



Schweizerische Eidgenossenschaft  
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Federal Department of Economic Affairs,  
Education and Research EAER

**State Secretariat for Economic Affairs SECO**

# Pregnancy and motherhood

Employee protection

SECO | Working Conditions



## Imprint

Published by: SECO – Labour Directorate, Department of Working Conditions

Graphic design: Michèle Petter Sakthivel, Berne

Photographs: Iris Krebs, Berne, flickr.com

(The photograph on page 31 was generously made available by «Travail.Suisse»)

Translation: Drew Lilley, Zug

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Download: [www.seco.admin.ch/dokumentation/publikation](http://www.seco.admin.ch/dokumentation/publikation)

Translation: June 2014, based on German version June 2014

# PREGNANCY AND MOTHERHOOD EMPLOYEE PROTECTION

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# I. Introduction

The following regulations concern pregnant employees, women who have recently given birth, and breast-feeding mothers:

## 1. The Labour Law<sup>1</sup> and the implementation of Ordinance 5

This legal framework protects the health of pregnant women, those who have recently given birth and breast-feeding mothers, with some exceptions (see below). It describes the conditions in which such women may be employed

Exceptions to Labour Law<sup>2</sup>:

- Certain companies and employees are completely excluded from these requirements, for example, agricultural enterprises, transport companies, private households and cottage industries.
- Others are only subject to the conditions of the Law in regard to health protection<sup>3</sup>, for example. all public administrations and employees who occupy scientific or senior management posts.

So that you can be sure whether or not the explanations to the Swiss Labour Law given in parts II – IV apply in your case, you are recommended to ask for clarification from the relevant authorities. The cantonal health and safety inspectors will be able to help you in this respect.

The conditions set out in the Labour Law are compulsory. Compliance is overseen by the cantonal and federal health and safety inspectors. An employee can file a complaint with these authorities.

## 2. The Swiss Code of Obligations<sup>4</sup>

This law protects pregnant women and those who have recently given birth primarily from an economic standpoint (continuation of salary payment) and in the event of termination of an employment contract. These requirements are applicable to all employers and all employees with an employment contract governed by private law, including part-time employees, apprentices, commercial saleswomen and employees who work at home for their employers in an uninterrupted fashion. Employees in public services are not generally covered by the Swiss Code of Obligations, but instead by specific laws (according to cantonal regulation) .

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<sup>1</sup> ArG, Art. 35 ff

<sup>2</sup> The Swiss Federal Labour Law was abbreviated to Labour Law in this text to facilitate reading. The Labour Law is applicable in all cantons of Switzerland. Art. 1-4 ArG

<sup>3</sup> Regarding maternity, these include restrictions on onerous or dangerous tasks, the conditions in which women are permitted to carry out such tasks and requirements for transfer to equivalent work (Art. 35 ArG; see part II, paragraph 1).

<sup>4</sup> OR; Art. 319 ff

Disputes regarding the application of these provisions are to be brought before either the civil or the industrial tribunal of the place of residence of the accused party or for the place where the employee usually carries out her work. The procedure in such courts is generally expeditious and without cost provided that the amount involved in the case does not exceed CHF 30,000<sup>5</sup>.

Although legal fees are generally not charged by the tribunals, they may require compensation to be paid where a party has incurred legal costs.

### **3. Replacement of Earnings Law<sup>6</sup> and corresponding ordinance**

Formerly, this law covered (partial) compensation for loss of income by people carrying out military service, civil defence or civilian service duties. Since 2005, this law requires compensation for loss of earnings by employed women during maternity leave.

### **4. Equality Law<sup>7</sup>**

This law forbids any discrimination against women which is due to an existing, future or past pregnancy<sup>8</sup>.

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<sup>5</sup> Art. 343 OR

<sup>6</sup> EOG, Art. 16b ff

<sup>7</sup> GIG

<sup>8</sup> see part VIII

## II. Period of pregnancy

During pregnancy women are more sensitive to stresses and injuries which arise through circumstances in the workplace.

Certain physical influences (e.g. x-rays), chemical substances (e.g. pesticides, solvents, carbon monoxide and lead) or biological factors (e.g. the rubella virus) can have serious consequences on the development of the foetus or cause premature births. Towards the end of the pregnancy onerous tasks (such as moving heavy loads, long periods of standing and inappropriate working hours) can have negative effects on the health of the expectant mother, who is more susceptible than usual to such factors, or the pregnancy.

Employers are therefore required to ensure that pregnant women work in such a way and in such conditions that their health and the health of the child are not put at risk<sup>9</sup>.

For example, pregnant women who primarily have to work standing up have the right, from the fourth month of pregnancy onwards, to a daily rest period of 12 hours. Furthermore, they are entitled, in addition to the usual legally required breaks, to a break of 10 minutes after every two hours work. From the sixth month of pregnancy, they should only be expected to work standing up for at most four hours per day<sup>10</sup>.

### 1. Unacceptable tasks

#### a) Dangerous or onerous tasks

Pregnant women should only perform dangerous or onerous tasks if a risk assessment certifies that there will be no negative impact on the health of the mother or the child, or if such an impact can be eliminated by adequate protective measures<sup>11</sup>.

Here is a list of tasks which, amongst others, are considered dangerous or onerous:

- Moving heavy objects by hand (more than 5 kg on a regular basis, more than 10 kg on an occasional basis)
- Movements and postures which lead to premature fatigue (extensive stretching or bending, continuous crouching, etc.)
- Tasks which involve the effects of blows, jolts or vibrations
- Working in extremes of cold (below  $-5^{\circ}\text{C}$ ), heat (over  $+28^{\circ}\text{C}$ ) or very wet conditions.
- Working under the effects of harmful radiation or noise (greater than or equal to 85 dB(A))
- Working under the effects of dangerous substances or micro-organisms
- Working in time management systems which put severe stress on the employee (shift work with backward rotation, more than three consecutive nightshifts, etc.)

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<sup>9</sup> Art. 35 section 1 ArG

<sup>10</sup> Art. 61 ArGV 1

<sup>11</sup> Art. 62 ArGV 1

The Ordinance for the Protection of Pregnant<sup>12</sup> Women, issued by the Federal Department of Economic Affairs, Education and Research, regarding dangerous and onerous tasks during pregnancy and maternity (maternity protection decree) provides more details on these tasks.

### **b) Risk assessment**

If tasks are performed in a company which are potentially dangerous or onerous to the mother or the child, a qualified expert is required to carry out a risk assessment. The risk assessment should be undertaken before women are employed.<sup>13</sup>

The risk assessment is designed to detect dangers, assess risks and stipulate adequate protective measures to enable the risks to be eliminated or managed.

Employees are to be informed of the result of the assessment and of the protective measures which result from it.

### **c) Evening and night shift work**

During the first seven months of pregnancy, an employee who is required to work between 8 pm and 6 am must, on request, to be given equivalent work during a day shift<sup>14</sup>.

From the eighth week prior to the expected birth, women are not permitted to work between 8 pm and 6 am<sup>15</sup>.

### **d) Replacement work and salary payment**

Employers are required to offer pregnant employees who carry out onerous or dangerous tasks, equivalent replacement tasks without risks, insofar as this is possible. They are also required to offer pregnant women who work between 8 pm and 6 am equivalent day shift work (between 6 am and 8 pm).

Equivalent work is deemed to make the same intellectual and technical demands and be carried out at the usual place of work and correspond to the same salary as the usual tasks.

If the employer is not able to offer equivalent replacement work, employees have the right to not carry out their usual tasks and are entitled to 80% of their salary<sup>16</sup>. While any extra allowances for night shift work do not have to be paid, a suitable compensation for loss of payment in kind (for example for meals) should be made.

This compensation of 80% of salary may not be deducted from the salary which is owed for inability to carry out work through no fault of one's own (see paragraph 3 below).

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<sup>12</sup> Mutterschutzverordnung des WBF

<sup>13</sup> ArGV 1, Art. 63 section 2

<sup>14</sup> Art. 35b section 1 ArG

<sup>15</sup> Art. 35a section 4 ArG

<sup>16</sup> Art. 35 and Art. 35b ArG



## **2. Further working restrictions**

### **a) Consent for employment**

Pregnant women are only to be given employment tasks to which they have given their consent<sup>17</sup>.

Should they request it, pregnant women are to be relieved of any duties which they find onerous<sup>18</sup>.

Pregnant employees must be able to lie down and rest in suitable conditions (for example on a comfortable couch in a separate relaxation room<sup>19</sup>).

### **b) Absence from work**

A pregnant woman may stay away from or indeed leave work at her own initiative<sup>20</sup>. In this case, however, her salary is not unconditionally owed to her, particularly if she cannot provide a medical certificate (see paragraph 3 section d hereafter).

### **c) Limitation of working hours**

The duration of daily work, as defined in the employment contract, may not be extended, and daily work may under no circumstances exceed nine hours, even if longer working days were provided for in the employment contract<sup>21</sup>.

## **3. Payment of salary during incapacity for work**

### **a) Basic provisions**

As is the case with illness or injury, the employer must pay a pregnant employee her salary for a limited duration if she cannot go to work due to her pregnancy<sup>22</sup>.

The pregnancy as such does not give any entitlement to salary when work is not carried out: Only if the pregnant employee is prevented from working due to health reasons, namely those which are related to her condition, can she request benefits as set out in Art. 324a OR.

The continued payment of salary as described here is not governed by the same regulations as those which rule out performing dangerous or onerous tasks or evening and/or night shift work (see above, paragraph 1 section d).

### **b) Payment in kind**

Should part of a salary be in payment in kind (for example as meals when an employee works away from home) adequate compensation is to be provided<sup>23</sup>.

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<sup>17</sup> Art. 35a section 1 ArG

<sup>18</sup> Art. 64 section 1 ArGV 1

<sup>19</sup> Art. 34 ArGV 3

<sup>20</sup> Art. 35a section 2 ArG

<sup>21</sup> Art. 60 section 1 ArGV 1

<sup>22</sup> Art. 324a section 3 OR

<sup>23</sup> Art. 324a section 1 and 3 OR

### c) Conditions

If the employee is in a permanent work contract, this must have been valid for a minimum of three months for her to have an entitlement to continued salary payment.

If the employee has a fixed term contract, this must have been valid for more than three months.

### d) Medical certificate

To obtain her salary, the employee has to prove, upon employer's request and by means of a medical certificate, that there are health reasons preventing her from working.

These health reasons can be either attributable to the pregnancy (for example, threatened miscarriage) or independent of it (for example, influenza).

### e) Duration of obligatory continued payment of salary

If there is no insurance coverage for loss of earnings due to illness (see section f hereafter), the duration of the continued payment of salary will be based on the number of years of service with the same employer.

Years of service do not automatically correspond to calendar years.

In the first year of service, the salary is to be paid for a total of at least three weeks. In the following years of service, the law provides for a correspondingly longer period of continued payment of salary which is, however, not specified<sup>24</sup>.

In order to simplify the definition of a "correspondingly longer period", individual industrial tribunals have set down the following scales with coefficients:

Years of service	Basle scale	Berne scale	Zurich scale
1st year of service	3 weeks	3 weeks	3 weeks
2nd year of service	2 months	1 month	8 weeks
3rd year of service	2 months	2 months	9 weeks
4th year of service	3 months	2 months	10 weeks
5th year of service	3 months	3 months	11 weeks
6th year of service	3 months	3 months	12 weeks
7th year of service	3 months	3 months	13 weeks
8th year of service	3 months	3 months	14 weeks
9th year of service	3 months	3 months	15 weeks
10th year of service	3 months	4 months	16 weeks
11th year of service	4 months	4 months	17 weeks

etc.

Should a new year of service begin during the period of inability to work, then this generates a new entitlement (see FAQ 13).

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<sup>24</sup> Art. 324a section 2 OR

#### **f) Taking out insurance for loss of earnings (daily benefits insurance)**

A written agreement can be made regarding the payment of salary during a period of inability to work. The benefits owing to the employee must, however, be at least equivalent to the scales described above<sup>25</sup>.

In most cases, this involves sick leave insurance which is taken out by the employer.

The benefits from this are considered equivalent to the scales if they cover 80% of the salary for 720 days (within a consecutive 900-day period) in the event of an illness, after a deferred period of a maximum of three days, and if the employer pays at least half of the insurance premium.

Private sick leave insurance which is paid for entirely by the employee does not exonerate the employer from salary payment according to the OR.

### **4. Reduction of holiday entitlement**

The basic principle is that employers may reduce the length of holiday entitlement if an employee does not work for a certain period of time<sup>26</sup>.

#### **a) Absences due to pregnancy**

The employer is allowed to reduce holiday entitlement only if the absence from work due to pregnancy has lasted longer than two months<sup>27</sup>. This means that the reduction can only begin from the third complete month of absence from work.

The reduction can amount to up to 1/12<sup>th</sup> for each complete month of inability to work, i.e. 1/12<sup>th</sup> after three complete months, 2/12<sup>ths</sup> after four complete months etc.

#### **b) Due to maternity leave**

Employers may not reduce holiday entitlement if the employee was not at work during the 14 weeks of maternity leave<sup>28</sup>.

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<sup>25</sup> Art. 324a section 4 OR

<sup>26</sup> Art. 329b OR

<sup>27</sup> Art. 329b section 3 OR

<sup>28</sup> Art. 329b section 3 OR

### **III. Period immediately after the birth**

#### **1. Employment restriction**

Women who have just given birth may not be employed for eight weeks after the birth<sup>29</sup>.

#### **2. Maternity leave**

##### **a) Basic provision**

Since 1st July, 2005, employees are entitled to maternity leave for a minimum of 14 weeks (or 98 days) after a birth<sup>30</sup> which is to be taken as one single period (interruptions are not possible).

This entitlement does not exist in the event of the adoption of a child.

##### **b) Benefits**

During maternity leave, the employee is entitled to 80% of her salary in the form of daily wage replacement<sup>31</sup>.

##### **c) Entitlement to claim**

The following are entitled to this maternity leave:

- Employed women
- Self-employed women
- Women who work in their husbands' business or that of a family member and who are paid a salary
- unemployed women
- women who are ill and receiving daily wage replacement

This must be the case at the time of the birth (see FAQ 15).

##### **d) Conditions**

For the woman to receive these payments, she must:

- be insured by the AHV (old age and surviving dependents insurance) for the nine months prior to the birth (six months in the event of birth before the seventh month of pregnancy, seven months in the event of birth before the eighth month of pregnancy and eight months in the event of birth before the ninth month of pregnancy), and
- have worked for a minimum of five months in the period prior to the birth.

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<sup>29</sup> Art. 35a section 3 ArG

<sup>30</sup> Art. 329f OR

<sup>31</sup> Art. 16e EOG. As of 1 January 2009, daily payments cannot exceed the sum of CHF 196 as a basic rule (Art. 16 ff EOG), which corresponds to 80% of a monthly salary of CHF 7,350. Exceptions to this are possible if the mother was receiving higher unemployment, accident, invalidity or sickness benefits or a military pension before the birth or had higher compensation from a service provider.

To calculate the minimum insurance period, any social insurance contributions paid and employment time worked in an EU/EFTA state must be counted (Art. 26 and 28 EOV).

If an employee does not fulfil the conditions of maternity insurance, continuation of salary is then carried out based on the same rules which govern inability to work through no fault of one's own (see part II, paragraph 3).

#### **e) Beginning of leave**

The leave begins when the baby is born irrespective of the length of the pregnancy<sup>32</sup>.

If the child is stillborn or dies after the birth, the mother is entitled to benefits if the pregnancy lasted a minimum of 23 weeks<sup>33</sup>.

#### **f) End of maternity leave**

The leave ends once the 14<sup>th</sup> week has finished, and in any case, when the mother returns to work, either part or full time<sup>34</sup>.

**NB:** The mother may not return to work before eight weeks have passed, during which time she may not be given or take up any employment.

#### **g) Postponement of maternity leave**

If the child is required to remain in hospital for a minimum of three weeks after the birth<sup>35</sup>, the mother can request a deferral of payments until she is able to take the child home. The mother runs the risk here, however, of not receiving any income during this time.

### **3. Working restrictions**

#### **a) Reduced capacity to work**

If the woman is not fully capable of performing her duties during the months immediately following the birth and can prove this by means of a medical certificate, she should not be required to carry out tasks which go beyond the limits of her capacities<sup>36</sup>. The medical certificate must give information about the particular tasks the affected person can and cannot perform.

#### **b) Evening and night shift work**

As is the case during the first seven months of the pregnancy (see part II, paragraph 1 sections c and d), employers are required, upon request, to offer equivalent work during the day shift to women who normally work evening or night shifts (between 8 pm and 6 am) between the eighth and 16<sup>th</sup> week after the birth, or to pay them 80% of salary.

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<sup>32</sup> Art. 16c section 1 EOG

<sup>33</sup> Art. 23 EOV

<sup>34</sup> Art. 16d EOG

<sup>35</sup> Art. 24 EOV

<sup>36</sup> Art. 64 section 2 ArGV 1

With the implementation of the new maternity insurance provisions (see paragraph 2 above), this ruling is only applicable between the 14<sup>th</sup> and 16<sup>th</sup> weeks after the birth, unless the woman decides to return to work as soon as the employment restrictions have expired, ie., eight weeks after the birth.

### **c) Consent for employment**

From the ninth to the 16<sup>th</sup> week after the birth, the mother may only work provided that she has consented to do so<sup>37</sup>. For breast-feeding mothers: see next page.

The new maternity insurance provisions mean that this is only applicable to the 15<sup>th</sup> and 16<sup>th</sup> weeks after the birth, during which time the employee has no entitlement to salary if she does not work.

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<sup>37</sup> Art. 35a section 3 ArG

## IV. Breast-feeding

Breast-feeding is of great importance not only for the health of the child and the mother but also in terms of bonding between mother and child. It is therefore important to give mothers all the encouragement they need beyond maternity leave. This is one of the intended goals of the rulings within the Labour Law, alongside general health protection of employees and employers.

### 1. General health protection

As is the case during the pregnancy, the employer is required to assign breast-feeding mothers suitable tasks and adapt their working conditions so that the health of neither the mother nor the baby is negatively affected<sup>38</sup>.

As is the case during the pregnancy, a breast-feeding mother can request that she be excused from onerous tasks and that suitable facilities be available to her so that she can lie down and rest.

### 2. Dangerous and onerous tasks

Breast-feeding women should not carry out any dangerous or onerous tasks<sup>39</sup>.

They must be offered equivalent replacement work which entails no dangers. Should this not be possible, they are entitled to 80% of salary<sup>40</sup>.

### 3. Consent for employment

Once the eight-week employment restrictions have expired, breast-feeding mothers have to give their consent for employment.

### 4. Breast-feeding period

Mothers are allowed the necessary time for breast-feeding<sup>41</sup> until the child's first birthday. The time for breast-feeding or for expressing milk is classed as paid working time<sup>42</sup> according to the following limits:

- On a daily working time of up to 4 hours: at least 30 minutes
- On a daily working time of more than 4 hours: at least 60 minutes
- On a daily working time of more than 7 hours: at least 90 minutes

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<sup>38</sup> Art. 35 section 1 ArG

<sup>39</sup> see part II, paragraph 1, section a

<sup>40</sup> see part II, paragraph 1, section d

<sup>41</sup> Art. 35a section 2 ArG

<sup>42</sup> Art. 60 section 2 lit. a-c ArGV 1

The time deemed necessary for breast-feeding is not classed as a rest period. It may not be classed as compensation for overtime or as annual leave.

## **5. Limitation of working hours**

The usual period of daily work as defined in the employment contract may not be extended and may under no circumstances exceed nine hours work, even if a longer working day is provided for in the employment contract<sup>43</sup>.

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<sup>43</sup> Art. 60 section 1 ArGV 1



# V. Termination

This section deals in particular with the protection against dismissal of pregnant employees and women who have just given birth in terms of untimely dismissal<sup>44</sup> and not in terms of unfair dismissal due to maternity. Notice of this kind is dealt with in part VI hereafter.

## 1. Employer's restriction on termination

### a) Basic provision

Employers may not terminate a permanent employment contract either during the pregnancy of the employee or in the 16 weeks after the birth<sup>45</sup>. This restriction applies regardless of the reason for termination (i.e. whether it is related to the maternity or not).

Whether this protection is still applicable in the 16 weeks following the birth of a still-born child or one which died shortly after birth is a disputed point. Based on the principles of the new maternity insurance legislation<sup>46</sup>, it can be assumed that the protection is applicable if the pregnancy ran for a minimum of 23 weeks.

### b) Beginning of protection period

Protection begins from the first day of pregnancy, even if the employee did not know at the time that she was already pregnant.

Protection from dismissal is then only applicable if the trial employment period, which can last for up to three months, has been successfully completed.

### c) Consequences

Notice which is served during this exclusion period is null and void, i.e. it has no effect. Employers are required to serve the notice again once the exclusion period has ended, if they wish to terminate the working agreement and they are required to respect any additional notice periods.

If employers serve notice before the beginning of an exclusion period (i.e. before the employee became pregnant) with the termination of the contract coming into effect after the beginning of the pregnancy, the notice period is put on hold during the entire exclusion period and does not expire until after the end of this period, i.e. from the 17<sup>th</sup> week after the birth<sup>47</sup>. Should the date of the postponed termination of the contract not fall on a regular termination date (as a general rule at the end of a month), the end of the contract will automatically be postponed to such a date<sup>48</sup> (see FAQ 16).

### d) Non-applicability of the protection period

Protection from dismissal is not applicable in the following cases:

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<sup>44</sup> Art. 336c OR

<sup>45</sup> Art. 336c section 1 section c OR

<sup>46</sup> see part III, paragraph 2, section e

<sup>47</sup> Art. 336c, section 2 OR

<sup>48</sup> Art. 336c, section 3 OR

- If the contract is terminated without notice in the event of due cause<sup>49</sup>;
- If notice is served during a trial employment period in the event of an existing pregnancy, even if the termination corresponds to a date after the end of the trial period;
- If the parties terminate the contract by mutual consent (see paragraph 3 below);
- If the employment contract has a fixed term: the contract then expires at the end of the fixed term without notice being necessary.

## **2. Termination by the employee**

The ban on terminating a contract is only applicable for employers. Employees who are pregnant, women who have just given birth and breast-feeding mothers can serve notice on an employment contract at any time. They are obliged, however, to respect the correct legal or contractual notice periods and dates or those defined in the Labour Law.

Termination of a contract by serving notice or by mutual consent on a date prior to the birth signifies that the employee loses her entitlement to loss of earnings compensation upon maternity. She only retains her entitlements if the contract is terminated on a date after the birth.

## **3. Termination of contract by mutual consent**

There is the possibility of terminating a contract prematurely by agreement between the employee and the employer, even if the parties are not aware at the time that the employee is pregnant. An agreement of this type is only applicable if both sides mutually agree to forgo the rights which were provided for by law or in the employment contract.

It is strongly advised that the agreement be made in writing between the various parties in order to provide written proof.

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<sup>49</sup> Art. 337 ff. OR

# VI. Non-discrimination against women during maternity

Particular rulings are in place to protect women who are discriminated against due to pregnancy.

## 1. Ban on discrimination

It is strictly forbidden to penalise an employee either directly or indirectly due to their sex, and specifically not in reference to a pregnancy<sup>50</sup>.

This ban is applicable not only during the course of an employment contract but also during the hiring of employees and the termination of employment contracts.

Therefore, not hiring a woman because she might become pregnant is deemed discrimination and as such is forbidden by law.

## 2. Simplification of burden of proof

In light of the fact that it is difficult to prove discrimination, the law allows for an employee's claims of discrimination to be seen merely as credible. Employers are therefore required to provide proof to the contrary, namely that they have not penalised the employee. This is applicable both to the salary and in terms of termination of the employment contract, but not for hiring<sup>51</sup>.

## 3. Discrimination during hiring process

If a woman is the victim of discrimination during the hiring process, she can demand a written explanation from the employers as to why she was not taken on as well as compensation up to a maximum of three months salary<sup>52</sup>.

The employee can validate her claim for compensation in court within three months of being informed that she would not be taken on<sup>53</sup>. If she does not do this within the specified period, her entitlement is no longer valid.

The employee cannot demand that she be hired by the employer.

## 4. Discrimination in termination process

### a) Rescindment of termination

The employee can demand for the termination of the contract to be rescinded and to be reinstated by the company in the following cases:

- There is no valid motive for the termination and

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<sup>50</sup> Art. 3 section 1 GIG

<sup>51</sup> Art. 6 GIG

<sup>52</sup> Art. 5 and 8 GIG

<sup>53</sup> Art. 8 GIG

- the notice was served after the employee had raised a complaint within the company regarding discrimination, or
- the notice was served after an arbitration or court process has been instigated.

The employee is protected from the moment that she lodges a complaint within the company, instigates an arbitration process or files a complaint with a court. This protection expires six months after the end of the internal inquiry within the company, the arbitration process or the court process.

The employee must file her complaint with the cantonal arbitration board or with the court during the period of notice.

The judge is entitled to order the provisional reinstatement of the employee for the duration of the process if it is probable that the notice will be rescinded.

During the process, the employee can demand compensation for wrongful dismissal (up to six months salary<sup>54</sup>) instead of reinstatement.

### **b) Wrongful dismissal**

If the employment contract is terminated due to reasons related to maternity, this constitutes wrongful dismissal and the employee can demand damages<sup>55</sup> (see FAQ 17).

## **5. Arbitration boards**

In each canton there is an arbitration board which can advise the various parties and help them to find an accord.

This process is optional but certain cantons can make it an obligatory step before a case can be taken to court.

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<sup>54</sup> Art. 10 GIG in conjunction with Art. 336a OR

<sup>55</sup> Art. 9 GIG in conjunction with 336b OR

## VII. Frequently asked questions (FAQ)

**1** I AM PREGNANT. ACCORDING TO THE RISK ASSESSMENT, MY JOB POSES RISKS TO MY HEALTH AND THAT OF MY CHILD, AND NO PROTECTIVE MEASURES CAN BE TAKEN TO AVERT THESE RISKS. WHAT CAN I DO?

Art. 35 ArG; Art. 64 ArGV 1 (see part II, paragraph 1, section d)

Your employer has to move you to an equivalent job where there are no risks. If this is not possible, you have the right to remain at home and are entitled to 80% of your salary until the birth.

**2** I AM PREGNANT AND WORK DURING THE NIGHT. SINCE MY EMPLOYER COULD NOT OFFER ME DAY SHIFT WORK, I WAS AT HOME FOR A MONTH AND RECEIVED 80% OF MY SALARY. I AM NOW WORKING DURING THE DAY BUT HAVE FALLEN ILL. ARE MY EMPLOYERS ENTITLED NOT TO PAY ME ANY SALARY FOR THE DURATION OF MY ILLNESS BECAUSE THEY HAD ALREADY PAID ME 80% OF MY SALARY FOR A MONTH?

Art. 35b ArG; Art. 324a OR (see part II, paragraph 1, section d)

No. The salary payment of 80% in lieu of offering day shift work is not related to continued salary payment during illness or inability to work due to no fault of one's own. Your employers are required to pay your salary for the duration of the illness – insofar as there is no replacement earnings insurance – based on the applicable scale.

**3** I AM PREGNANT AND WORK IN THE WATCH INDUSTRY CARRYING OUT QUALITY CONTROLS. MY WORKPLACE IS NEXT TO SOME VERY NOISY MACHINERY. I COMPLAINED TO MY EMPLOYERS WHO THEN PROVIDED ME WITH EAR PLUGS. IS THIS SUFFICIENT?

Art. 11 of the decree for the protection of mothers; Art. 35 ArG; Art. 64 ArGV 1 (see part II, paragraph 1, sections a, b and d)

No. Ear plugs only protect you, not your child. A noise level equal to or greater than 85 dB(A) is dangerous for your child. In order to evaluate the situation, a risk assessment must be carried out. If it proves that the level of 85 dB(A) is attained, your employers are required to provide you with a less noisy workplace. If this is not possible, you have the right to remain at home and are entitled to 80% of your salary.

**4** I AM PREGNANT. MY WORK INVOLVES INHALING CAR EXHAUST FUMES THROUGHOUT THE DAY. AM I RIGHT TO BE WORRIED ABOUT MY UNBORN CHILD?

Art. 13 of the decree for the protection of mothers; Art. 35 ArG ; Art. 64 ArGV 1 (see part II, paragraph 1, sections a, b and d)

Exhaust fumes contain, amongst other elements, carbon monoxide (CO), a gas which is considered to be particularly dangerous for mothers and children. Women in childbearing age should be informed by their employers of this danger; pregnant women and breast-feeding mothers should not be employed in such workplaces. Your employers must find you alternative work without delay. If this is not possible, you have the right to remain at home and are entitled to 80% of your salary.

**5** I AM PREGNANT. THERE ARE CERTAIN DAYS WHERE I FEEL REALLY TIRED, AND I NEED TO REST. IS THIS POSSIBLE?

Art. 35a ArG ; Art 34 ArGV 3 (see part II, paragraph 2, section a, and paragraph 3)

Yes, you can either leave work or get yourself dispensed from work if you feel the need. You should, however, note that during these periods of absence, you will not necessarily be paid your salary. Periods of absence are paid if you provide a medical certificate and if you have not yet exhausted your entitlement to payment in the event of inability to work. It should also be noted that you must have the possibility to lie down and rest in an adequate or even a special room provided at your place of work.

**6** I AM PREGNANT. MY EMPLOYMENT CONTRACT STATES THAT I SHOULD WORK 40 HOURS PER WEEK, BUT AT THE MOMENT WE HAVE A LOT OF WORK ON AND EVERYONE IS REQUIRED TO WORK OVERTIME. DOES THIS ALSO APPLY TO ME?

Art. 60 ArGV 1 (see part II, paragraph 2, section c)

No. Your employers must make sure that you do not work any more than is stipulated in your contract. In any case you are not to work more than 40 hours per week and nine hours per day.

**7** I AM PREGNANT AND TEND TO DO SHIFT WORK WHICH ALSO INCLUDES NIGHT SHIFTS. IN MY CURRENT STATE I CAN NO LONGER MANAGE THE FATIGUE THAT THIS CAUSES. WHAT CAN I DO?

Art. 35a and 35b ArG (see part II, paragraph 1, section c and d, and part III, paragraph 3, section b)

As of eight weeks prior to the birth, pregnant women should not work between the hours of 8 pm and 6 am. Throughout the pregnancy and from the eighth to the 16<sup>th</sup> week after the birth, your employers are required to offer you equivalent work on a day shift. You can then choose whether you wish to carry on working on night shift or if you wish to accept the offer of day shift work. Should there not be equivalent work available on a day shift, you are entitled to 80% of your salary should you not wish or be able to work on the night shift.

**8** I AM PREGNANT AND WORK AS A SECRETARY. I FIND MY JOB TO BE ONEROUS SINCE I AM SITTING ALL DAY AND AM KEPT VERY BUSY. MY EMPLOYERS ARE NOT ALLOWING ME TO STAY AT HOME AS THEY DO NOT CONSIDER MY JOB TO BE ONEROUS. I HAVE NO MEDICAL CERTIFICATE, SO WHAT OPTIONS ARE OPEN TO ME?

Art. 35a ArG (see part II, paragraph 2, sections a and b, and paragraph 3)

If you demand it, you can be relieved of your duties. Without a medical certificate and without proof that your tasks are objectively onerous, employers are not obliged to pay your salary. Unpaid leave of this kind could have an effect on the amount of maternity benefit you receive, since this is calculated on the average income which you earn prior to the birth.

## **9** I AM PREGNANT. AM I OBLIGED TO TELL MY EMPLOYERS?

Nothing obliges you to do so. The earlier you inform them of your condition however, the quicker your employers can take the necessary measures to adapt your workplace correspondingly and provide you with better protection. You should also realise that certain things, for example some chemical products, are particularly harmful at the beginning of a pregnancy.

## **10** I INFORMED MY EMPLOYERS THAT I WAS PREGNANT AND THEY SHOWED ME THE DOOR...

Art. 336c OR (see part V, paragraph 1)

If you have a permanent employment contract and the trial period has finished, employers are not allowed to dismiss you during the pregnancy or for 16 weeks after the birth. The notice which they have served you with is invalid. To avoid any risk of losing your entitlement to salary, you should inform your employers as soon as possible and preferably in writing that you are prepared to continue working or to return to work.

## **11** I HAVE JUST GIVEN BIRTH AND WISH TO RETURN TO WORK IMMEDIATELY. IS THIS POSSIBLE?

Art. 35a ArG (see part III, paragraph 1)

No, your employers are not allowed to employ you during the first eight weeks immediately after the birth. You are allowed to return to work eight weeks after the birth, but you lose your entitlement to paid maternity leave, if you do so.

## **12** MY CHILD HAS BEEN BORN AND I RETURNED TO WORK AFTER MY MATERNITY LEAVE. THE CHILD IS OFTEN ILL AND THE CRÈCHE REFUSES TO TAKE HIM IN THESE CASES. WHAT CAN I DO?

Art. 36 ArG, Art. 324a OR

Upon presentation of a medical certificate for the child, employers must allow you (or the father of the child) the necessary time off to care for your child (up to three days per bout of illness). Illness of a dependant is classed as inability to work through no fault of one's own and your salary must be paid to you insofar as you have not used up the corresponding entitlements.

## **13** I AM PREGNANT AND HAVE BEEN WORKING FOR MY CURRENT EMPLOYERS SINCE 1ST JULY, 2004. ON 15TH JUNE, 2005 I PRESENTED THEM WITH A MEDICAL CERTIFICATE STATING THAT DUE TO MY PREGNANCY, I HAVE TO REMAIN LYING DOWN UNTIL THE BIRTH. I GAVE BIRTH ON 15 AUGUST 2005. WHAT ARE MY ENTITLEMENTS FOR THE PERIOD PRIOR TO THE BIRTH?

Art. 324a OR (see part II, paragraph 3)

During the first year of service (from 1st July 2004 until 30th June 2005), you are entitled to your salary for three weeks. You then began your second year of service on 1st July 2005 and from this point onwards you are entitled to a month's salary based on the Berne scale (assuming that your place of work is in the canton of Berne). Your employers must therefore pay you your salary from 15th June until 31st July, 2005 (2 weeks + 1 month). From 1st – 15th August, 2005 you receive no salary since you have exhausted your entitlement in terms of inability to work, except if there are further salary entitlements provided for in your employment contract or by insurance.

## **14** I HAVE GIVEN BIRTH AND MY 14 WEEKS OF MATERNITY LEAVE HAVE COME TO AN END. I FEEL FULL OF ENERGY BUT DO NOT WANT TO GO BACK TO WORK STRAIGHT AWAY, AND INSTEAD WOULD RATHER SPEND A LITTLE MORE TIME WITH MY CHILD. DO I HAVE THE RIGHT TO DO THAT?

Art. 35a section 3 ArG, Art. 324a OR (see part III, paragraph 3, section c and part IV) During the 15<sup>th</sup> and 16<sup>th</sup> weeks after the birth, you have the right not to return to work. After that time you must return to work unless you are not able to do so due to medical reasons. Your employers are not required to pay you a salary during these two weeks, since you are no longer on paid maternity leave and are not incapable of working. If, on the other hand, you are breast-feeding, your employer cannot oblige you to work even after the 16<sup>th</sup> week if you are not in agreement, but you will receive no salary.

**15** I GAVE BIRTH ON 1ST AUGUST, 2005, HAVING GIVEN NOTICE ON MY EMPLOYMENT CONTRACT PRIOR TO THE BIRTH WITH AN EFFECTIVE DATE OF 30TH SEPTEMBER, 2005. AM I ENTITLED TO FULL PAID MATERNITY LEAVE BASED ON THE FACT THAT THIS WOULD END ON 6TH NOVEMBER, 2005?

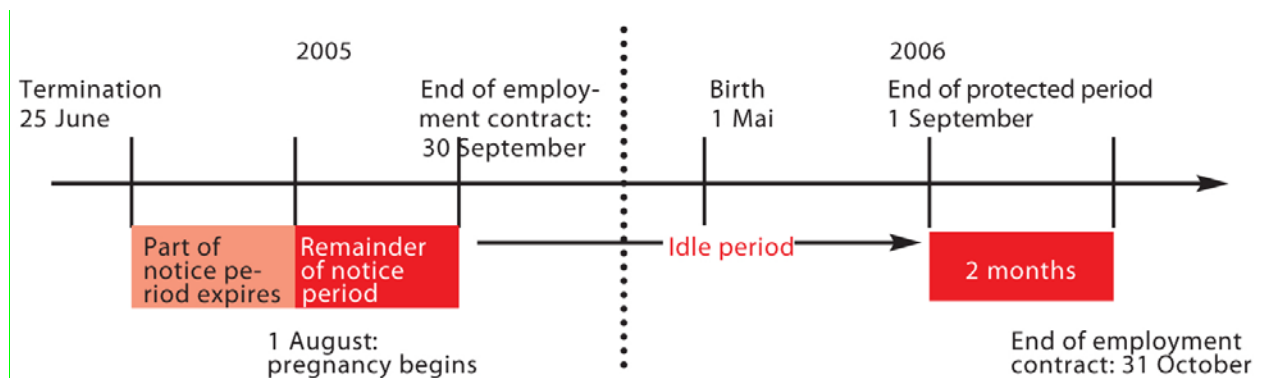
Art. 16b EOG (see part III, paragraph 2, section d)

Yes. In order to benefit from fully paid maternity leave, you need to be under contract at the time of the birth. Whether you intend to return to work after that point or not does not play a decisive role.

**16** I HAVE BEEN PREGNANT SINCE 1ST AUGUST, 2005 AND AM DUE TO GIVE BIRTH ON 1ST MAY, 2006. MY EMPLOYERS SERVED ME NOTICE ON MY CONTRACT ON 25TH JUNE, 2005 WITH A TERMINATION DATE OF 30TH SEPTEMBER, 2005, BASED ON A THREE-MONTH NOTICE PERIOD. IS THIS NOTICE OF TERMINATION VALID? AM I ENTITLED TO MATERNITY LEAVE AFTER THE BIRTH?

Art. 336c OR (see part V, paragraph 1, section c)

If the notice was served before the protected period with an effective date which falls within the protected period, the notice period is put on hold and will only recommence after this time. In your case, this means that the end of the contract will be postponed to 30th October, 2006 (see also diagram below). You are entitled to paid maternity leave should you fulfil the necessary conditions at the time of birth, in particular the one that states that you are to be under contract of employment.



**17** SINCE I AM STILL BREAST-FEEDING SIX MONTHS AFTER GIVING BIRTH, I HAVE REMAINED AT HOME, AS I AM ENTITLED TO. MY EMPLOYERS HAVE, HOWEVER USED THIS AS A REASON TO DISMISS ME. IS THIS LEGITIMATE?

Art. 9 GIG; Art. 336b OR (see part VI, paragraph 4, section b)

No. If notice was served on you because you are breast-feeding, it is a case of wrongful dismissal. Should you wish to dispute the decision, you must react to the dismissal in writing at the very latest before the notice period expires. If you cannot reach an agreement with your employers to continue the employment contract, you have a period of 180 days in which to bring a case before court and demand compensation, which can be up to six months salary.



## VIII. Abbreviations

ArG	Swiss Federal Labour Law: law regarding work in industry, commerce and trade (Labour Law) <a href="http://www.admin.ch/ch/d/sr/c822_11.html">http://www.admin.ch/ch/d/sr/c822_11.html</a>
ArGV 1	Ordinance No.1 of the Swiss Federal Labour Law <a href="http://www.admin.ch/ch/d/sr/c822_111.html">http://www.admin.ch/ch/d/sr/c822_111.html</a>
ArGV 3	Ordinance No.3 of the Swiss Federal Labour Law (health protection) <a href="http://www.admin.ch/ch/d/sr/c822_113.html">http://www.admin.ch/ch/d/sr/c822_113.html</a>
Art.	Article
EOG	Swiss Federal Law of Obligations: Replacement of Earnings Law for service providers and during maternity (earnings replacement law) <a href="http://www.admin.ch/ch/d/sr/c834_1.html">http://www.admin.ch/ch/d/sr/c834_1.html</a>
EOV	Ordinance of Replacement of Earnings Law <a href="http://www.admin.ch/ch/d/sr/c834_11.html">http://www.admin.ch/ch/d/sr/c834_11.html</a>
ff	And following
GIG	Swiss law pertaining to the equal treatment of women and men (Equality Law) <a href="http://www.admin.ch/ch/d/sr/c151_1.html">http://www.admin.ch/ch/d/sr/c151_1.html</a>
Ordinance for the protection of mothers	Ordinance for the protection of regarding dangerous and onerous tasks during pregnancy and maternity <a href="http://www.admin.ch/ch/d/sr/c822_111_52.html">http://www.admin.ch/ch/d/sr/c822_111_52.html</a>
OR	Swiss Federal Law pertaining to the extension of the Swiss civil code (Part five: Swiss Code of Obligations) <a href="http://www.admin.ch/ch/d/sr/c220.html">http://www.admin.ch/ch/d/sr/c220.html</a>
SECO	State Secretariat for Economic Affairs

## IX. Further information

### 1. Further information regarding Swiss Federal Labour Law

Cantonal occupational health and safety inspectors can provide information about the applicability of the Labour Law and the corresponding ordinances:

 [www.iva-ch.ch/](http://www.iva-ch.ch/)

Information on this particular subject can also be found on the SECO Internet site:

 [www.seco.admin.ch](http://www.seco.admin.ch) (Arbeit → Arbeitnehmerschutz)

### 2. Further information on paid maternity leave

The Federal Social Insurance Office is responsible for all questions relating to maternity benefits:

 [www.bsv.admin.ch](http://www.bsv.admin.ch) (EO/Mutterschaft)

### 3. Further information on the Swiss Code of Obligations/ Private Law issues regarding work

Labour Law offices can generally provide brief legal information.

### 4. Social partners

Trades unions and employers' associations can also provide information, although primarily, if not exclusively, for their own members.