KOVÁCS RÉTI SZEGHEŐ
ÜGYVÉDI IRODA

Protection for pregnant employees – Pregnancy and human reproductive procedure

The following questions often arise in connection with pregnancy: When and in what form do the rules of employment law protect employees? What about employees involved in procedures using human reproductive technologies? Dr. Ádám Kéri, our legal expert specialising in employment law made a comprehensive analysis of this topic which was published at hrportal.hu.

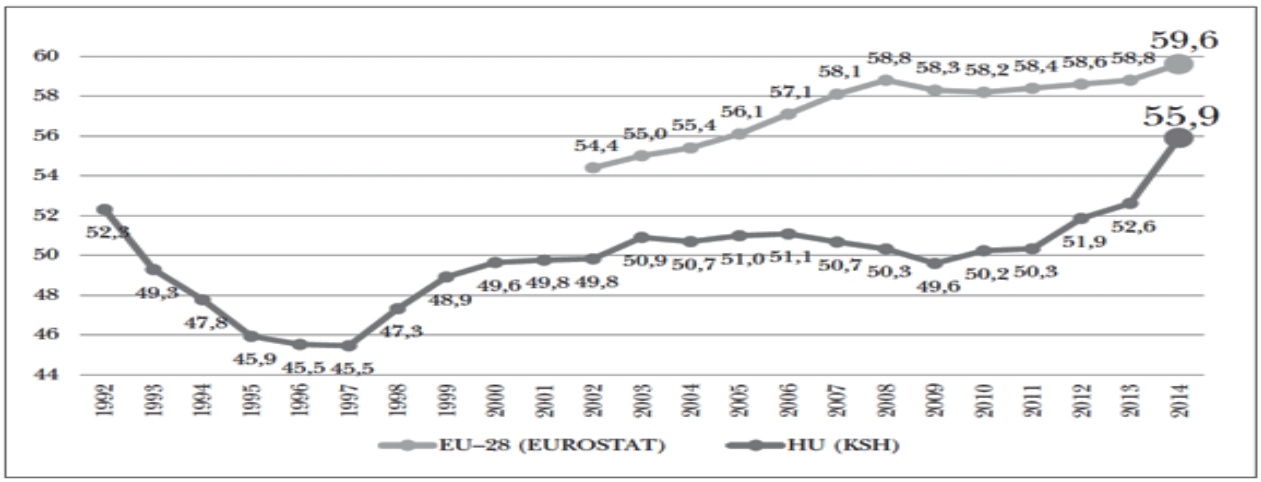
Importance of the issue

It is worth dealing with this issue also within a separate analysis because both employers and employees are concerned about it. Employees are interested in this matter given that once the family has decided to have children, it is also important to predict the professional future of the mother. Whether she can return to her workplace, claim the same position, when and how many vacation days she is entitled to, how she is protected by legislation etc. Employers are interested in this matter because they would like to know how to substitute employees who are often absent for years or whether they may be replaced or not. The Government also enters as third actor and amends legislation in order to support employees' decision to have children. I think this area can be considered indeed as a success area although it must also be pointed out that life and law-making do not always go hand in hand.

Low rate of employment for women in Hungary

At first, let us glance at the "set of numbers" we are talking about:

I have received this chart from Ms Piroska Szalai, Government Commissioner from whom so many important data are obtained in this field. I help those to whom this chart is not entirely clear: the bottom line describes the situation in Hungary.



It is apparent that female employees do not inadvertently represent a headline target in government policy, either, as their employment rate at European level is extremely low. Against this background, we can understand more easily the legislative framework designed to protect them.

First phase: pregnancy

Women are protected from the beginning of their pregnancy

It is a moment of special importance in a woman's life when she learns that she is expecting a baby. In this context, it is important to know that, **in accordance with Subsection 65(3) of the Labour Code, pregnant employees are protected against dismissal**. Childbearing is a major issue that is usually discussed between the concerned parties at first, and in such case the role of the Managing Director rarely comes to their minds unless he is the father. The Constitutional Court recognised it in its decision no. 17/2014. (V. 30.) AB annulling as of 31 May 2014 the phrase that pregnant employees or those involved in reproductive procedure are required to notify the employer of her condition before the termination notice is communicated. Namely, the contested part of the text requires pregnant women, irrespective of the communication of the termination notice, to inform the employer about circumstances falling within the scope of privacy and intimacy. By this, employees are forced to give information, required by the contested provision, without delay on the commencement date of the reproductive procedure or after learning of their pregnancy to the employer necessary for enforcing the protection against dismissal. And that unnecessarily limits the right to privacy and human dignity of pregnant employees.

Pregnancy may be communicated at any time

Female employees are under the **so-called objective protection against dismissal** under Subsection 65(3) of the Labour Code on account of their pregnancy. It means that **legal protection is provided irrespective whether she or the employer is aware of the pregnancy**. Therefore, it can also be evidenced subsequently (BH2004.521., EBH2005.1242.). It may emerge as to which the latest date is when pregnancy can still be communicated. The Labour Code does not provide for this issue as it did not take into account the decision of the Constitutional Court. Thus, it is also conceivable that an employee declares about pregnancy in the employment lawsuit she instituted and contests the legality of the termination notice based on the fact that the employer could not have been aware of at the time of the termination of employment. However, it is apparent that a notification by the employee stems from general conduct requirements as soon as the employee is indeed in that position (notification of the termination notice). Individuals falling within the scope of the Labour Code are required to notify one another of any fact, data, circumstance or any change to the same which are essential in terms of the establishment of employment relationship as well as the exercising of rights and the fulfilment of obligations specified in the Labour Code (Subsection 6(4) of the Labour Code). The legal situation is presently complicated by the fact that the employer is not entitled to unilaterally withdraw the termination notice it has given upon learning of the pregnancy of the employee. In this context, the expected amendment to the Labour Code will provide in such a way that the employer may withdraw the notice of termination without requiring consent from the employee (otherwise it is not allowed to do so), if it had not been notified of the pregnancy at the time when the notice of termination was given.

Women are fully, men are partially, protected during reproductive procedure

With regard to human reproductive procedure, the protection covers the first six months of the human reproductive procedure (thus, the rules applicable to pregnancy are not enforced here). It may emerge as to when the procedure begins. The provisions of Act CLIV of 1997 provide (some) guidance in this matter.

It is important to know that only women are entitled to protection under the Labour Code. In this context, we often tend to forget that the provisions of Act CXXV of 2003 on the Equal Treatment and the Promotion of Equal Opportunities (Ebktv.) also recognise fatherhood as protected quality and also provide a certain degree of protection for the father. Certainly, protection neither come automatically like in case of a pregnant woman nor is objective. Please note that both parties may invoke the violation of the requirement for equal treatment even upon passage of six months; moreover, the employer must submit exemption evidence (reversed burden of proof).

Sometimes position also needs to be changed

A position better suited to her health condition must be offered to the employee if from the date when her pregnancy was established until her child turns one year old – on the strength of the medical opinion of her suitability for the position – she cannot be employed in her position. Council Directive 92/85/EEC also requires medical opinion to be presented. It is an especially important rule designed to protect employees, also specified in the occupational safety act in the same manner (please also see Council Directive 92/85/EEC). She must be exempted from work if it is impossible to employ her in a position suited to her health condition. In doing so, the employee should not suffer a loss. She is entitled to a base salary suited to the position offered to her which may not be less than her base salary under her contract of employment. She is entitled to her base salary for the duration of exemption unless she refuses to accept the offered position without due cause. It will be considered as due cause if the offered position is not suited to the qualification, education, experience of the employee, or it would cause disproportionate harm to her on the grounds of her personal circumstances, age or health condition. **However, common consent is required to change the position and for this reason the position of the employee cannot be terminated in the absence of due cause.**

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