men to work part-time in order to meet childcare and elder care obligations, and may, therefore, be more adversely affected by such policies and practices.

### What if an employer does not intend to discriminate?

It is possible to discriminate without intending to violate the law. Sometimes a policy or practice that seems neutral has a greater negative effect on some people based on a protected characteristic, such as sex or family status.

The following are two examples of discrimination in employment on the basis of pregnancy or marital or family status where the discrimination may not be intended.

- **Workplace dress codes**

Dress codes do not generally contravene *The Human Rights Code*. If a restaurant, however, requires that all of its servers wear its standard uniform, even though the uniform does not provide an option for pregnant employees, discrimination can result. A pregnant server unable to work because she can no longer wear the required uniform could file a human rights complaint alleging discrimination based on sex (including pregnancy and circumstances related to pregnancy).

- **Changes to work hours**

Shift and schedule changes sometimes create difficulties for employees who rely on childcare or have other family obligations. These changes may result in discrimination on the basis of family status, depending on the circumstances.

## **Reasonable accommodation of special needs based on pregnancy and family status is required in employment**

Special needs of applicants or employees that are based on protected characteristics, such as pregnancy or family status, must be reasonably accommodated in employment, to the point of undue hardship. For example, if an applicant advises an employer that she cannot attend a job interview at the time scheduled because it conflicts with a medical test related to her pregnancy, the employer must reasonably accommodate her request for alternate arrangements, to the point of undue hardship.

Reasonable accommodation of special needs of an existing employee who is pregnant and temporarily unable to perform all the essential duties of her job may require an alternate job assignment or a reassignment of some job duties, where to do so would not create an undue hardship for the employer. An example of a request for accommodation of a special need based on pregnancy is a pregnant employee who requests reasonable accommodation of her medical restrictions related to standing or lifting.

## **Requests from new employees for pregnancy-related leaves of absence or for a period of maternity leave**

In employment with sick leave benefits, newer employees may have little accumulated sick leave entitlement. Reasonable accommodation of special needs based on pregnancy and circumstances related to pregnancy requires an employer to allow such an employee additional unpaid leave for pregnancy-related medical needs, to the point of undue hardship.

In employment which does not have sick leave benefits, or where an employee has exhausted her sick leave entitlements, employers must reasonably accommodate an employee's request for unpaid leave for pregnancy-related medical needs, to the point of undue hardship.

Reasonable accommodation of special needs based on pregnancy and circumstances related to pregnancy also requires that an employer consider the request of a pregnant employee for a period of maternity leave, even where that employee has not worked for the employer long enough to qualify for a period of maternity leave under *The Employment Standards Code*. In such circumstances, the employer must still reasonably accommodate that employee's request for a period of maternity leave, to the point of undue hardship.

## **Employment and breast feeding**

Employees who are nursing have the right to reasonable accommodation of their related special needs, to the point of undue hardship. The employee may require adjustment or flexibility with respect to breaks and work schedules to allow for nursing or to allow her to express her milk. Reasonable accommodation may also mean making available a comfortable place for the employee to breastfeed her child or express her milk, and providing access to cooled storage for expressed milk.

## **Other special needs related to pregnancy or circumstances related to pregnancy**

Women have the right to reasonable accommodation of special needs related to pregnancy. Examples of special needs related to pregnancy include the need for leave for fertility treatments, for health problems during pregnancy, for recovery from childbirth, and for recovery and/or bereavement following stillbirth, abortion or miscarriage.

## **Employment, parenting and sexual orientation**

It is discrimination based on sexual orientation to treat an employee who is a parent in a family headed by a same-sex couple less favourably with respect to leave entitlements, benefits or other terms and conditions of employment than an employee who is a parent in a family headed by an opposite-sex couple, unless reasonable cause exists for the discrimination.

## **Employment, parenting and adoption**

Reasonable accommodation of special needs based on family status includes reasonable accommodation of special needs related to the adoption of a child, to the point of undue hardship. "Adoption" includes First Nation traditional and custom adoption of a child by an employee. An example of a special need related to the adoption of a child is the need for a leave of absence and/or flexibility with respect to vacation leave scheduling to facilitate out-of-province adoption arrangements.

Treating adoptive parents less favourably than biological parents with respect to eligibility for parental leave, or the benefits available to employees while on parental leave, is contrary to *The Code*, unless reasonable cause exists for the discrimination.

(For further information on reasonable accommodation requirements under *The Code*, please see the Manitoba Human Rights Commission reasonable accommodation guidelines).

## **Can an employer give preference in hiring to qualified persons from groups that have been disadvantaged in employment?**

Section 11 of *The Code* permits affirmative action programs or other special programs that aim to lessen the disadvantaged conditions of individuals or groups, where the programs achieve, or are reasonably likely to achieve, that objective.

Pre-employment inquiries with respect to a protected characteristic, such as family status, do not contravene *The Code* where the information is required for the purposes of a special program, the applicant voluntarily provides the information, and it is used in a manner consistent with section 11 of *The Code*. An example of such a special program might be an employment training program designed for low-income single parents.

(For further information, please see Manitoba Human Rights Commission policy “Special Programs”.)

## **RENTAL HOUSING**

It is contrary to *The Human Rights Code* for a landlord, rental agent, or a tenant who sublets, to unreasonably refuse applicants for tenancy on the basis of pregnancy or marital or family status. For example, it is contrary to *The Code* for a landlord to refuse to rent to applicants because they have children, are pregnant or are single parents.

Discrimination in rental housing under *The Code* includes failure to reasonably accommodate special needs of a tenant that are based on pregnancy or family status.

Harassment based on sex, including pregnancy, or on the basis of family status is also prohibited. It is contrary to *The Code* for anyone responsible for rental housing to knowingly permit or fail to take reasonable steps to terminate harassment of one participant by another participant - such as one tenant by another tenant. Please also see Manitoba Human Rights Commission rental housing guidelines.

### **Can a landlord limit the number of occupants for a rental unit?**

It is a contravention of *The Code* for a landlord or rental agent to have a general policy or standard which sets out a maximum number of persons that can occupy a given rental accommodation, unless there is reasonable cause for such a standard or policy.

## **Can landlords restrict families with children?**

It is contrary to *The Code* for a landlord or rental agency to refuse to rent to families with children or to restrict families with children to certain floors or apartments within a building, such as basement apartments, without reasonable cause.

Landlords wanting to ensure a quiet environment can include clauses in the rental agreement that address unreasonable noise from tenants, but must not adopt standards which unreasonably discriminate based on pregnancy, age (children) or family status (families with children). Reasonable noise from children must not be the basis for any detrimental treatment of tenants.

## **What are “special programs” in rental housing?**

Special programs assist individuals or groups to overcome the disadvantage that discrimination creates, and are permitted under *The Code*. An example of a special program in housing is a building designed for low income families with supportive features, such as onsite daycare and an outdoor play area. Special programs help groups that have been disadvantaged by discrimination to achieve equality of opportunity. (For further information, please see Manitoba Human Rights Commission policy “Special Programs”.)

## **What is an example of reasonable accommodation of pregnancy in rental housing?**

The following is an example of reasonable accommodation of a tenant’s special need that is based on pregnancy:

- A pregnant tenant sees a notice in her apartment building’s elevator that the common hallway will be painted the next week. She tells her landlord that she is concerned about the health and safety risk posed by the paint fumes. The landlord agrees to paint the hall at another time when the tenant will be away.

## SERVICES

It is contrary to *The Code* for a service provider, such as a store, restaurant, business, government, or school, to discriminate on the basis of pregnancy or marital or family status, without reasonable cause. For example, it is contrary to *The Code* for a hospital to discriminate against a woman because she is a single mother.

Discrimination in the provision of services includes failure to reasonably accommodate special needs that are based on pregnancy or marital or family status. Harassment in services on the basis of pregnancy or marital or family status is also prohibited.

### **Standards, rules or policies regarding the provision of a service**

If a standard, rule or policy that a service provider is using might have a discriminatory effect on a service user, adopting an alternative approach that avoids or limits the discriminatory effect, such as individual testing and/or a more individually sensitive standard, will help to ensure compliance with *The Code*.

Service providers must ensure that any standards, policies or rules they adopt for the service:

- are rationally connected to the provision of the service;
- are adopted in an honest and good faith belief that they are necessary to the fulfillment of a legitimate service-related purpose; and
- are reasonably necessary to accomplish the legitimate service-related purpose.

Service providers must also ensure that reasonable accommodation of any special needs that are based on protected characteristics under *The Code*, such as pregnancy or family status, has been made.

For example, a store has a policy that requires shoppers to leave all bags or knapsacks with the cashiers at the front of their store. A shopper with a baby does so, but later returns to get a diaper bag in order to change the baby in the customer washroom. The customer is told they are not allowed to bring the bag into the store, even to change the baby. The store's "no bags" policy was adopted because of concerns about product theft, and is not directed at parents. The manager later agrees to modify store policy to allow caregivers of young children access to diaper bags for washroom use.

## **“No stroller” policies**

It is contrary to *The Code* for a service provider, such as a restaurant, to adopt a “no stroller” policy, unless there is reasonable cause for such a policy. Service providers are required to provide equal access to their services regardless of family status, and “no stroller” policies present barriers to families with young children.

## **“Adults Only” policies**

Service providers cannot restrict access to all or part of their services on the basis of age and/or family status, unless there is reasonable cause for doing so. An example of reasonable cause is a movie theatre refusing to admit children to a movie that has been rated 18+. Examples of policies that could be the subject of human rights complaints are those of a vacation resort that refuses families with children, or which does not allow families with children to eat in the dining room.

## **Breastfeeding**

It is contrary to *The Code* to discriminate, without reasonable cause, against a nursing mother because she is breastfeeding her child in a public area. While service providers may provide a quiet, comfortable area for the use of nursing mothers, nursing mothers who are told to move to another place without reasonable cause may file a human rights complaint.

If there is any conflict between these guidelines and *The Human Rights Code*, *The Human Rights Code* prevails.

Le présent guide est également disponible en français

April 2010