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Anita Bosch (Editor)
Published: August 2016



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South African Board for People Practices (SABPP)

Women's Report 2016

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The SABPP Women's Report 2016

Pregnancy in the workplace

Anita Bosch (Editor)



Contents

ACKNOWLEDGEMENTS.....	1
FOREWORD.....	2
CHAPTER ONE.....	3
Pregnancy is here to stay – or is it?	
<i>Prof. Anita Bosch</i>	
CHAPTER TWO.....	7
Career decisions for women considering pregnancy	
<i>Mrs Italia Boninelli</i>	
CHAPTER THREE.....	13
Pregnancy and employment law	
<i>Prof. Hugo Pienaar and Ms Elizabeth Sonnekus</i>	
CHAPTER FOUR.....	18
Menopause and the workplace	
<i>Dr Linda Chipunza and Mrs Elizabeth Dhlamini-Kumalo</i>	
CONTRIBUTORS.....	23
FACULTY OF MANAGEMENT.....	25
DEPARTMENT OF INDUSTRIAL PSYCHOLOGY AND PEOPLE MANAGEMENT.....	26
SABPP.....	27

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The annual Women's Report is furthermore supported by the South African Board for People Practices (SABPP) through their on-going interest in gender issues in the workplace. The SABPP remains committed to workplace equality and the advancement of evidence-based knowledge that could ultimately lead to a representative and productive workforce in South Africa.

Foreword

Each year, the Women's Report provides an opportunity to revisit human resource management topics in relation to gender. With each Report, new avenues for research emerge, and topics that may seem mainstream, such as pregnancy, get taken off the shelf, dusted, and re-examined, with the aim of contributing to improved management practices and the sharing of information.

Upon first glance, pregnancy does not seem like a topic that should be linked to the workplace. However, as the chapters unfold, it becomes clear that the occurrence of pregnancy in the workplace often leads to discriminatory practices, one parent exiting paid work completely, and management experiencing discomfort in dealing with the HR challenges.

In this year's Women's Report, Chapter 1 outlines the reasons why pregnancy should be normalised and not treated as an anomaly in the workplace. The chapter concludes with aspects that HR practitioners should consider in dealing with the phenomenon. In Chapter 2, Italia Boninelli presents a strong argument for the management of a woman's career from a family planning perspective. The thoughtful advice should inspire women to take charge of the timing of pregnancies whilst remaining focused on their career goals.

The South African Constitution protects women from discrimination based on pregnancy and birth, amongst other diversity markers. In Chapter 3, Hugo Pienaar and Elizabeth Sonnekus outline South African employment law considerations in relation to pregnancy. Their contribution also covers an overview of legislation in the USA and Europe, as well as the stance of the International Labour Organisation with regard to the protection of pregnant women.

Chapter 4 rounds off this year's Women's Report with an overview of the end of a woman's reproductive functioning — menopause. Linda Chipunza and Elizabeth Dhlamini-Kumalo provide interesting reading on a topic that is rarely discussed at work.

I trust that you will find inspiring quotes and clear practices in the report that could enhance gender relations in your workplace.

Professor Anita Bosch

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CHAPTER ONE

Pregnancy is here to stay – or is it?

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Pregnancy is arguably one of the most visible differences between men and women in the workplace. The appearance of an obviously rounded belly signals that a woman is somehow different – a state that does not seem to have a place in a work environment. Perhaps pregnancy is too much of a reminder of the primal nature of being human in work environments, where individuals are often reduced to automatons that are predominantly seen to be present only for the labour that they bring to an organisation.

This chapter serves to remind us that pregnancy is, in fact, part of the workplace and societal functioning. I deliberately state that pregnancy is a normal occurrence in the workplace because it is widely acknowledged that women are in their reproductive years in their early and middle career, yet many women report that pregnancy is often career limiting. If one is to accept that women are part of your workforce, the reality of pregnancy is immediately present, whether the phenomenon presents management challenges or not.

When considering the World Bank's figures on women's fertility rates¹, expressed as the average number of children that women in their childbearing years have, an interesting picture emerges. Birth rates have been on the decline in most parts of the world, with only Guatemala and Bolivia showing an average of more than three children per fertile woman in the Americas overall². Countries that are predominantly Muslim show relatively high birth rates in comparison to Europe and Japan, and most of the population growth is occurring on the continent of Africa, showing five children per woman in certain countries. The World Bank reports that many births in Sub-Saharan Africa are not recorded³, and therefore the fertility figures for Africa may be understated. High-income nations, overall, show a marked drop in the rates of birth from 1960 to present.⁴ On a lighter note, when considering the World Bank data on a world map, there seems to be something about living in warmer areas close to the equator

1 World Bank (2014). Fertility rate, total (births per woman) <http://data.worldbank.org/indicator/SP.DYN.TFRT.IN>

2 World Bank (2014). Fertility rate, total (births per woman) <http://data.worldbank.org/indicator/SP.DYN.TFRT.IN>

3 World Bank (2016). <http://blogs.worldbank.org/opendata/2016-edition-world-development-indicators-out-three-features-you-won-t-want-miss>

4 World Bank (2014). Birth rate crude (per 1000 people) <http://data.worldbank.org/indicator/SP.DYN.CBRT.IN?view=map>

that supports population growth. In a nutshell, national development levels, including the level of education of girls and access to birth control, as well as religious beliefs and social norms, are factors that influence population growth. Besamusca, Tijdens, Keune, and Steinmetz⁵ view “women’s capabilities to work or not as revolving around a balance of economic, educational, family, and gender ideological influences that affect women in different manners depending both on the country they live in and their position along the life course.”

While population growth is on the decline in certain countries, the overall population of the globe is indeed growing, at a rate of 1.13%⁶. The phenomenon of declining birth rates is said to be linked to, amongst others, access to higher income by women, the high cost of education and housing, non-flexible workplace practices, and a lack of feasible childcare options⁷. Although these reasons are, on the face, linked to women and their choices, it is important to be reminded that pregnancy does not occur without men. Globally, women have not colluded to withhold having children, but instead, in high-income countries, working families have determined that it is better for the family unit to refrain from having any or many children, as the way society, including the workplace, is structured, is not conducive to raising healthy families whilst at the same time providing normalised employment for both parents. Invariably, one parent focuses on the family, often resulting in exiting formal work or stagnation of that parent’s career prospects, including income, in order to provide much-needed stability for children in the household. At the same time, the other partner is often excluded from the joys and duties of raising children.

World Population:

- has reached 7 billion as of October 31, 2011
- is projected to reach 8 billion by 2024
- has doubled in 40 years from 1959 (3 bil.) to 1999 (6 bil.)
- is currently growing at a rate of around 1.13 % per year
- growth rate reached its peak in the late 1960’s, when it was at 2%
- growth rate is currently declining and is projected to continue to decline in the coming years
- average annual population change is currently estimated at over 80 million
- world population will reach 10 billion in the year 2056

World population growth predictions (Source: <http://www.worldometers.info/>)

However, “policy makers calling for job creation in female-dominated sectors to help women increase family incomes ... should consider they will primarily be drawing young and older women into the labour force, unless their efforts are accompanied by investments in care arrangements and reducing the stigma on work”⁸ [for women]. In their study on the effects in female labour force participation in 117 countries, the authors found that women in their mid-years are burdened disproportionately with the care of children and elders, with very little intervention by the state to provide policy guidelines or mechanisms for care such as after-school care and nursing care, which could free women in their mid-years to participate more fully in paid full-time employment.

Managers often lament that women employees are fantastic, up to the point where they fall pregnant. At that stage of their career, as aptly stated by Ranson⁹, women are “no longer one of the boys.”

5 Besamusca, J., Tijdens, K., Keune, M., & Steinmetz, S. (2015). Working women worldwide: Age effects in female labor force participation in 117 countries. *World Development*, 74, pp. 123–141, p. 124.

6 Worldometers (2016). World Population, <http://www.worldometers.info/>

7 Nargund, G. (2009). Declining birth rate in Developed Countries: A radical policy re-think is required. *Facts, Views & Vision in ObGyn*, 1(3), pp. 191–193.

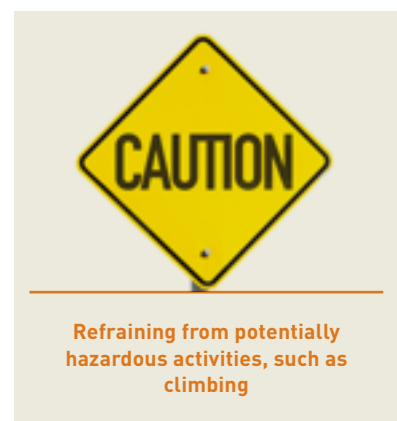
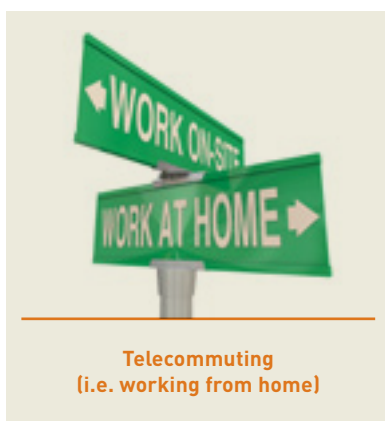
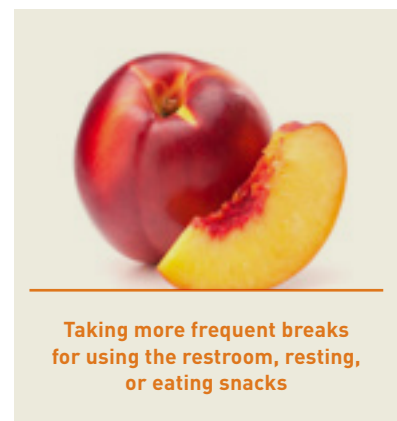
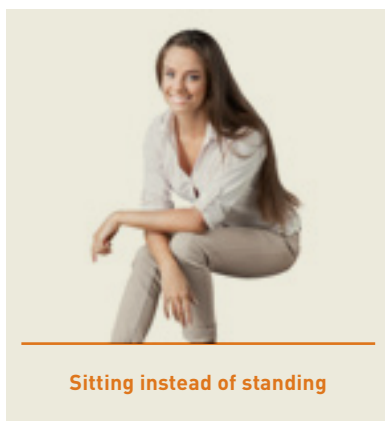
8 Besamusca, J., Tijdens, K., Keune, M., & Steinmetz, S. (2015). Working women worldwide: Age effects in female labor force participation in 117 countries. *World Development*, 74, pp. 123–141, p. 136.

9 Ranson, G. (2005). “one of the boys”: Negotiations with motherhood, as prospect or reality, among women in Engineering. *The Canadian Review of Sociology and Anthropology*, 42(2), pp. 145–166.

They are obviously different from men, and become a 'hassle factor' and a cost to the company. Furthermore, up to the point of actual pregnancy or the decision about pregnancy, women often do not need to make career decisions differently from the way in which a man would. Once pregnancy becomes an option, the care associated with birthing children and the time necessary to address and accommodate a child's needs pose challenges. Since social structures such as the expectation of a parent providing early childhood care, schooling, and health services, to name a few, presuppose that there is a person available at home during the day to care for a child, parents are left with little choice but to employ caregivers, place the child in care outside the home, or for one of the parents to stop working.

In the workplace, there are a number of realities that managers deal with once a woman announces her pregnancy. The reallocation of tasks that may be hazardous to the unborn child, loss of production when removing women from production lines, scheduling of work, accommodation of women who are absent for at least four months during maternity leave in South Africa, as well as the cost of training temporary replacement personnel, are all examples of the often conflicting realities that managers would rather avoid. Since male employees do not ask for similar accommodations and their way of working is regarded as 'normal' practice, pregnancy becomes undesirable in the workplace.

Some of the practical accommodations that employers provide for pregnant women¹⁰ are listed below:



¹⁰ Karkowsky, C. E. & Morris, L. (2016). Pregnant at work: Time for prenatal care providers to act. *American Journal of Obstetrics & Gynaecology*, 30 May 2016.

“... women still choose to pursue education and career in order to achieve stability and independence. This is unlikely to change.”¹¹ So, if pregnancy is a reality of life and paid work is also a reality for the majority of families across the globe, how can workplaces deal with the phenomenon effectively?

- *Contingency budgets should be kept to address costs associated with the insourcing of replacement workers and other costs.*
- *Childcare options should be explored as a measure to attract and retain women employees. For more information about the role that human resource practitioners can play in facilitating childcare, please refer to the SABPP Women's Report 2014, Childcare in South Africa, pp. 30-36.*
- *Scheduling software that accommodates flexibility should be utilised to ensure optimal functioning of production lines.*
- *Tasks that are appropriate for a pregnant employee to conduct should be pre-identified, and employees should be given the opportunity to decide where they want to work if their normal tasks are deemed hazardous to the unborn child.*
- *Gender stereotyping should be highlighted, and managers should be educated about the pitfalls of misguided stereotyping.*

Pregnancy is a normal, everyday occurrence in the workplace. Employers that are interested in attracting and retaining women should continue to expand their practices and benefits to normalise pregnancy. Indeed a small gesture towards the creation of an inclusive workplace which should yield great benefits to employers in the long run.

¹¹ Cooke, A., Mills, T. A. & Lavender, T. (2010). 'Informed and uninformed decision making'—Women's reasoning, experiences and perceptions with regard to advanced maternal age and delayed childbearing: A meta-synthesis, *International Journal of Nursing Studies*, 47, pp. 1317–1329, p. 1327.



CHAPTER TWO

Career decisions for women considering pregnancy

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Introduction

With the acceptance that an increasing proportion of the workforce over the next decade will be women and that most of these women will have children, employers have to rethink their approach to career decisions for women considering pregnancy. As the number of women in management and key skills positions parallel this growth, this has important policy and practice implications for corporate employers, not least in the area of leadership positions. South Africa has declined to just 23% of senior roles being held by women in 2016 (compared to 27% for Africa overall), and there are still 39% of South African businesses with no women in senior management roles¹.

Although their priorities are individually determined and may change over time, women will handle their maternity decisions in different ways, with some choosing to be career primary and others to combine career and family, or to do this sequentially. If organisations are to retain their competitive advantage, they must recognise the value of their female talent by, amongst others, respecting their maternity decisions, providing a more flexible work environment, and reviewing their policies and practices regarding working mothers. This will benefit both the individual and the employer. The individual will have freedom of choice between career or family or the appropriate sequencing of these, or a combination of both, while the employer will be able to retain a valuable resource – talented women in the organisation.

Company maternity policies and procedures

While it goes without saying that companies must comply with all relevant legislation governing pregnancy and maternity benefits, many companies offer maternity benefits that exceed the minimum laid down by law. Every company should have an up-to-date maternity policy that clearly spells out the terms and benefits of maternity leave. This is necessary to clarify for women, their partners, their managers, and their colleagues the expectations and support arrangements around work responsibilities and time off surrounding pregnancy.

The policy should go further and explain the approach to determining the following:

- **The quantum of basic pay offered by the company during maternity leave, and whether a waiting period applies, e.g., paid**

¹ Grant Thornton. (2016). *Women in Business. Turning promise into practice*. Grant Thornton International Business Report 2016. London, pp. 1-24.

maternity leave may only be offered to employees with a minimum length of service, while statutory unpaid maternity leave is available to all pregnant employees, irrespective of length of service. Policies should also be clear as to what 'pay-back period' is attached to any benefit, e.g., some companies will pay a substantial portion of the employee's salary during maternity leave, but the employee will be expected to sign a contract undertaking to refund this amount, should she not return from maternity leave or leave the company's employ during the first year after taking maternity leave;

- **Benefits** (medical, retirement funding, life cover, leave, and any other guaranteed benefits) and how these will be treated during maternity leave. Policies should be clear as to how contributions (both employer- and employee contributions) to various schemes will be treated, and whether there are any special conditions attached to maternity leave, e.g., some employers will continue their contributions to retirement funds, even during periods of unpaid maternity leave, but will have a claw-back clause, should the employee not return to work;
- **The impact of maternity leave on any applicable incentives**, both short-term (e.g., cash bonuses) and long-term (e.g. shares), and any retention schemes in place where these involve remuneration (e.g., retention bonuses);
- **Job guarantees upon return to work**, e.g., whether the company undertakes that the employee will be able to resume work either in the same role or in a suitable alternative role after expiry of the maternity leave at the same remuneration and job grade that was applicable to the employee immediately prior to taking maternity leave;
- **Accommodation** in terms of working hours, should an employee wish to work more flexible hours when she returns to work, provided that her immediate line manager approves this, and how her remuneration, terms, and conditions of employment will be adjusted accordingly, if appropriate.

Many companies have put in place maternity support programmes to support female employees through a vulnerable time, when they need advice to make the right career decisions². Participation in such programmes is voluntary and can be supported by expert external maternity coaching consultants. Some companies, in their efforts to attract and retain talented female

managers and executives, are taking maternity benefits to a new level; for example, Apple and Facebook have extended employee benefits to cover egg freezing for female employees³, and several other companies may soon follow their lead. This kind of benefit appeals to women who fear that prioritising pregnancy over career could have consequences at work, but who also fear that their biological clock is ticking and are anxious that their fertility will plummet after their mid-thirties. This gives them some additional options in their decision to delay child-bearing. However, this is not an 'insurance policy.' Research has shown that the success rate with egg freezing is similar to in-vitro fertilization (around 40% for women under 35 years of age and dropping to less than 5% after age 42)⁴. Some companies are even reimbursing adoption expenses⁵ for those parents choosing to adopt children.

Many companies offer generous maternity and paternity leave⁶; e.g., Ernst and Young offer 39 weeks on full pay for mothers; Bank of America offers 12 weeks of paid parental leave for mothers and fathers; Yahoo offers women 16 weeks and men a full eight weeks of paid parental leave; Deloitte gives mothers eight weeks and fathers three weeks of paid leave, but, if the parents so decide, those numbers can be reversed; Discovery Communications offers 11 weeks' with full pay and three weeks' part-pay for mothers, and three weeks with full pay for fathers. Other companies offer up to 26 job-guaranteed weeks off, albeit unpaid, for both mothers and fathers.

Many companies have employee assistance programmes in place that support both mothers and fathers with the challenges of pregnancy and childbirth and the challenges of work-life balance with young children.

Tips for HR practitioners

It is always a good idea to benchmark against external best practice when reviewing maternity policies and benefits. Clarity in policies is important, and it may be possible to

² Hutton, S. (2016). Finding smart ways to retain working mothers. *The Workplace Report*, The Star, 10 March 2016, p. 4.

³ Alter, C. (2015). Buying time. More women are counting on egg freezing to prolong their fertility. *Time Magazine*, 16 July 2015, pp. 41-45.

⁴ Alter, C. (2015). Buying time. More women are counting on egg freezing to prolong their fertility. *Time Magazine*, 16 July 2015, pp. 41-45.

⁵ Flanders, C. (2012). Paid parental leave: What the top 10 companies offer moms (and dads). *Working Mothers Report*, Learnvest webpage, retrieved from http://www.learnvest.com/2012/02/paid-parental-leave-what-the-top-10-companies-offer-moms-and-dads/?gallery=426&pid=#pid-5388_aint-0

⁶ Flanders, C. (2012). Paid parental leave: What the top 10 companies offer moms (and dads). Retrieved from http://www.learnvest.com/2012/02/paid-parental-leave-what-the-top-10-companies-offer-moms-and-dads/?gallery=426&pid=#pid-5388_aint-0



enhance benefits in several ways. However, changes must always be proposed in consultation with the intended beneficiaries (and, in some cases, representatives of organised labour) and after careful analysis of costs and other implications, if they are to receive full support in the organisation. Providing easy access to policies and publicising them is essential, and there are secondary benefits to familiarising all affected parties (the pregnant employee, her spouse, and family, her manager, and co-workers) with the benefits, the terms, and expectations from the company. This often promotes better support by managers and co-workers of the female employee during pregnancy and upon her return to work.

Returning to work after pregnancy

More than 30 years ago, Felice Schwartz sparked a furore about the ‘mommy track’ in a Harvard Business Review article titled “Management women and the new facts of life” when she suggested that women can be divided into two categories, those she calls career-primary and those she calls career-and-family, each with particular value to the corporation⁷. While this was seen as a step backwards by many feminists at the time, so many years later one of the most important things for women returning to work is still flexibility, because even the highest-performing women often take primary responsibility for caring for babies and are left feeling frustrated and guilty that they are unable to function at their best, either at work or at home. Physical problems can lengthen maternity leave. So can a demanding infant, a difficult family or personal adjustment, or problems with child care.

This flexibility may be time off during the day or the week to work from home, which modern technology makes entirely possible. It may also mean part-time/half-day work for a period of time when the employee with a small baby first returns to work, or, in some cases, even job-sharing with another individual. While these types of arrangements are practically feasible, they are often resisted by old-fashioned managers. Many women, upon their return to work after having a baby, have to adjust their schedules, and this impact is experienced most in ‘extra time’ commitments such as overtime, travel, after-hours meetings, socialising with clients, and even community involvement. In some cases, women alter their own expectations of what is possible, and “taking a

low corporate profile” is a typical reaction⁸. Sometimes, women choose jobs because they offer more flexibility or can accommodate family needs better. Yet, the reality is that these decisions often run counter to (or fail to promote) career progress, and, as a result, the women may direct their frustrations toward their organisations. This need not be the case with better planning and support from the organisation, and remains an area where HR practitioners can most positively impact the maternity experience of their female talent. However, no assumptions should be made, as many career-focussed women go to considerable effort and expense to structure and arrange their family situations to minimise the interference children have on their availability and organisational commitment. This may include day-care, nannies, and au pair arrangements and assistance from family members and housekeepers.

Tips for HR practitioners

Be aware that employees returning from maternity leave may require a period to adjust to the demands of motherhood, and may require assistance in structuring their working and family arrangements to be most effective (see paragraph below). Consulting with the employee to understand her needs and facilitating discussions with her manager will assist in finding the best solutions, and will add immeasurably to the employee’s experience of a supportive work environment.

Work accommodation and other tactics for addressing work-and family challenges

There are many tactics that companies can adopt to facilitate women taking maternity leave and their return to work once they have had a child. Each of these should be undertaken in consultation with the employee returning from maternity leave, and may need to be adjusted as she adjusts to her new working and family conditions.

Some work accommodation and other tactics include:

- **Teamwork** can be used so that clients can contact a number of people in the team, making it easier

⁷ Schwartz, F. N. (1989). Management women and the new facts of life, Harvard Business Review, January-February issue, retrieved from <https://hbr.org/1989/01/management-women-and-the-new-facts-of-life/ar>

⁸ Stoner, C. R. & Hartman, R. I. (1990). Family responsibilities and career progress: The good, the bad and the ugly. Business Horizons, May-June issue, pp. 7-14.

for the female staff member to take time off⁹. Organisations can plan the work together with the female employee, so that team members or temporary staff can fulfil certain functions while she is on maternity leave, and she could still stay in contact and provide input while away. This requires planning for optimal execution, rather than being left to chance.

- **Flexible work schedules**, shorter work days, and job sharing will also be attractive to many new mothers. Unfortunately, the unintended consequence of line managers who are reluctant to discuss this kind of work accommodation proposals with women returning from maternity leave means women often feel they have to choose between family life and work, and they may choose to opt out, rather than continuing to progress their career¹⁰.
- **In-house child-care** facilities are perceived as a great benefit by parents who view the security offered by reliable child-care as a necessary precondition to meaningful job involvement. An alternative is companies co-operating with other employers in the same area to attract and support reliable child-care providers in the vicinity of the work premises. Companies could assist with organisation referral to help parents find reliable child-care facilities, and also offer corporate subsidies.
- **Changing cultural and business norms** to make it easier for them to manage both career and family and to take up leadership positions has been highlighted as a need. This means changing the expectation that the parents who will side-line their career to look after children will be women, normalising shared parental leave, providing improved support for women on maternity leave, and offering genuinely flexible working arrangements.

In particular, it is important that work accommodation not be viewed as unfortunate organisational costs needed to placate a special category of employees, but rather as an investment in a changed social climate and in female talent.

- **Workplace support** is important for the female employee, both during pregnancy and upon return to work. Women who receive workplace support during pregnancy do not feel compelled to choose between work and motherhood, and they retain a strong commitment to work¹¹. This workplace support should not just be in the form of benefits and policies that support women and families; equally important is a supportive workplace culture that manifests in the interpersonal support of managers, co-workers, and colleagues.

Tips for HR practitioners

The tactics suggested above and others may not be practical in every situation. They need to be tailored to the particular circumstances of the women, their needs, their role, and their expected outputs. Each tactic may require a new policy and/or the development of new guidelines. The tactics also require the support of managers, co-workers, and colleagues, and here HR practitioners can play a valuable role in educating and coaching staff on appropriate responses to female employees during pregnancy and upon their re-entry to the workplace.

Career cycles and timing of pregnancy

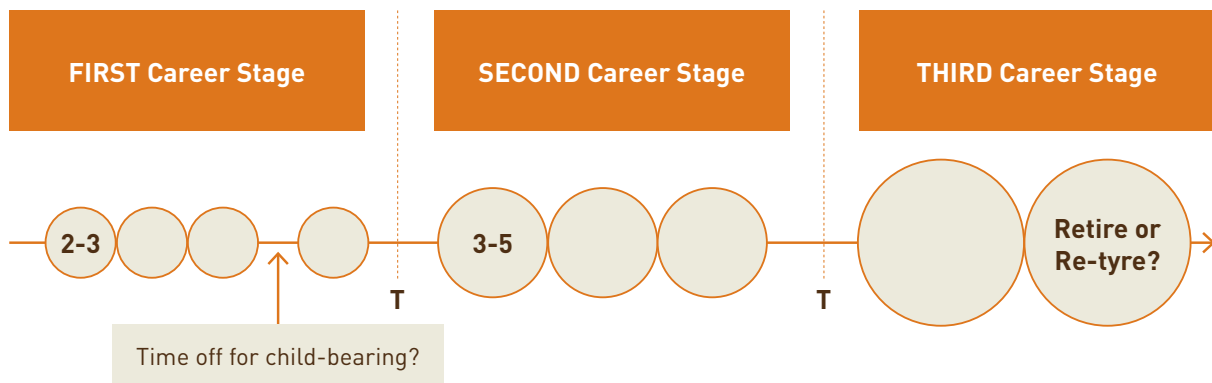
The careers of individuals classified as 'talent' in the organisation usually follow three career stages. The first career stage is typically of the individual contributor or technical expert; the second career stage is in middle and senior management or running a small business; and the third career stage is when the individual is heading up a large division or is on the executive of a medium to large organisation. Each career stage can last 10-15 years and thus the individual may occupy more than one role or position during each career stage. The time spent in each role also follows a predictable pattern. At the beginning of the cycle in each role, the person is new in role and trying to find their feet. During the middle stages of the cycle in that role they have mastered the role and are focussed on delivery of key projects. Towards the end of the cycle, projects have come to an end and the individual will start feeling restless and look for new challenges as they may perceive that more time in the same role will not lead to new learning but rather to a repetition of past experience.

9 Li, V. (2015). Team approach keeps pregnancy leave from stalling careers. *American Bar Association Journal*, June issue, p. 1. Retrieved from <http://www.abajournal.com/magazine/article/team>

10 Grant Thornton. (2016). Women in business. Turning promise into practice. Grant Thornton International Business Report 2016. London, pp. 1-24.

11 Fursman, L. (2002). Ideologies of motherhood and experiences of work: Pregnant women in management and professional careers. Working Paper no. 34, May 2002, Center for Working Families, University of California, Berkeley, pp. 1-34.

Figure 1: Career cycles (Boninelli, 2014).



Many women fall pregnant when they least expect it, or struggle to fall pregnant when they would want to, and have to undergo extensive treatments in order to do so. To the extent that it is at all possible to plan the timing of a pregnancy, careful consideration needs to be given to the stage of the career in which the woman finds herself and the point of a cycle in that stage. While many women are choosing to have children later in life and are still wanting to retain and progress their careers, the timing of pregnancy should be towards the end of a particular cycle in their current role – refer to Figure 1: Career cycles.

In the first career stage, the focus is on building technical skills in a particular discipline and becoming proficient in all the components of the discipline value chain. This is also a time of experimentation and seeking new experiences. As a result, career cycles in this first stage tend to be shorter averaging 2 to 3 years in each role. At some point (for many people this will be somewhere in their late twenties or early thirties), there is a transition (T in figure) to a much bigger and more complex role, where integrated solutions are required, covering many more components of the broader business value chain. The person will then be managing large teams and large budgets. The average time spent in a role in this second career phase becomes much longer, with career cycles averaging 3 to 5 years in each role. During the second career phase, the focus should be on delivering projects or key achievements that have a demonstrable impact on the business. The next transition will be to a top executive role. This usually occurs later in a woman's life, and usually beyond the stage when she would be thinking of having children, but this possibility cannot be excluded.

It is usually easier to have a child during the first career stage, as much due to the nature of the role that a woman occupies as for biological reasons. After age 35, it is

more difficult for a woman to conceive and carry a baby to term, compared to before age 30¹². Whether a woman chooses to fall pregnant in the first or second career stage, it would be preferable to do so towards the end of a particular cycle. There are several benefits to this. It is far easier to take time off when a key performance deliverable or a key project has just been completed than when it is part-way through and the pressure may be high. Reputation and professional standing are built on the back of the successful delivery of a project or key achievement, which usually gives the woman greater power to negotiate more flexible conditions during maternity leave and in the initial period upon her return to work, and also ensures that her career progression when she comes back from maternity leave will not be set back or delayed. Leaving part-way through key projects or deliverables means that the company will have to find a replacement to complete the project. Having completed 30% or 40% of a project is probably not much to boast about, and does not add significantly to reputation, professional standing, or negotiating leverage.

There may be other reasons why women delay having children. Research has shown¹³ that women with degrees and those in professional or managerial occupations experience reduced earnings around the time of first birth, together with a flattening of the wage profile following motherhood. It has also been shown that delaying motherhood increases career earnings and post-motherhood wage rates. It is not clear from the research whether this is because mothers with small

¹² Verchere, C. (2014). *Biology vs. career*. *British Columbia Medical Journal*, 56 (7), pp. 314-355.

¹³ Miller, A. R. (2011). *The effects of motherhood timing on career path*. *Journal of Popular Economics*, 24, pp. 1071-1100.

children invest less time in their skill development or whether companies offer these mothers fewer training and advancement opportunities. It is likely the two are interconnected. What is clear is that the same research indicates that women can achieve higher earnings by delaying motherhood during their twenties and early thirties. So, women may delay maternity until they have achieved a certain level of career success. However, this is often when they are more valuable to the company and the impact of their absence on maternity leave will be greater.

Another reason for delaying maternity may be that, when the economy goes through a down-cycle, women are more likely to be affected by unemployment than men, and research shows that, where the potential for long-term unemployment is highest, women would rather postpone childbearing¹⁴. Women fear not only the loss of future income, but also their inability to invest sufficiently in their own development at crucial stages of their careers¹⁵. While companies cannot use pregnancy or childbirth as criteria in selection of individuals for retrenchment when they are restructuring (and doing so would result in an automatically unfair labour practice, which could be challenged before the Council for Conciliation, Mediation and Arbitration or even in the labour court), women who perceive that the company and/or the industry is in economic difficulty may choose to postpone pregnancy until job tenure and return to work after pregnancy are less at risk.

Tips for HR practitioners

Be aware that, as people approach the end of a particular career cycle, they are more likely to be seeking new challenges, and will seek other job opportunities if no future career opportunities discussion takes place. For the same reasons, this may be the period in which a female employee decides to have a child. As soon as the employee notifies the employer that she is pregnant, specific deliverables should be agreed – what she can reasonably be expected to complete before she goes on maternity leave. This would allow her to go on maternity leave feeling she has reached certain milestones, and also allow her and her manager to understand and agree on expected outputs. Any plans for colleagues or a temporary replacement to take over some of her workload have to be discussed and agreed upon by

the affected parties before she departs on maternity leave. There should also be an open career discussion with her manager and, where possible, her manager once removed (her manager's manager) on what future career options would be available upon her return. Certainty of job tenure and clarity as to what to expect when she returns will go a long way in ensuring her commitment and her timely and productive return to work.

Changing jobs while pregnant

Legally, a company cannot deny a candidate employment because she is pregnant, and she is not legally required to let potential employers know that she is expecting. A prospective employee should never be asked questions regarding pregnancy or future plans to have children. If the employer does ask in the interview whether the candidate is pregnant or plans to have children, this can be used as strong evidence that the employer is in breach of legislation preventing discrimination on the grounds of pregnancy. The unfortunate reality for the pregnant candidate is that some hiring managers may view pregnancy and the upcoming maternity leave as an inconvenience and, as a result, will not consider her for the job¹⁶. While this is illegal, it could be very difficult to prove that pregnancy was the reason for not being selected. On the other hand, not telling a prospective employer that you are pregnant and then being regarded as having been less than truthful at the interview stage could damage your credibility and the future working relationship.

For all these reasons, changing jobs while pregnant is probably not advisable, and, if contemplated, should be done as early as possible in the pregnancy and preferably with full disclosure to the new employer up front. The best time to tell the prospective employer is probably at the time of offer, and not after you have accepted the position or started the job. The company needs to be clear up front as to what benefit limitations there are for women joining the company while pregnant; e.g., some companies do not offer paid maternity leave to employees with less than a year's service, and only offer the statutory unpaid maternity leave. Medical aids may also have waiting periods for qualifying for certain benefits, and the prospective employee needs to acquaint herself with all the pertinent conditions before taking the final decision.

14 Bono, E. DeL, Winter-ebmer, R., Bono, E. DeL, & Winter-ebmer, R. (2008). *Clash of career and family: Fertility decisions after job displacement* (Report No. 3272). Bonn.

15 Adsera, A. (2005). *Vanishing children: From high unemployment to low fertility in developed countries. Papers and proceedings of the 107th annual meeting of the American Economic Society, The American Economic Review*, 95 (2), pp. 189-193.

16 Lowman, E. (2013). *The unofficial rules of job hunting while you're pregnant*. Forbes Leadership, posted 25 February 2013, retrieved from <http://www.forbes.com/sites/dailymuse/2013/02/25/the-unofficial-rules-of-job-hunting-while-youre-pregnant/#3d83501321e9>

Tips for HR practitioners

No interview questions or screening processes should include asking a candidate for a job (whether internal or external) whether she is pregnant or planning to become pregnant. Line managers, in particular, may not be sensitive to these issues, and need to be briefed accordingly, to avoid possible claims of discrimination. If an offer is made to a pregnant candidate, the maternity policy and any limitations on benefits need to be explained in full before the offer is finalised.

Maternity benefit or ‘poison chalice’?

We have discussed at length the various benefits and accommodations that should be considered for pregnant employees and those returning from maternity leave. However, for many professional women, maternity leave can still be experienced as “the equivalent of a ‘poisoned chalice’ – offered as a benefit, but damaging to a career”¹⁷.

In one study, it was found that up to 22% of pregnant women experience at least one form of workplace discrimination related to their pregnancy, such as negative comments or being excluded from training, development, or promotion¹⁸. Another study¹⁹ suggests that pregnant women in managerial roles are especially vulnerable to unfair treatment. This has negative impacts such as higher levels of anxiety, fatigue, irritability, and ante-natal depression. Simply being away from work and losing touch temporarily is experienced as being out of the mainstream and away from the managerial focus. This is exacerbated when managerial reaction to an employee’s pregnancy and maternity leave is tinged with scepticism about the woman’s priorities, which, in turn, leads to the perception by women that organisations often view them less favourably after maternity leave.

Women have also experienced the lack of mobility that often accompanies having children as the single biggest

family-related block to career progress²⁰. This could be due to the preference given to husband’s careers, where moves are undertaken for his career, even though these may frustrate the career progress of the wife. The wife may also be unable to relocate due to the husband’s career. Even where this is not the case, the inability to relocate may result from the perceived impact on the children’s schooling or their social circle and happiness. Companies expecting staff to work in different locations as part of the organisational career pattern for the development of managers may result in career opportunities being bypassed by women and their career choices being limited. This may be addressed through companies offering relocation assistance that includes exploring career opportunities for spouses.

Conclusion

It is essential that organisation leaders, and human resources professionals in particular, recognise that a new approach to maternity- and career decisions of female employees is required. A new perspective on work and family is not only possible, but necessary. The value of women in organisations has been validated in research, which has shown that companies that have women as top managers demonstrate higher operating margins and market capitalisation than companies managed by men only²¹. Therefore, it is unreasonable for a talented woman to face a gauntlet of organisational obstacles related to taking maternity leave and returning to work, or because of her perceived failure to conform to stereotypically male visions of the behaviours required for career success. Organisations must also take steps to dispel what have been called ‘re-entry myths’²² and the presumption that having a family negatively affects career commitment and output. Organisations must offer greater flexibility by allowing women to remain productive while still meeting family commitments. Good childcare is also essential to a woman being able to commit to her work, and companies could play a greater role here. In order to allow women to pursue their professional development and combine their work- and family lives while contributing to the success of the company, it is necessary for organisations to reconsider how best to accommodate pregnancy and the career decisions of their female talent.

17 Li, V. (2015). *Team approach keeps pregnancy leave from stalling careers*. American Bar Association Journal, June [07470088], p. 1. Retrieved from http://www.abajournal.com/magazine/article/team_approach_keeps_pregnancy_leave_from_stalling_careers

18 Cooklin, A. R., Rowe, H. J., & Fisher, J. R. W. (2007). *Employee entitlements during pregnancy and maternal psychological well-being*. Australian and New Zealand Journal of Obstetrics and Gynaecology, 47(August), pp. 483-490. <http://doi.org/10.1111/j.1479-828X.2007.00784.x>

19 Gatrell, C. J. (2013). *Maternal body work: How women managers and professionals negotiate pregnancy and new motherhood at work*. Human Relations, May issue, pp. 97-112.

20 Stoner, C. R. & Hartman, R. I. (1990). *Family responsibilities and career progress: The good, the bad and the ugly*. Business Horizons, May-June issue, pp. 7-14.

21 Borisova, D. & Sterkhova, O. (2012). *Women as a valuable asset*. McKinsey & Company Report, pp. 1-16.

22 Stoner, C. R. & Hartman, R. I. (1990). *Family responsibilities and career progress: The good, the bad and the ugly*. Business Horizons, May-June issue, pp. 7-14.

CHAPTER THREE

Pregnancy and employment law in South Africa

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Introduction

Gender equality in South Africa and particularly, the protection of pregnant women in the workplace has recently come under scrutiny in the courts. In order to place this scrutiny in context, this chapter will introduce the relevant South African legislation that regulates pregnancy in the workplace, before a brief discussion of recent cases that have grappled with the legislation.

Thereafter, an overview of the standards prescribed by the International Labour Organisation (ILO), as well as various other countries shall be given in order to place South Africa in the global sphere.

From this a comparison can be drawn, allowing one to hypothesize the developments that are required in order to not only bring South African standards in line with other leading countries, but to ensure that South Africa can realise its progressive potential that is inherent in its Constitution.

South African legal framework

The Constitution of the Republic of South Africa¹ is the umbrella legislation that forms the foundations for more specific legislation to deal specifically with issues relating to pregnancy in the work place. It provides this foundation in Section 9(3), which broadly states that no person may be discriminated against based on pregnancy. The Constitution goes on to provide protection for a person's right to bodily and psychological integrity, which encompasses the right to make decisions concerning reproduction, in section 12(2).

The Basic Conditions of Employment Act² (BCEA) contains specific provisions such as:

Section 25 which states that an employee is entitled to at least four consecutive months' maternity leave. However, this is unpaid leave. Furthermore, the employee may not work for six weeks after

¹ 1996

² No. 75 of 1997

the birth of her child, unless a medical practitioner or midwife certifies that she is fit to do so;

Section 26 which states that no employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child. Suitable alternative employment has to be offered to the employee, by the employer for a period of six months after the birth of her child; and

Section 27, which addresses leave known as family responsibility leave. Family responsibility leave allows for three days paid leave to be taken in cases when the employee's child is born. While this seems to be akin to maternity leave, this leave is also utilised in case of death of a family member.

The Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child

In an attempt to ensure that comprehensive legislative policies are practically applied in the workplace, the legislator formulated a Code of Good Practice on the Protection of Employees during Pregnancy and After the Birth of a Child. The Code provides a framework for both employers and employees in implementing the legislating relating to pregnancy in the workplace. It emphasises that discrimination relating to pregnancy is strictly prohibited. Further, it deals with certain aspects during pregnancy that may affect work; namely, morning sickness, backache, and varicose veins as a result of prolonged sitting or standing.

The **Employment Equity Act (EEA)**³, in Section 6, prohibits discrimination based on pregnancy.

The **Labour Relations Act (LRA)**, in Section 187(1)(e), states that a dismissal is automatically unfair if the reason for the dismissal is the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy.

This section is wider than Section 186(1)(c), which defines a dismissal to include the refusal of an employer to allow an employee to return to work after maternity leave.

Schedule 8 of the LRA, Code of Good Practice: Dismissals stipulates that a dismissal on the grounds of intended

or actual pregnancy is grounds for an automatic unfair dismissal.

Section 24 of the Unemployment Insurance Fund Act⁵ (UIF Act) states that "a contributor who is pregnant is entitled to the maternity benefits contemplated in this Part for any period of pregnancy or delivery and the period thereafter, if application is made in accordance with prescribed requirements and the provisions of this Part."⁶ It is important to note that maximum period of maternity leave is 17,32 weeks.⁷

Section 24(5) of the UIF Act states that "A contributor who has a miscarriage during the third trimester or bears a still-born child is entitled to a maximum maternity benefit of six weeks after the miscarriage or stillbirth."

The Occupational Health and Safety Act No. 85 of 1993 states that the employer has an obligation to provide safe working conditions for its employees.

It appears that the practice in the South African labour environment is, for some employers, to simply apply the minimum provisions in terms of the law, whereas other, more progressive companies provide six months' paid maternity leave, which has discussed later can have UIF implications.

It is also a practice at some companies to impose a penalty on employees who receive full maternity benefits, should they fail to continue working after paid maternity leave, for a period of 12 months or longer. It is also not uncommon for employers who pay such additional benefits to limit the amount of paid maternity leave.

South African Case Law

Recent case law has changed South African legislation regarding maternity leave.

In De Beer v SA Export Connection CC t/a Global Paws⁸, the employee went on maternity leave on 23 September 2005, and gave birth to twins on 28 September 2005. She was allowed one month's maternity leave by agreement. As the babies were both ill by the time the one-month maternity leave period had elapsed, the mother applied for another month's leave. The employer was only

³ No. 55 of 1998

⁴ No. 66 of 1995

⁵ No. 3 of 2001

⁶ Section 24(1) of the UIF Act.

⁷ Section 24(4) of the UIF Act.

⁸ 2008, 1 BLLR 36

willing to grant her two extra weeks' leave. When she did not return to work thereafter, she was dismissed.

The employee referred the matter to the Labour Court, claiming that the dismissal was automatically unfair in terms of Section 187(1)(e) of the LRA, because she had been dismissed for reasons related to her pregnancy.

The employer argued that the illness of the children did not relate to the pregnancy. The argument was furthermore that the phrase in the LRA "reasons relating to pregnancy" refers to the mother herself, and not to newborn children.

The Labour Court found that the phrase "reasons relating to pregnancy" refers, not only to the mother, but also to newborn children, and includes the mother's right to nurture them. The agreement entered into by the parties limiting the maternity leave to one month was null and void, as she was entitled to four months' maternity leave in terms of the BCEA. The court found that the employee was legally entitled to take the remainder of her maternity leave to look after her babies. The dismissal was automatically unfair, and the employer was ordered to pay the employee 20 months' remuneration in compensation plus the legal costs of the employee.

In Ismail v B&B Harvey World Travel Northcliff⁹, a probationary employee informed her employer that she was pregnant on the same day that the employer informed her that she was dismissed as a result of poor work performance. She referred the dispute to the Labour Court in terms of Section 187(1)(e) of the LRA, alleging that the dismissal was automatically unfair.

The court found that the termination of employment was not as a result of the pregnancy, but due to the poor work performance of the employee. Her poor work performance, disinterest in the work, and the lack of professionalism when dealing with clients were the reasons for her dismissal. The court further found that the employee's belief that the timing of her

termination was suspiciously close to the disclosure of her pregnancy did not constitute sufficient evidence to discharge the onus on the employee of proving that her pregnancy was the dominant or most likely reason for the termination of her employment.

In MIA v State Information Technology Agency¹⁰, the Employee and his partner had a surrogate baby. The employee referred the dispute to the Labour Court on the basis that the employer refused to grant the employee maternity leave.

The employee alleged that the employer's refusal to grant maternity leave constituted unfair discrimination on the grounds of gender, sex, sexual orientation, and family responsibility in terms of the EEA. The employer relied on the word "maternity" as the defining character of the leave, and held that it was a right due to and to be enjoyed only by female employees.

The court found that maternity leave is not only occupied with the mother and the physical well-being of the mother, but that the maternity leave is also with regard to the best interest of the child, as is regulated by Section 28 of the Children's Act No. 38 of 2005 (Children's Act).

The court went on to state that the acceptance of surrogacy and same-sex unions in the legislation is indicative that any policy an employer adopts should be read in accordance with the Children's Act and the Civil Union Act No. 17 of 2006.

The court subsequently found that the policy of the employer did indeed discriminate unfairly, and that the policy should be adjusted to grant maternity leave in situations of surrogacy. This case was only with regard to the one parent's maternity leave and not with regard to the other.

The question this case raises is how the leave would be regulated between the two parents. Either of the two parents in a same-sex relationship could approach his or her individual employer to request four months' maternity leave. This scenario would then discriminate against opposite-sex parents, especially in light of the fact that Section 26 of the BCEA currently does not provide for paternity leave other than family responsibility leave.

It is evident that there is a need to update South African legislation regarding paternity and maternity leave to bring it in line with the Civil Union Act and

⁹ 2014, 35 ILJ 696 (LC)

¹⁰ 2015, [6] SA 250 (LC)

the Constitution of South Africa. It is our opinion that paternity leave should be introduced into South African legislation, as has already been done in other countries, subject to the considerations set out in this Chapter.

ILO and European conventions

The ILO has enacted several conventions regarding maternity leave. The most prominently addressed issues in these conventions are the unlawfulness of discrimination based on pregnancy and the duration of the maternity leave the ILO recommends. Several reports comparing different countries' legislation with regard to maternity leave and maternity benefits have been issued by the ILO.

The **Maternity Protection Convention No. 183 of 2000** concerning the revision of the Maternity Protection Convention of 1952 (Revised)¹¹ was drafted in accordance with a number of United Nations Conventions that protect the rights of pregnant women in the workplace.

Article 3 states that:

"Each Member shall, after consulting the representative organisations of Employers and workers, adopt appropriate measures to ensure that pregnant or breastfeeding women are not obliged to perform work which has been determined by the competent authority to be prejudicial to the health of the mother or the child."

Article 4 indicates that the maternity leave may not be less than 14 weeks, which includes a period of six weeks' compulsory leave after childbirth.

Article 8 states that it is unlawful for an employer to terminate the employment of a woman during her pregnancy, and, furthermore, that a woman is guaranteed the right to return to the same position or an equivalent position and paid at the same rate at the end of her maternity leave. This convention has not been ratified by South Africa, Germany, the United Kingdom, or the United States.

In the **Maternity Protection Recommendation No. 191 of 2000**, the Recommendation Concerning the Revision of the Maternity Protection Recommendation 195¹² states that the members to Convention No. 183 should endeavour to extend the maternity leave period to 18 weeks.

Furthermore, that the woman should be allowed to choose freely when the non-compulsory portion of her leave is taken — before or after the birth of her child. The regulation also recommends that facilities be made available for mothers who are breastfeeding near or at the workplace¹³.

A total of 63 countries are members to at least one maternity protection convention of the ILO. According to an ILO report¹⁴, at least 51% of member countries meet the requirement of at least 14 weeks of maternity leave. Over a 15-year period, 1994 – 2009, in most ILO member states, the maternity leave period either stayed consistent or was increased¹⁵.

In the ILO report, it is stipulated that all EU member states have to enforce maternity leave of a period of two weeks' compulsory leave, allocated before or after confinement.

European Parliamentary Assembly Recommendation No. R (96) 5 on reconciling work and family life provides that "[W]omen should be entitled to legal protection in the event of pregnancy, and, in particular, an adequate period of maternity leave, adequate pay or allowance during this period and job protection"¹⁶. The European Parliament, in 2010, passed a proposal allowing for 20 weeks' full paid maternity leave in all EU countries¹⁷.

In the 2015 study **Maternity, paternity and parental leave: Data related to duration and compensation rates in the European Union: Study for the FEMM Committee**, it was published that there is no European legislation regulating paternity leave, but that 23 member states offer paternity leave, and that the duration varies from one to 64 days¹⁸.

An International Perspective

This section focuses on specific legislation in Germany, the United Kingdom and the United States of America, with specific regard to the clauses related to maternity leave, benefits, and protection.

¹¹ Entry into force: 07 Feb 2002; Adoption: Geneva, 88th ILC session (15 Jun 2000)

¹² Adoption: Geneva, 88th ILC session (15 Jun 2000)

¹³ [n 10] Section 9

¹⁴ Öün, Trujillo, & Harper, *Maternity at work: A review of national legislation: Findings from the ILO Database of Conditions of Work and Employment Laws* 6

¹⁵ [n 12] 10

¹⁶ European Parliamentary Assembly Recommendation No. R (96) 5

¹⁷ europa.eu/epic/news/2010/20101020_en.htm

¹⁸ [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509999/IPOL_STU\(2015\)509999_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509999/IPOL_STU(2015)509999_EN.pdf)

The purpose of making reference to international law is to compare it with the South African employment environment and in particular, to highlight possible shortcomings in South African legislation in this regard.

Germany

In 1951, the **Federal Parliament enacted the Federal Act on the Protection against Dismissal** ("Kündigungsschutzgesetz"). An employee is covered by the Act on Protection against dismissal only if two conditions are fulfilled. First, the employment relationship had to have existed for at least six months. "In employment relationships that exist for less than six months, the Employer can dismiss without the restriction of the Act on Protection against Dismissal."

Consequently, employees are normally on probation for six months.

Secondly, the employer may not dismiss pregnant employees and mothers until four months after childbirth, if the employer has knowledge of the pregnancy or receives information about it within two weeks after the pronouncement of the dismissal.

However, the competent authority of the state is entitled to authorise the dismissal, if the dismissal is not motivated by the pregnancy or by the accouchement of the employee. In practice, this can lead to long administrative procedures for the employer¹⁹.

Article 3, Paragraph 3 of the German Constitution prohibiting discrimination on the grounds of race, ethnic provenance, or religion is not only binding on the state, but also has a (certain) horizontal effect, in that it is binding on employers as well.

Child-based leave or maternity leave consists of 14 weeks of maternity leave, of which at least eight must be taken after childbirth. Taking the eight weeks' leave after childbirth is compulsory. In the event of multiple or premature births, 18 weeks' maternity leave is allowed. During maternity leave, women are eligible for a

maternity allowance ("Mutterschaftsgeld"), if they have been enrolled in a statutory insurance programme for at least 12 weeks during the period between 10 months and four months before the child's expected birth date²⁰.

The Maternity Protection Act of 1968 ("Mutterschutzgesetz") stipulates the following²¹:

Employers have to provide a healthy and safe work environment for expecting and nursing mothers.

Employers have to provide an adequate break room that can accommodate a reclining chair for expecting and nursing mothers who require it.

Expecting mothers are not permitted to perform heavy physical labour or to work with or amongst materials, substances, and gases or extreme elements that could be deemed potentially hazardous to their health.

Expecting and nursing mothers should not be exposed to compressed air or radioactive material. Chemical and biological pollutants could also be considered harmful.

In the aforementioned circumstances, either the Employment Protection Office ("Arbeitsschutzämter") or the Business Supervisor's Office ("Gewerbaufsichtsämter") is to act as the deciding authority in unclear cases. Both employer and employee may contact the responsible office for consultation at any time.

Expecting and nursing mothers are not permitted to work certain hours of the day or on Sundays. Exceptions are made for employees working in hospitals, restaurants, hotels, agriculture, the arts and in family households.

The Maternity Protection Act makes provision for breastfeeding. Employees are allowed to take nursing breaks. These breaks may not be deducted from a nursing mother's pay or hours worked and they may not be counted in place of other instituted breaks (like lunch breaks).

¹⁹ Seifert & Funken-Hötzel Wrongful dismissal in the Federal Republic of Germany. *Comparative Labour Law Journal*, Vol. 25, 487

²⁰ Blum & Erler (2013) Germany country note. In: P. Moss (Ed.), *International Review of Leave Policies and Research 2013*. Available at: http://www.leavenetwork.org/lp_and_r_reports/

²¹ Maternity Leave and Job Protection ("Mutterschutz") in Germany Federal Ministry for Family, Seniors, Women & Adolescents, *Maternity Protection Guide 2005*. Available at: http://www.howtogermany.com/pages/maternity_protection.html

*Maternity protection pay*²²: Maternity protection pay is issued by the employer and must be equal to at least the average of 13 weeks' wages or the wages of the last three months before pregnancy.

Protection period before and after giving birth: Expecting mothers do not have to work during the last six weeks of their projected pregnancy, but may do so, as long as they formally state their intention to work during this period.

New mothers are not allowed to return to work until eight weeks have passed since the date of their child's birth.

For premature, multiple and caesarean births, the return date to work is extended automatically to 12 weeks after birth.

A Public Health Officer will decide which cases are to be lengthened from the normal eight weeks' leave. If the birth is later than calculated, the employee will not forfeit any leave and will still be granted a full eight weeks' maternity leave, starting at the time of the birth of the child.

United Kingdom

The Employment Rights Act 1996 prescribes a compulsory maternity leave period of at least two weeks.

The Work and Family Act 2006 prescribes the pay period for maternity leave in terms of the Social Security Contributions and Benefits Act 1992, which is 26 weeks.

The Children and Families Act 2014 allows for shared parental leave to be inserted into the Employment Rights Act 1996. Furthermore, it states that regulations under Section 75E of the Employment Rights Act are to indicate the amount of leave parents are allowed to take and the benefits payable to them.

Section 18 of the Equality Act 2010 prohibits any discrimination against an employee based on pregnancy or maternity.

The Revised Leave Directive states that, from 8 March 2013, both parents are entitled to 18 weeks' unpaid leave, instead of 13 weeks. This is, however, limited to four weeks per year²³.

The Amendment to the Paternity and Adoption Leave Regulations 2002 removed the current requirement of a qualifying period of service of 26 weeks before an employee is entitled to adoption leave. It further introduced protection for employees who suffer a detriment or are dismissed in relation to time off for ante-natal or adoption appointments and amended the provisions on the right to return after paternity- or adoption leave. In the United Kingdom, the employer is responsible for the cash benefits that employees receive during the period of maternity leave, but is reimbursed up to 92% from public funds.

United States of America

The USA has two federal acts that regulate pregnancy in the workplace.

The Family and Medical Leave Act²⁴ stipulates that the employee shall be entitled to "job-protected" unpaid leave of 12 weeks during any 12-month period of continued work for an employer with more than 50 employees for one or more of the following: because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

The Fair Labour Standards Act of 1938²⁵ provides for an hour every day that an employee is allowed to express breast milk for up to a year after the birth of the child.

The state of New York has the **Women's Equality Act of 2013 (WEA)**, which states that it is unfair discriminatory action to compel an employee to take leave if said employee is pregnant²⁶. It goes on to prohibit any "familial" discrimination. Familial is defined as "(a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or (b) one or more individuals (who have not attained the age of eighteen years) being domiciled with: (1) a parent or another person having legal custody of such individual or individuals, or (2) the designee of such parent."

22 *Maternity Leave and Job Protection ("Mutterschutz") in Germany*
Federal Ministry for Family, Seniors, Women & Adolescents, *Maternity Protection Guide 2005*. Available at: http://www.howtogermany.com/pages/maternity_protection.html

23 *LexisNexis Legal Newsroom Labour and Employment Law*

24 *Chapter 63 of Title 5, United States Code Section 6382 (2)*

25 *Section 207 (2) (1) (C) (r)*

26 *Part D (g)*

The WEA also requires employers to provide reasonable accommodations for employees with pregnancy-related conditions²⁷.

Lastly, a brief overview of relevant legislation of other countries who are member states of the OECD Convention is provided hereunder.

Other countries (as discussed in the detailed look at parental leave policies in 21 Member states of the Convention on the Organisation for Economic Co-operation and Development “OECD” Countries)²⁸

France

In France, women are entitled to 16 weeks’ paid leave, to be divided into six weeks before and ten weeks after the expected birth²⁹. If a woman so desires and if a medical practitioner approves, she may reduce the prenatal leave by up to three weeks and transfer those weeks to the postnatal period.

Women are also allowed to preserve their maternity leave if a newborn is hospitalised for a long period. If a child is hospitalised until the sixth week after confinement, mothers may postpone taking their remaining leave until the child leaves the hospital³⁰.

French legislation furthermore provides 11 working days’ paid paternity leave for fathers³¹.

There is a further provision that allows the father to take leave for a maximum period of ten weeks after the birth of a child, if the mother dies during maternity leave.

Russia

Many countries prescribe precisely how to distribute maternity leave, stating the number of days’ leave that may be taken before and after childbirth. In Russia, leave is to be taken for 70 days before and 70 days after the birth³².

Australia

New parents in Australia may take 52 weeks of unpaid family leave. A new mother may choose to either use all 52 weeks as maternity leave, or to transfer one week to the child’s father as paternity leave. Adoptive couples may divide the yearlong leave between the parents however they wish, including assigning all 52 weeks to one parent³³.

Fathers are allowed up to 14 working days’ paid paternity leave, funded by the government³⁴.

Austria

Austrian family leave consists of an initial paid maternity leave, to be taken solely by the mother, of eight weeks prior to and eight weeks after the birth, as well as extended, partially paid parental leave, which can be taken by either parent³⁵.

There is no provision for fully paid paternity leave³⁶.

Belgium

New parents in Belgium may take a total of 43 weeks of leave. Mothers may take 15 weeks of maternity leave, of which nine weeks are compulsory. Fathers may take two weeks of paternity leave (which equates to ten working days’ paid leave)³⁷ and each parent may take three months of parental leave³⁸.

Maternity benefits begin at 82 percent of a mother’s usual earnings, and then scale back to 75 percent of her earnings after the first 30 days. Paternity benefits begin at 100 percent of a father’s usual salary, and are reduced to 82 percent of his salary after the first three days.³⁹

27 Part I S2(a)

28 Ray. *The detailed look at parental leave policies in 21 member states of the Convention on the Organisation for Economic Co-operation and Development “OECD” Countries* Center for Economic and Policy Research, September 2008

29 (n 24) 12

30 (n 24) 12

31 Addati, Cassirer, & Gilchrist *Maternity and paternity at work: Law and practice across the world*, 54

32 (n 12) 15

33 (n 24) 3

34 (n 26) 54

35 (n 24) 4

36 (n 26) 154

37 (n 26) 54

38 (n 24) 5

39 (n 26) 12

Denmark

In Denmark, new parents receive a total of 52 weeks of family leave, divided as follows: 18 weeks of maternity leave, two weeks of paternity leave and 32 weeks of parental leave to be divided between them⁴⁰. All family leave is accompanied by a financial benefit paid by the parents' municipal government, ranging from 30 percent to 90 percent of their usual salary.⁴¹

Many countries provide additional leave in the event of a stillbirth, miscarriage, death, or other complications arising from abnormal confinement⁴².

Australia, Lesotho, Papua New Guinea, Swaziland and the USA provide some form of maternity leave, but there is no general legal provision of cash benefits⁴³.

In some countries, such as **Mongolia**, citizenship is a requirement for protection during pregnancy. In other countries, such as Israel, Sweden and Uzbekistan, all women residing in the country have the right to paid maternity leave⁴⁴.

In **Sweden**, to be entitled to cash benefits, a parent has to have been in insured employment for at least 240 consecutive days before the birth of the child⁴⁵.

South Africa

In South Africa, the possibility of extending maternity leave to same-sex parents or parents of surrogacy children opens the debate of possible discrimination against different-sex parents. An argument can also be made that the South African employment legislation is archaic and does not provide the protection against discrimination as the Constitution and the Civil Union Act of South Africa envisage (especially in the case of same-sex couples).

In South Africa, the employee has to claim benefits from the UIF⁴⁶. The Minister of Labour determines the scale of benefits to be paid during maternity leave. The scale of benefits may vary between 60% of remuneration for lower-income contributors, to a lower rate for higher-income contributors. These thresholds are set out in Schedule 3 of the UIF Act. South Africa is under scrutiny,

as the benefits are only available to employees who work in the formal economy and contribute to the UIF during their employment. This is due to the absence of public national health insurance, as well as the absence of an obligation on employees to become members of medical aid schemes⁴⁷.

An additional difficulty with the facilitation of the UIF fund has begun to surface, where more progressive companies are offering to 'top up' the amount received by an employee from the UIF, so that the payment is equal to the amount the employee received while working.

While on the face of it this seems like a straightforward policy for companies to implement, it is made difficult by the fact that the determination of the UIF payment is not easy to quantify before receiving the benefit. This is important to consider because in terms of section 24(3) of the UIF Act an employee on leave may not earn more than they would have if they had been at work.

Furthermore, the UIF will not pay out the benefit if the employee receives a benefit from the employer prior to the UIF payment.

Another issue to consider is the expediency at which the UIF make payments. In practise, these payments are sporadic and unreliable.

A possible solution to this problem could be to adopt a similar approach as is seen in the United Kingdom where the company is responsible for the payment of benefits up front, but they can then claim those benefit amounts back from the UIF.

Conclusion

It is evident that pregnancy in the workplace is taken in a serious light by the international community. The international community seems unanimous in their support of anti-discrimination legislation regarding pregnant employees.

⁴⁰ (n 24) 9

⁴¹ (n 26) 12

⁴² (n 24) 17

⁴³ (n 12) 17

⁴⁴ (n 12) 40

⁴⁵ (n 24) 27

⁴⁶ (n 5)

⁴⁷ Van Niekerk, Smit, Christianson, McGregor, & Van Eck *Law@Work*, 3rd ed., 487

The ILO puts pressure on member states to extend the duration of the leave allowed to mothers and fathers during the pregnancy, as well as the obligation on the employer to provide a safe and hazard-free environment for pregnant or nursing mothers.

Employers of choice have become known to provide day care facilities for children of employees, on site, so as to accommodate post maternity needs of both the mother and the child. However, such facilities are of course subject to the employers financial resources.

Cash benefits available to employees on maternity leave also seem to have been increasing in many countries over the past ten years. In some countries, these benefits are paid by the employer, while in other countries the state provides the benefits. The following recommendations are made for South Africa.

In considering the protection of parents in the South African environment, it is important that a proper balance be struck. This means that there should be ample protection for both parents in the case of pregnancy, whilst, at the same time, not burdening the employer so as to have an adverse effect on the creation of employment.

In addressing the aforesaid balance, it is not unfair to require the government to become a contributing partner to the financial support of both parents in the case of pregnancy. This will effectively mean an increase in UIF benefits.

It is also necessary to regulate and address the position of both parents and their rights and benefits in the case of surrogacy.

Consideration should also be given to the no-fault termination clause, allowing employers to terminate employment where there is pregnancy within the first six months of employment and, furthermore, limiting the number of payments or reducing same in the event of maternity leave beyond a certain number of children. It is appreciated that these considerations may raise possible constitutional challenges.

Lastly, consideration should be given to the provision of paternity leave. South Africa's family responsibility leave, which is the closest thing to paternity leave, seems to be lacking, compared to that of other countries. Three days is insufficient as paternity leave and should be lengthened. Alternatively, maternity leave should be shared by both parents. Further to this, there is a definite need for legislation regulating leave for same-sex parents. The sharing of maternity and paternity leave between the parents should be somewhat more flexible.



CHAPTER FOUR

Menopause and the workplace

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Studies have pointed to the need for information on the functional relationships between menopausal women¹ and the effects that this may have on their job performance and tenure.

According to the Concise Oxford Dictionary (1990), menopause is the period in a woman's life when menstruation ceases. It occurs, if not induced, for most women, between the ages of 49 to 55 years, and, in some instances, as early as 42 years. The menopausal transition spans about ten years of a woman's working life. This, in most cases, is the prime of their working lives, as they immerse themselves in building careers after having raised children.

Menopause in the South African workplace is not recognised or considered in wellness programmes. Both authors, in their respective working experiences, were not exposed to any policies and procedures that addressed menopause and its impact in any of their workplaces, including where they were responsible for areas where they could have influenced or introduced the issue. This alone is telling, let alone the dearth of literature on the topic, especially in the South African workplace.

A number of studies have, however, been conducted abroad to measure the impact of menopause on women in the workplace. Most of these studies found that most women are negatively affected at work because of menopausal transition.

Why should HR practitioners know about menopause and its effects?

HR practitioners cannot afford ignorance on menopausal transition and its impact on women in the workplace, as this affects a large – and growing – number of women in the labour force.

According to a report titled *The status of women in the South African Economy 2015*, there are well over 2.4m women in employment in South Africa who are aged 45 to 65 years². This represents 11% of the total South African labour force. These numbers are set to rise as women increasingly enter the workforce. Where, not so long ago, older women would have been content to fulfil nurturing roles when they stepped out of employment, changing gender norms and the

¹ High, R.V., & Marcellino, P.A. (1994). Menopausal women and the work environment. *Social Behaviour and Personality – An International Journal*, 22(4), pp. 347-354.

² Department: Women. Republic of South Africa. (2015). *The status of women in the South African Economy*

call for equality between the sexes have enabled women to extend their tenure and to seek greater self-fulfilment and income. Moreover, owing to increasing financial pressures globally, and as a result of increasing life expectancy, women now tend to remain at work for longer than was previously the norm.

According to the same report, the South African female labour force is slightly older than that of other countries, due to women being more likely to exit the labour force during childbearing ages. It goes on to say that this may indicate changing attitudes towards the participation of older women in the South African workplace. Furthermore, the report states that employment figures of women aged 55 to 65 years have increased.

Employed women in South Africa tend to have slightly higher levels of education than employed men, making them an asset in many workplaces. It has also been well documented that work boosts the psychological and emotional wellbeing of older women, functioning as a source of self-esteem^{3,4}.

This chapter will highlight why human resource practitioners should know about menopause and its impact on the workplace, albeit based on studies conducted outside of South Africa. It is also aimed at creating an awareness of, and an interest in, the findings of studies documented elsewhere, in order to stimulate local research in this field. The opportunities and new work frontiers that have recently become open to women in South Africa demand that information about the menopausal transition and its impact on work be made available, which will hopefully result in better employment practices⁵. The absence of significant research in this area in developing countries and, in particular, in South Africa, is indicative of an underlying ignorance regarding the subject⁶.

During menopause, women may experience a wide range of physical and emotional symptoms that may negatively impact their work experiences. Symptoms could include sleep disturbances (leading to day-time fatigue), mood changes, memory/concentration impairment, headaches, anxiety and fear, and hot

flushes. These symptoms may result in the woman's job performance being adversely affected and, consequently, poor self-esteem⁷.

Literature surveyed

In reading articles on menopausal women and the work environment, it became clear that menopause, the associated symptoms, and the effects thereof are not generally considered an occupational health and safety issue, even though symptoms may interfere with the quality of women's work.

In a comprehensive study conducted in the UK in 2013 aimed at establishing the extent to which widely recognised menopausal symptoms were problematic at work, compared to life in general, the following emerged⁸:

Symptom	Work %	2002-2004
Poor concentration	50.9	34.9
Tiredness	50.7	53.4
Poor memory	50.5	42.1
Feeling low/depressed	41.9	39.7
Lowered confidence	38.9	21.9
Sleep disturbances	37.9	56.5
Irritability	35.6	37.8
Hot flushes	35.1	40.4
Joint- and muscular aches and discomfort	31.3	41.5
Mood swings	29.0	35.5
Anxiety/panic attacks	25.3	21.2
Tearfulness	23.7	25.4
Frequent visits to the toilet	23.3	32.8
Heavy periods	22.4	24.0
Clumsiness	17.4	24.4
Palpitations/irregular or racing heart	15.0	19.9
Weight gain	10.6	38.3
Night sweats	8.3	43.1
Change in skin/dryness	6.4	27.0

From: Griffiths, A., & MacLennan, S.J., & Hassard, J. (2013). Menopause and work: An electronic survey of employees' attitudes in the UK. *Maturitas Journal*, 76(2), p. 156.

3 Department: Women. Republic of South Africa. (2015). *The status of women in the South African Economy*

4 Griffiths, A., & MacLennan, S.J., & Hassard, J. (2013). Menopause and work: An electronic survey of employees' attitudes in the UK. *Maturitas Journal*, 76(2), pp. 155-159.

5 Department: Women. Republic of South Africa. (2015). *The status of women in the South African Economy*

6 High, R.V., & Marcellino, P.A. (1994). Menopausal women and the work environment. *Social Behaviour and Personality - An International Journal*, 22(4), pp. 347-354.

7 Hamman, R. A.M., Abbas, R. A., Hunter, M. S. (2012) Menopause and work - The experience of middle-aged female teaching staff in an Egyptian governmental faculty of medicine. *Maturitas Journal*, 71(3), pp. 294-300.

8 Griffiths, A., & MacLennan, S.J., & Hassard, J. (2013). Menopause and work: An electronic survey of employees' attitudes in the UK. *Maturitas Journal*, 76(2), pp. 155-159.

The findings stated in the table are not listed in order of severity, but were coded according to the age, race, cultural background, and level of education of the respondents⁹. Furthermore, the researchers neither analysed the data according to the percentage of women who were classified as premenopausal or in natural menopause, nor whether the menopause was natural or surgically induced. The type of job, industry, and work calendars were also not taken into consideration. This points to a need for further investigation.

What is of interest, however, is that, when the women were asked how difficult it was to manage work during menopausal transition, out of a sample drawn from 10 organisations, 5% stated that it was “very or extremely difficult,” 48% reported that it was “somewhat or fairly difficult,” and 47% found it “not at all difficult¹⁰.” In follow-up discussions with a few respondents, the findings of the UK study were broken down further, and symptoms commonly reported as problematic in a work environment were: poor concentration, fatigue, poor memory, feeling depressed, and lowered self-confidence¹¹.

Had questions about these difficulties been asked in face-to-face interviews, would the responses have been the same? Given the difficulty faced by most women to legitimise their tenure in the workplace, would they have been willing to admit to anything that might cast doubt on their capability?

In a similar study conducted in the USA, where women were categorised into managers and non-managers, a correlation coefficient was calculated for each symptom¹². The findings showed that irritability and mood changes had a significant correlation with job performance, while the other commonly known symptoms did not yield significant correlations with job performance¹³. What was of significance in that study, however, was that overall, the women in non-managerial jobs appeared to struggle more with

menopausal symptoms, which, based on self-appraised job performance ratings, adversely affected their job performance.

In another study, conducted in Egypt, it was found that menopausal women generally suffered from a depressed mood, somatic symptoms, sleep problems, and memory- and concentration loss¹⁴. This resulted in reduced quality of life. What is worth noting about the said study is that most of the women who formed part of the sample were unemployed. Some were from rural areas, and most had never consulted a doctor.

They learnt about the condition through family and their social circles. In that sample, the most frequently reported menopausal symptoms were fatigue, headaches and hot flushes. The study's sample in Egypt could mirror the South African environment, as the majority of women are in non-managerial jobs and are located in rural settings¹⁵. In such environments, menopause might not be discussed openly, due to cultural norms.

Importance of the topic

Studies that focus on the impact of menopausal symptoms on work performance and vice versa would be of benefit to HR practitioners in South Africa and the continent as a whole. HR practitioners should therefore familiarise themselves with the effects of menopausal transition on women's work performance, especially in areas where there is a shortage of skills. Women with critical skills should be assisted in managing menopausal transition, and be able to continue to work unimpaired by the symptoms identified.

HR practitioners also need to be more aware of all the possible effects of menopause on women involved in more physical work, as climatic conditions may exacerbate some menopausal symptoms, such as hot flushes, fatigue, joint and muscle pain.

Given the wide range of menopausal symptoms that have been identified and classified as health issues, HR

⁹ Griffiths, A., & MacLennan, S.J., & Hassard, J. (2013). Menopause and work: An electronic survey of employees' attitudes in the UK. *Maturitas Journal*, 76(2), p. 156.

¹⁰ Griffiths, A., & MacLennan, S.J., & Hassard, J. (2013). Menopause and work: An electronic survey of employees' attitudes in the UK. *Maturitas Journal*, 76(2), pp. 155-159.

¹¹ Griffiths, A., & MacLennan, S.J., & Hassard, J. (2013). Menopause and work: An electronic survey of employees' attitudes in the UK. *Maturitas Journal*, 76(2), pp. 155-159.

¹² High, R.V., & Marcellino, P.A. (1994). Menopausal women and the work environment. *Social Behaviour and Personality - An International Journal*, 22(4), pp. 347-354.

¹³ High, R.V., & Marcellino, P.A. (1994). Menopausal women and the work environment. *Social Behaviour and Personality - An International Journal*, 22(4), pp. 347-354.

¹⁴ Oddens, B.J., & den Tonkelaar I., & Nieuwenhuys, H. (1999). Psychosocial experiences in women facing fertility problems: A comparative survey. *Human Reproduction*, 14(1), pp. 251-261.

¹⁵ Hamman, R.A.M., Abbas, R.A., Hunter, M.S. (2012) Menopause and work – The experience of middle-aged female teaching staff in an Egyptian governmental faculty of medicine. *Maturitas Journal*, 71(3), pp. 294-300.

practitioners now need to re-examine the workplace policies and be able to broaden offerings of wellness programmes that will support female employees going through this period in their lives.

It would also be important to include in their workforce analytics, information on women who may be affected by the menopausal transition symptoms, and analyse how this may be affecting their day-to-day performance, with a view to establishing how such women can best be accommodated in the workplace. HR practitioners may need to review their organisations' working conditions, to create a conducive environment that is comfortable for all participants. This should include paying attention to changes in behaviour that may prejudice women who may be going through traumatic hormonal changes.

Practical application

The literature review conducted points to the need for further studies conducted in this area, with a view to understanding the full extent of the problem and to what extent job performance can be adversely affected by this phenomenon. In the South African context, and given the cultural background of the larger percentage of the workforce, it is highly likely that many women continue to suffer in silence.

There also appears to be a need to sensitize line managers, both male and female, to the phenomenon, in order to create environments that are more aware and understanding of the impact that menopausal symptoms have on the psychological and cognitive wellbeing of women going through this phase. A clearer understanding of these issues would enable strategic and workforce planning that takes cognisance of this growing segment of the workforce.

The South African Board of People Practices (SABPP) would also need to review the HR Standard that looks at wellness at work, and set clear guidelines and make recommendations on how HR practitioners should support women who are going through menopausal transition.

Conclusion

This chapter briefly discussed the subject of menopause, based on studies conducted abroad, and highlighted the importance of HR practitioners in South Africa familiarising themselves with this phenomenon, which, to date, has lain outside the ambit of their normal operations and responsibilities.

In order to assist practitioners with information that is relevant to their context, it is important that researchers in South Africa replicate studies done elsewhere, and include factors and information unique to the sub-continent, in order that the HR fraternity may gain a better understanding of the situation. It would also be important to conduct the research in as many different industries as possible, to determine to what extent different working environments and workplace design factors may aggravate menopausal symptoms.



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- We build HR knowledge and competence
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The Human Resource profession is at the heart of the implementation of the HRD Strategy for South Africa. This internationally recognised profession, more than any other, is responsible for transformation, sourcing, training and retaining talent and ensuring harmonious work relationships. The SABPP's role is to professionalise this function to ensure that HR becomes an increasingly recognised and respected profession. The Board is an accredited ETQA (Education and Training Quality Assurance body) under the SAQA Act and is therefore a statutory body.

Our ethical values

Responsibility | Integrity | Respect | Competence

About the HRRI

The purpose of the HRRI is to influence HR practice by supporting ground-breaking and impactful research which will promote excellence in the field of HR management in SA.

HRRI objectives are to:

- Enable HR benchmarking and decision-making based on quality research;
- Identify and highlight trends in the South African HR and business market and from those trends, identify HR research needs;
- Source skilled HR researchers & develop young research talent;
- Forge successful partnerships between companies & researchers in order to facilitate data collection & obtain research sponsorship;
- Facilitate knowledge sharing and networking opportunities between various industries, businesses and academic stakeholders;
- Disseminate HR research results in an accessible manner;
- Award recognition for research excellence.



Disclaimer

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