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## Work and family policies as industrial and employment entitlements

In the run-up to the 2004 federal election, the major parties have released policies to promote work and family, most notably in enhanced maternity allowance or baby payment. Work and family measures typically take the form of leave to assist working parents to meet family illnesses or related contingencies. This Research Paper canvasses the types of family-friendly policies which workplaces provide and covers the form of provision or entitlement and the spread of such policies across workplaces. The family provisions case currently before the Australian Industrial Relations Commission is also noted.

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## Executive Summary

Work and family measures are receiving national consideration on a number of fronts—most clearly from the political process itself in the run-up to the 2004 federal election. Election policies of political parties now tend to reflect (in differing degrees) the realities of both partners in families needing to work. The Commonwealth Budget 2004 reflecting the priorities of the Howard Government has directed resources into promoting work and family. Also, on the industrial front, the first review and update of award-based work and family provisions for almost 10 years, by the Australian Industrial Relations Commission (AIRC) is underway in the *family provisions* test case, details at: (<http://www.e-airc.gov.au/familyprovisions/applications>).

Work and family policies are likely to be prominent in political and industrial terms because of the reasonably unique coincidence of national interests supporting their development. These trends include that of both parents working and the rise of the working of atypical hours, which has meant less time to spend in non-work related activity. Such work arrangements include casual, asocial and ‘on-demand’ hours at one end and sequential, long shifts such as 10 and 12 hours worked sometimes over 14 day blocks (or longer) at the other extreme.

Work and family issues are also emerging in national political agendas as countries are forced to grapple with the ‘demographic time bomb’ – ageing populations and declining fertility, with implications for declining labour force participation and economic growth, impacting ultimately on the international influence of a country.

The following workplace policies represent a broad package of measures to assist working families: [home-based work](#), [job sharing](#), [regular part-time work](#), [pregnancy at work](#), [maternity and parental leave](#), [child care](#), [breastfeeding in the workplace](#), [carer's leave](#), [elder care](#), [father friendly workplaces](#) and [working hours](#). These policies are explained on the Government’s website <http://www.workplace.gov.au>.

Academic research on these measures suggests the work and family issues which are most likely to develop pressures are: a wider range of flexible working time and leave options, eldercare, father-friendly workplaces and making work/life balance policies a reality in workplaces rather than merely policy positions.

There is a considerable cost involved for women, in particular, who leave the workforce to have children. The loss of financial standing over a working life through child-rearing is the consequence of related changes occurring within industrialised nations, reflected by an increased participation by women in the paid workforce, an increase in dual earner and single parent households and a decline in households with full-time home-makers since the 1960s.

Australian National University researchers John Beggs and Bruce Chapman quantified such costs some years back. They found that women who had left the workforce to have

children had significantly lower lifetime earnings than women who did not. They found that a woman with average education who had one child, had a lifetime earnings loss of about \$336,000 (\$1986) with a much lower level of lost earnings for the second and third children. However, an update of this work in 1999 suggests that the costs of child-rearing may have fallen.

There are the forces of demographic change which have alerted and in some respects alarmed our major employer associations with fears expressed over labour shortages placing caps on future economic growth. While employers have called for relaxation of immigration targets (ie more immigrants, especially to meet skills shortages) they are likely to be responsive to the demands for more accommodating workplace policies both to accommodate workers with family responsibilities and to retain older workers by using pre-retirement measures essentially allowing reduced working time.

In Australia, work and family policies in the workplace may be facilitated under legislation, awards and agreements and company or employer policy. State and federal employment laws provide for unpaid parental leave for up to 52 weeks (Commonwealth, New South Wales, Victoria, Queensland, South Australia, Western Australia and the Australian Capital Territory). Carer's leave allows employees to use personal leave (formerly known as sick leave) for the purposes of caring for sick family members; an entitlement of 5 days out of 8 days. In Queensland, industrial legislation provides a legislative entitlement to carer's leave (at the national standard), and extends part of the leave to 'long term' casuals. A similar provision operates in the West Australian legislation (but not for casual employees).

How does the mix of laws, agreements, awards and company policy deliver work and family entitlements to workers? Obtaining recent data on these arrangements is reasonably difficult. The last Australian Workplace Industrial Relations Survey (1995)<sup>1</sup> found:

- 34 per cent of workplaces (59 per cent of public and 23 per cent of private workplaces) with more than 20 employees had paid maternity leave
- 18 per cent had paid paternity leave
- large public sector workplaces were most likely to have a spread of family friendly measures
- more workplaces have a 'flexible use of time' attitude to family friendly than expensive provisions
- giving employees some control over time and work issues produces better results in lower stress and better satisfaction,

In respect of employees being able to work extra hours in order to take time off, the Australian Bureau of Statistics (ABS) found that about two thirds of female employees did

not have the option (with a similar proportion of male employees also unable). About one third of female employees would be likely to be denied carers' leave and similar entitlements due to their casual employment status.

There does not seem to be a significant growth in work and family provisions in enterprise agreements, despite current public policy supporting such agreements. For example in respect of paid maternity leave, a review of the provisions of federal enterprise agreements found that 639 or 7 per cent of agreements contained these provisions, then most commonly for a period of 2 weeks.<sup>2</sup> However the Human Rights and Equal Opportunity Commission (HREOC) later reported that about 34 per cent of females covered under federal enterprise agreements in 2000-2001 potentially had access to paid maternity leave of about 7 weeks. It also showed that at the time only 21.7 per cent of the Australian workforce had employment conditions determined under federal certified agreements, thus limiting the access to paid maternity leave under these instruments.<sup>3</sup>

As the major political parties have recently supported forms of maternity allowance/payment, paid through government finances, the payment may engender a focus on the corollary of taking maternity leave (where the pregnant employee is working). Prolonged absences from work whether for personal sickness or for caring purposes require evidence from a medical practitioner to the employer.

Accessing and managing award/legislative parental leave entitlements (especially maternity leave), given the contingencies involved in pregnancy to child-birth, can be a more complicated exercise than applying for other forms of leave. The Shop Distributive and Allied Employees Association provides 'pro forma' employee advices of pregnancy on its website (ie to be used by pregnant employees to formally access parental leave under awards/legislation). The advices are designed to be practical, ie for use by SDA members, but also comply with award and legislative requirements concerning maternity leave.

However, accessing maternity leave remains one source of pregnancy discrimination complaints. In its 1999 report on pregnancy, HREOC considered the nature of the discrimination applications reported to it.<sup>4</sup> A number of these applications involved a pregnant employee providing a pregnancy advice to an employer. A recent conference on sex discrimination (June 2004) suggests that the issue has not diminished.<sup>5</sup> This paper proposes measures to mitigate these possible negative responses to maternity leave requests. For example, one mechanism to inform pregnant employees of their maternity leave rights could be the provision of governmental advice on maternity/parental leave made available through medical practitioners, ie explaining her rights to maternity leave, the role of discrimination legislation, together with the appropriate caveats on eligibility to take the leave.

Alternatively, it may be possible for the authorities to enable a mechanism to be created for her to request that a copy of the medical certificate of the pregnancy together with a request for maternity leave to be forwarded to the relevant employer via an industrial

registry office, or, via the Office of the Employment Advocate (OEA). Such an advice might be accompanied with a short outline the claimant's claimed eligibility for the leave and of the relevant employment and discrimination provisions which may protect an employee's right to return to work following pregnancy, ie applicable to the particular State/Territory.

Depending on the final wording of such an advice, it is envisaged that the mechanism would be a practical measure, acting as a circuit breaker and perhaps reduce formal unfair dismissal or discrimination applications as well as alerting employers to relevant instruments preventing discrimination. Nevertheless, the options may warrant consideration by a forum such as the Workplace Relations Ministers Council, or the relevant federal and state departments.

## **Introduction**

Work and Family workplace policies enable parents, primarily, to balance the demands of family- rearing while either retaining their jobs or maintaining a connection with the world of careers and paid employment.

The work and family workplace agenda has been described as including: leave and hours flexibility entitlements to allow retention of employment while redistributing some time from the workplace to home; provision of childcare services to redistribute some tasks from the home to the public sphere and policies to facilitate labour market re-entry after a child rearing absence.<sup>6</sup>

This paper reviews some of the political and industrial factors behind the push for greater acceptance of work and family policies in Australian workplaces. It reviews a suite of measures generally grouped as work and family practices. The paper also looks at key instruments (legislation, corporate policies, awards and enterprise agreements) which facilitate access to such policies by employees and makes suggestions about the effective delivery of these policies, for example, in improvements to the current system requiring pregnant employees advising the relevant employer of pregnancy and maternity leave intentions.

### **Why the focus on work and family policies?**

Possible answers include that changes in work have helped drive individuals and representative institutions to react and respond to the changes as these affect family life. Certain key interest groups in the national polity see that their own organisational ends will be met by support of these policies, not that the organisations, predominantly governments, political parties, unions and organisations representing families as well as women's organisations, necessarily share the same reasons for the adoption of work and family policies.

Distinct work and family workplace policies correlate with particular stages in the life cycle: the demands of pregnancy, child-birth, post-natal care, leave to care for sick children, leave to care for sick or infirmed family members including those with disabilities and the elderly. Workplace policies responding to these needs are described in more detail, but mostly they build on traditional leave entitlements (award-based annual leave, sick leave and long service leave).

It is not a coincidence that political and industrial support for work and family policies in recent years have paralleled the rise of the working of atypical hours, which has meant less time to spend in non-work related activity – casual, asocial and ‘on-demand’ hours at one end and sequential, long shifts such as 10 and 12 hours worked sometimes over 14 day blocks or longer at the other extreme.<sup>7</sup> These work patterns mirror the decline of standard hours, and curtail the time to be allocated to other family and leisure pursuits.

The working of intensive shifts has been particularly prevalent in the mining industry, such that the Tasmanian Government recently conducted an inquiry into the health and safety effects of working hours in the State’s mining industry, and the resulting report made observations of the stress caused to mining families by the prolonged absence of, typically, one of a family’s primary caregivers.<sup>8</sup> With changes at work affecting families, pressures are created through the political processes to restore some balance between work, family and leisure needs.

Work and family issues are emerging in national political agendas as countries are forced to grapple with the ‘demographic time bomb’ – ageing populations and declining fertility, with implications for declining labour force participation and economic growth, impacting ultimately on the influence of a country and the way it presents itself to its peers internationally.<sup>9</sup> Governments have looked to certain policy mixes in response both to facilitate families/family life and to boost workforce participation, basically following a carrot and stick approach:

First are negative and/or prescriptive measures like reducing pension payments, increasing the retirement age or redefining women as childbearers in traditional households. These either treat symptoms rather than causes, or are impossible to implement. Enter, then, positive and supportive policies. Here the problem is not seen as changing demographic behaviour as such, but rather that institutional structures have not kept up with changing social expectations and behaviour. The solution here is to use social policy to change this situation. Hence the idea of ‘reconciling employment and family life’ - change the structures so that women (and men) can both have a life and have babies.<sup>10</sup>

Add to the mix of factors supporting work and family policies, a perception by employers that these policies may assist in retaining skilled and experienced employees in an age of emerging skills shortages.<sup>11</sup> It is one of the ironies of the current skills shortage issue that, for the past 20 years or so, mature age employees have been targeted for retrenchment. As



a recent report by the Senate Employment Committee inquiring into skills shortages observed:

Inevitably, the industry 'downsizing' mentality is rarely coincidental with a consciousness of the need to train new staff or retrain existing staff.<sup>12</sup>

Increasingly, this group is likely to be crucial to the task of ameliorating the predicted skills shortage crisis, and retention of these workers is one issue which governments, unions and employers have agreed on.<sup>13</sup> Concerns for time-flexibility to the employee's advantage may counter the managerialist notion of 'turn up to work expecting it to be your last day'. Rather, these new work and family policies may fashion workplace environments such that workplaces become a bit 'more like home' with senior employees valued accordingly.<sup>14</sup> In other words a significant cultural change may be underway in workplaces with the adoption of work and family policies.

Work and family policies may also assist in reducing staff turnover. For example, in receiving the 2004 work and family gold award on behalf of the Australian Federal Police from the Australian Chamber of Commerce and Industry and the Business Council of Australia, AFP Commissioner Keelty highlighted both the value these policies played in staff retention and reducing AFP attrition rates (from 11 per cent of staff to 3 per cent in recent years) and the role of the relevant union in proposing measures and supporting the overall program, which has meant trade-offs in more restricted access to penalty rates and higher earnings.<sup>15</sup>

For its part, the Australian Council of Trade Unions (ACTU) has placed work and family issues high on its agenda and is currently revisiting the current work and family federal award provisions in the form of a test case before the Australian Industrial Relations Commission (AIRC). Among its claims, the ACTU is seeking award provisions facilitating:

- return to work on a part-time basis after maternity leave
- allowing employees the right to buy up to six weeks' extra leave through salary adjustments
- the right to emergency family leave
- the right to request more flexible hours
- increasing carer's leave by 5 days, and
- extend the current unpaid parental leave period from 12 months to 24.

Additionally, the ACTU wants casuals to be covered by these benefits. The test case was lodged in the AIRC on 24 June 2003.<sup>16</sup>

Employers' association, such as the Australian Chamber of Commerce and Industry together with the National Farmers Federation (ACCI/NFF), have lodged a set of counter claims for flexibility, by reforms to award provisions in:

- annual leave – options for taking leave more flexibly and purchasing more leave through wage trade offs
- cashing out penalty rates and annual leave loading trade-offs for time off
- long service leave flexibility
- part time and casual work – removal of barriers to access
- cashing out overtime – to provide more time off
- make up time – time off made up at a later time
- carer's leave – use of sick leave for caring purposes
- parental leave – consultation on return to work options.<sup>17</sup>

In addition, the Australian Industry Group (AiG) has submitted that bereavement leave should be removed from the pool of days constituting personal leave, as this component of personal leave (2 days out of 10, discussed below) does not accrue if the leave is not taken in one year.<sup>18</sup> The AiG also proposes variations to award provisions to enable for example the flexible taking of long service leave by employees and extending the exemption of casuals from termination of employment for 12 months to 2 years.

The AIRC has provided a website for materials relating to its *Family Provisions Case 2004*.<sup>19</sup> It has been reported in the media that employers and the ACTU have agreed to extend personal leave from 5 days per year to 10 days, under the AIRC's conciliation processes, but other elements of the claim will be resolved through arbitration commencing 30 August 2004.<sup>20</sup>

It might be noted that the AIRC has recently considered the issue of working hours in 2002 in its *Working Hours Case*, in which the ACTU sought to govern the working 'long' hours, days or weeks by the insertion of mandatory time-off when a certain block of hours, days or weeks were worked. Rather than granting the substantive elements of the ACTU's claim, the AIRC allowed award provisions which would affirm an employee's right to refuse to work unreasonable overtime.<sup>21</sup>

### **Recent work and family proposals**

Work and family policies are likely to be one of the key grounds contested between the political parties in the forthcoming 2004 federal election, and major work and family policies have been made with no doubt more to come in the forthcoming campaign.

The Australian Democrats developed a paid maternity leave scheme in May 2002.<sup>22</sup> Amendments were proposed to the *Workplace Relations Act 1996* (WR Act). The WR Act currently provides an unpaid parental leave entitlement of up to 12 months absence from work on the assumption that the parents have no other form of unpaid parental leave entitlement.

The [Democrat amendments](#) proposed a 14 week payment to new mothers up to the minimum wage under a proposed new division of the Act. The payment required the employee to have served a qualifying period of service of 12 months. The scheme was to be funded by the Commonwealth at an expected net cost of \$352 million. Employers could top-up these payments by enterprise agreements. The proposal also extended unpaid maternity leave to all mothers regardless of service.<sup>23</sup> There are further elements to the Democrats work and family package.<sup>24</sup>

The ALP announced its [baby-care payment](#) on 31 March 2004. It proposes a 14 week maternity payment to mothers of \$3000 (for 14 weeks, or \$3000 spread over a year) rising to \$5300 in 2010.<sup>25</sup> Another element of ALP work and family policy is a proposal to facilitate easier access to part-time work for mothers returning to work following childbirth.<sup>26</sup>

In respect of the Government, the Commonwealth Budget 2004 makes the following provisions:

- a new Maternity Payment of \$3000 is introduced, which will be increased to \$4000 on 1 July 2006 and then again to \$5000 on 1 July 2008
- relaxation of the income tests for both Family Tax Benefit (A) and Family Tax Benefit (B). There will be an increase of \$600 a year in the maximum and base rates of FTB (A) for each dependent child. The \$600 increase will be made available as a lump sum following the end of each financial year at the time that reconciliation of entitlement for the previous year occurs. As well as the ongoing increase in FTB (A), all families receiving or eligible for FTB (A) in 2003-04 will receive an immediate lump sum payment of \$600 per child. Most families will receive \$600 before 30 June 2004 and be eligible for a further \$600 per child after their 2003-04 reconciliation of entitlement.
- an extra 40 000 outside school hours family day care places.<sup>27</sup>
- a reduction in the FTB (B) income test withdrawal rate for the second earner from 30 per cent to 20 per cent. As well, the income test threshold will be increased to \$4000 a year from its existing level of \$1825.

The measures appear to correlate with many but not all recommendations from an inter-departmental committee charged with making proposals for the Federal Cabinet on work

and family issues in December 2002.<sup>28</sup> The recommendations apparently canvassed in the report included:

- increasing childcare benefit payments by up to \$1000 a year, or, allowing parents to claim childcare costs as a tax deduction
- canvassing additional assistance for families with more than one child, to boost 'workforce participation'
- 14-week maternity payment for all working mothers
- improved access to part-time work for parents returning from unpaid maternity leave
- targeted funding changes to improve the affordability of paid childcare
- adjustments to family payments to improve rewards for some parents returning to work.<sup>29</sup>

The rationales for work and family policies

For employers, work and family policies generally mean some authorised absence from the workplace, which involve some costs to employers. Peak employer groups have argued that:

... in practice, employers make considerable effort to accommodate employee requests for leave or variations to hours and conditions. They do this despite the ongoing and significant competitive and commercial pressures. The granting of leave imposes costs on a business, particularly leave on short term notice. Employers have to meet a range of customer and client demands. Increasing costs prime facie makes it harder for businesses to remain viable. They have binding legal and contractual obligations that must be fulfilled. Therefore leave and other work and family measures must remain balanced and measured, and employers must retain capacity to determine their ability to responsibly meet employee requests ... The award system (must?) help business match labour market to operational circumstance, not hinder the management of labour.<sup>30</sup>

Although it may sound obvious, there are also financial costs involved to women who leave the workforce to have children. The loss of financial standing over a working life through child-rearing is the consequence of related changes occurring within industrialised nations, reflected by an increased participation by women in the paid workforce, an increase in dual earner and single parent households and a decline in households with full-time home-makers since the 1960s.<sup>31</sup> According to Phillip Longman, although many factors are at work,

... the changing economics of family life is the prime factor in discouraging childbearing. In nations rich and poor, under all forms of government, as more and more of the world's population moves to urban areas in which children offer little or no

economic reward to their parents, and as women acquire economic opportunities and reproductive control, the social and financial costs of childbearing continue to rise.<sup>32</sup>

Using 1986 earnings data, Australian National University researchers John Beggs and Bruce Chapman quantified such costs. They found that women who had left the workforce to have children had significantly lower lifetime earnings than women who did not. They found that a woman with average education who had one child, had a lifetime earnings loss (then) of about \$336,000 with a much lower level of lost earnings for the second and third children. Updating this study using 1997 data Chapman et al found that there had been a significant change in the earnings decrease associated with having a first child. In 1986 and 1997 respectively the percentage reduction was 54 and 28 per cent. In 1997 dollars, these proportions translate into about \$435,000 and \$200,000. As the authors noted:

Apparently there has been a radical change over the last decade in the lifetime earnings of women associated with having a child.<sup>33</sup>

In most families, mothers return to the workforce within a few years of child-birth, as noted by ACCI/NFF in their submission on the *family* provisions case:

- 52 per cent of mothers in couple families and 34 per cent of sole mothers with their youngest child under 5, were in the workforce
- by the time the youngest child is 5 to 9 years, 72 per cent of mothers in couple families and 62 per cent of sole mothers were in paid work
- by the time the youngest child is 10 to 14 years, 76 per cent of mothers in couple families and 61 per cent of sole mothers were in the workforce
- for fathers in couple families, regardless of age of youngest child, 95 per cent were in the workforce.<sup>34</sup>

This data suggest some imperative for mothers to return to work essentially to mitigate the monetary and career losses quantified by Chapman et al. Workplace policies also assist in mitigating some of the costs of what would be otherwise a more pronounced separation from paid work.

### What form do work and family measures take?

Work and Family measures provided for by employers need not be always elaborate or costly. Reviewing survey responses to questions in the 1995 Australian Workplace Industrial Relations Survey, Matthew Gray and Jacqueline Tudball have concluded that relatively simple workplace practices such as allowing employees some control over start and finish times and access to a telephone for family reasons can significantly assist in reconciling work and family demands.<sup>35</sup>

A compilation of model work and family measures can be found on the Department of Employment and Workplace Relations' website under its [Family Friendly Fact Sheets](#).<sup>36</sup> A short outline of each measure is provided below:

[Home-based work](#)

Home-based work involves staff working away from the workplace on a part-time, full-time, temporary or permanent basis. Many organisations allow staff to work at home for some of the time, depending on the nature of the work.

[Job sharing](#)

Job-sharing is an arrangement in which two or more people share one full-time job, each working part-time on a regular ongoing basis. It may be viable when ordinary part-time work is not, such as when a job needs to be filled on a full-time basis, though not necessarily by one person.

[Regular part-time work](#)

Regular part-time work can be distinguished from casual work by the presence of a 'permanent' contract of employment (ie an ongoing contract of unlimited duration).

A regular part-time employee is a worker who works less than the full ordinary weekly or monthly hours, or less than a full year, has reasonably predictable hours of work, and is entitled to employment entitlements associated with permanent employment, such as sick leave and annual leave, on a pro rata basis.

[Pregnancy at work](#)

Pregnant or potentially pregnant employees should be treated in a fair and equitable manner. Employers should not reduce an employee's terms and conditions or deny other benefits on the basis of pregnancy or potential pregnancy.

Where necessary, employers should make all reasonable adjustments to the workplace to accommodate the normal effects of pregnancy. Employers need to discuss the issues with the pregnant employee to find solutions.

Where medical issues are associated with a pregnancy or legitimate OH&S issues arise, employers should make reasonable adjustments in the workplace to allow pregnant employees to continue to work.

[Maternity and parental leave](#)

Men and women are able to take time off work, without having to resign, to care for their newborn child and during the first year of the child's life. Parental leave may also be referred to as maternity leave (for women) or paternity leave (for men).

Parental leave is available to permanent or part-time employees, including those employees not covered by industrial awards or agreements. It may also be available to casual employees under the

terms of their industrial award or agreement.

[Child care](#)

The cost of quality child care is a significant factor in the decisions families make about their employment and child care arrangements. Employers should be mindful of this in deciding how to approach and/or structure employer sponsored child care. Providing assistance with child care can be a recruitment or retention tool for employers.

[Breastfeeding in the workplace](#)

Many mothers want to continue breastfeeding when they return to work. It may be unlawful to treat a woman differently from other employees because she needs to breastfeed or express milk. The federal Government has tabled a Bill (now passed) to amend the Sex Discrimination Act to include breastfeeding as an unlawful ground of discrimination. Women who continue to breastfeed at this time provide important health benefits to the baby and themselves, and health and cost savings to employers and the community in general.

[Carer's leave](#)

Carer's or family leave enables employees to take time off to care for and support an immediate family or household member who is sick. Entitlements to carer's leave may be contained in awards, workplace agreements or human resource policies.

[Elder care](#)

Many people have significant caring responsibilities for other adults including their partners or spouses, elderly relatives and relatives with disabilities. In many of these cases, carers provide care for their relatives in addition to fulfilling paid work responsibilities.

[Father friendly workplaces](#)

Men as well as women desire to lead balanced lives. Unless work and family policies are tailored to meet the needs of men as well as women, and the workplace culture is accepting of men in their role as fathers, neither male employees nor the employer may benefit fully from work and family programs.

[Working hours](#)

Enterprises should consider introducing flexible start and finish times and allow staff to have some control over their working hours, for example by introducing make-up time so staff can make up hours if they need to attend an appointment.

### **Instruments underpinning family-friendly policies in the workplace**

Work and family policies may be provided by employers through formalised instruments such as an obligation to provide a benefit or a right created under legislation, through obligations imposed through industrial awards or through collective and individual agreements (either of which may improve on the legislative prescription but may also trade-off the award provisions). Also such benefits may be provided simply under the

discretion of an employer and may be incorporated in personnel manuals, or may be unwritten, and these are referred to as company policies.

#### Company or employer policies and practices

Employees access these policies through consent of their employer, and often through company or business policies outlining the work and family policies available to employees.

However, industrial practitioners tend to regard company policies with some suspicion where these are not included or regulated under a registered agreement/award, as they may not be legally enforceable and possibly may not even be put in writing. On the other hand, university law lecturer Joellen Riley, has argued recently that there may be scope to conduct a legal suit for breach of an implied term of an employment contract against an employer who promotes the business's work and family policies to employees and potential employees, but later denies access to them.<sup>37</sup> In any case, company or workplace policies are an important source of family-friendly policies.

#### Legislation

Work and family policies may be facilitated under legislation. The Queensland industrial legislation provides a legislative entitlement to carer's leave (at the national standard), and extends part of the leave to 'long term' casuals.<sup>38</sup> A similar provision operates in the West Australian legislation (but not available to casual employees).<sup>39</sup> Most state and federal employment laws provide for unpaid parental leave for up to 52 weeks (Commonwealth, New South Wales, Victoria, Queensland, South Australia, Western Australia and the Australian Capital Territory).<sup>40</sup>

The WR Act unpaid parental leave provisions<sup>41</sup> act as a fall-back arrangement such that should an employee have another entitlement under an award or agreement, that other provision should be utilised.<sup>42</sup> However in key respects the WR Act provisions mirror the federal award parental leave provisions (see below). Also, Commonwealth public servants have a legislated access to an unpaid maternity leave entitlement of 52 weeks incorporating a paid entitlement of 12 weeks since 1973.<sup>43</sup> Employment laws may incorporate objects of allowing employees to balance work and family responsibilities.<sup>44</sup>

Federal and state discrimination laws also support work and family policies by requiring that persons with family responsibilities not be discriminated against in comparison to those without those responsibilities. It should be noted that these laws usually allow an exemption to the prohibition (on discrimination) where it is needed for 'operational reasons'.<sup>45</sup>



## Federal awards

Work and family policies may be incorporated into the provisions of industrial awards or workplace agreements applying to the business, although, any particular work and family matter needs to fall under the current set of ‘allowable award matters’ for the provision to be incorporated in federal awards. Federal award provisions currently are limited to three work and family policies: part-time work, carer’s leave and parental leave.

### *Part-time work*

Permanent part-time work provisions are required to be contained, where appropriate, in federal awards [WR Act: section 143(1C)(b)]. The ability to work part-time under a federal award is allowable under s.89A(2)(r), although arbitrated ‘conversion’ between forms of employment (eg casual to full-time employment) is proposed to be removed from federal awards (ie, conversion would be subject to the employer’s discretion).<sup>46</sup>

Former award provisions allowing an employee’s right to part-time work during pregnancy or following child-birth have been removed under ‘award simplification’. Award simplification required that awards in place prior to the operation of the WR Act be divested of provisions deemed contrary to certain transitional provisions of the enabling legislation to the WR Act.<sup>47</sup> The rationale for the removal of part-time work clauses from the maternity leave provisions of awards was that from 1997 awards were generally required to have permanent part-time provisions, noted above. While permanent part-time work is also addressed in further provisions of the WR Act [sections 89A(4) and (5)], an employee’s right of access to it on account of family needs is not stipulated.

### *Personal/carer’s leave*

This form of leave is allowable under federal awards [section 89A(2)(g)]. Carer’s leave was inserted into federal awards following two test cases before the AIRC in 1994/5.<sup>48</sup> The initial decision allowed employees under federal awards to use their sick leave to care for sick family members. The supplementary decision awarded a maximum of 5 days of leave to be taken for the purpose of caring for sick family members. Aggregated sick and bereavement leave accruals form a pool of days from which sick, carer’s or bereavement leave may be taken. The standard annual accrued entitlement, after the first year of work, is 10 days of ‘personal’ leave. Bereavement leave, sick leave and carer’s leave may be taken out of this pool.

### *Parental leave*

As noted above, federal awards contain unpaid parental leave provisions (maternity, adoption and paternity leave) by virtue of award test cases conducted by unions in 1979, 1985 and 1990 before the AIRC (and its predecessor)<sup>49</sup>. Such provisions are still regarded as allowable award matters under the WR Act [section 89A (2) (h)] and allow employees

(parents) a combined period of up to 12 months of unpaid leave. Such entitlements have recently been awarded to ‘long-term’ casual employees.

#### Work and family policies under enterprise agreements

In recent years enterprise bargaining has been promoted as a preferred method of determining employment conditions to industrial awards; this position is reflected for example in the objects of the WR Act [sections 3(b) and 3(c)]. It is useful to establish the extent to which work and family policies are reflected in enterprise agreements. Research on the provisions of enterprise agreements is reported by the department of Employment and Workplace Relations (DEWR) (with the Office of the Employment Advocate) presented in its two yearly report on agreement-making in Australia.<sup>50</sup>

#### Incidence of family-friendly provisions in agreements in 1998–1999 and 2000–2001

Provision	1998-1999 average % of agreements	2000-2001 average % of agreements
Flexible annual leave	6	6
Access to single days annual leave	9	13
48/52 career break	2	3
Unlimited sick leave	1	1
All purpose paid leave	5	3
Family/carer’s leave	28	27
<i>Access to other leave for caring purposes</i>	21	19
<i>Paid family leave</i>	3	3
<i>Unpaid family leave</i>	<0.5	9
Extended unpaid parental leave	1	2
Paid adoption leave	1	2
Paid maternity/primary carer’s leave	10	7
Paid paternity/secondary carer’s leave	2	4
Part-time work	22	25
<i>Regular part-time work</i>	7	7
Home based work	2	1
Family responsibilities	3	3
Childcare provisions	1	1
Job sharing	2	3
Number of agreements	13 064	13 632

DEWR-OEA: *Agreement-making under the Workplace Relations Act 2000 and 2001*<sup>51</sup>

These enterprise agreements apply to workforces covering (at the time) almost 1.5 million employees. They do not cover all employees working under collective agreements.

There does not seem to be a significant growth in agreements with work and family provisions. In the above table the proportion of enterprise agreements with paid maternity leave fell over the periods compared. Another review of the provisions of enterprise

agreements (over the period 1998-2002) found that 208 or 7 per cent of agreements contained paid maternity leave provisions.<sup>52</sup> The same research noted an earlier study (1996) of enterprise agreements which reported that 6 per cent of enterprise agreements contained maternity leave clauses, and that the bulk of these clauses reflected the legislative standard. This led the author to conclude:

There has clearly not been any increase in the use of enterprise agreements for maternity leave arrangements since the mid 1990s.<sup>53</sup>

Enterprise agreements appear to provide a limited range of work and family measures to a small proportion of the workforce. The above table's data shows that the most common family-friendly provisions under enterprise agreements were family/carer's leave and part-time work, each of which were in at least a quarter of agreements certified during the reporting period, and most often provided under the relevant award. However, the other sources such as the ABS and AWIRS, despite their limitations, suggest that many work and family leave can be accessed by the majority of employees which in turn suggests that legislation, award provisions and company policies may be more important than enterprise agreements as a source of entitlement (discussed below).

In 2004, employees number over 8.2 million.<sup>54</sup> From a survey conducted in 2002, 35 per cent of employees were covered by collective agreements and just on 20 per cent of employees were paid under awards (a contracting share), and individual contracts were used for over 41 per cent of employees (the real growth area), although awards may have a more extensive application in determining conditions of employment, in other words, awards would apply to more employees but for an individual or collective over-award pay arrangement.<sup>55</sup>

#### Australian Workplace Agreements

Australian Workplace Agreements are a form of an individual employment agreement between an employer and employee. However, it is difficult to estimate the extent to which family-friendly provisions are provided under Australian Workplace Agreements. This arises because of their sheer number (over 470 000 filed AWAs as at April 2004 and about 213 000 'current' AWAs<sup>56</sup>), and because of a perception of non-disclosure aspects associated with their filing (WR Act, section 83BS). Thus, the authorities generally do not have a systematic analysis of AWA contents. For example, the OEA relies on the ABS earnings data to make claims of earnings under AWAs, reflected in OEA press releases outlining AWA earnings.<sup>57</sup>

Researchers have been given access to some AWAs, as the OEA has power to disclose the content of AWAs (WR Act, section 83BT) with the consent of one of the parties to an AWA and providing that the identities of the parties are not revealed. Gillian Armstrong used data on 889 AWAs and found that 11.6 per cent of the AWAs surveyed contained at least one family-friendly provision.<sup>58</sup> As proxy for more stronger analysis of AWA work and family provisions, other researchers have relied on surveys as to whether AWA

employees are content with their working conditions; whether they are finding it easier or harder to meet family responsibilities, or the reasons why employers sought to use AWAs with their employees. A report on employees' satisfaction with AWAs is included in DEWR/OEA's agreement survey of 2002 and its method compares responses from 'random groups' of employees, compared with AWA groups in a survey of 2000 employees. Interestingly, the key table in this report on employee satisfaction with balancing work and family responsibilities suggests that more employees, including those under AWAs have found it 'harder' to balance work and family compared to a lesser number who found it 'easier' to balance work and family, and the balance of those surveyed reported no change.<sup>59</sup>

Further research on AWAs by Paul Gollan used responses of 688 employers to a survey of their reasons for using AWAs (filed up to February 2000). One notable outcome of this survey was the use of AWAs by employers to broaden trading enterprises' hours of operation (45 per cent of these businesses operated 8 – 11 hours a day, while 29 per cent of businesses were operating between 17 – 24 hours per day).<sup>60</sup> Claims that AWAs enhance work and family policies seem to be based on patchy evidence, instead, AWAs are more likely to be used to extend working hours.

The spread of work and family provisions across workplaces

With the main forms of work and family assistance measures outlined above together with the forms such provisions are accessed under, it is useful to ask which measure is provided or accessed by employees and by what method. The Australian Workplace Industrial Relations Survey of 1995 included analysis of family issues in workplaces. Although now dated, the 1995 AWIRS report remains a valuable guide to the availability of work and family policies in Australian workplaces (in light of decisions not to update it). It found that:

- 34 per cent of workplaces (59 per cent of public and 23 per cent of private workplaces offered paid maternity leave) with more than 20 employees had paid maternity leave
- 18 per cent had paid paternity leave
- large public sector workplaces were most likely to have a spread of family-friendly measures
- more workplaces have a 'flexible use of time' attitude to family-friendly than expensive provisions
- giving employees some control over time and work issues produces better results in lower stress and better satisfaction.<sup>61</sup>

The Australian Bureau of Statistics found in 2003, of all female employees, 36 per cent were entitled to some paid maternity leave. Of male employees 26 per cent had an

entitlement to some paid paternity leave. However, 67 per cent of female employees (slightly higher for males at 75 per cent), had an entitlement to sick leave (and thus carer's leave).<sup>62</sup> In respect of employees being able to work extra hours in order to take time off, the ABS found that about 2.2 million female employees did not have the option (out of about 3.6 million female employees in 2003), and a similar proportion of males were also unable to vary hours.<sup>63</sup> With female casual employees numbering 1.1 million<sup>64</sup>, almost one third of female employees would be denied carers' leave and similar entitlements. These results are corroborated by workforce surveys reported by the Equal Opportunity for Women in the Workplace Agency (EOWA), which has noted that 70 per cent of all working women and working men have inflexible start and finish times.<sup>65</sup> In other words, while there has been significant movement in family payments especially from the recent Commonwealth Budget, pressures are likely to arise for commensurate time off work for caring purposes.

The issue of different industry sectors responding to work and family demands is explored further by the Australian Institute of Family Studies in a report comparing family-friendly policies of the federal public sector to those of the retail sector.<sup>66</sup>

### **Taking leave and advising employers**

Prolonged absences from work whether for personal sickness or for caring purposes require evidence from a medical practitioner to the employer of the nature of the illness or other reason.

#### **Maternity leave advice**

Accessing and managing award/legislative parental leave entitlements, given the contingencies involved in pregnancy to child-birth, is far more complicated with the onus more likely to fall on women. Such advices must be provided to the employer at certain stages of the pregnancy, assuming the employee does not intend to resign her position and will have 12 months of service when she provides the 10 week written notice of the estimated date of the birth, and is either an on-going employee or has other grounds for the entitlement.

The standard federal award/legislative provision concerning provision of the advice to the employer of the employee's intention to take maternity leave reads:

#### **Maternity leave**

An employee must provide notice to the employer in advance of the expected date of commencement of parental leave. The notice requirements are:

- (i) of the expected date of confinement (included in a certificate from a registered medical practitioner stating that the employee is pregnant) - at least 10 weeks;

(ii) of the date on which the employee proposes to commence maternity leave and the period of leave to be taken - at least 4 weeks.

When the employee gives notice the employee must also provide a statutory declaration stating particulars of any period of paternity leave sought or taken by her spouse and that for the period of maternity leave she will not engage in any conduct inconsistent with her contract of employment.

An employee will not be in breach of this clause if failure to give the stipulated notice is occasioned by confinement occurring earlier than the presumed date.

Subject to clause ... and unless agreed otherwise between the employer and employee, an employee may commence parental leave at any time within six weeks immediately prior to the expected date of birth.

Where an employee continues to work within the six week period immediately prior to the expected date of birth, or where the employee elects to return to work within six weeks after the birth of the child, an employer may require the employee to provide a medical certificate stating that she is fit to work on her normal duties.<sup>67</sup>

In its [\*Pregnant and productive, it's a right not a privilege to work while pregnant\*](#) report, HREOC noted that dismissal from employment upon an employee making the employer aware of her pregnancy was the most common source of pregnancy discrimination complaints. HREOC found that:

- the majority of complaints related to dismissal on the basis of pregnancy, ie, dismissal by the employer after receiving advice that the employee was pregnant
- most complainants were either in clerical jobs or worked in the services sector
- the vast majority of complainants were not legally represented
- 55 per cent of complaints were made against small business (employing less than 20 staff)
- 84.6 per cent of the respondents to complaints were in the private sector.<sup>68</sup>

More recently, the Victorian Equal Opportunity Commission received 2216 complaints of discrimination against women in 2003, which included 124 claims of discrimination on the grounds of pregnancy and over a similar period HREOC received 230 complaints relating to pregnancy.<sup>69</sup> HREOC's *Pregnant and productive* report argued that it should be an obligation on employers to advise female employees of their right to take maternity leave at the time of their employment and HREOC's [\*Pregnancy Guidelines\*](#) are designed to assist employers on their responsibilities. The aim of these obligations is in effect to reverse the onus of advice to some extent, although it can be presumed that most employers do not offer such advice

Discriminatory dismissals are a common source of sex discrimination complaints made to HREOC under the Sex Discrimination Act, and the most common basis for complaints of discrimination is on the ground of pregnancy.<sup>70</sup>

So, the question arises: how does an employee access the statutory and/or award parental leave provisions in accordance with the requirements prescribed for these instruments? Fortunately, the Shop Distributive and Allied Employees Association (the shop assistants union or SDA) has posted pro forma guides for accessing maternity leave and paternity leave and returning to work under an advice on its website at [http://www.sda.org.au/policies\\_show.php3?id=9](http://www.sda.org.au/policies_show.php3?id=9). The SDA website also provides additional pro-form letters conforming with parental leave advice requirements but addressing other contingencies, eg return to work following a still-birth and an employees' proposal to split parental leave between both partners as well as other advices. (See Appendix A to this paper). The aim here is to provide practical advice to members in a matter which is complicated by the contingencies of pregnancy, and to do so in forms which comply with the standard maternity leave provisions.

Options for pregnancy notification

Improvements to the system of providing maternity leave notice seem warranted.

Options to address this issue could begin with:

- a generic brochure on employment rights for women during and after pregnancy could be distributed through doctor's surgeries; or
- at the employee's request, have an authority such as either the federal or state industrial registrar or indeed the Employment Advocate, to provide the initial advice of the pregnancy on behalf of the pregnant employee.
  - From this point, a generic brochure might be developed that the industrial registrar might send with the leave applicant's medical certificate giving employer the option to call for more individual advice if they need it, but the intention is that the employee then negotiates the leave request.
- In a stronger option, the medical practitioner forwards the pregnancy certificate together with information including obviously the name of the employee, place of work, name of employer period of leave intended to be taken as well as length of service to qualify for the leave (ie this detail is completed by the employee) to the registry. Upon receipt of this advice, the industrial registrar/advocate might advise the employer in writing setting out the circumstances of the particular employee's pregnancy, the relevant state and federal laws on employment and discrimination regarding pregnancy and her general return to work rights prior to a full-term pregnancy, or post natal.

The aim is to assist pregnant employees who are apprehensive of a negative response by an employer to the employee's pregnancy, but in addition alerts the employer to the statutory instruments protecting the right to maternity leave and non-discrimination. It is not envisaged that such advice would prove the employee's right to the entitlement, but sets out the basic parameters of the employee's pregnancy, taking the leave, returning to work and the legislative mechanisms supporting the leave entitlement. This process is proposed to comply with current award/legislative advices concerning pregnancy and does not represent an additional regulatory burden on business.

HREOC noted that there are about 250 000 births per year to mothers, less than half of whom (about 106 000) might be eligible for unpaid parental leave, ie only these have a sufficient attachment to the workforce to qualify for maternity leave.<sup>71</sup> These schemes of pregnancy notification are put as an option for the employee to choose, but in any case they, or some scheme similar might be considered by the workplace relations ministers council, or, by federal and state departments.

Many employers are unsure of the employee's rights concerning return to work. Unless specifically provided, an employee cannot demand a return to part-time work if employed as a full-time employee prior to maternity leave (ie under federal awards or the WR Act), although this is subject to a claim before the AIRC in respect of federal awards. However, employers need to consider carefully a request to return part-time as a refusal may amount to unlawful discrimination.

### Likely future developments

A recent Labour Law conference, organised around the theme of work and family was presented with likely future developments in work and family workplace policies by Dr Louise Thornthwaite.<sup>72</sup> She identified four significant trends in work and family initiatives:

Wider range of flexible working time and leave options

Apart from wider use of compressed working weeks/hours, annualised hours and similar existing arrangements, there could be wider use of 'self-rostering' approaches.

Some examples would be an occasional lunch break of 2-3 hours to be used for carer's activities, and dividing leave provisions into half-day and single-day blocks. Leave provisions may become much more detailed with more options available. Other possibilities may include:

- the longer types of leave, such as parental and carer's leave, could be spread over longer periods, for example a series of shorter periods rather than a single long period of parental leave; and



- exemptions from overtime, shift work and weekend work for employees with particular family/carer's responsibilities—this could also be a feature of phased retirement programs.

#### Eldercare

Eldercare issues are more complex than those for childcare, as the situation is more unpredictable, and tends to become more costly and time-consuming as time passes, often with substantial health and psychological implications for the carer.

Developments are likely to include more flexible leave/hours arrangements (again, the long lunch to take elders to medical appointments, etc), eldercare facilities at work, eldercare information/resource kits, support networks and access to counselling.

#### 'Father-friendly' workplaces

The fear of appearing 'less committed' if they use work and family initiatives possibly affects fathers even more than mothers.

Developments may include more flexible work scheduling, paid paternity leave, wider use of carer's leave, leave to attend school events and other events involving children, performance appraisals that emphasise work output and quality instead of hours spent at work (that of course, should apply equally to women), role modelling by senior managers who should use the options themselves, and active promotion of work and family policies/initiatives as being available to all employees.

#### Making work/life balance policies a reality

Strategies that will help include: having a wide range of policies (not just a handful) to embed in the culture, steps to ensure that job security and career prospects are preserved, training managers to manage work and family issues, and appropriate practical transition measures.

## Conclusion

Work and family measures are receiving national consideration on a number of fronts – most obviously from the political process and the policies of the major political parties, additional resources from the Commonwealth Budget, but also on the industrial front with the first review and update of award-based work and family provisions for almost 10 years. Work and family policies will continue to be prominent on the political and industrial front because of the reasonably unique coincidence of national interests supporting their development and adoption. From an international perspective, these policies, it is argued, may secure a population base which is needed by a country like Australia to exercise influence in international affairs.

The forces of demographic change have alerted and in some respects alarmed the major employer associations over pending labour shortages placing caps on future economic growth. While employers have called for relaxation of immigration targets (ie more immigrants, especially to meet skills shortages) they are likely to be responsive to the demands for more accommodating workplace policies both to accommodate workers with family responsibilities and to retain older workers by using pre-retirement measures essentially allowing reduced working time.

Such policies need to be translated into individual workplace policies. The paper has shown that the system with the most application across the workforce – federal (and state) legislation – has a limited spectrum of work and family policies currently under its wing. Therefore, the delivery of work and family measures is likely to be made through awards, or company policy. Work and family measures delivered through enterprise agreements and individual agreements have had growth, but for a variety of reasons, are still limited in terms of the scope of provision and the numbers affected (in the federal system).

The academic research on these measures suggests the ways that they are likely to develop, such as into areas as eldercare. Finally, as much of the recent work and family debate has been on paid maternity leave, proposals have been canvassed in the paper to make pregnancy notification by employees in accessing parental (maternity) leave, less onerous on the employee but also to better inform employers of the employee's current rights and the general obligations of employers in what is a unique application for leave.

## Endnotes

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  71. HREOC, *Valuing Parenthood: Options for paid maternity leave: Interim paper 2002* pp. 88–89.
  72. L. Thornwaite and J. Buchanan, 'Likely future developments in work and family policy and practice', paper presented to the Annual Labour Law Conference, Sydney 1 April, 2004. An edited version of this paper is available at [WorkplaceInfo](#), 2 April 2004.

## Appendix A—pregnancy advices to employers

### **How do I notify my employer?**

If you intend to take maternity leave or alter your existing leave arrangements, you must notify your employer in writing within specified time limits.

The following are examples of letters you may wish to use to advise your employer about your leave.

*Don't forget to address, date, sign and keep a copy of any letters you send your employer.*

### **DRAFT LETTER 1 - Notification of Pregnancy**

This letter can be used to notify your employer of the expected date of confinement and must be delivered to your employer at least 10 weeks before the anticipated date.

*In relation to maternity leave, I wish to notify you that the expected date of my confinement is (insert date). I enclose a doctor's certificate which confirms my pregnancy and states the presumed date of my confinement.*

### **DRAFT LETTER 2 - Notification of Maternity Leave**

This letter can be used to notify your employer of the commencement date and period of leave. It must be delivered to your employer at least four weeks before your leave starts.

*I wish to commence maternity leave on (insert date). I will be taking (insert relevant number) weeks leave and will be returning to work on (insert date).*

STATUTORY DECLARATION - Stating any Paternity Leave your Partner has applied for

I, (insert name), of (insert address) declare that:

*My partner, (insert name), of (insert address), has applied for (insert number) weeks paternity leave on the birth of our child. During my own leave I will not engage in any activities inconsistent with my employment award or agreement.*

(The Declaration must be signed by a person authorised to witness a statutory declaration, such as a Justice of the Peace, a member of the police force, a solicitor or a bank manager. This person must also witness your signature.)

### **DRAFT LETTER 3 - Notification of Return to Work**

This letter can be used when returning to work after maternity leave and must be delivered to your employer at least four weeks before you return to work.

*I left work on (insert date) because of my pregnancy. I now wish to confirm my intention of returning to work after the expiration of my period of maternity leave on (insert date).*

#### **DRAFT LETTER 4 - Notification of Return to Work Part-time**

This letter can be used when returning to work after maternity leave and seeking to return on a part-time basis. It must be delivered to your employer at least four weeks before you return to work.

*I left work on (insert date) because of my pregnancy. I now wish to confirm my intention of returning to work on (insert date) as previously advised.*

*I wish to return to work on a part-time basis and am available to work (insert hours and days). Please advise me of my roster as soon as possible, to allow me to make the necessary child care arrangements.<sup>1</sup>*

#### **DRAFT LETTER 5 - Extension of Maternity Leave**

This letter can be used to lengthen your period of leave.

*I left work on (insert date) to commence (insert number) weeks maternity leave. I now wish to lengthen the period of my maternity leave by (insert number) weeks. I will not be returning to work on (insert date).//*

#### **DRAFT LETTER 6 - Shortening of Maternity Leave**

This letter can be used to shorten your period of leave.

*I left work on (insert date) to commence (insert number) weeks maternity leave. I now wish to shorten my leave by (insert number) weeks and return to work on (insert date). Could you please provide me with your written consent as soon as possible.*

#### **DRAFT LETTER 7 - Cancellation of Maternity Leave due to Miscarriage or Still Birth**

This letter can be used by a woman on maternity leave whose pregnancy has terminated other than by the birth of a living child and who wishes to return to work before the expiration of her maternity leave.

*I left work on (insert date) to commence (insert number) weeks maternity leave . As my Pregnancy has ended other than by the birth of a living child, I wish to resume work on (insert date). I know that I am entitled to resume work after four weeks from the date of this letter, or earlier with your consent. Please notify me as soon as possible of the date when I can resume work.*