



## Protecting the rights of pregnant female employees according to Vietnamese labor law

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### Abstract

The paper analyzes the rights of pregnant female employees according to the provisions of Vietnamese labor law. By assessing the achievements and limitations in the current legal regulations, the author proposes some recommendations to improve the law on protecting the rights of pregnant female employees and improve the practical effectiveness in practice.

**Keywords:** pregnant female employees, handling labor discipline, labor code 2019

### Introduction

In the history of human development, women have always been an integral part of the family and society. With quality, intelligence and creative labor, women not only contribute to creating wealth, material and spiritual, but also actively participate in the struggle for national liberation, for the advancement of humanity.

In Vietnam, women and men are equal before the law in all economic, political, cultural and social life. Female employees are a great human resource, making an important contribution to the successful implementation of the country's socio-economic development goals in the integration period. Vietnam is one of the countries with the highest percentage of women in the labor force in the world. According to statistics, in 2021, female employees participating in the labor market will be 23.5 million people, accounting for nearly 49% of the labor force aged 15 and over in our country. Most female employees go through pregnancy and childbirth because the reproductive age is within the working age. During the period of pregnancy, the health and psychology of female employees decline because they have to perform both the women's natural duties and the employee's obligations. Pregnant female employees are vulnerable, especially in terms of health, so this is a specific group that needs to have its own protection mechanism. With such a meaning, protecting the rights of pregnant female employees becomes a particularly important content in Vietnam's labor law. The Labor Code 2019 (LC 2019) takes effect from January 1, 2021 with Chapter X (from Articles 135 to Article 142), the Law on Occupational Safety and Health, the Law on Social Insurance, and the guiding documents have separate provisions giving priority to female employees in general and pregnant female employees in particular.

### 1. Legal current situation on protection of rights of pregnant female employees

In our country, the current law has many provisions aimed at protecting the rights of pregnant female employees. These regulations clearly show two trends with pregnant women: protection and priority. According to the author, the rights of pregnant female employees include the following basic contents

**Firstly:** pregnant female employees are given special priority in labor for maternity protection.

Employees are directly attached to their jobs for at least 8 hours/day, so the working environment conditions have an important influence on their psychology, health and work efficiency. Therefore, arranging jobs for employees in a manner that is suitable to gender and health is of utmost importance, especially for female employees who are in the pregnancy stage. This is a sensitive period that makes it difficult for female employees to control their psychology and lose the ability to focus on work. According to the provisions of Article 137 of the Labor Code 2019:

1. Employers are not allowed to employ female employees to work at night, work overtime and go on business trips in cases of pregnancy from the 7th month or from the 6th month if working in the highlands, deep-lying, remote, border and island areas;
2. Female employees doing heavy, hazardous, dangerous occupations or jobs; or particularly heavy, hazardous or dangerous occupations or jobs; or doing occupations or jobs that adversely affect reproductive function and child rearing while pregnancy and notify the employer, the employer will switch them to lighter, safer work or reduce the daily working hour by 01 hour without any reduction in wages and rights and benefits until the end of the period of raising a child under 12 months of age. Previously, in Article 155 of the 2012 Labor Code, the above provisions only were applied to female employees doing heavy work when they were pregnant from the 7th month. The provisions of the Labor Code 2019 have added hazardous and dangerous jobs and cases of occupations and jobs that adversely affect reproductive function and child rearing.
3. An employer may not dismiss or unilaterally terminate an employee's labor contract for reasons of pregnancy or maternity leave, unless the employer is an individual who dies and is declared loss of civil act capacity, is missing or dead, or the employer who is not an individual terminates its operation or has no legal representative, authorized person and legal representation obligation.

If the female employee is unilaterally terminated the labor contract because of pregnancy, the employer is forced to accept the employee back to work, and at the same time compensate the employee for material and spiritual loss as prescribed in Article 41 of the Labor Code 2019. In case of dismissal or unilateral termination of the contract with an

employee due to pregnancy, the enterprise may be fined up to 20 million VND according to Point e, Clause 2, Article 27 of Decree No.28/2020/ND-CP stipulating penalties for administrative violations in the field of labor, social insurance, sending Vietnamese workers to work abroad under contracts.

In case the labor contract expires while the female employee is pregnant, the priority shall be given to entering into a new labor contract. This is a new regulation added in the Labor Code 2019 that the Labor Code 2012 has not.

Many opinions from businesses believe that these regulations are too protective for female employees, making them passive in the use of human resources. However, from the perspective of ensuring equal rights and motherhood, these are absolutely necessary regulations for female employees in general and pregnant female employees in particular. When a woman works, she has to bear both work responsibilities and the responsibility of being a mother, taking care of her family, giving birth and raising children, so there is a lot of pressure. If men in your family, and male colleagues as well as employers have specific preferences for female employees, it is also completely reasonable. As a result, they can make use of female human resources while protecting their motherhood.

**Second:** Pregnant women are given priority in vocational training.

The State has the responsibility to expand many types of training that are favorable for female employees to have variety of occupations which are suitable to women's physical, physiological and maternal functions (Clause 5, Article 135 of the Labor Code 2019). This regulation contributes to the protection of pregnant women in the sense that, when female employees have been trained in a preventive profession, during the period of pregnancy, the work they are doing is not suitable for their health situation, they can move on to a more suitable job.

During the contract performance, if the apprentice becomes pregnant, and if there is a certificate from a competent medical facility that the performance of the apprenticeship contract will adversely affect the fetus, the apprentice may terminate the apprenticeship contract and get a refund of the paid tuition fee of the remaining study period and have the learning results preserved (Clause 3, Article 18 of Decree No. 139/2006/ND-CP dated November 20, 2006 of the Government detailing and guiding the implementation of a number of articles of the Law on Education and the Labor Code on vocational training).

**Third:** Female employees during pregnancy are given priority not to be subject to labor discipline.

According to point d, clause 4, Article 122 of The Labor Code 2019 stipulates that the employer is not allowed to take disciplinary action against the pregnant employee. Therefore, if violating labor regulations during pregnancy, female employees will not be disciplined. It must also be noted that, when the period of pregnancy, maternity leave and child rearing under 12 months has expired, but the statute of limitations for handling labor discipline has not yet expired, female employees may still be subject to labor discipline. Because, the statute of limitations for handling labor discipline is 06 months from the date of the violation; in case the violation is directly related to finance, property, disclosure of technology secrets or business secrets of the

employer, the statute of limitations for handling labor discipline is 12 months. (Article 123 of the Labor Code 2019). When the period of pregnancy, maternity leave or raising a child under 12 months old has expired, the statute of limitations for handling labor discipline has also expired, the employer may extend the statute of limitations for handling labor discipline, but not more than 60 days from the date of expiration of the above time.

**Fourth:** During pregnancy, female employees have the right to unilaterally terminate or suspend labor contracts (Article 138 of the Labor Code 2019).

Accordingly, if a pregnant female employee is certified by a competent medical facility that continuing to work will adversely affect the fetus, she has the right to unilaterally terminate the labor contract or suspend the labor contract. In case of unilaterally terminating the labor contract or suspending the performance of the labor contract, the employer must be notified together with the certification of the competent medical examination and treatment facility that continuing to work will adversely affect the fetus.

In case of temporary suspension of the performance of a labor contract, the duration of the suspension which shall be agreed upon by the employee with the employer but must be at least equal to the time specified by the competent medical examination and treatment facility. In case there is no appointment of a competent medical examination and treatment facility regarding the time off, the two parties shall agree on the duration of the temporary suspension of the performance of the labor contract.

The pregnant female employee who terminates the labor contract in this case is unilaterally terminating the contract in accordance with the law, so she is still entitled to full salary and severance allowance if she has worked regularly for the employer for full 12 months or more as prescribed in Article 46 of the Labor Code 2019.

In fact, it is not uncommon for some enterprises that are employers to terminate labor contracts with female employees, especially female employees who are pregnant or raising children under 12 months old. In order to ensure their rights when participating in labor, female employees need to understand the legal provisions, avoid conflicts and disputes with enterprises.

**Fifth:** Pregnant female employees are entitled to a maximum of two months of prenatal leave.

To prepare well for the birth and child rearing period, the Labor Code 2019 has regulations on allowing female employees to take 06 months of prenatal and postnatal leave. In case female employees have twins or more, from the second child onwards, for each child, the mother is entitled to an extra month of leave.

According to the provisions of Clause 1, Article 139 of the Labor Code 2019, female employees are entitled to a maximum of 02 months of prenatal leave. This time will be deducted from maternity leave.

**Sixth:** The social insurance regime for pregnant female employees

In addition to the benefits prescribed by the Labor Code as mentioned above, the benefits of pregnant female employees are also reflected in the maternity regime as prescribed by the Law on Social Insurance. During her pregnancy, female employees are entitled to take 5 times off work for prenatal

check-ups, 1 day each time. In case of being far away from medical facilities or the pregnant woman has a medical condition or an abnormal pregnancy, she is entitled to 2 days off for each prenatal check-up, excluding New Year holidays and weekly rest. The social insurance regime for female employees who take leave for antenatal care is: The social insurance allowance for female employees who take leave for antenatal care on a daily basis is equal to the monthly maternity allowance divided by 24 days. In which, the maternity benefit rate is calculated at 100% of the average monthly salary and wages on which social insurance premiums are based for the 06 consecutive months before leaving work. If social insurance premiums have been paid for less than 6 months, the maternity benefit allowance is the average salary and wages of the months for which social insurance premiums have been paid (Article 32 of the Law on Social Insurance 2014).

In addition, the State also encourages employers to create conditions for pregnant female employees to take more leave than prescribed in Article 32 of the Law on Social Insurance (Clause 2, Article 80 of Decree No. 145/2020/ND-CP detailing guidelines for the implementation of a number of articles of the Labor Code on labor conditions and labor relations).

## 2. Some limitations of labor law in protecting the rights of pregnant female employees.

In addition to the remarkable progress of the labor law on protecting the rights of pregnant female employees, there are still some shortcomings in the implementation process:

**Firstly:** it is not reasonable to determine the gestational month to give priority to pregnant female employees in maternity protection.

Point a, Clause 1, Article 137 of the Labor Code 2019 stipulates that employers are not allowed to employ female employees who are pregnant from the 7th month or from the 6th month if they work in highland, deep-lying, remote areas, border or island areas, work at night, work overtime and go on business trips. Reality as well as medical science has shown that, during pregnancy, the period of pregnancy from 1 to 3 months is very important, mother and fetus need to be carefully protected. Because, during this time, pregnant women often have morning sickness. The fetus is in the stage of forming organs and parts of the body, so if the mother moves a lot, or collides, works too long, making the body tired, it will negatively affect the development of the fetus and has a high risk of miscarriage and birth defects.

**Secondly:** it is not appropriate to stipulate that during pregnancy, female employees are allowed to take antenatal leave for 5 times, 1 day each time according to the Law on Social Insurance 2014. Because, to monitor the health of the mother and the development of the fetus, pregnant women often go to antenatal care more than 5 times during the whole pregnancy, at least 8 times during the pregnancy. For antenatal check-ups exceeding 5 times as prescribed by law, female employees must arrange their own time and are not entitled to benefits. The State encourages employers to create conditions for pregnant female employees to take more leave than prescribed, but this is not a mandatory regulation, so it is difficult to apply in practice. In addition, at present, many female workers choose the form of examination outside office hours, that is, after the prescribed working time, they

go to the doctor or get a check-up on day-offs. In this case, the law has not provided for a mechanism to support antenatal care for female employees.

**Third:** during pregnancy, there are many cases where female workers have a medical condition or an abnormal pregnancy, they need to rest for a certain length of time to ensure the health of the fetus, especially during pregnancy period from 01-03 months, but they are not entitled to the insurance benefits, and have to apply for unpaid leave.

The Law on Social Insurance 2014 stipulates that employees who fall ill or have to take time off work to take care of their sick children under 7 years old, and have a certificate of a competent medical facility, will be entitled to sickness benefits. The maximum period of enjoying sickness benefits in a year for employees is calculated by working days excluding public holidays, New Year holidays and weekly rest days and is regulated as follows:

- Working in normal conditions, they are entitled to 30 days if they have paid social insurance premiums for less than 15 years; 40 days if the payment is from full 15 years to less than 30 years; 60 days if the payment is for full 30 years or more;
- Doing heavy, hazardous, dangerous occupations or jobs or particularly heavy, hazardous or dangerous occupations or jobs on the list promulgated by the Ministry of Labor, War Invalids and Social Affairs and the Ministry of Health, or working in a place with a regional allowance coefficient of 0.7 or more, they are entitled to 40 days if they have paid social insurance premiums for less than 15 years; 50 days if the payment is from full 15 years to less than 30 years; 70 days if the payment is for full 30 years or more.
- Employees who take leave due to illness on the List of diseases requiring long-term treatment promulgated by the Ministry of Health are entitled to sickness benefits for up to 180 days, including public holidays, New Year holidays and weekly rest days;

However, in the case of pregnant female employees who have to take maternity leave, this provision does not apply.

*Fourth,* when an enterprise employs female employees or pregnant female employees, they have to suffer more disadvantages than using male employees, but the law has not paid much attention to the rights of employers who are using pregnant female employees, and has not developed a support mechanism for enterprises using pregnant female employees. This makes enterprises have no incentive to use female employees, especially female employees who are of childbearing age and have not given birth.

**Fifthly:** although it is not official, now in many agencies and enterprises, when considering emulation and commendation, they consider pregnant female employees and maternity leave as a weakness. They believe that, during this period, female employees cannot contribute as much as others. However, female employees who are pregnant and giving birth are performing their duties with themselves, their families and the whole society. Therefore, using the reason of pregnancy and maternity leave to evaluate the effectiveness of female employees' work performance is inhumane and unreasonable.

### 3. Some recommendations to improve the law on protecting the rights of pregnant female employees.

From the above analysis, the author makes some recommendations to improve the law on protecting the rights of pregnant female employees:

**Firstly:** Amend the provisions at Point a, Clause 1, Article 137 of the Labor Code 2019 as follows:

“Employers are not allowed to use employees to work at night, work overtime and go on a business trip in the following cases:

Pregnancy if working in highland, remote, border, or island areas, unless otherwise agreed by the employee”

This regulation not only demonstrates the humanity of the labor law for female workers but also ensures the health of future generations of the country.

**Secondly:** Pregnant female employees are allowed to take antenatal care leave from 05 times to 09 times during pregnancy, corresponding to each month of pregnancy, female employees can go to antenatal care once. In addition, the law should stipulate the social insurance regime for female employees with antenatal care outside working hours. Accordingly, female employees are not only entitled to the salary and wages paid by the employer during the working period, but they are also entitled to the amount paid by the social insurance agency in the case of take a leave of absence from work to go for a pregnancy test. Such regulation ensures fairness between those who take time off from work to take antenatal care and those who take antenatal care outside of working hours.

**Third:** Supplementing regulations allow pregnant female employees with a medical condition or abnormal pregnancy certified by a medical facility to take maternity leave and enjoy the same benefits as employees taking sick leave.

**Fourth:** It is necessary to have a mechanism to support enterprises employing pregnant female employees, ensuring that the support mechanism compensates for the disadvantages they suffer when using pregnant female employees. In addition, the procedure for enterprises to receive support when using pregnant female employees should be simple, quick and effective. Regulations in this direction create incentives for businesses to use female employees, pregnant female employees and also limit the case that enterprises refuse to use female employees of childbearing age and time.

**Fifth:** It is necessary to clearly state that it is not allowed to use the reason that female employees are pregnant to not consider emulation or commendation or consider it a weakness when considering emulation and commendation.

### References

1. Labor Code 2012
2. Labor Code 2019
3. Law on Social Insurance 2014
4. Decree No. 139/2006/ND-CP dated November 20, 2006 of the Government detailing and guiding the implementation of a number of articles of the Education Law and the Labor Code on vocational training.
5. Decree 28/2020/ND-CP stipulating penalties for administrative violations in the field of labor, social

insurance, sending Vietnamese workers to work abroad under contracts.

6. Decree 145/2020/ND-CP detailing guidelines for the implementation of a number of articles of the Labor Code on labor conditions and labor relations.