

Women's Right to Breastfeed in the Workplace: Legal *Lacunae* in Malaysia

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Abstract

This paper investigates the right (or the absence of it) of women in Malaysia to breastfeed in the workplace. We find that there has been a lack of clear legal guidance as to their rights and a lack of facilities in the workplace. The implication has been that in the absence of workplace support, it is difficult to combine breastfeeding and work. We find that the support of women's right to breastfeed in the workplace in Malaysia has been sporadic. The policy supporting breastfeeding has been piecemeal, issued by various ministries and hospitals. Using a qualitative approach that is anchored in legislation and government policy, this paper examines issues on the "right" of working mothers to breastfeed their babies in the workplace. Legal statutes and case law are analysed to gain an understanding of current legislation governing maternity protection and breastfeeding employees. We find that in Malaysia, employees' breastfeeding rights are not provided under the Employment Act 1955; hence this Act creates legal lacunae or gaps with regard to women's rights. Other legislation, such as industrial safety laws, protects breastfeeding employees by temporarily removing them from working in hazardous and dangerous working conditions but there is no legislation to offer equivalent protection in other workplaces. This issue is also analysed with reference to International Labour Standards, which provide a legal framework for breastfeeding breaks.

Key words

Malaysia, employment law, maternity protection, breastfeeding employee, workplace

Introduction

A pivotal feature of employment law should allow it to provide a balance of protecting the productivity and reproductive rights of working women, including breastfeeding rights in the workplace. The rules to protect, promote and support breastfeeding in the workplace are under the umbrella of a variety of laws, such as health law, gender law, child law, and employment law. In Malaysia, there is no clear provision in law giving the right to working mothers or employees to breastfeed their babies in the workplace. It is only national policy and industrial practices that promote and support such a right.

Legislating employment policies for women employees is important to cultivate breastfeeding practices in workplaces (Guendeleman et al., 2009). These policies will promote public health, welfare and safety, advance family values, reduce health care costs, lower taxes, and clarify the unclear guidance on how to practice breastfeeding in the workplace (G. Wagget & R. R. Wagget, 1994-1995). Are all of these the effect of the policies of breastfeeding or anticipated results of its legislation? Logically they should be the positive results of the legislation about breastfeeding, because in Malaysia there is already such a policy. However, the situation is not so in reality. Every policy is not necessarily the result of legislation in Malaysia. There is no clear provision on breastfeeding in Malaysian legislation. The principle legislation on employment is the Employment Act 1955, and there is no single provision on this right. Policy on breastfeeding in Malaysia is more in the form of Ministry guidelines. The main obstacle for working women in continuing to breastfeed is the inadequacy of maternity leave, because private employees are only entitled to 60 days of maternity leave. The government has encouraged employers to build crèches (nurseries where babies and young children can be cared for during the work day) at workplaces so that working mothers can easily breastfeed their babies, but so far this government encouragement has not been successful.

The evidence further suggests that if a mother can stay with her baby and continue breastfeeding for at least four months, there will be a greater opportunity to continue breastfeeding after that because 16 weeks are long enough to establish the milk supply in the longer term (Balkam et al., 2011).

The second obstacle is the lack of regulations and legal guidance on breastfeeding breaks to express and store breast milk or to feed a baby in the workplace. The third obstacle is a lack of facilities to express breast milk, such as private spaces. As a result, women may be forced to pump in a pantry, prayer room, or at their own workstations. According to Meadowbrook Insurance Group, in 2005, when Meadowbrook built a new branch office, it provided two “lactation” rooms with sofas and chairs for new mothers to have a private and comfortable place to pump breast milk. The Vice President of Human Resources explained the company policy: “in order for us to retain quality employees and those already having a good track record, we have to help them to balance their work and personal lives...It's a win-win situation. We will have a more focused employees” (Williams, 2009, p. 1021). (Many female employees in Malaysia are quite traditional and religious and would probably wish to breastfeed their babies. The living quality of female employees who become mothers will also be more meaningful if they can breastfeed their babies while at the same time pursuing their careers).

In order to encourage and facilitate breastfeeding, employment policy should be clear regarding how employers would benefit from supporting breastfeeding, and employment law must underpin this. Longer paid leave after birth can be an effective strategy for increasing the duration of breastfeeding (Galtry, 1997; Rodgers, 1999). In addition, employers who provide health care to women employees will eventually pay lower health costs, such as doctor's visits, hospitalisation and medication for both the women and their babies. It is generally believed that breastfed babies are healthy (Balkam et al, 2011). This paper addresses the following issues: firstly, the legal protection of breastfeeding employees in Malaysia and the standards of the International Labour Organization (ILO) serving as a guideline for maternity protection and secondly, the benefit to employers of a workplace policy to support breastfeeding.

In this study, we focus on the legal position of women's right to breastfeed in the workplace in Malaysia. We trace the various legislation and national policies that concern the rights of working women to maternity leave and explore whether the right to breastfeed can be implied in such leave. We investigate the importance of the International Labour Standards as guiding principles with which national legislation should

comply. The condition and goal of the paper is to clearly highlight the right of female employees to breastfeed their babies. To achieve the purpose, Malaysia through regulations must not only give breaks to female employees but must also build crèches at the workplace so that female employees can easily breastfeed their babies. Break time and crèche facilities must be provided or this goal will not be achieved. The government has said many times that crèche facilities must be provided at the workplace but so far it has not been successful in persuading workplaces to provide such facilities.

In terms of methodology, to investigate the importance of various maternity leave policies and benefits, we employ secondary data obtained from the United Nations document as well as the International Labour Organization conventions and Malaysian legislation. Secondary data in legal research is a norm. What is primary in legal research on national law is an analysis of legislation, case-law (if any) and national policy. For research on international law, reference and analysis must be made with regard to international instruments. In this study, qualitative research refers to a new, thorough, systematic, investigative, or legal analysis. Its aim is to explore, revise, add value and improve the concept, theory, principles and application of law. In other words, the research adopts the method of legalistic analysis that places emphasis on legal problems and issues (Yaqin, 2007). Using the content analysis technique, qualitative legal research aims to resolve a problematic situation and identify elements that constitute such problems and the regulations that are relevant in each problem. All the problems can be viewed from philosophical and comparative perspectives.

We need to explain the term *lacunae*. The legal term *lacuna* (plural *lacunae*) refers to a gap in law. When there is a gap on certain aspects or provisions of law, such a gap needs to be filled, either by the incorporation of new amendments or enactment of new legislation. In the context of women's right to breastfeed in the workplace in Malaysia, we argue that there are *lacunae* in law which have to be addressed. Currently, we do not have much protection provided for breastfeeding employees in the workplace. Breastfeeding employees in the workplace do not have much protection by the Employment Act 1955. However, under the Employment Act, workers are given a break for not less than thirty minutes after five consecutive hours of working, and women can

use this as a break to breastfeed their babies, provided that the babies are placed at a nearby crèche. Through regulations, Malaysia must not only give break to female employees but must also build crèches at the workplace so that female employees can easily breastfeed their babies. Break time and crèche facilities must be provided, or this goal will not be achieved. The government has said many times that crèche facilities must be provided at the workplace but so far these efforts have not been successful. The Employment Act of 1955, which is the primary legislation on workplace conditions, provides general terms and conditions and basic rights of workers, but has no clear provision on breastfeeding rights. Moreover, in term of scope/coverage, the Act applies only to manual workers and those earning a salary of not more than RM 2,000.00 a month. Many female workers are thus outside the purview of the Act.

It is only the occupational safety legislation (for female employees working in hazardous and dangerous work conditions) that has some provisions on breastfeeding. For example, Part X, Regulation 28 of the Occupational Safety and Health (Use and Standards of Exposure to Chemicals Hazardous to Health) Regulations (2000) provides the following for breastfeeding employees: “The employers, after being notified by an occupational safety and health officer who is also a medical practitioner or an occupational health doctor of the fact, shall not permit a pregnant employee or *breastfeeding employee* to be engaged in, and shall remove the employee from work which may be exposed or is likely to expose the employee to chemicals hazardous to health.” Regulation 43 of the Factories and Machinery (Lead) Regulations Regulation (1984) states the same condition, that a pregnant employee or a breastfeeding employee must be removed temporarily if the nature of the work may expose the employee to lead. The right to breastfeed in the workplace is more a matter of policy than law. The regulation is more concerned with protecting the safety and health of breastfeeding employees at the workplace, not on the employees’ right to breastfeed their babies.

The paper is organised as follows. Section 2 provides background material on the policy of breastfeeding in the workplace in Malaysia. Section 3 provides an explanation of legal protection for breastfeeding employees. Section 4 describes the key areas of maternity protection under International Labour Standards and international practices. In sec-

tion 4, we offer some concluding remarks.

Policy Background

In Malaysia, the main stakeholders in fostering breastfeeding practices at work are the Ministry of Health, the Ministry of Human Resources, and the Ministry of Women, Family and Community Development. For example, the Ministry of Health has set a target of 35% of babies to be exclusively breastfed by the year 2015 through the Plan of Action for Nutrition 2006-2015 in compliance with the National Breastfeeding Policy of 1993 (Dewan Negara, 2010; Fatimah et al., 2010). The National Health and Mobility Surveys (NHMS) monitor these targets every ten years. According to the health survey, in 2006, 14.5% of infants in Malaysia were exclusively breastfed until six months of age (Fatimah et al., 2010). Among mothers attending clinics in 2011, 22.9% of infants were exclusively breastfed until six months of age. To achieve the target of 35% by 2015, the Ministry of Health Malaysia encourages various sectors to provide baby-friendly infrastructure in hospitals, public places, and workplaces. The Baby-Friendly Hospital Initiative programme was implemented in 1992. By November 2011, 125 of 126 government hospitals (98%) and seven of 183 private hospitals (5.3%) had been recognised as Baby-Friendly Hospitals. The Ministry of Health has set a target of 30% of shopping centres and 50% of government offices providing nursing areas and breast milk pumps by 2015 (Amin et al., 2011).

Maternity protection is vital for women to harmonise their productive and reproductive lives. It addresses the health needs of women workers and their children and allows them to remain employed during childbearing. According to the Department of Statistics on Women, Family and Community 2011, women actively enter the labour market by the ages of 25-29. In 2010, 70.9% of women in urban areas were in paid work. However, women's participation in the labour market declines to 64.8% between the ages of 30-34. The percentage of women in the labour force decreases as the age of working women increases. A contributing factor to this phenomenon is that the 30-34 age range is the childbearing period (Dewan Negara, 2010; Fatimah et al., 2010). The occupations mentioned are classified according to MASCO (Malaysia Standard Classification of Occupation 1998). According to the

Seventh Malaysia Plan (1996-2000), a low labour participation rate of Malaysian women prevailed despite the fact that women were achieving a better education than men. Two factors are identified as key contributors to the under-utilization of women in the economy: inadequate affordable childcare and inflexible working regulations (Rowley & Yukongdi 2009). Rowley and Yukongdi's (2009) study identified that inflexible working regulations are key to the low percentage of women in the workforce, especially between the ages of 30 and 34. This suggests that working women in that age group are not given the right to breastfeed at work due to a lack of breastfeeding breaks provided in their employment policy. When their rights are not protected, a possible consequence is that these women may choose to prioritise their obligation towards their family and leave their jobs.

Legal Protection for Breastfeeding Employees

In Malaysia, a female employee is entitled to maternity protection under Part IX, sections 37 - 44A of the Employment Act 1955. A female employee is entitled to maternity leave for a period of not less than 60 consecutive days (section 37 (1) (d) (II)) and to maternity pay (subject to the required eligibility). (Table 1) Dismissal of a female employee during her maternity leave is an offense. Under the First Schedule paragraph 1, the Act is applicable to any person whose wages do not exceed two thousand Ringgit a month or to manual employees regardless of salary. However, for female employees, Section 44A Employment Act (EA) 1955 stipulates that "Notwithstanding paragraph 1 of the First Schedule, this part extends to every female employee who is employed under the contract of service irrespective of her wages." Therefore, in practice all female employees who work in the private or informal sector are eligible for 60 consecutive days of maternity leave. The informal sector includes domestic servants/workers. Under the Employment Act, they are employed under a contract of service; however, they are excluded from many provisions of the Act. The term "informal" is always used by the industry providing domestic servants, most of whom are foreign workers. This 2012 amendment to the EA 1955 provides clear legal support for all women workers in the private sector.

Breastfeeding was a fundamental component of maternity protection during the inception of the International Labour Organization in 1919. The ILO standards contained seven key elements of maternity protection in the workplace, with special reference to Maternity Protection, 2000 (Convention 183) and the Maternity Protection Recommendation (Recommendation 191). It is worth noting that maternity protection in Malaysia exemplifies the model based on the standard of the ILO, of which Malaysia has been a member since 1957 (ILO official website). The current international instrument in support of breastfeeding is the Convention on the Elimination of All Forms of Discrimination against Women 1981 (CEDAW) (Official Website of the Office of the United Nations High Commissioner for Human Rights), which states that “parties shall ensure to women appropriate services in connection with pregnancy, confinement, and the postnatal period, granted free services.” With the Proclamation of Teheran 1968, reproductive rights are considered one of the recognised human rights that first appeared in an international context.

According to UNICEF, breastfeeding is recognised in Article 24 of the Convention on the Rights of the Child as “an essential component in assuring the child’s right to the highest attainable standard of health.” Malaysia is a party to the Convention on the Rights of the Child (CRC). Malaysia acceded to the CRC on 17 February 1995 and to the Convention on the Elimination of All Forms of Discrimination against Women on 4 August 1995. To support breastfeeding at work, the Innocenti Declaration 1990 declares, “All governments by the year 1995 should have enacted imaginative legislation protecting the breastfeeding rights of working women and established means for its enforcement...” (UNICEF, 2005). Enacting employment law that protects the right to breastfeed among working mothers is the best mechanism to ensure compliance with this Declaration, along with guidance on how to support breastfeeding at the workplace. These conventions and declarations further indicate that the practice of breastfeeding is a human rights issue for women and children, particular in terms of the right to healthy and nutritional food (Article 24 of the Convention on the Rights of the Child). To protect these rights, significant reform towards the existence of supportive workplace environments is required (World Alliance of Breastfeeding Action, 2000).

The main issue that must be highlighted is the inadequacy of maternity leave in Malaysia, which prevents employees from breastfeeding their infants for the recommended periods. According to the ILO, maternity leave is defined as leave with the purpose of safeguarding the health of a female employee and that of her child during the pre- or postnatal period, whether immediately before or after the birth (Pickering, 2004). The ILO set the standard under Convention No. 183, Article 4 (1) that a woman to whom this Convention applies shall be entitled to a period of maternity leave of not less than 14 weeks. In addition, under Recommendation No. 191, Paragraph 1 (1), members should endeavour to extend the period of maternity leave in Article 4 of the Convention to at least 18 weeks (ILO on Maternity Protection 2010). Currently, under Section 37 of the Malaysian Employment Act 1955, female employees of private and informal sectors are entitled to only 60 days (eight weeks) of maternity leave, in contrast to female civil servants, who are entitled to 90 days (12 weeks). The latter rules commenced in 2010 (Malaysia Public Services Department, 2010). The significance of a longer period of maternity leave is that it can promote breastfeeding among working mothers. The length of maternity leave is a contributory factor in the initiation or duration of breastfeeding among working mothers (Visness & Kennedy, 1997) because an early return to full-time or part-time work has been associated with decreased rates of breastfeeding initiation and duration (Ogbuanu et al., 2011). The impact of a short postpartum leave on breastfeeding cessation is stronger among non-managers, women with inflexible jobs, and women with high psychosocial distress (Guendeleman et al., 2009). Maternity leave is also essential to allow a mother to recover from birth, to breastfeed her infant, and to give her the opportunity to spend time with and provide care and nurturing for the young child to help the child adjust to a new environment (World Alliance of Breastfeeding Action, 2000). Table 1 presents a comparison of maternity benefits in most Asian countries, selected Middle East countries, and Western countries (ILO, 2010). As shown in Table 1 (in the appendix), Malaysia is the only country that provides only 60 days of maternity leave, compared to other countries such as Indonesia, in which maternity leave extends to 90 days. Overall, the countries presented provide an average of 14 weeks of maternity leave. This figure shows how the protection of women workers in

Malaysia does not comprehensively fulfil the reproductive requirement for adequate leave after childbirth and compares Malaysia to other states. The National Breastfeeding Policy of 1993 should be translated into legal maternity protection so that it is workable and effective for working women.

With regard to legal protection for breastfeeding employees, employment law in Malaysia is silent; thus, legal guidance on the rights of breastfeeding employees in the workplace is unclear. Legal recognition for breastfeeding employees is important to encourage more female employees to continue breastfeeding their children exclusively for six months, as recommended by the government. Breastfeeding employees need private places and breaks to express breast milk or to directly feed a baby who may be placed in a (nearby) crèche. The most effective way of achieving this may be through legislation ensuring that companies provide breastfeeding breaks and education so that employers and co-employees understand breastfeeding employees' working needs. Regarding employment policy, a guideline published by the Department of Occupational Safety and Health (DOSH) of Malaysia, which defines an employee who is breastfeeding, is the most relevant document pertaining to this issue. Under the Guideline on Reproductive Health Policy and Programmes in the Workplace, "an employee who is breastfeeding" is one who has given birth not more than 24 weeks previously, is breastfeeding, and informs her employer of her condition in the workplace. This study examines employment law to determine the extent to which breastfeeding employees are recognised under the law (see discussion below).

Part X, Regulation 28 of the Occupational Safety and Health (Use and Standards of Exposure to Chemicals Hazardous to Health) Regulations (2000) provides the following for breastfeeding employees:

The employers, after being notified by an occupational safety and health officer who is also a medical practitioner or an occupational health doctor of the fact, shall not permit a pregnant employee or *breastfeeding employee* to be engaged in, and shall remove the employee from work which may be exposed or is likely to expose the employee to, chemicals hazardous to

health.

Regulation 43 of the Factories and Machinery (Lead) Regulation (1984) (this Regulation is made under its parent Act – the Factory and Machinery Act 1967) states the same condition, that a pregnant employee or a *breastfeeding employee* must be removed temporarily if the nature of the work may expose the employee to lead. In addition to securing and protecting workers against a hazardous workplace, the Occupational Safety and Health Act 1994 promotes a safe and healthy workplace environment that may include physiological and psychological needs. Despite provisions protecting reproductive rights, female employees must sometimes make a choice between working and breastfeeding because the workplace conditions do not support it.

Evidence shows that breastfeeding can help to protect the mother against cancer and can protect the child from certain diseases in infancy (Stuebe, 2009). Thus, obstacles to breastfeeding in the workplace may significantly affect the health of both the mother and the child. Section 15 OSHA 1994 outlines general duties for employers and self-employed persons: “It shall be the duty of every employer and every self-employed person to ensure, so far as is practicable, the safety, health and welfare at work of all his employees.”

Interestingly, the DOSH Guidelines on Reproductive Health Policy & Programmes in the Workplace contains constructive and preventive measures for pregnant and breastfeeding employees to avoid working in hazardous places. Mental and physical fatigue, working hours, and occupational stress have been found to be hazards that may be risky to reproductive health. For example, long working hours, shift work, and night work may have a significant effect on the health of new and expectant mothers and on breastfeeding mothers/employee (Esterik & Greiner, 1981). Likewise, expectant mothers and breastfeeding mothers may be particularly affected by occupational stress for various reasons (Doan & Popkin, 1993). Stress has been associated in some studies with increased incidences of miscarriage, pregnancy loss, and impaired ability to breastfeed. Preventive measures may include adjustments to working conditions or working hours and ensuring the necessary support, counselling, and recognition when women return to work to ensure a woman

that her privacy and her right to breastfeed are respected. This DOSH guideline is in line with the aim of this study, which is to establish adequate legal rights for employees by providing breastfeeding breaks. However there is no legal obligation on the employer; thus, its applicability to protect the reproductive rights of female employees working in hazardous places is dependent on the “best practices” of their employers. To conclude, the Regulation under the Occupational Safety and Health (1994) and the Factories and Machinery Act (1967) only stipulate the term for breastfeeding employees without establishing the right to breastfeeding breaks.

A further question that can be posed involves the extent to which female employees’ rights in Malaysia can be protected with regard to other reproductive rights, such as protection against discrimination for pregnancy. Protection for pregnant female employees remains unclear. Are they protected under Article 8(2) of the Federal Constitution (a general provision about equal rights) on gender equality against any discrimination at work, including discrimination for pregnancy? This issue arises because the Federal Court in the case of *Beatrice A/P AT Fernandez v. Sistem Penerbangan Malaysia & Others* [2005] (3 MLJ 681) refused to grant leave to appeal against the Court of Appeal’s decision that the applicant, an air stewardess with the national carrier *Sistem Penerbangan Malaysia* or Malaysian Airlines System (MAS), had been rightly dismissed when she became pregnant (Hassan, 2012). The employer’s right to terminate her service was stipulated in the collective agreement signed between the MAS employee union and MAS. In relation to this study, both pregnancy and breastfeeding are among female workers’ rights because they are related to childbirth and pregnancy. However, there is no legal obligation for an employer to provide breastfeeding breaks or facilities for breastfeeding workers. Thus, not doing so is not discrimination under the law. A question arises: does not the Employment Act have a provision about equal rights between male and female workers? Why does not the Court apply Article 8(2) of the Federal Constitution on gender equality against any workplace discrimination in this case? The answer is: The Employment Act does not have provisions about equal right between male and female workers. The Court in the Fernandez case had decided that the notion of equality under Article 8(2) of the Federal Constitution does not apply to workers

in the private sector, as they are bound by their collective agreement. Article 8(2) mention about public service only. That is the decision of the Court, although we might disagree with it.

In England, a case related to pregnancy and breastfeeding issues in the workplace was raised in *Williams v. Ministry of Defence* [2003] All ER (D) 142, in which a female engineering officer won a first claim for the loss of a promotion based on sexual discrimination due to her pregnancy. Williams also challenged the Ministry of Defence (MoD) over her right to breastfeed her child upon her return from maternity leave. She claimed that the MoD's breastfeeding policy is discriminatory in stipulating that local circumstances may permit a return to duty whilst still breastfeeding; however, service women have no right to this ... it is, of course, up to individual service woman to decide whether to breastfeed, and if so, when to stop... service women who wish to be certain of being able to breastfeed beyond their eighteen weeks' OML period (occupational maternity leave) should take advantage of OMA to cover this period.

These two cases concern the same legal issue, discrimination in relation to pregnancy. However, because workplaces in Malaysia are not familiar with breastfeeding policies at work, no issue of breastfeeding rights has ever arisen in any case law. Several reasons can be offered. First, such a scenario exists because female employees are not aware of the right to breastfeed at work as a human right acceded to by the CEDAW, CRC, and ILO. Second, breastfeeding at work is considered a personal issue and is privately practised by working mothers. Alternatively, because of a lack of time and facilities, these employees may end up feeding their child with formula milk. This is why, according to the Ministry of Health, breastfeeding rates for exclusive breastfeeding are high in the first two months after birth but drop rapidly when maternity leave ends and working mothers return to paid employment.

Recently, Senator Mumtaz bin Nawawi raised the issue of breastfeeding among working women in the Third Meeting of the Fifth session of the Twelfth Malaysian Parliament Sitting (Bill 23), 2011. She asked about the extent of monitoring, infrastructure, and incentives provided by the government to ensure that the programme of breastfeeding among women with careers in the public and private sector until the child

reaches the age of six months to two years is met. The Ministry of Health has targeted a goal of all government offices providing childcare at work by 2015. As of August 2011, a total of 148 baby-friendly public areas had been established. Efforts to support breastfeeding mothers are in collaboration with the Ministry of Women, Family and Community Development, which provided incentives of up to RM 200,000 to launch the establishment of childcare centres or nurseries in the year 2010 for employment in the public sector. The government has emphasised this matter in the Malaysia Public Services Department (1989), which encourages ministries, departments, and agencies to provide childcare centres. The Ministry of Health is also working with the Ministry of Women, Family and Community Development by extending public sector maternity leave from 60 days to 90 days for each birth within 300 days of maternity leave entitlement during an employee's service (Malaysia Public Services Department, 2010). Fathers are also granted paternity leave for seven days to care for their wives (Malaysia Public Services Department, 2002). The mother is allowed to take additional leave without pay for five years to nurse the child, as provided in Circular Service No. 15. These efforts are intended to achieve the country's target of improving breastfeeding practices to assist women with careers and to create a healthier future generation, among other reasons.

However, these policies are applicable to female civil servants only and thus leave a loophole for private sector employees. The provision of maternity protection under employment law must address longer maternity leave with a minimum of 14 weeks for all female employees in Malaysia. In addition, there should be available provisions for postnatal rights under employment law, including breastfeeding breaks. Currently, maternity protection in Malaysia does not include breastfeeding at work as a provision of law, except for breastfeeding employees who work in hazardous and dangerous work settings.

Key Areas of Maternity Protection under International Labour Standards and International Practices

The International Labour Organization (ILO) includes seven key elements of maternity protection at work, with special reference to Maternity Protection 2000 (Convention 183) and the Maternity

Protection Recommendation (Recommendation 191). These elements are scope, leave, benefits, health protection, employment protection, non-discrimination, and breastfeeding breaks (World Alliance of Breastfeeding Action, 2008; 2012). The ILO standards on maternity protection are compared with employment legislation in Malaysia. Malaysia is not a signatory party to the Convention on Maternity Protection 2000. However, Malaysia adopts the main principles embodied in this Convention but differs in its content.

Table 1 presents Malaysian legal provisions on maternity protection pertaining to length of leave, wages paid during coverage period, and provider of maternity coverage as compared to other selected countries. The length of maternity leave for private sector employees in Malaysia is 60 days, which is the same as Indonesia. Other South East Asian countries such as Thailand, Laos, and Cambodia have longer maternity leave, i.e. 3 months or 90 days. The length of maternity leave in Vietnam is 4 to 6 months, and 12 weeks in Myanmar and Singapore. Other countries such as China and Egypt have 90 days of maternity leave. Maternity leave in Brazil is 120 days. In Europe, Britain and Spain's maternity leaves are 52 and 16 weeks respectively. From this table, we can conclude that the length of maternity leave in Malaysia is comparably low compared to other South East Asian countries. However, female employees on maternity leave in Malaysia are fully paid during the coverage period and this provision is much better than Cambodia and Myanmar where wages paid during the coverage or eligible period is 50% and 67% respectively.

Table 2 presents the maternity legal protection in Malaysia compared to the ILO standards (Convention No. 183). In terms of the types of jobs for female employees protected under the scheme, the ILO standards cover all married and unmarried employed women, including those working in atypical forms of work. In Malaysia, all female workers employed longer than 90 days, except domestic workers, are protected. The Malaysian legal provision in this context is not line with the ILO standards, as Malaysian law excludes domestic workers. The term "domestic workers" is defined under section 2 of the Employment Act as a person employed in connection with the work of a private dwelling house and not in connection with any trade, business, or profession carried on by the employer in a dwelling house. Currently, almost all domestic serv-

ants who work in private houses in Malaysia are foreign employees, and the majority of them are from Indonesia and the Philippines (Khalid et al., 2012). Their work contract contains a term that prohibits them from getting pregnant; thus issues of maternity leave do not arise here. The First schedule of the Employment Act clearly excludes protection of maternity leave for domestic workers (Hassan et al., 2007; Hassan & Rahman, 2009).

The amount of leave under the ILO standard is not less than 14 weeks, but Malaysia only provides 60 days for private and informal workers. Likewise, the medical benefit Malaysia provides is only paid sick leave with certain conditions under section 60F of the Employment Act 1955. However, the Employment Act 1955 has no clear provision on breastfeeding breaks as a right for female employees. It may be suggested that the “silence” of employment law on protecting breastfeeding employees may indirectly decrease breastfeeding rates in Malaysia and may slowly impede the effort of upholding women’s right to a healthy life under CEDAW and the right to nutritional food for children under the CRC.

Although Malaysia has legal provisions on maternity leave, this study reveals that in Malaysia, female employees require legal support on breastfeeding rights because there is no regulation, policy, or law to protect or support them in breastfeeding in the workplace. Table 2 (last column) presents that the ILO adopts a standard that female workers should (i) have the right to one or more daily breaks for breastfeeding or lactation, (ii) have the right to daily reduction of daily working hours for breastfeeding, and (iii) have breaks or reduction in hours counted as working time and be paid accordingly. However, Malaysia does not have legal provisions pertaining to these breastfeeding rights.

Conclusion

This study also finds that social support from employers contributes to the initiation or duration of breastfeeding by employees at work. The working environment is not supportive of breastfeeding, and difficulty pumping breast milk is often given as a reason for working women to wean early (Ortiz et al., 2004). In general, support at work can increase the effectiveness of combining employment and breastfeeding. Schedule

adjustments and lactation rooms can encourage breastfeeding. A study from the United States showed that among working mothers enrolled in an employer-sponsored programme, lactation, and breastfeeding were practiced by 97.5% of women (Williams, 2009; Ortiz et al., 2004, p. 111; Cadwell & Maffe, 2002). Hence, workplace interventions may have a positive impact on both the initiation and duration of breastfeeding. Research shows that an organisation will also benefit if its employees are still breastfeeding after they return to work, as the following examples show. The researchers concluded that organisations that support women in breastfeeding in the workplace would receive the following benefits:

- Improved employee relationships, loyalty, commitment and morale;
- Increased productivity;
- Higher return to work rates and more rapid return to work;
- Higher retention rates, ensuring skills, knowledge, abilities and experience are retained and costs of recruitment and retraining are reduced;
- Reduced absenteeism (due to improved maternal and child health);
- Improved reputation/image for the employer, which can improve customer loyalty, public goodwill, and profitability/value.

The findings of this study are as follows: First, employment law in Malaysia does not enforce breastfeeding breaks as a legal right for breastfeeding female employees. Second, shorter maternity leave is likely to be an obstacle to female employees continuing breastfeeding after return to work. The maternity protection stipulated under the Employment Act 1955 inadequately supports breastfeeding employees at work. However, employment law is the most appropriate medium to promote, protect, and support breastfeeding in the workplace because it regulates the relationship and obligations between employers and employees. The comprehensive model embodied in the ILO maternity protection has shown that legal protection of breastfeeding employees is fundamental and can be implemented in workplaces. Finally, legislating employment policy to protect breastfeeding employees is necessary so that it will correspond with other key elements of maternity protection. From economic and social perspectives, employers who sup-

port breastfeeding have much to gain, and this can be the motivating factor in legalising breastfeeding breaks in Malaysia.

The condition and goal of the paper is to clearly highlight the right of female employees to breastfeed their babies. To achieve this purpose, Malaysia through regulations must not only give break to female employees but must also build crèches at the workplace so that female employees can easily breastfeed their babies. Break time and crèche facilities must be provided or this goal will not be achieved.

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Appendix

Table 1
Maternity Protection between Selected Countries

Country	Length of maternity leave	Wages paid during coverage/eligible period (%)	Provider of maternity coverage
Malaysia	60 days	100	Employer
Indonesia	60 days	100	Employer
Thailand	3 months	100	Employer and Social Insurance Policy
Laos	90 days	100	Social Security of Employer
Cambodia	90 days	50	Employer
Vietnam	4-6 months	100	Social Insurance Fund
Myanmar	12 weeks	67	Social Security
Singapore	12 weeks	100	Employer and the Government
China	90 days	100	Social Insurance
India	12 weeks	100	Social Insurance or Employer
Egypt	90 days	100	Social Security (75%) Employer (25%)
Zimbabwe	90 days	100	Employer
Brazil	120 days	100	Social Insurance
Britain	52 weeks	90	Employer (92% refunded by public funds)
Spain	16 weeks	100	Social Insurance

Source: United Nations Statistics Division: June 2010

Table 2
Comparison of ILO Standard (Convention 183) and Employment Law in Malaysia on Maternity Protection

Scope	ILO standard	Malaysia	Legislation/statute
Who is covered	All married and unmarried employed women, including those in atypical forms of work	All workers employed longer than or 90 days in aggregate, except for domestic workers.	Part IX; Section 44A; First Schedule Paragraph 1 Employment Act 1955
Amount of leave	Not less than 14 weeks. Provision for six weeks compulsory postnatal leave.	Not less than 60 days, equal to eight weeks	Section 37 (1) (a), Section 37 (1) (d) (II) Employment Act 1955
Cash benefits	Two-thirds of a woman's previous	A female employee shall be entitled to	Section 37 (2) (a) Employment Act

Scope	ILO standard	Malaysia	Legislation/statute
	earnings OR equivalent payment. Benefits to be provided from social insurance or public funds or to be determined by national law and practice.	receive maternity allowance. Full (for those employed longer than 90 days).	1955
Medical benefits	Prenatal, childbirth and postnatal care and hospitalisation care when necessary.	Prohibition of night work for female employees between 10.00 pm and 5.00 pm without dispensation from the Director General. No specific provision to protect pregnant employees or new mothers. Available provisions for pregnant employees.	Hospitalisation care: Section 60F: (1) An employee shall, after examination <i>at the expense of the employer</i> -- (a) By a registered medical practitioner duly appointed by the employer; or (b) If no such medical practitioner is appointed or, if having regard to the nature or circumstances of the illness, the services of the medical practitioner so appointed are not obtainable within a reasonable time or distance, by any other registered medical practitioner or by a medical officer, be entitled to paid sick leave, --
Health protection	Pregnant and nursing women shall not be obliged to perform work that is assessed as detrimental to the mother and child	Restriction on dismissal of female employee while on maternity leave	Section 34 Employment Act 1955-prohibition of night work. Occupational Safety and Health Act (Use and Standards of Exposure of Chemicals Hazardous to Health-pregnant and breastfeeding employees not to be exposed to hazardous workplace. Regulations 2000, Factories and Machinery (Lead) Regulations Regulation 1984.

Scope	ILO standard	Malaysia	Legislation/statute
Employment protection and discrimination	Unlawful for an employer to dismiss a woman during pregnancy, while on maternity leave or nursing; the burden of proof rests with the employer. Guaranteed right to return to the same position or an equivalent position with equal pay. Protection against discrimination in employment (e.g., hiring policies) on grounds of maternity; prohibition of pregnancy testing in recruitment.	No Provision	Section 42 Employment Act 1955
Breaks for breastfeeding/child care	Right to one or more daily breaks for breastfeeding/lactation. Right to daily reduction of daily working hours for breastfeeding. Breaks or reduction in hours counted as working time and therefore paid.		No Provision

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