



# Practice Resource

## PREGNANCY AND PARENTAL LEAVE POLICY FOR ASSOCIATES

### PREFACE

This policy was developed by the Law Society of British Columbia and updated in collaboration with the firms participating in the Law Society of British Columbia Justicia Project. The policy is intended as a tool to assist firms in developing internal policies on pregnancy and parental leave for their lawyers in British Columbia. The guide does not provide legal advice and is not meant to be the ultimate or ideal policy.

This policy is drafted in the context of a traditional law firm environment with partners, associates and other staff. Firms are encouraged to adapt and tailor their internal policy to reflect their own structure and culture. For example, the policy may not apply to lawyers hired on shorter, fixed-term contracts, depending on the terms stipulated in those contracts.

This policy is intended to apply to associates and others in an employment-type relationship with the law firm. Equity partners and lawyers in similar ownership arrangements are covered by the policy for partners that has also been prepared as part of this project.<sup>1</sup>

Law firms have differing abilities to provide benefits, and lawyers have differing needs. For smaller firms, certain aspects of the policy may be impractical or impossible to implement. For this reason, this policy is intended to serve as a guide only. However, law firms are strongly encouraged to adopt some form of written pregnancy and parental leave policy for a number of reasons, including the following:

- 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 firm's management is committed to advancing inclusiveness and diversity at the firm and to providing the appropriate supports to new parents;
- Communicating the firm's commitment to potential recruits, lawyers of the firm, and clients; and

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<sup>1</sup> Each firm will need to determine whether this policy or the partner policy should apply for roles such as associate counsel or income partner depending on the nature of the arrangement and whether it is closer to an employment relationship versus that of an owner.

- Ensuring that the firm complies with its legal obligations, including under the British Columbia *Human Rights Code*.<sup>2</sup>

As an additional guide, footnotes in this policy set out the lowest and highest available unpaid leave periods and remuneration levels during firm-paid leave, and other key survey information drawn from a survey of 17 Vancouver firms, each having 50 or more lawyers, conducted by the Law Society of British Columbia in July 2013 (the “2013 Justicia BC Survey”).

The provincial *Employment Standards Act, R.S.B.C. 1996 c. 113* (the “ESA”) does not apply to lawyers.<sup>3</sup> The pregnancy and parental leave benefits outlined therein do, however, provide guidelines that are instructive, since they apply to most other firm employees and it may be desirable to place lawyers on at least equal footing with other employees with regard to pregnancy and parental benefits. As of March 2014, the ESA provides for up to 17 weeks of unpaid leave for birth mothers (pursuant to section 50 of the ESA) plus up to 35 consecutive weeks of unpaid parental leave beginning immediately after the end of the leave taken under section 50 or, for birth mothers who do not take leave under section 50, up to 37 consecutive weeks of unpaid parental leave. Birth fathers and adoptive parents are entitled to up to 37 consecutive weeks of unpaid parental leave. In particular circumstances, the ESA provides for additional periods of leave.<sup>4</sup>

Law firms also 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 *Code of Professional Conduct*. These obligations include a prohibition against discrimination on the basis of pregnancy, family status or gender, as well as a duty to accommodate to the point of undue hardship.<sup>5</sup>

Leaving aside the question of the length of time a lawyer may take for pregnancy and parental leave, there is also the question of remuneration during the leave. The results of the 2013 Justicia BC Survey demonstrate that many law firms do provide for some form of remuneration during these leaves, whether in the form of EI top-up or regular pay.

In this model policy, “pregnancy leave” refers to leave time available to birth mothers who are pregnant or have recently given birth, and “parental leave” refers to leave time available to parents of either gender who have not taken pregnancy leave and are caring for a newborn or newly adopted child. This policy recommends that an adoptive parent who is the child’s primary caregiver be eligible to receive the same amount of overall paid leave time as would be available to a birth mother (albeit under the parental, rather than pregnancy, leave category).

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<sup>2</sup> Context attributed to the guides published by the Law Society of Upper Canada in its Justicia materials.

<sup>3</sup> *Employment Standards Act Regulation*, B.C. Reg. 396/95, s.31(c).

<sup>4</sup> *Employment Standards Act*, R.S.B.C. 1996 c. 113 at sections 50(3) and 51(2).

<sup>5</sup> A detailed review of this topic is beyond the scope of this policy, but lawyers and law firms should familiarize themselves with these legal requirements. Law firms should also consider involving firm members or other lawyers with expertise in employment and human rights matters in drafting firm pregnancy and parental leave policies. The Law Society of British Columbia Code of Professional Conduct places a special responsibility on lawyers not to discriminate against any person.

Under the federal *Employment Insurance Act, S.C. 1996 c. 23*, lawyers may be eligible for 15 weeks of government-paid pregnancy leave benefits and 35 weeks of government-paid parental leave benefits for a total of 50 weeks of government-paid leave after a two-week waiting period. Under the *Employment Insurance Act*, the highest benefit payment possible, as of the date of this policy, is \$501 a week.

Sections of this policy are based upon the materials produced by the Law Society of Upper Canada's Justicia Project. Permission to adapt the materials is gratefully acknowledged.

## **POLICY**

### **1. Statement of Principles**

#### **1.1 Commitment of the Firm**

[Name of firm] understands that new parents may wish to spend an extended period of time with newborn or newly adopted children. In recognition of the physical impact of pregnancy and childbirth on birth mothers, the policy provides for periods of paid and unpaid pregnancy leave. The policy also provides for periods of paid and unpaid parental leave that are available to parents other than the birth mother upon the birth or adoption of a child in recognition of the time necessary to adjust to the demands of having a new child in the home.

This policy applies to all associate lawyers, associate counsel and income partners.

#### **1.2 Purpose**

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. This policy also recognizes the role of the firm in assisting lawyers to transition their practice prior to, during and after a leave, and the role of the lawyer who takes a leave in ensuring continued excellence in client service and practice management.<sup>6</sup>

### **2. Pregnancy Leave**

#### **2.1 Eligibility**

The pregnancy leave portion of this policy is applicable to lawyers who are pregnant or have given birth.

Every such lawyer, regardless of her period of service with the firm, is eligible for pregnancy leave for the length of time described in Section 2.2.

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<sup>6</sup> See Law Society of Upper Canada's Justicia Guide to Assist Law Firms in Developing Pregnancy and Parental Leave Policies for Associates, pages 7 and 19.

Every such lawyer who has completed at least \_\_\_\_ months of continuous employment with the firm before the commencement of her pregnancy leave is eligible for the paid pregnancy leave described in Section 2.3.<sup>7</sup>

## 2.2 Length and Timing

All eligible lawyers are entitled to a period of pregnancy leave, whether paid or unpaid, of up to \_\_\_\_ continuous weeks.<sup>8</sup> Pregnancy leave may commence as early as eight weeks before the expected date of birth and as late as the actual birth date.<sup>9</sup>

Pregnancy-related illnesses requiring absence from work prior to and after the pregnancy leave period are not covered by this policy. Lawyers should refer to applicable firm sick-leave policies and disability benefit plans and/or employment insurance sick-leave benefits.<sup>10</sup>

## 2.3 Remuneration for Lawyers Eligible for Paid Pregnancy Leave

All eligible lawyers are entitled to \_\_\_\_ weeks of paid pregnancy leave (the balance, if any, to be taken as unpaid pregnancy leave).<sup>11</sup>

Lawyers on paid pregnancy leave who are eligible for employment insurance benefits will be entitled to receive supplementary payments (the “Pregnancy Leave Top-Ups”) during the period provided for in this Section 2.3.<sup>12</sup> The Pregnancy Leave Top-Ups will top up the gross

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<sup>7</sup> A firm may choose to require an employee to work for a period of time before becoming entitled to paid pregnancy leave. In the 2013 Justicia BC survey, two firms stipulated an eligibility period of two years, six firms stipulated one year, two stipulated six months, and seven did not impose an eligibility period at all. Some firms have chosen to require that the lawyer return to “active” employment for a particular period of time before a subsequent paid leave may be taken.

<sup>8</sup> The specific amount of time that a firm chooses to offer is to be determined by the firm. The ESA provides for 17 weeks of unpaid pregnancy leave. Of the 17 firms in the 2013 Justicia BC Survey, all offered up to 52 weeks of total (paid and unpaid) pregnancy leave.

<sup>9</sup> The recommended timing for commencement of paid pregnancy leave is the same as the timing for pregnancy leave benefits under the *Employment Insurance Act*.

<sup>10</sup> Law firms should examine their disability benefit plans to ensure they are in accordance with the Supreme Court of Canada decision in *Brooks Allan & Dixon v. Canada Safeway* (1989), 59 DLR (4<sup>th</sup>) 321, which held that disability insurance plans that exclude pregnancy-related illness from coverage contravene human rights protections against sex discrimination.

<sup>11</sup> Some firms may offer only paid or only unpaid pregnancy leave, or a combination. Of the 17 firms in the 2013 Justicia BC Survey, one offered eight weeks of paid pregnancy leave, three offered 15 weeks, 12 offered 17 weeks, and one offered 26 weeks.

<sup>12</sup> Employers are not required to obtain formal approval from Human Resources Development Canada for plans used to supplement pregnancy and parental benefits but employers are required to indicate in the record of employment that a supplement will be paid to an employee. These supplementary benefits will not be considered earnings to the employee and, therefore, will not be deducted from employment insurance benefits if:

- (i) when the payment is added to the employee's weekly benefits, the total does not exceed the employee's normal weekly wage earnings, or 100% of gross salary; and
- (ii) the payment will not be used to reduce other accumulated employment benefits such as sick leave, vacation leave credits, or severance pay.

employment insurance benefits and any other earnings of the lawyer to \_\_\_ %<sup>13</sup> of the lawyer's normal weekly salary.<sup>14</sup>

Lawyers on paid pregnancy leave who are not eligible for employment insurance benefits will be entitled to receive an amount equivalent to the Pregnancy Leave Top-Ups that the firm would pay to a lawyer who qualifies for such benefits.

## **2.4 Benefits**

The firm will maintain all employee benefits, including accrual of paid vacation, in accordance with its usual practice, throughout a period of paid pregnancy leave.

The firm will maintain all employee benefits, other than accrual of paid vacation, in accordance with its usual practice, throughout a period of unpaid pregnancy leave.<sup>15</sup>

## **2.5 Reimbursement**

A lawyer who has taken paid pregnancy leave is expected to return to work at the firm on the same basis (whether full or part-time) as before her leave, or on an agreed-upon reduced-work schedule, and to remain working at the firm for a period of not less than \_\_\_ months following her return from leave.<sup>16</sup>

If a lawyer who has taken a paid pregnancy leave does not return to work for that period or resigns during that period, that lawyer must repay \_\_\_ %<sup>17</sup> of the Pregnancy Leave Top-Ups she received during the period of paid pregnancy leave.

## **3. Parental Leave**

### **3.1 Eligibility**

The parental leave portion of this policy is applicable to lawyers with newborns or newly adopted children who have not taken pregnancy leave.

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<sup>13</sup> In the 2013 Justicia BC Survey, the percentage to which salary was topped up ranged from 75% to 100%, with one firm topping up to 75%, one firm topping up to 95%, and 15 firms topping up to 100%.

<sup>14</sup> Firms that do not compensate lawyers on a straight salary basis (for instance firms that use a base salary plus performance compensation model) will need to determine the appropriate formula for paid leave.

<sup>15</sup> The *Employment Standards Act* contains express rules about the continuation of benefits and vacation accrual during pregnancy leave; however, lawyers are exempt from that statute. This model policy recommends that firms treat pregnancy leave as they would other types of leave for purposes of vacation accrual and benefits.

<sup>16</sup> Some firms have implemented a “return to work” requirement that stipulates that a lawyer who has taken paid pregnancy leave is required to return to work at the firm for a specified period of time, failing which she must repay all or a pro rata portion of the remuneration received from the firm during the period of paid leave. Of the 17 firms in the 2013 Justicia BC Survey, seven did not have a return to work requirement, one required a return to work for at least 26 weeks, and eight required a return to work for one year.

<sup>17</sup> Of the 17 firms in the 2013 Justicia BC Survey, seven had no return to work requirement (and so no consequence for failure to return to work), two had discretionary consequences, three required the repayment of a pro rata portion, and five required the repayment of 100% of the Top-Ups received during the period of paid pregnancy leave.

Every such lawyer, regardless of his or her period of service with the firm, is eligible for parental leave for the length of time described in Section 3.2.

Every such lawyer who has completed at least \_\_\_\_ months<sup>18</sup> of continuous employment with the firm before the commencement of his or her parental leave is eligible to receive the remuneration described in Section 3.3.

### **3.2 Length and Timing**

The maximum cumulative period of parental leave, including paid and unpaid leave, for a lawyer who is the primary caregiver of a newborn or newly adopted child is \_\_\_\_ continuous weeks.<sup>19</sup>

The maximum cumulative period of parental leave, including paid and unpaid leave, for a lawyer who is not the primary caregiver of a newborn or newly adopted child is \_\_\_\_ continuous weeks.<sup>20</sup>

Where an eligible lawyer is either:

- (a) the primary caregiver of a newborn or newly adopted child, he or she is entitled to a period of paid parental leave of up to \_\_\_\_ continuous weeks<sup>21</sup> following the arrival of the child in the lawyer's home; or
- (b) not the primary caregiver of a newborn or newly adopted child, he or she is entitled to a period of paid parental leave of up to \_\_\_\_ continuous weeks<sup>22</sup> within the first year following the birth or adoption of a child.

Details of the remuneration for lawyers entitled to paid parental leave under this policy are set out in Section 3.3 below.

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<sup>18</sup> A firm may choose to require an employee to work for a period of time before becoming entitled to paid parental leave. In the 2013 Justicia BC survey, two firms stipulated an eligibility period of two years, six firms stipulated one year, two stipulated six months, and seven did not impose an eligibility period at all.

<sup>19</sup> For a lawyer with a newborn or newly adopted child who is the primary caregiver of that child, three of the 17 firms in the 2013 Justicia BC Survey offer 35 continuous weeks of paid and unpaid leave, 12 offer 52 weeks, and two have discretionary periods of cumulative leave. Firms for which the absence of a lawyer for an extended period is a hardship could consider hiring a contract lawyer or making use of legal outsourcing services for that period.

<sup>20</sup> Of the 17 firms in the 2013 Justicia BC Survey, two offer a lawyer with a newborn or newly adopted child who is not the primary caregiver of that child no leave, two offer two weeks, two offer four weeks, one offers 30 weeks, three offer 35 weeks, two offer 37 weeks, and three offer 52 weeks. Firms for which the absence of a lawyer for an extended period is a hardship could consider hiring a contract lawyer or making use of legal outsourcing services for that period.

<sup>21</sup> The amount of time that a firm chooses to offer as paid time is to be determined by the firm. This model policy recommends that the primary caregiver of a newly adopted child be eligible to receive the same overall amount of paid leave time as would be available to a birth parent.

<sup>22</sup> The amount of time that a firm chooses to offer as paid time is to be determined by the firm. Of the 17 firms in the 2013 Justicia BC Survey, nine offer a lawyer with a newborn or newly adopted child who is not the primary caregiver of that child zero weeks of paid leave, one offers two weeks, five offer four weeks, and two offer 17 weeks.

Where paid parental leave has been taken, unpaid parental leave is to commence immediately following the paid parental leave unless the firm and the lawyer agree to a different schedule. In any event, parental leave (whether paid or unpaid) is to be completed within 52 weeks of the child's arrival in the home.

### **3.3 Remuneration**

A lawyer on paid parental leave who is eligible for employment insurance benefits will be entitled to receive supplementary payments (the "Parental Leave Top-Ups") during the period provided for in Section 3.2.<sup>23</sup> The Parental Leave Top-Ups will top up the gross employment insurance parental leave benefits and any other earnings of the lawyer to \_\_\_\_\_%<sup>24</sup> of the lawyer's normal weekly salary.

A lawyer on paid parental leave who is not eligible for employment insurance parental leave benefits will be entitled to receive an amount equivalent to the Parental Leave Top-Ups that the firm would pay to a lawyer who qualifies for such benefits.

### **3.4 Benefits**

The firm will maintain all employee benefits, including accrual of paid vacation, in accordance with its usual practice, throughout a period of paid parental leave.

The firm will maintain all employee benefits, other than accrual of paid vacation, in accordance with its usual practice, throughout a period of unpaid parental leave.<sup>25</sup>

### **3.5 Reimbursement**

A lawyer who has taken a paid parental leave is expected to return to work at the firm on the same basis (whether full or part-time) as before the leave, or on an agreed upon reduced work

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<sup>23</sup> Employers are not required to obtain approval from Human Resources and Social Development Canada for plans used to supplement pregnancy and parental benefits, but employers are required to indicate in the record of employment that a supplement will be paid to an employee and to maintain records showing when the supplemental benefits were paid and that the benefits meet the two conditions for not being considered earnings. These supplementary benefits will not be considered earnings to the employee and, therefore, will not be deducted from employment insurance benefits if:

- (i) when the payment is added to the employee's weekly benefits, the total does not exceed the employee's normal weekly wage earnings, or 100% of gross salary; and
- (ii) the payment will not be used to reduce other accumulated employment benefits such as sick leave, vacation leave credits, or severance pay.

<sup>24</sup> Firms that do not compensate lawyers on a straight salary basis (for instance, firms that use a base salary plus performance compensation model) will need to consider the appropriate formula to use.

<sup>25</sup> The ESA contains express rules about the continuation of benefits and vacation accrual during parental leave; however, lawyers are exempt from that statute. This model policy recommends that firms treat parental leave as they would other types of leave for purposes of vacation accrual and benefits.

schedule, and to remain working at the firm for a period of not less than \_\_\_\_ months<sup>26</sup> following his or her return from leave.

If a lawyer who has taken a paid parental leave does not return to work for that period or resigns during that period, that lawyer must repay \_\_\_\_ %<sup>27</sup> of the Parental Leave Top-Ups he or she received during the period of paid leave.

#### **4. Consequences of Leave**

A lawyer's targets for hours recorded and fees billed will be reduced to reflect the number of weeks of pregnancy or parental leave taken.

Salary increases for lawyers on pregnancy or parental leave may or may not be affected or delayed, depending on the length of the leave and its impact on the lawyer's professional development, but will be discussed with the lawyer upon his or her return to the firm.<sup>28</sup>

The firm will determine whether and when an associate will be admitted to partnership or an income partner will be admitted to equity partnership based on the individual's professional and practice development, among other factors.

Because law is an experience-based profession, a lawyer's compensation, billing rate and prospects for advancement are tied to his or her legal skills and development. While taking any significant period of leave (or successive leaves) for any reason may affect the lawyer's professional and practice development, the impact will be considered on an individual basis and not simply assumed.

Taking a leave of up to \_\_\_\_ weeks<sup>29</sup> should not in and of itself affect the lawyer's remuneration or path to partnership.

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<sup>26</sup> Some firms have stipulated that a lawyer who has taken paid parental leave is required to return to work at the firm for a specified period of time, failing which he or she must repay to the firm some or all of the remuneration received from the firm during the period of paid leave. Of the 17 firms in the 2013 Justicia BC Survey, one required a return to work for at least 26 weeks, eight provided for one year, and seven had no requirement.

<sup>27</sup> Of the 17 firms in the 2013 Justicia BC Survey, two had discretionary consequences, three required the repayment of a pro rata portion, and five required the repayment of 100% of the Top-Ups received during the period of paid parental leave. Seven firms had no return to work requirement and therefore no consequence.

<sup>28</sup> In determining whether a lawyer's salary will increase after a leave, firms should consider the length of the leave and the impact on the lawyer's professional development and growth during the period being considered. For instance, a short leave period during a work year would have little impact on the year overall in terms of professional growth and development opportunities, whereas a year-long leave could have a different result.

<sup>29</sup> 17 weeks is the minimum period of pregnancy leave stipulated by the ESA, which, while it does not apply to lawyers, is instructive. A firm may decide to specify here a shorter or longer period, possibly to coincide with the duration of the paid pregnancy leave provided by the firm if longer than 17 weeks, or to leave out this reference, which is included in the model policy in order to provide lawyers taking leave with some certainty.



## **5. Notice and Approval Procedures**

### **5.1 Notice and Confirmation**

Except in the case of a medical emergency or adoption when its timing is unexpected, a lawyer must notify the firm, in writing, in advance of his or her intention to take a leave for which he or she is eligible. The notice should specify the approximate starting date of the leave and the estimated date of return and should be submitted to [insert appropriate position e.g. Associate Coordinator, Practice Lead, the Director of Human Resources] as soon as possible and not less than three months prior to the leave period. The firm will promptly confirm the terms of the leave.

### **5.2 Approval of Excess Leave**

Leave requests in excess of the policy period will be subject to the approval of [insert appropriate position e.g. Associate Coordinator, Practice Lead, the Director of HR].

The criteria for approval will include the needs of the requesting lawyer, workload, specific client needs, the unique skills of the requesting lawyer and time for proper planning to meet the demands of the practice.

## **6. Transitional Procedures**

### **6.1 Transition Plan**

Upon receipt of the lawyer's notice of his or her intention to take leave for which he or she is eligible, the firm shall designate \_\_\_\_\_ to assist the lawyer to develop and implement a transition plan which addresses the following matters:

- (a) transfer of client files including, for each file, to whom the file will be transferred, the timing of the transfer, any transfer memos or meetings required, the form of notification to the client and others involved in the file, and the resumption of responsibility for those files when the lawyer returns from leave;
- (b) transfer of administrative, client management, marketing or other non-billable responsibilities of the lawyer, and resumption of those responsibilities when the lawyer returns from leave;
- (c) the lawyer's intentions and expectations regarding continuation of any duties or responsibilities while on leave, such as the availability of the lawyer for consultation on client files, client management and marketing, and continued participation in firm committees or other administrative work, and whether this is paid;
- (d) mentoring, coaching, and practice support including the acquisition of work and the maintenance and growth of his or her practice before and after return from leave;

- (e) social and other contact with the firm while on leave (e.g. if the lawyer wishes to be notified of or actively involved in firm or client events, practice group meetings, committee meetings, educational seminars and lunches with colleagues);
- (f) administrative issues such as mode of communication with the firm, remote access to the firm computer system, mobile device usage, e-mail and voice mail access and notification, any administrative support, and any office space required while on leave;
- (g) any accommodation anticipated to be required both before and after return from leave (e.g. room for breastfeeding);
- (h) notification to the firm/colleagues regarding some or all of the above issues;
- (i) confirmation of benefits (e.g. extended health, top-up, disability) and the effects, if any, of the leave (e.g. eligibility for partnership, salary upon return, scheduled reviews); and
- (j) the timing of and attendance at meetings with \_\_\_\_\_ to facilitate all of the above before, during and after the leave.

Assuming professional obligations are met, lawyers on leave are not required to be available for legal work. However, the lawyer and the firm should consider the fact that extended leaves, particularly where the lawyer is entirely cut off from the firm and its clients, will likely delay the professional development of the lawyer and his or her practice. The lawyer and firm should discuss opportunities for the lawyer to continue to have involvement in legal work and business and professional development, as appropriate to the circumstances, should the lawyer on leave wish to do so.

## **6.2 Joint Responsibility**

It is the joint responsibility of the lawyer taking leave and the firm to properly manage the lawyer's practice to ensure that the necessary steps are taken to appropriately transition client and practice obligations before and after taking a leave and to be as productive as possible during the transition periods.

## **6.3 Transitional Work Scheduling**

- (a) Reduced work schedule prior to birth of child

Lawyers may find that the physical impact of pregnancy necessitates a reduced-hours schedule prior to the birth of a child. Lawyers may request to work a reduced-hours schedule in accordance with the firm's Flexible Work Arrangements Policy or in accordance with the firm's short-term disability policy.

(b) Reduced work schedule on return

Lawyers may find that the demands of child-care necessitate a reduced-hours schedule on return to work. Lawyers may request to work a reduced-hours schedule in accordance with the firm's Flexible Work Arrangements Policy.

**7. Legislation**

**7.1 Applicable Legislation**

This policy will be deemed to incorporate any changes required to comply with applicable legislation from time to time. It will be updated to reflect such changes as soon as practicable.