

# Updated Pregnancy, Nursing, Maternity Leave and Court Scheduling Policy

Adopted by Wisconsin Association for Justice Board of Directors

DATE: July 18, 2019

## Introduction:

The number of women lawyers continues to increase each year. A recent article in the *Wisconsin Lawyer* noted that between 1986 and 2015 the percentage of women attorneys *doubled* from 16 percent to 33 percent.<sup>1</sup> This trend is likely to continue.<sup>2</sup> The Wisconsin Association for Justice (WAJ) believes strongly that women should be encouraged to enter and maintain careers in the legal profession and that our justice system is strengthened by growing diversity within our ranks. The Wisconsin Association for Justice believes our court system should adopt scheduling practices consistent with those values. Our courts must recognize that an efficient, well-functioning system adapts to the unique needs of women attorneys who are pregnant or who have recently become mothers.

On July 8, 2010, the Wisconsin Association for Justice adopted a Pregnancy and Maternity Leave and Court Scheduling Policy to increase awareness of certain accommodations necessary for pregnant lawyers and those who had recently given birth to or adopted a child. While many members around the state were satisfied with how courts and firms handled their leave, some members faced significant barriers to their practices in light of their medical or maternal needs. Five years ago, members reported problems with scheduling cases around pregnancy and maternity leave.

WAJ recently surveyed the members of its Women's Caucus and is pleased to report that more firms and courts are acknowledging and accommodating the practical needs of pregnant and nursing lawyers. However, members did report the following instances of unreasonableness with regard to scheduling:

- A judge required the pregnant lawyer to name witnesses and disclose expert reports within 40 days so that everything would be filed before her due date, which was 45 days away. The lawyer explained that the schedule could be problematic, as the case was complex and required the cooperation of out-of-state third parties. Opposing counsel had no objection to accommodating the lawyer's request for a date that fell after her leave. The judge set the 40-day deadline. Later, when the lawyer and opposing counsel filed a stipulation to amend the scheduling order and to adjourn the pretrial conference, the judge required counsel to appear to "offer an explanation for why the judge should grant additional time."

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<sup>1</sup> Kara Higdon Getter, *Bringing Up Baby: How Lawyer-moms Make It Work*, *Wisconsin Lawyer*, Vol. 88 No. 4 (April 2015).

<http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=88&Issue=4&ArticleID=23996>

<sup>2</sup> At present, women represent nearly half (47 percent) of those awarded a J.D.

[http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_july2014.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf)

- A judge required a lawyer who had returned from maternity leave two days earlier to name witnesses within 30 days because her discovery responses were 10 days overdue. The judge gave opposing counsel 120 days to name his witnesses.
- In the administrative context, members have reported problems with the scheduling of back-to-back hearings for weeks on end immediately following a pregnant lawyer's return from maternity leave.

Another member reported problems with breast pumping during a trial:

- A judge allowed the lawyer to pump during breaks. When her expert witness arrived during one such break, the lawyer stopped pumping and greeted the witness. She then finished pumping before returning to the courtroom. The judge was upset that she took too long and stated she could not greet her witnesses if she was going to be doing “other things” on her break as well. Thus, the lawyer had to *choose* whether to pump or to greet her witnesses, but of course, pumping was not optional for her.

Thus, despite improvements, obstacles remain for female lawyers who are pregnant, nursing, or on or recently back from maternity leave.

### **Misperceptions:**

The following misperceptions must be addressed in order to facilitate the continuing careers of our women trial attorneys: (1) Getting pregnant is “optional” and, therefore, something that does not need to be accommodated. (2) Maternity leave is a vacation, and attorneys can and should be expected to work during that time and/or be able to resume a full intensity practice a day or two after returning to work. (3) Lawyers are interchangeable, and anyone on leave should simply be able to have someone else in her firm handle her cases. (4) Breast pumping is a quick and optional activity that can be elected in place of other activities such as eating lunch or greeting witnesses.

#### **I. By virtue of age alone, most women law school graduates will have children in the first 10 years of their career; it is neither surprising nor self-indulgent to do so.**

The view of pregnancy as merely a choice for young women lawyers ignores the fact of their age and human reproduction. Assuming a young attorney graduated high school at 18, attended a 4-year college, and then completed an additional 3 years of law school, she will be entering the legal profession at the age of 25. According to United States statistics, over 90% of first-time mothers give birth before age 34.<sup>3</sup> Additionally, the average age at which a woman has her first child has risen substantially over the past 30 years, and is now 26 years old.

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<sup>3</sup> There are many statistics which show that women over the age of 35 have a significantly harder time becoming pregnant. Additionally, over the age of 40, there are greater risks of pregnancy, as well.

In other words, it should not be surprising that young women entering the legal field have their first child in the 10 years following their graduation. In fact, it should be recognized as likely to occur and a normal part of some attorneys' legal careers.

The changes in the ages at which women have children have been a more recent occurrence, changing dramatically over the past 30 years, with the average age of first-time mothers rising over five (5) years from 21 to 26. This change may mean that older judges and practitioners may not recognize the landscape in which young women lawyers practice and plan their careers.

There may also be the perception that young women should just "take time off" during those years when they have young children. Again, dropping out of a career path can have long-term impacts on the success of a woman's career. Jack Welch, former CEO of General Electric, put it this way: "Women who take time off can still 'have a nice career,' but their chances of reaching the top are smaller," according to a Wall Street Journal account. "We'd love to have more women moving up faster," he said. "But they've got to make the tough choices and know the consequences of each one."<sup>4</sup>

The view that an attorney cannot practice law and be permitted to become pregnant or adopt a child effectively would bar many young women who want to have children from becoming attorneys and/or continuing to practice law. This is not an equitable choice.

## **II. Maternity leave is not a vacation – it is time to recover from the rigors of childbirth and having an infant in the home.**

Remarkably, we received comments from several women that judges scheduled matters within the same week the attorney returned from leave. Apparently, some judges saw the time off as being "vacation" and time that could be used merely working from home.

It is recognized that a particularly long leave would be very difficult for a court to accommodate. However, a woman who gives birth needs a reasonable period of recovery time and should be accommodated as any other worker would be for other medical conditions requiring rehabilitation time. Additionally, the demanding needs of a newborn require that parents, whether biological or adoptive, also be accommodated with regard to time off after a baby's arrival.

## **III. Attorneys are not interchangeable. In order to provide the highest quality legal services, maintain clients, and permit career growth, attorneys need to keep their files whenever possible.**

Some judges react to news of an attorney's pregnancy or maternity leave by stating that "someone else" will simply have to take over the file. While there is no dispute that during any leave an attorney will need to rely on coworkers for certain assistance, this should be the exception rather than the rule. Attorneys who have spent years preparing a case should not lose the file because of a three (3) to four (4) month delay in a trial date. In order to maintain career growth,

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<sup>4</sup> [http://www.abajournal.com/news/article/jack\\_welch\\_women\\_take\\_time\\_off\\_for\\_kids\\_at\\_their\\_peril/](http://www.abajournal.com/news/article/jack_welch_women_take_time_off_for_kids_at_their_peril/)

attorneys need to keep their files. In addition, the client who has come to rely upon his or her attorney should not be required to relinquish that relationship.

**IV. Expressing breast milk is a physical necessity for a nursing mother and cannot be rescheduled or deferred without significant discomfort and distraction and should be accommodated in clean, private environments.**

There has been growing recognition of the substantial benefits to both infants and mothers of breastfeeding for the first year of life. In fact, the Centers for Disease Control have made a policy recommendation to increase breastfeeding for all infants.<sup>5</sup> Similarly, the American Academy of Pediatrics recommends women breastfeed infants exclusively during the child's first six months and up to one year or longer as desired by the mother and child.<sup>6</sup>

The Wisconsin Legislature enacted a "right to breastfeed" law (now Wis. Stat. § 253.165 (2013-14)), and the Federal government has enacted similar laws by amending the Fair Labor Standards Act under the Affordable Care Act.<sup>7</sup> These laws recognize that women need accommodations in the workforce to continue breastfeeding and require that women be permitted to take reasonable breaks to express breast milk and that they be provided with private facilities to do so that are not bathrooms.<sup>8</sup> WAJ recommends these same accommodations be afforded to professional employees, including attorneys.

Attorneys who breastfeed upon their return to practice are acting in the best interest of their infants and in accordance with recognized best-practices. It is recognized that many courts have not previously been asked to accommodate such requests, but given the changing landscape it is assumed that most will be asked to do so.

### **Recommendations for Attorneys and Courts**

There is tension between the needs of an efficient court system and the needs of a pregnant, adoptive, and/or nursing attorney. However, courts and attorneys should consider the following recommendations in order to reasonably accommodate the attorneys and court system:

1. Attorneys should inform the court and counsel of their pregnancy or adoption as soon as is reasonably practical. Attorneys should realize that the earlier, the better.
2. Courts should try to schedule matters prior to the final four (4) weeks before an attorney's due date or date of adoption so as to prevent important matters from being adjourned.

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<sup>5</sup> <http://www.cdc.gov/breastfeeding/policy/hp2010.htm?topicId=26>

<sup>6</sup> See *Breastfeeding and the Use of Human Milk*, Pediatrics, Volume 129, Number 3, March 2012.

<http://pediatrics.aappublications.org/content/129/3/e827.full.pdf+html>

<sup>7</sup> 29 U.S.C. § 207(r) ("Reasonable break time for nursing mothers").

<sup>8</sup> 29 U.S.C. §§ 207(r)(1)(A) and (B)

3. A court should consider a minimum of eight (8) to twelve (12)<sup>9</sup> weeks post-birth or post-adoption maternity leave as being normal and should not schedule any matter in the days immediately following a return to work. Caution should be exercised in scheduling a trial in the days immediately following an attorney's return from leave.
4. Spousal leave should be accommodated for a minimum of three (3) weeks. However, it should be recognized that this time may need to increase if there are medical complications involved for either mother or child which require the other parent to be available.
5. Wherever possible, the court and counsel should work together so that attorneys are able to maintain their files/clients. This benefits the parties as well as the court.
6. Attorneys anticipating a leave should have someone in their office who is responsible for a file while they are on leave. That person's identity and contact information should be provided to the court and counsel long before the attorney gives birth or begins leave, and that person should have a reasonable familiarity with the file so that he or she may address any issues that arise while the primary attorney is unavailable.
7. Attorneys should notify courts prior to trial or lengthy hearings if they will require a break to express breast milk. As many courthouses add private facilities for nursing mothers, preparation and identification of those facilities should simplify any hurdles in securing a private, clean location. Advance notice will permit efficient scheduling to accommodate necessary breaks.
8. When notified of the need of an attorney to express breast milk, courts should make every effort to provide a convenient, private location for the attorney. Bathrooms, common break rooms or other public areas are not considered reasonable accommodations. Courts should expect that most attorneys will need three breaks during the day to accommodate pumping (mid-morning, noon, and mid-afternoon).<sup>10</sup> Those breaks will commonly take 25-30 minutes, as not only must the activity itself be performed, but the equipment must be cleaned, and the milk properly stored. In addition to the time needed for pumping, the attorney will also need to attend to the usual tasks accomplished during breaks, including using the restroom, eating lunch, or greeting/organizing witnesses who may be waiting to testify.

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<sup>9</sup> The Family and Medical Leave Act (FMLA) entitles eligible employees who work for employers with 50 or more employees to 12 weeks of job-protected leave for the birth and care of a newborn child. 29 U.S.C. § 2612(a)(1)(A).

<sup>10</sup> Note: the particularity of these breaks will vary from mother to mother. Courts should also note that the Attorney needs time to travel to the private location.

The Department of Health and Human Services notes that women typically need two to three breaks during a typical 8-hour work period.

<http://mchb.hrsa.gov/pregnancyandbeyond/breastfeeding/outreach/breastfeedingpresentation.pdf>