

# Not an offence to refuse 90 days' maternity leave, MEF tells ministry

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MEF executive director Datuk Shamsuddin Bardan said that while the Federal Constitution is indeed the supreme set of laws, it does not enforce any legal provision allowing for a 90-day maternity leave, pointing out that Putrajaya therefore cannot penalise employers.

KUALA LUMPUR, Dec 17 — The Malaysian Employers Federation (MEF) told the Human Resources Ministry that private corporations cannot be punished if they do not provide 90 days' maternity leave as there is currently no legislation requiring it.

MEF executive director Datuk Shamsuddin Bardan said that while the Federal Constitution is indeed the supreme set of laws, it does not enforce any legal provision allowing for a 90-day maternity leave, pointing out that Putrajaya therefore cannot penalise employers.

“Basically of course what the deputy minister has said has no legal basis. There is no legal basis for him to make that kind of statement because the Constitution, yes it’s an overarching provision, but it doesn’t say specifically on maternity leave and things like that.

“I don’t see how companies’ refusal to give 90 days, when the law says 60 days, can become an offence. So I would say what the deputy minister said is a figment of his own imagination and it’s too far-fetched,” he told *Malay Mail* when contacted.

In his ministerial winding up speech during the debate on the 2018 Budget in Parliament, Human Resources deputy minister Datuk Seri Ismail Abd Mutalib reportedly said that private sector employers can be investigated and charged should they fire female staffs who take 90 days’ maternity leave.

Bernama reported him saying that the move was in line with provisions under the Federal Constitution that protected equal rights, including in employment.

He however admitted that there is currently no clause which criminalises any employers who refuse to approve the said number of leave days.

Ismail also reportedly said that the 90-day maternity leave framework would be executed in two phases: first by getting feedback from stakeholders, and second by amending Section 37 of the Employment Act 1995, Section 83 of the Sabah Labour Ordinance Chapter 67, and Section 84 of the Sarawak Labour Ordinance Chapter 76.

Prime Minister Datuk Seri Najib Razak had announced, during the tabling of Budget 2018 last October, that maternity leave for the private sector would be raised from 60 to 90 days, as in the government sector.

Article 8(2) of the Federal Constitution prohibits discrimination on the grounds of religion, race, descent, place of birth, or gender in government appointments or employment, “or in the administration of law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment”.

However, former Chief Justice Tun Abdul Hamid Mohamad has argued that the constitutional provisions on equality and non-discrimination only apply to the government, and not to individuals or private corporations.

In the case of ex-Malaysia Airlines stewardess Beatrice Fernandez, the appellant had sought a court declaration that the collective agreement between the MAS employees union and the national carrier — which required her to resign upon becoming pregnant, failing which the company had the right to sack her — contravened Article 8 of the Federal Constitution that guaranteed equality and prohibited discrimination.

However, the Court of Appeal ruled that an individual may have remedies under private law if their “fundamental right” was violated by another private individual, but constitutional remedy would not be available as the concept of a “fundamental right” involved State action. The Federal Court also later upheld the appellate court’s decision.

Shamsuddin also denounced a suggestion by the Women, Family and Community Development Ministry, to increase the current seven-day paternity leave to 30 days, adding that such a move would affect employers financially.

Bernama reported Women, Family and Community Development deputy minister Datuk Azizah Mohd Dun as saying last month that her ministry would be making the proposal to the government to be considered.

“In the private sector, we do not give seven days. As a matter of legal right, it is the companies’ discretion and practice that they normally give between three and seven days, but more of three days than seven.

“This is normally by contractual provision and not by legal provision,” Shamsuddin said. The MEF head lamented that Malaysian workers currently are already enjoying many holidays, thus reducing their number of working days.