January 6, 1975

JOSEPH A. HOFFMAN, *Commissioner*
Department of Labor and Industry
Room 1303 - Labor and Industry Bldg.
John Fitch Plaza
Trenton, New Jersey 08625

FORMAL OPINION NO. 1 - 1975

Dear Commissioner Hoffman:

The Department of Labor and Industry has asked for an opinion as to the constitutionality of the New Jersey laws which provide for the payment of temporary disability benefits to disabled workers, insofar as the provisions allow unemployed women to collect benefits by reason of pregnancy only for an eight-week period surrounding childbirth. For the following reasons, you are advised that the provisions in question appear to be consistent with all constitutional requirements.

The unemployment insurance programs in each of the 50 states, which were spawned by the Social Security Act of 1935, are intended to provide unemployed workers with a temporary substitute for wages during a period of unemployment that is not the fault of the worker. *California Dept. of Human Resources v. Java*, 402 U.S. 121 (1971). The New Jersey Unemployment Compensation Law sets forth a number of conditions of eligibility for unemployment benefits. N.J.S.A. 43:21-1 *et seq.* Among other requirements, a claimant must demonstrate that he is "able to work," "available for work," and "actively seeking work." N.J.S.A. 43:21-4(c).

Prior to 1948, a worker who suffered an illness or accident that arose out of his employment and rendered him unable to work could apply for workmen's compensation benefits, but a worker who sustained a disability that did not occur in the course of his employment and who was not among the relatively few who were covered by private disability insurance plans was wholly unprotected against the loss of wages. The worker was ineligible not only for workmen's compensation but for unemployment insurance benefits as well, since by definition he was not "able to work," "available for work," or "actively seeking work" as required by the Unemployment Compensation Law. N.J.S.A. 43:21-4(c). To remedy this situation, the Legislature in 1948 enacted the Temporary Disability Benefits Law (N.J.S.A. 43:21-25 *et seq.*) to provide partial income replacement for workers who sustain a non-occupational illness or injury while employed, or within two weeks after becoming unemployed, and who as a result are rendered temporarily but totally unable to perform the duties of their job. At the same time, the Legislature amended the Unemployment Compensation Law to provide identical protection to workers who become disabled more than two weeks after they lose their jobs. L. 1948, c. 110.

Before 1961, both the Unemployment Compensation Law and the Temporary Disability Benefits Law prohibited the payment of disability benefits to women "for any period of disability due to pregnancy or resulting childbirth. . . ." In addition, another provision of the Unemployment Compensation Law stated that a worker who quit his or her job "voluntarily without good cause" was disqualified for *unemployment* benefits until such time as the worker got another job, earned a specified amount of wages, and again became unemployed. N.J.S.A. 43:21-5 (a). The net result of these provisions was to render an unemployed pregnant woman, with one

exception, ineligible for both unemployment benefits and temporary disability benefits. The exception was that a woman who was laid off from her job through no fault of her own and, despite her pregnancy, was still able to work, available for work, and actively seeking work, was deemed qualified for unemployment benefits. *Medwick v. Board of Review*, 69 N.J. Super. 338, 343 (App. Div. 1961).

In 1961, certain amendments relating to pregnancy were added to both the Unemployment Compensation Law and the Temporary Disability Benefits Law, and it is with the meaning and validity of these amendments that this opinion is concerned. L. 1961, c. 43. The Unemployment Compensation Law was amended to provide that an unemployed pregnant woman will not be considered "able to work" or "available for work" for the four-week period preceding the expected birth of the child or for four weeks after birth, thereby rendering such women ineligible for *unemployment* benefits for the eight-week period in question. N.J.S.A. 43:21-4(c)(1). At the same time, the provisions of both the Unemployment Compensation Law and the Temporary Disability Benefits Law which disallowed *disability* benefits "for any period of disability due to pregnancy or resulting childbirth. . ." were amended to provide such benefits for the same eight-week period. N.J.S.A. 43:21-4 (f) (1) (B); 43:21-39(e).[1] Although the reason for these amendments is not explicitly articulated, one court has commented that the Legislature "apparently deemed it desirable, as a matter of public policy, that a pregnant woman should have leisure to take care of herself and her child for the eight-week period." *Iorio v. Board of Review*, 88 N.J. Super. 141, 152 (App. Div. 1965). Finally, N.J.S.A. 43:21-5(a) of the Unemployment Compensation Law, which under the old law had disqualified for *unemployment* benefits workers who "left work voluntarily without good cause," was amended by appending the words "attributable to such work" to the latter clause. At the same time, the Legislature provided that "no disqualification shall be applicable to a woman who left or was separated from her work solely by reason of her pregnancy."

The upshot of the foregoing amendments, as they have been interpreted by the New Jersey courts, is this: Whereas all other claimants must show that they are *actually* disabled and under medical care during *each and every week* for which they seek disability benefits, an unemployed expectant woman who otherwise meets the eligibility requirements of the statutes in question is *automatically* entitled to disability benefits for the four weeks before and after childbirth solely by reason of her pregnancy. *Iorio v. Board of Review, supra.* Which of the two laws she is eligible under depends on whether she becomes "disabled" during employment or within two weeks after she leaves her job, in which case the Temporary Disability Benefits Law applies, or more than two weeks after she leaves her job, in which case the disability provisions of the Unemployment Compensation Law apply. In addition, whereas all other workers who leave their jobs for reasons which are not "attributable to the work" are disqualified for *unemployment* benefits, a woman who is compelled to leave her job because of pregnancy may collect such benefits if she is still able to work, available for work, and actively seeking work, except for the eight-week period surrounding childbirth.[2] Finally, in contrast to the above provisions, which accord expectant mothers a benefit given to no other category of claimants, N.J.S.A. 43:21-4 (f)(1)(B) and 43:21-39(e) provide that a woman is not entitled to disability benefits for any disability resulting from pregnancy outside the eight-week period surrounding childbirth.

The New Jersey disability benefits system is completely self-sustaining; that is, it is funded entirely by "contributions," or taxes, paid by workers and their employers

based on the amount of wages earned, with the State treasury contributing nothing. As an alternative to paying contributions to the State disability benefits fund, the Temporary Disability Benefits Law permits the employer to establish a "private plan" for the payment of benefits to its employees. Such plans, however, which are usually implemented through insurance policies purchased by employers from private carriers, must be approved by the State, and their terms must be at least as beneficial to workers as the provisions of the statute itself. Like unemployment compensation benefits, temporary disability benefits are payable to eligible claimants for a maximum of 26 weeks,[3] with the amount of each weekly payment varying according to the worker's average weekly wage during the year preceding the filing of the claim.

This, then, is the essence of the present New Jersey law with regard to the payment of temporary disability benefits to pregnant women. The question to which we now turn is whether the foregoing provisions are consistent with the requirements of the United States Constitution.

An examination of this question must begin with the recent decision of the Supreme Court of the United States in *Geduldig v. Aiello,* 417 U.S. 484 (1974), where the Court upheld California's disability insurance law as applied to pregnant women. The California statute disallows benefits for any disability associated with normal pregnancy and childbirth, the ineligibility period extending through the 28th day after termination of the pregnancy. At the same time, the law allows benefits for disabilities resulting from medical complications of pregnancy, such as caesarian section delivery, ectopic pregnancy, toxemia, vaginitis, heart disease, hypertension, phlebitis, and varicose veins. Like the New Jersey disability insurance system, California's is totally self-supporting, but unlike New Jersey's, it is financed solely by contributions from workers, who pay 1% of their salary up to a maximum of $85 per year.

The plaintiff in *Geduldig* had a normal pregnancy and delivery and sought benefits for the period she was incapacitated by childbirth. She contended that insofar as the California law singled out a particular kind of female disability—one resulting from normal pregnancy and delivery—and excluded it from eligibility for benefits, while it at the same time covered all disabilities sustained by men, the statute unlawfully discriminated on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In rejecting this argument and upholding the statute, the Supreme Court observed that the law "does not discriminate with respect to the *persons or groups* which are eligible for disability insurance protection under the program," but merely excludes from its coverage a particular *risk.* 417 U.S. at 494. The Court noted that the inclusion of disabilities resulting from normal pregnancy would substantially increase the cost of the program, with total benefit payments increasing by about one-third, or $100 million per year. The plaintiff argued that this increased cost could be accommodated by making appropriate adjustments in the level of benefits payable under the program and in the contribution rates paid by workers. The Court responded, however, that the same thing could be said of other disabilities excluded from the law's coverage, such as those that do not extend beyond seven days and do not require hospitalization, or, on the other hand, those that extend beyond 26 weeks.[4] Noting that "a totally comprehensive program. . .would inevitably require state subsidy" as well as a higher rate of contributions and a lower scale of benefits, the Court held:

> "The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance." *Id.* at 496.

These legitimate state interests, said the Court, "provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has," adding:

> "There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[5] There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Id.* at 496-497.

The Court found the case before it a "far cry" from cases involving "discrimination based upon gender as such," saying:

> "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification. . . .Normal pregnancy is an objectively identifiable physical condition with unique characteristics. *Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.*
>
> "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." *Ibid.*, n. 20 (emphasis added).

See also *Kahn v. Shevin*, 416 U.S. 351 (1974) (upholding Florida statute granting widows, but not widowers, $500 exemption from local property tax); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) ("The Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."); *Jefferson*

v. Hackney, 406 U.S. 535 (1972) (upholding Texas welfare statute that allowed recipients under the Aid to Families with Dependent Children program only 75% of their estimated financial needs, while the blind, disabled, and aged were allowed 95% or 100%).

The New Jersey provisions, to be sure, differ from the California law upheld in *Geduldig v. Aiello, supra*, by providing partial coverage of normal pregnancy for the eight-week period surrounding childbirth, but we do not perceive this distinction as legally significant. There is nothing in the Supreme Court's opinion in *Geduldig* to suggest that a state must choose between covering normal pregnancy on an equal basis with other covered risks or excluding it altogether. To the contrary, the Court held that "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this *on any reasonable basis*, just as with respect to any other physical condition." 417 U.S. at 497, n. 20 (emphasis added).

You have also expressed concern over the "conclusive presumption" embodied in the provisions in question, under which otherwise eligible women are automatically entitled to disability benefits for the eight weeks surrounding childbirth irrespective of any actual inability to work, and you raise the question whether this "presumption" may discriminate against male claimants as well as against non-pregnant women, who in order to qualify for benefits must show that they are actually unable to work. We are aware of no Supreme Court decision, however, that has invalidated a presumption whose purpose and effect is to *benefit* a particular group. As noted earlier, the legislative purpose behind the New Jersey provisions was the feeling that "a pregnant woman should have leisure to take care of herself and her child for the eight-week period." *Iorio v. Board of Review, supra*. Moreover, the "presumption" of disability embodied in these provisions is not without foundation in medical reality. As the American College of Obstetricians and Gynecologists noted in a Policy Statement on Pregnancy-related Disabilities issued on March 2, 1974, "In an uncomplicated pregnancy, disability occurs near the termination of pregnancy, during labor, delivery and puerperium. *The process of labor and puerperium is disabling in itself. The usual duration of such disability is approximately six to eight weeks.*" (Emphasis added.) *Cf., Cleveland Board of Education v. La Fleur*, 414 U.S. 632 (1974) (striking down school board regulations requiring pregnant teachers to take maternity leave without pay beginning four months and five months, respectively, before the expected date of birth, on the ground, among other things, that the regulations "contain an irrebutable presumption of physical incompetency"). Therefore, the New Jersey disability insurance provisions appear to be consistent with all constitutional requirements insofar as they exclude *normal* pregnancy from coverage except for the eight weeks surrounding birth.

We are advised, however, that the Department has departed to a limited extent from the scheme upheld in the *Geduldig* case by construing the provisions in question, which disallow benefits "for any period of disability due to pregnancy or resulting childbirth" except for the eight weeks surrounding delivery, to encompass not only normal pregnancy but also disabilities associated with medical complications of pregnancy, ranging from vaginitis to high blood pressure and heart disease. You are advised that such a construction of the language of N.J.S.A. 43:21-4(f)(1)(B) and 43:21-39(e) is erroneous. While it might be possible, from a strictly semantic viewpoint, to reach such a result from a literal rendering of the words of the statutes, such a restrictive reading is inappropriate in the present context for two reasons.

First, the laws in question explicitly provide that they are to be liberally construed in favor of claimants. See N.J.S.A. 43:21-2 and 43:21-26. Consequently, any

doubts as to the meaning of the provisions at issue must be resolved in favor of affording the broadest possible coverage. It is noteworthy in this regard that there is nothing in the legislative history either of the original statutes enacted in 1948 or of the 1961 amendments to suggest that the Legislature intended to include disabilities associated with "abnormal" pregnancies in the same category as normal pregnancy and birth. To the contrary, the absence of any reference to complications of pregnancy in the numerous statements submitted to the Governor and Legislature in connection with the original legislation strongly suggests that full coverage of these risks was contemplated.

Second, there is serious question whether the provisions in question could withstand constitutional scrutiny if they were construed to provide less than full coverage of disabilities associated with complications of pregnancy. *Geduldig v. Aiello, supra,* appears to stand for the proposition that while a particular risk may, for demonstrable fiscal or other legitimate reasons, be covered to a lesser extent than other risks under state disability insurance programs or even excluded altogether, once a state chooses to cover some physical condition, it must do so on an equal basis as to all persons who are potentially subject to that condition. Therefore, since non-pregnant women or men who become disabled by reason, for example, of a heart attack or varicose veins are potentially eligible for disability benefits for a maximum of 26 weeks under the law, the establishment of a less liberal scale of benefits for pregnant women who sustain the same disability merely because their condition may to some degree be related to the pregnancy might well constitute unlawful discrimination against such women in violation of the Equal Protection Clause of the Fourteenth Amendment. It is a well-established principle of statutory interpretation that "[e]ven though a statute may be open to a construction which would render it unconstitutional or permit its unconstitutional application, it is the duty of [the judiciary] to so construe the statute as to render it constitutional if it is reasonably susceptible to such interpretation." *State v. Profaci,* 56 N.J. 346, 350 (1970); *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 134 (1974). We therefore conclude that the Legislature intended to afford full coverage of medical complications of pregnancy.[6]

Finally, we see no reason to question the validity of the amendment to N.J.S.A. 43:21-5(a) of the Unemployment Compensation Law which exempts women who leave their jobs "solely by reason of [their] pregnancy" from the general disqualification for *unemployment* benefits of claimants who leave work for personal reasons unrelated to their work duties. As noted earlier, the immediate purpose of the exception apparently was to ensure that pregnant women who leave their jobs and subsequently sustain disabilities *not* related to their pregnancy will remain eligible for *disability* benefits for the maximum 26-week period provided by law, even though they cannot recover for the pregnancy itself outside of the eight weeks surrounding birth. A second consequence of the exception is that women who are forced to leave their jobs because of pregnancy will be eligible for *unemployment benefits* if they remain attached to the labor market and are still able to work in some capacity.

In creating the exception in question, the Legislature may well have been motivated by the feeling that an expectant woman who is unable because of her pregnancy to perform the duties of a particular job should be free to leave and search for another job more congenial to her condition, even though her reason for leaving—pregnancy—does not constitute "good cause attributable to the work" within the meaning of N.J.S.A. 43:21-5(a). The Legislature may also have regarded the exception as partial "compensation" for the fact that normal pregnancy is excluded from eligibility for disability benefits except for the eight-week period surrounding de-

livery. Nor is it significant that these possible purposes behind the amendment have not been explicitly articulated by the Legislature, because "[a] statutory discrimination will not be set aside *if any state of facts reasonably may be conceived to justify it.*" *Dandridge v. Williams, supra,* 397 U.S. at 485 (emphasis added).

For the foregoing reasons, you are advised that the provisions of the Unemployment Compensation Law and the Temporary Disability Benefits Law which disallow disability benefits for normal pregnancy except for the four weeks before the expected date of birth and the four weeks following delivery appear to be consistent with applicable constitutional requirements as explicated in recent decisions of the Supreme Court of the United States. You are further advised that claims based on medical complications of pregnancy are to be treated the same as any other claim for disability benefits, with the exception of claims arising from normal pregnancy and delivery. Finally, you are advised that the portion of N.J.S.A. 43:21-5(a) under which women who leave their jobs "solely by reason of [their] pregnancy" are not thereby disqualified for unemployment benefits appears to present no legal problem.

Very truly yours,

WILLIAM F. HYLAND
Attorney General of New Jersey

By: MICHAEL S. BOKAR
Deputy Attorney General

1. The meaning of this provision, as it has been applied in practice by the Department of Labor and Industry, can best be illustrated by a hypothetical example. Suppose a woman is told by her doctor that she is pregnant and that the expected date of birth is June 15. If the mother has a full-term pregnancy and the child is born on or about the estimated date, she is eligible for disability benefits for four weeks before and after the actual date of birth. Similarly, if the child is born prematurely on a date reasonably close to the expected birth date—one to four weeks early, for example—the mother will likewise be eligible for the eight-week period. If the mother has a premature delivery more than four weeks before the estimated birth date, she would have to show that her doctor's estimate was medically unreasonable at the time it was originally given in order to qualify for benefits for the four weeks before birth, although she would still be eligible for the four weeks after birth, since these would be weeks "following the termination of the pregnancy."

2. We are informed that the primary reason for this amendment is to enable pregnant women to qualify for *disability* benefits in cases where they suffer a disability *not* caused by pregnancy during the time they are unemployed. Under the Unemployment Compensation Law, a worker who becomes disabled while unemployed is not entitled to disability benefits unless he or she "would be eligible to receive benefits. . . except for his inability to work." N.J.S.A. 43:21-4(f)(1). Consequently, if the Legislature had not amended N.J.S.A. 43:21-5(a) to exclude pregnant women from the general prohibition against leaving work for personal reasons, a woman who was forced to leave her job because of pregnancy and later happened to sustain a disability unrelated to the pregnancy would have been ineligible for disability benefits except during the eight weeks surrounding delivery.

3. In periods of high nationwide unemployment, a claimant may also qualify for up to 26 additional weeks of unemployment compensation benefits.

4. New Jersey likewise does not pay for disabilities of seven days or less under the Temporary Disability Benefits Law, except where the disability lasts for three weeks or more. N.J.S.A. 43:21-39. Also, as noted earlier, benefits, as in California, are payable for a maximum of 26 weeks.

5. The Court noted in a footnote that evidence presented to the trial court indicated that women

as a whole were filing more disability claims and collecting more benefits than men, and were receiving more in benefits each year than they paid in contributions to the California disability insurance fund. *Id.*, n. 21. We are advised that the experience in New Jersey is similar. It might also be noted in this regard that for the period from January through August of this year, one of every eight disability claims paid by the New Jersey Disability Benefits Fund was based on pregnancy, $1 of every $10 paid was for pregnancy claims, and one of every nine benefit weeks was attributable to a pregnancy claim.

6. By "medical complications of pregnancy" we mean, of course, physical infirmities of the kind set forth in the new California law referred to earlier, as opposed to various non-disabling minor discomforts which frequently accompany pregnancy. We are advised in this regard that the California Department of Employment Development has adopted a procedure for implementing that state's law, which went into effect on January 1, 1974, under which claims for complications arising from pregnancy are allowed only where there is a convincing showing of actual inability to work. We are further advised that the California agency had paid out only $5 million in disability benefits for complications arising from pregnancy through October 1974.

Furthermore, under well-established principles of finality with respect to the administration of social welfare legislation such as that here involved, the Department of Labor and Industry is not required to reopen pregnancy claims which, as of the date of this opinion, have already been finally determined by the agency. See, *e.g.*, *City of East Orange v. McCorkle*, L-26927-69 (Law Div. 1969) (unreported) (refusing retroactive application of earlier decision requiring Division of Public Welfare to pay State share of municipal welfare assistance, because of "the resultant strain that will be imposed on the general assistance budget of the State of New Jersey in the light of the vast sums involved").

January 31, 1975

VERNON N. POTTER
Director
Division on Civil Rights, Room 400
1100 Raymond Boulevard
Newark, New Jersey 07102

FORMAL OPINION NO. 2—1975

Dear Director Potter:

You have asked whether the Division on Civil Rights has jurisdiction over a complaint by a young, unmarried male who contends that an insurer discriminated against him on sex and marital grounds in its automobile insurance rates and that the New Jersey Department of Insurance aided and abetted such discrimination by approving said rates. You are hereby advised that the Division on Civil Rights lacks subject matter jurisdiction since the Law Against Discrimination does not give it power to review rates approved by the Commissioner of Insurance.*

The Law Against Discrimination confers broad jurisdiction on the Division on Civil Rights to eradicate discrimination in matters involving real property, employment, and the use of public accommodations. See N.J.S.A. 10:5-12. While the statute does not discuss applicability to State agencies, it has been construed to confer