



---

January 2021

## Employment Spotlight: Hong Kong's Breastfeeding Discrimination Law - What Should Employers and Employees Know?

In a significant advancement towards inclusiveness, the amendment to the Sex Discrimination Ordinance (“**SDO**”) prohibiting breastfeeding discrimination (“**Amendment**”) will come into force on 19 June 2021.

We have summarized the key legal implications of the Amendment and key takeaways for employers.

### Applicability

The protection against breastfeeding discrimination applies to a woman:

1. Who is breastfeeding a child,
2. Who is expressing breast milk, or
3. Who feeds a child with her breast milk,

(collectively, “**Breastfeeding**”).

### Discriminatory Conduct

Direct and indirect discrimination, victimisation, discriminatory practices, and instructions to discriminate in the context of Breastfeeding will be unlawful once the Amendment takes effect. Breastfeeding need not be the dominant reason but should be one of the reasons for the less favourable treatment. Accordingly, it will amount to Breastfeeding discrimination if an employer does not allow flexible working hours to a Breastfeeding employee not only because the employer does not consider it appropriate for the employee to take any time off for expressing milk, but also because the employer thinks that this would cause other employees to ask for more time off.

**Direct discrimination** occurs when an employee who is Breastfeeding is treated less favourably than another employee who

# GALL

is not Breastfeeding in the same or similar circumstances. For example, if an employee requests her employer to allow her to use an unused room in the office for expressing milk during the lunch break but the employer refuses the request saying that the room can only be used for purposes other than Breastfeeding, it will amount to direct discrimination.

**Indirect discrimination** occurs when without any justification a requirement or condition is imposed on all employees which is less likely to be complied with by a Breastfeeding employee and is detrimental to the Breastfeeding employee because she cannot comply with it. An example of this could be if a firm imposes a requirement on all partners that if they wish to take additional breaks during working hours, they must still ensure that their number of billable working hours per day is the same as all other partners. This requirement may have a detrimental effect on a partner who is Breastfeeding and needs to take lactation breaks and could amount to indirect discrimination unless the requirement can be justified.

**Victimisation** occurs when a person is treated less favourably than others in comparable circumstances for bringing or seeking to bring proceedings against the discriminator under the SDO, or for giving evidence or information in connection with such proceedings. Accordingly, if a Breastfeeding employee's employment is terminated as she made a complaint on the ground of Breastfeeding discrimination against the employer to the Equal Opportunities Commission ("EOC"), it is likely to amount to victimisation.

Furthermore, discriminatory practices or any pressure or instruction to discriminate is also unlawful. Employers may also incur vicarious liability for the conduct of employees unless it can be shown that the employer took reasonably practicable steps to prevent Breastfeeding discrimination by employees.

## Key Takeaways for Best Practices and Policies

There is no positive statutory obligation to provide facilities for Breastfeeding, yet it is advisable for employers to review and revise their policies to comply with the Amendment. The Equality for Breastfeeding Women Guidance for the Employment and Related Sectors published by the EOC is insightful for measures that employers may consider adopting alongside the following: -

**Provision of facilities:** There is no statutory requirement to provide facilities for Breastfeeding. Nonetheless, the manner of provision of access or denial of access to facilities for Breastfeeding, may amount to discrimination. As good practice, it is sensible for employers to consider the available facilities and the adjustments that can reasonably be made to provide for an inclusive workplace. For instance, arrangements (such as screens and supported chairs) can be made in a multi-purpose room to facilitate privacy for lactation breaks. Alternatively, employers may consider allowing access to child-care facilities near the workplace. It should be noted that toilets are not considered hygienic for lactation purposes.

**Whistleblowing:** To guard against the risk of victimisation, employers should put in place mechanisms where employees can raise concerns relating to Breastfeeding discrimination without the threat of victimisation.

# GALL

## Contacts



**Nick Dealy**  
Partner  
+852 3405 7656  
ndealy@gallhk.com



**Kritika Sethia**  
Legal Analyst  
+852 3405 7654  
kritikasethia@gallhk.com

*All material contained in this article are provided for general information purposes only and should not be construed as legal, accounting, financial or tax advice or opinion on any specific facts or circumstances and should not be relied upon in that regard. Gall accepts no responsibility for any loss or damage arising directly or indirectly from action taken, or not taken, which may arise from reliance on information contained in this article. You are urged to seek legal advice concerning your own situation and any specific legal question that you may have.*