



Pregnancy and Maternity Discrimination

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This guide is based on the Acas publication “Pregnancy and Maternity discrimination: key points for the workplace” and has been adapted for the Isle of Man. MIRS acknowledges, and thanks Acas for, their consent to use their source material.

About this guide

This guide primarily offers employers, managers, HR professionals, employees, employee/trade union representatives and job applicants a grounding in how to reduce the chance of pregnancy and maternity discrimination happening in the workplace, how it might still occur and how it should be dealt with if it does happen. While employers and employees can be liable for their own acts of discrimination, employers can also be liable for their employees' acts.

The Equality Act 2017 protects employees from discrimination and victimisation because of pregnancy and maternity, one of nine features known in law as protected characteristics and covered by the Act.

The main issues

Mothers-to-be and new mothers can face difficulties including:

- being dismissed or forced out of their jobs because of their pregnancy and/or maternity
- some managers believing mothers-to-be will be able to cope with only a lower level of work, or less work, because of their pregnancy
- mothers having to settle for low-paid, part-time work on returning to employment – this in particular is a problem for young mothers – as some employers believe they will not be as committed because they have a family.

Sources include Equality and Human Rights Commission, Trades Union Congress, PriceWaterhouseCoopers and Fawcett Society

This guide encourages employers to make sure their workplaces are 'inclusive'. In other words, so employees feel they belong and are not disadvantaged or undervalued because they are pregnant or on maternity leave.

What is pregnancy and maternity discrimination?

The Equality Act protects employees from certain types of discrimination relating to the protected characteristic of pregnancy and maternity. The characteristic covers a woman from when she becomes pregnant until her maternity leave ends or she returns to work (or opts to leave employment).

During that time – known as the protected period – she is protected against discrimination because:

- of her pregnancy
- of any illness related to her pregnancy, or absence because of that illness
- she is seeking to take, taking or taken maternity pay and/or leave
- the employer does not want her to return to work because she is breastfeeding (See the Breastfeeding section further into this guide).

It is important to understand that once the protected period ends, it can still be unlawful to treat her unfairly because of her pregnancy, maternity or breastfeeding. This might be because the unfair treatment stems from a decision taken during the protected period. Or, she might claim sex discrimination. The guide covers this in more detail in the section, **Impact of other protected characteristics**.

In addition to the Equality Act, other pregnancy and maternity rights are contained in:

- Employment Act 2006 - on health and safety, maternity leave, time off for antenatal care and, from day one of starting a job, against unfair dismissal because of pregnancy and/or maternity

An employee who is undergoing IVF or fertility treatment is not protected under the pregnancy and maternity protected characteristic until she becomes pregnant. However, unfair treatment because she is undergoing IVF or fertility treatment might amount to sex discrimination. Also, see the Antenatal appointments section further into this guide.

The Equality Act does not require any minimum length of continuous employment, or any employment at all in the case of a job applicant, for a discrimination claim to be made. It makes discrimination unlawful at all stages - from when a role is advertised and interviewed for, through to the last day of employment and beyond, including any job references.

How pregnancy and maternity discrimination can happen

The Equality Act protects pregnancy and maternity in a considerably different and stronger way than for most other areas of life covered in the Equality Act – what are known as the protected characteristics. For most of the protected characteristics the protection is against 'less favourable' treatment. For pregnancy and maternity, the protection is against **unfavourable** treatment.

This means an employee or job applicant must not be disadvantaged because of her pregnancy or maternity. And there is no need for her to compare her treatment to how someone else is treated (which is needed for most of the other protected characteristics including sex). In effect, under this special protection she must not, for example:

- be subjected to unfair treatment because of her pregnancy or maternity
- suffer disadvantage because of her pregnancy or maternity through her employer's policies, procedures, rules or practices, or
- suffer unwanted behaviour because of her pregnancy or maternity.

This special protection also means that treatment which impacts on an employee negatively because of her pregnancy or maternity may be discriminatory even though other staff are treated the same way.

For example... unfavourable treatment

Lucy phones into work sick, saying she is not feeling well enough to come into the office that day. She explains to her manager, Caroline, that she is feeling very nauseous and very tired because of her pregnancy. However, Caroline thinks Lucy is over-stating her morning sickness and instructs her to come into work. This is likely to be unfavourable treatment because of pregnancy.

Victimisation

Victimisation is when an employee suffers what the law terms a 'detriment' - something that causes disadvantage, damage, harm or loss because of:

- making an allegation of discrimination, and/or
- supporting a complaint of discrimination, and/or
- giving evidence relating to a complaint about discrimination, and/or

- raising a grievance concerning equality or discrimination, and/or
- doing anything else for the purposes of (or in connection with) the Equality Act, such as bringing an employment tribunal claim of discrimination.

Victimisation can also occur because an employee is suspected of doing one or more of these things, or because it is believed they may do so in the future. 'Victimisation' is a term commonly misused and misunderstood, and only applies when it meets the explanation in this section. A 'detriment', for example, might include being labelled a 'troublemaker', being left out and ignored, being denied training or promotion, or being given a poor reference.

For example... victimisation

Since Janneke told her manager, Simon, she is pregnant, she feels sidelined because her prestigious project was then given to a colleague to complete, even though she was on track to finish it herself. She complained to Simon about losing the project, but felt he wasn't listening.

By chance, Simon's boss, Rebecca, chats to Janneke and finds out about the switch. Later, an angry Rebecca warns Simon that his decision because of Janneke's pregnancy was discrimination and not to make such a mistake again. Now, Simon wants what he sees as revenge. From that point, he makes sure Janneke has an increased workload, gets far less important work to do and avoids speaking to her. Simon's 'revenge' is likely to be victimisation. His decision to give Janneke's project to someone else is the detriment.

Key areas of employment where pregnancy and maternity discrimination can happen

Common areas of employment where pregnancy and maternity discrimination can occur include:

- recruitment
- pay, and terms and conditions of employment
- job vacancies and promotion opportunities
- training opportunities
- managing absence during pregnancy

- work performance
- dismissal
- selection for redundancy
- maternity leave
- return to work.

Recruitment

Should a job applicant tell the employer she is pregnant?

A job applicant does not have to tell the employer during the recruitment process that she is pregnant. Where she volunteers information about her pregnancy or maternity, or is obviously pregnant, or appears to be pregnant, interviewers and recruitment decision makers should not be influenced by that information or impression.

If she gets the job, she must tell the employer of her pregnancy if there are any health and safety reasons, and to take time off for antenatal appointments in work time.

Generally, the rule is that an employee must tell her employer at the latest by the 15th week before the expected week of childbirth (when she is about six months' pregnant) to give notice of her intention to take maternity leave and any pay that might be due under her contract. However, in circumstances where an applicant joins a new employer after the 15th week before childbirth, the law says she must tell the employer as soon as is 'reasonably practicable'.

Benefits in an employee telling her employer early that she is pregnant include her rights and her employer's responsibilities for her as a pregnant employee, such as in health and safety, coming fully into effect in practice at that point. She should confirm her pregnancy in writing.

To avoid discrimination, an **employer when recruiting should** take these steps when:

- **writing the essential documents:** be careful when writing an advertisement, job description and person specification for a vacancy. Stay clear of any reference to pregnancy and maternity. Further, an employer

- **should not** include anything irrelevant to the job, and should avoid wording and illustrations it is unsure about or thinks might be open to legal challenge
- **pinpointing skills, experience and qualifications for the job:** be clear on exactly what is needed for the post so managers are objective in assessing and selecting candidates. This should reduce the chances of ruling out a candidate because she is pregnant or on maternity leave
- **asking for personal information:** make sure the personal information requested is relevant to the job and/or administration of the recruitment process. Avoid asking her questions of a personal nature unrelated to the job and her application – for example, do not ask her if she is pregnant or if she is planning to have children
- **using a recruitment agency:** tell the agency it must comply with the Equality Act. An employer **must not** suggest to the agency that it would prefer candidates who are not pregnant or on maternity leave, and an agency **must not** follow such an unlawful instruction.
- **offering the job:** select and appoint the best candidate - an employer **must not** rule out the most suitable applicant because she is pregnant or cannot start until after her maternity leave.

Where possible an **employer could** look to organise jobs differently, perhaps by making them part-time, job-shares or considering other types of flexible working so a range of candidates feel able to apply, including women returning to the workplace after maternity leave.

For example... recruitment discrimination

Shanika is pregnant and applies for a role to cover the jobholder's maternity leave. She has all the necessary skills, experience and qualifications for the post, but is turned down because she would not be able to work the full 12-month cover period. After about five months, Shanika too would have to go on maternity leave. The employer's rejection is likely to be unfavourable treatment because of pregnancy.

Pay and terms of employment

Pay: When an employee is on maternity leave, only her pay should be affected. She may qualify for the rate of maternity pay stated in her contract or for a Maternity Payment from the government.

Other terms and conditions: An employee who is pregnant or on maternity leave should not lose out in her other terms and conditions – they must continue as if she was not pregnant or on maternity leave. For example:

- if she has a company car, she would be able to run it while on maternity leave unless it was for business use only
- she is entitled to the same amount of annual leave as if she was at work and it would usually be taken before or after the maternity leave
- she should get the same level of contributions from her employer to her workplace pension during the first 26 weeks of her maternity leave, known as ordinary maternity leave, whether or not she is receiving maternity pay. For the next 26 weeks of maternity leave – known as additional maternity leave – the position is not clear at the time of writing. Advice is being sought and once a definitive answer has been provided this guide will be updated. If you need advice about an individual situation please call MIRS on 01624 672942.

Improvements in terms and conditions: If there are improvements in the employee's terms and conditions while she is on maternity leave, she should get them as if she was still at work. It means she should get:

- a pay increase she would have got if not on maternity leave taken into account in working out any contractual maternity pay
- a bonus at the time she would have got it if not on maternity leave – however, a performance bonus could be reduced pro-rata for the time on maternity leave during the bonus period
- on her return to work, any pay increase in her contractual pay she would have got if not on maternity leave. If the increase is at the employer's discretion or performance related, the employer must take care not to disadvantage her because of her pregnancy or maternity leave.

Salary sacrifice scheme: If an employee is in a scheme where she gives up part of her salary for non-cash benefits, an employer is advised to seek legal advice on what should happen to those benefits while she is on maternity leave.

Sick pay during pregnancy: See the section, Managing absence during pregnancy.

Other factors: It should be borne in mind that an employer may be able to justify different terms and conditions among employees if there is an important factor or factors behind them not related to pregnancy or maternity. For instance, these

might include job experience, qualifications and where the job is based geographically.

For example... terms of employment discrimination

Shona is on maternity leave and receiving contractual maternity pay. Her employer, in its annual pay review, gives all staff a pay increase. She only finds out about the rise on her return to work some months later. Her maternity pay should have been recalculated, taking the pay rise into account. Her employer's failure to pay the increase is likely to be unfavourable treatment because of maternity.

Job vacancies and promotion

Regarding job vacancies and promotion opportunities, an employee must not be discriminated against because of her pregnancy or maternity. For example, it would be discriminatory to:

- not tell an employee about suitable job vacancies because she is pregnant or on maternity leave
- turn down an application because the candidate is pregnant or on maternity leave
- discourage an employee from applying because she is pregnant or taking maternity leave
- not promote an employee who is the best person for the job because she is pregnant or on maternity leave.

An employer should ensure job vacancies and promotion opportunities are mentioned to all relevant staff, including employees who are pregnant or on maternity leave, and are accessible for staff who are pregnant or on or returning from maternity leave. For example, the employer should try to interview her for a promotion on a date and time to fit in with her, as, for instance, she may have antenatal appointments or be recovering from giving birth. Failure to do so could be discriminatory.

For example... promotion discrimination

Professionally-qualified Nicola is being coached in a property firm towards promotion to a senior role, hopefully in six months. She becomes pregnant and tells her employer. The time comes round for the promotion review, but the role goes to less-experienced and junior colleague Ben, who at that stage was not being coached for the role.

Nicola is told that, as it turned out, Ben proved to be the better candidate, and that she should try again for a senior role at a future review. However, the managers who conducted the review know the real reason the promotion went to Ben is because Nicola would be on maternity leave at the time the firm needed a new senior in place. Next, word of the real reason leaks out to Nicola, who was already suspicious because of Ben's lack of experience.

The discrimination against Nicola is likely to be unfavourable treatment because of pregnancy and maternity.

Training

Withholding training from an employee because of her pregnancy and maternity leave is likely to be discriminatory. For example, generally, it would be unlawful for a woman to miss out on training because she:

- becomes pregnant
- is about to take maternity leave or is on maternity leave, or
- is absent from work because of illness related to her pregnancy or maternity.

However, both employer and employee need to be reasonable about when training takes place, and they can discuss the best timing for training.

The employer should be sensitive about when an employee, absent from work because of her pregnancy or maternity, starts, undertakes or completes any training. It should be mindful of her needs in these circumstances to avoid any potential discrimination.

In turn, the employee should be mindful of the most effective time to start or undertake training. For example, starting training spanning various times over a year one month before going on maternity leave is unlikely to be practical. And it should also be understood that an employer would be able to justify withholding training from an employee who is pregnant or on maternity leave because there was a genuine and particular health and safety risk.

However, it should offer the training as soon as possible once there is no longer a risk or she returns to work.

Further, employer and employee might agree to use keeping-in-touch days during maternity leave for training. Perhaps the employer might be able to offer support

with childcare in this circumstance. A large organisation may also have childcare facilities.

Also, an employer should ensure training opportunities are mentioned to all relevant staff, including employees who are pregnant or on maternity leave. And, generally, the opportunities should be accessible to staff who are pregnant or on or returning from maternity leave. Failure to do so could be discriminatory.

For example... training discrimination

Before Madhavi went on maternity leave, she asked her manager to tell her about training opportunities so she would be kept up to date. When she returns to work, she finds out that all her colleagues were emailed the latest opportunities, but she was not. This is likely to be unfavourable treatment because of maternity.

Managing absence during pregnancy

An employer must not include absences because of pregnancy or pregnancy-related illness in 'managing absence triggers' – a trigger is the number of days' absence in an employer's policy when managers would consider disciplinary warnings, and ultimately dismissal, unless attendance at work improves.

Neither should absences because of pregnancy or pregnancy-related illness be included in any other kind of absence record. Also, negative comments or warnings about absences because of pregnancy or pregnancy-related illness are likely to be discriminatory.

An employee off sick because of a pregnancy-related illness has the same right to contractual sick pay as if she was off ill for any other reason.

If she is absent because of a pregnancy-related illness in the last four weeks before her expected week of childbirth, her maternity leave and pay can be automatically triggered at that point.

If, in the employee's contract, contractual sick pay is at the employer's discretion, it should pay it to avoid potential discrimination.

For example... managing absence discrimination

Some months back, Heather told her manager, Greg, she was pregnant. He takes her to one side and mentions that she seems to be taking a lot of sick leave lately. He adds that if she takes any more, the matter would have to be looked at under the company's sickness absence policy and she could face being disciplined. She had been off ill for a week with a virus, and then a month later for another week with a severe ear infection. Since, she has been off work six times because of

complications with her pregnancy. Greg knows the reasons, and his warning has made her more anxious and stressed about her pregnancy.

The warning and Greg's decision to add Heather's absences because of her pregnancy to her absences because of illness not related to her pregnancy are both likely to be unfavourable treatment

Work Performance

Managing the work performance of a pregnant employee can often be approached as it would if she was not pregnant, using the employer's usual work appraisal, assessment or review method. However, two very important factors need to be taken into account in any individual appraisal, assessment or review:

- any particular health and safety risks for the pregnant employee (see the Health and safety section further into this guide), and
- the impact of pregnancy on one employee may be very different to that on another.

With this in mind, an employer will need to be understanding, and if necessary make allowances, if an employee's work performance dips at times because of her pregnancy or a pregnancy-related illness. For example, if an employee is struggling because of fatigue caused by her pregnancy, the employer could suggest reducing travel in her role while she is pregnant, and instead working more on a project from

the office and sometimes from home. Such changes agreed between employer and employee would have to be taken into consideration fairly in her appraisal, assessment or review - her performance must not be marked down because of pregnancy and maternity reasons.

Further, the employer needs to bear in mind:

- where the appraisal, assessment or review is due during maternity leave, it should be carried out before the leave or soon after the employee returns to work, as long as this does not put her at a disadvantage because of her pregnancy/maternity leave – for example, because of a pregnancy/maternity-related illness
- where the employer starts a work performance appraisal, assessment or review with the employee, and planned to take action to improve her performance before it knew she was pregnant, those steps must be unconnected with her pregnancy and maternity leave.

And regarding a new employee working a probation period:

- if she is at work and struggling because of her pregnancy, a decision to extend her probation period must not be because of her pregnancy or maternity
- if poor work performance was a significant issue before she became pregnant, it could extend her probation as long as the reason for the extension was not related in any way to her pregnancy or maternity leave.

For example... work performance discrimination

Lihua has felt tired during her pregnancy, but worked throughout apart from annual leave, bank holidays and time off for medical appointments concerning her pregnancy. At her annual appraisal when she is seven months' pregnant, she is shocked to be told by her manager, Jason, that her performance has become poor and she will have to be put on an improvement plan.

She protests that her performance has not been poor, but adds that she has felt very tired because of her pregnancy. Jason counters that she is exaggerating her tiredness, that her pregnancy shouldn't make any difference and repeats that her performance has been poor.

Unless Jason can show performance problems that are not linked to her pregnancy, his handling of her appraisal is likely to be unfavourable treatment because of pregnancy.

Dismissal

It is discriminatory for an employer to dismiss an employee because of her pregnancy or maternity. It would also be automatically unfair to dismiss a woman because, for example:

- she is pregnant
- of anything linked to her pregnancy – for example, an illness related to her pregnancy
- she is taking maternity leave.

An employee can be disciplined while pregnant or on maternity leave, as long as the reason for the disciplinary action is genuine and fair, and not related to her pregnancy or maternity in any way. If the employee has had a pregnancy-related

illness, the employer will need to be careful in agreeing to a date and location where the employee is well enough to attend a disciplinary meeting.

An employer can dismiss a pregnant woman, but this must have nothing to do with her pregnancy or maternity in any way. The employer would have to be able to show the dismissal was for a genuine and fair reason, and that it followed a fair process. For example, the reason might be continued poor performance before and/or after the pregnancy, or gross misconduct such as offensive behaviour or failing to follow important instructions.

Also, see the section on Work performance, the Return to work section regarding the employee's rights when going back to work after maternity leave, and the Redundancy section regarding circumstances where her job no longer exists.

For example... dismissal discrimination

After a disciplinary process, an employer dismisses employee Samantha for what the firm says is unacceptable behaviour undermining her manager. She appeals against the decision, saying other colleagues have also clashed with the same manager, yet they were given final written warnings and not dismissed. She adds that she has been treated unfairly as her conduct was no worse than theirs. Her appeal is rejected.

She maintains that the only difference between her and her colleagues is that she is pregnant and they are not. She says the firm found a way to 'get rid of her' because she is pregnant and would have gone on maternity leave. If true, this is likely to be unfavourable treatment because of pregnancy and maternity.

Redundancy

An employee must not be put at a disadvantage or discriminated against in a redundancy process because of her pregnancy or maternity. For example, an employer must not single out a woman for redundancy because she is pregnant, taking maternity leave or something linked to her pregnancy or maternity, such as being off ill because of her pregnancy.

Employers: Take care with redundancy selection criteria

An employer should take particular care regarding pregnancy and maternity in the use of redundancy selection criteria including:

- **absence** - exclude an employee's absences connected to pregnancy and maternity. Failure to do so would be discriminatory. Instead, if measuring

absence and attendance records, use another period of time when she was not pregnant or on maternity leave

- **job performance** – give the employee the choice of having her performance assessed during her pregnancy and/or maternity or based on her previous annual review. However, an employer is advised to be very careful if using a period where she has been absent because of her pregnancy – for example, she may attend work not feeling as well as normal after a pregnancy-related illness. If using the previous year is not possible, adjusting her job performance score upwards realistically may be appropriate - yet, this can be a legally complicated area. An employer should ensure it can clearly show an adjusted score is proportionate, appropriate and necessary so an employee is not at a disadvantage because of her pregnancy or maternity. On the other hand, it should not attempt to duck the issue by giving her a maximum score, unless fully justified, as this would be unfair and potentially discriminatory against colleagues also being assessed
- **skills, experience and qualifications** - for example, an employee may have had time off because of her pregnancy or be on maternity leave, and missed important exams or training for a qualification to help further her career – a proportionate adjustment to her score might be considered, but this too can be a complicated area.

Employers: Take care in managing a redundancy process

An employer should take particular care regarding pregnancy and maternity in managing a redundancy process in areas including:

- **communication** - make sure employees absent because of pregnancy or maternity are kept informed about any relevant changes at work, and are consulted properly throughout the redundancy process. Failure to do so could put them at a disadvantage and be discriminatory
- **tests for alternative roles** - make sure an employee is not at a disadvantage because of her pregnancy or maternity leave in an assessment process for an alternative role in a restructuring of the organisation. For example, make sure she is invited to all briefings about a test, or given information in good time. Also see the section, offering an alternative role
- **offering an alternative role** – an employee taking maternity or adoption leave can be considered for another role while on that leave – the employer should not wait to see if she returns. If she is being made redundant, she

must be offered any suitable vacancy, if there is one, before other employees not on such leave. She does not have to apply for it. If the employer has genuine doubts about her suitability for the role, it can assess/interview her for the role – and if found suitable she must be offered it. If there is an interview, the employer should try to hold this on a date to suit her, so she is given time to make any childcare arrangements and catch-up on relevant workplace information or changes. Also, do not penalise her if she works part-time. If there is not a suitable role, she can be made redundant if the decision is not because of pregnancy or maternity or adoption leave, and the redundancy process is fair.

For example... redundancy discrimination

Esme returns to work after maternity leave to find the firm is being re-structured. Her particular role has gone and most of the other jobs in the restructuring have

been filled, leaving her few options in the roles left. She feels she is being pressured to leave. She asked to be kept in touch during maternity leave, but her manager was never around and did not respond to her calls. This is likely to be unfavourable treatment because of maternity.

Maternity leave

An employer must not put pressure on an employee to work during her maternity leave or return to work from her maternity leave sooner than she wants. Also see the section, Pay and terms of employment, earlier in this guide, and the sections, Maternity leave and pay, and Contact during maternity leave.

For example... maternity leave discrimination

Wiga is put under pressure to come into work during her maternity leave, on top of the keeping-in-touch days she has agreed to work, to continue managing one important account. She reluctantly agrees, but in practice finds it impossible to keep to the agreement. Her manager, Max, tells her she has done her reputation no good at all, let the firm down and cost it a lot of money, and that she will have to make up the loss, on top of her other work, when she returns from maternity leave. This is likely to be unfavourable treatment because of maternity.

Return to work

Flexible working: If the employee has worked for her employer continuously for 26 weeks, she has the right to ask to work flexibly (she is likely to qualify to ask as maternity leave counts as continuous service). For example, this might be to reduce

hours, change which hours she works or work the same number of hours but over fewer days. Or, it might be to work from home or as a job share, or go part-time.

The employer must agree to flexible working where it can accommodate the request, but can turn it down on business grounds defined in flexible working regulations. However, it must make sure it does not discriminate. The employer can ask her to make the request, if possible, at least three months before she returns to work. In law, she is allowed to make a flexible working request only once a year, but in practice it might be advisable to allow some leeway to arrive eventually at a work pattern that works best.

Going back after maternity leave: An employee at the end of ordinary maternity leave has the right to return to her job on the same terms and conditions as before she left, if the job still exists and depending on how her employment contract defines 'the job'. If she takes additional maternity leave, she still has a right to return to her old job – however, if it is not reasonably practicable for her to do so, she can be offered a similar job where terms and conditions must be as good. This means someone covering in her old job cannot be given the role permanently because the employer thinks they are better at it than the employee returning from maternity leave.

An employee who wants to end her leave and return to work early, or who wants to end her leave later than she originally planned, must give the employer at least 28 days' notice.

The employer should hold a return-to-work meeting with the employee to welcome her back, discuss any needs for a refresher induction or training to fully update her, and cover any flexible working arrangements that have been put in place.

Handling a build-up of annual leave: An employee is entitled to her paid annual leave allowance on top of her maternity leave. Her options, with her employer's approval, might include:

- extending her time off work by taking her accrued paid annual leave straight after her maternity leave
- ending her maternity leave at some point when she is no longer getting maternity pay to use up her paid annual leave
- using the build-up of paid annual leave to create a phased return to work allowing the employee to work shorter days to start with – for example, for an agreed period returning to work three days a week and taking off the other two days a week as paid annual leave.

For example... return to work discrimination

Agatha is coming towards the end of her maternity leave and has been keeping in contact with manager Aneta to stay abreast of key matters while she is on leave. However, Aneta is pressuring Agatha to return to work early. Such pressure is likely to be discriminatory. See the section, Contact during maternity leave.

Considerations for everyone

Employers, managers, HR personnel, employees and their employee or trade union representatives should make sure they understand:

- what pregnancy and maternity discrimination is and how it can happen
- their rights and responsibilities
- the employer's policy for preventing discrimination, and
- what behaviour and actions are unacceptable such as derogatory comments about an employee's pregnancy or maternity.

Also, employer and employees should be very careful regarding questions related to an individual's pregnancy or maternity as these might be or become discriminatory, particularly if they are intrusive or handled insensitively.

Employers: Develop a pregnancy and maternity policy

An employer should have, or develop, a policy so employees can find out and understand their pregnancy and maternity rights, and so managers know what steps need to be taken – for example, when should an employee tell her employer she is pregnant? Small firms may find it more practical to make clear what behaviours are acceptable and unacceptable through a staff handbook.

Pregnancy and maternity awareness training for staff

An employer should provide training for all employees in constructively developing their general awareness and understanding of equality and diversity, and promoting them in the organisation. Find out more in the companion guide, Prevent discrimination: support equality.

An employer should also provide specific training in managing pregnancy and maternity in the workplace. This should benefit both the organisation and the employee who is pregnant or on maternity leave. For example, managers could be trained to know how to:

- handle effectively and sensitively that first conversation when the employee tells them they are pregnant, and set the correct approach and tone
- spot and deal with any conflict between the needs of the business and any needs of the employee because she is pregnant
- make sure the employee is clear on her rights, and reassuringly prepare her to leave work to have her baby and return after maternity, if that is what she intends
- plan how they will keep in touch during maternity leave, her return to work and any flexible working so she can manage childcare.

Health and safety for employees who are pregnant or new mothers

Risk assessments: An employer's general workplace health and safety assessment must specifically consider risks to:

- a pregnant employee and the unborn child she is carrying, and/or
- an employee who has become a new mother in the last six months, or is breastfeeding.

Risks might include working conditions, heavy lifting or carrying, travel, standing or sitting for a long period without adequate breaks, long working hours and exposure to toxic substances.

Once an employee has told her employer in writing that she is pregnant, a new mother or breastfeeding, she should have regular health and safety discussions. Concerns and any risks can then be reviewed and addressed, taking into account possible risks that may occur at different stages of pregnancy.

Identification of a risk to an employee who is pregnant, a new mother or breastfeeding - and which is beyond the normal level of risk found outside the workplace and cannot be removed - means an employer must:

- Step 1 – Avoid the risk, by adjusting her working conditions and/or hours and/or breaks while she pregnant or a new mother, or if not possible

- Step 2 - Avoid the risk, by offering her suitable alternative work on the same terms and conditions, or if not possible
- Step 3 - Avoid the risk, by suspending her from work on fully-paid leave while there is a health and safety issue.

Breastfeeding: An employee who wishes to breastfeed once she has returned to work should write to her employer before working keeping in touch days or returning to work to request somewhere suitable to breastfeed, or express breastmilk, and the time to do it. Treating an employee unfairly because she wants to breastfeed or express breastmilk at work, or is breastfeeding or expressing breastmilk at work, is likely to be discriminatory.

Antenatal appointments

Pregnant employees are entitled to reasonable and paid time off for antenatal care advised by a doctor, midwife or health visitor.

Antenatal care can be wide-reaching and include, for example, planning the employee's medical care during her pregnancy, tests, scans, regular checks on her pregnancy, briefings on giving birth, and gaining information on diet, exercise and caring for a new-born baby.

- For the first antenatal appointment, an employee does not have to show her employer proof of the appointment, but will still need to ask for the time off
- For the other antenatal appointments, an employee should show her employer, if it asks, a document showing an appointment has been made. Again, she will need to ask for the time off. The employer can refuse the time off if the employee cannot show this information.

An employer cannot refuse an appointment because it thinks date or time is inconvenient. It can ask if the time could be changed, but in practice, the employee is likely to have little say in the clinic's choice of date and time for an appointment.

A pregnant employee must not be discriminated against (for example, have their pay reduced or asked to make up the time off at a later date) for going to an antenatal appointment.

Fertility treatment is not regarded as antenatal care, but an employer's refusal of time off could be sex discrimination. However, once a woman is pregnant through fertility treatment she has the same antenatal rights as any other pregnant employee.

Maternity leave and pay

There are separate rules on maternity leave and maternity pay. Who qualifies for them can be complicated. In part, it depends on the woman's employment status – in other words, whether she is classed as an 'employee', a 'worker', an 'agency worker' (also sometimes called an 'agency temp'), or 'self-employed'. For example:

- An 'employee' has a right to maternity leave from day one of her job, and may also qualify for either contractual maternity pay or maternity allowance, if she meets certain conditions
- A 'worker', including many 'agency workers', is not entitled to maternity leave. However, she must still take at least two weeks off work after having her baby.
- A 'worker', including many 'agency workers', may qualify for maternity allowance if the employer or agency deducts tax and National Insurance from her earnings through PAYE
- Some 'agency workers' can be 'employees of the agency' and in those circumstances can qualify for maternity leave and contractual maternity pay, or maternity allowance, but would still have to meet the other conditions to get them.
- The 'self-employed' do not qualify for maternity leave but may qualify for maternity allowance.

It should be borne in mind that there are no precise legal definitions of employment status and ultimately, in an individual case, it can be up to an Employment and Equality Tribunal or court to decide.

Contact during maternity leave

Generally staying in contact: This needs sensitive and careful handling, and in practice can be a complicated area because:

- One employee may wish to keep in contact with her employer, while another may want no contact and generally is not obliged to have any. However, the law does allow the employer to keep in 'reasonable contact' with the
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employee, and some contact is likely to be necessary as the employer has a duty of care towards her.

- An employer getting the level of contact wrong can lead to a claim of discrimination from a new mother who feels, for example, she has not been kept in touch with changes at work, job vacancies or opportunities for training or promotion; or, conversely, from a new mother who feels she is being put under pressure to end her maternity leave early and return to work, or confirm early that she will be returning to work, or to call into work when she does not want to.

The best way forward is:

- Before maternity leave starts, employee and employer should meet so the employer can understand how, when and how often she would like to be kept in touch, about what and with whom. They should come to an agreement.
- Also, both should accept that once maternity leave starts, there may be a need for flexibility about what they have agreed. Once she has a baby to look after she may find she cannot keep up to the level of contact she agreed to – and she is not obliged to.
- They should also discuss whether she is interested in coming into work on a separate arrangement called Keeping-in-touch days – to find out more, see the section, Keeping-in-touch days.
- Towards the end of her maternity leave, the employer should suggest they discuss her plans to return to work, so they can make arrangements. The employer cannot demand she confirms whether or not she is returning to work. But if not, she must give the same notice she would if still at work – for example, if her contract says she has to give one month's notice, she should give notice of her resignation at least a month before the end of her maternity leave.

Keeping-in-touch days: Before going on maternity leave, the employer might discuss with the employee whether she is interested in coming into work for keeping-in-touch days. The employer does not have to offer them and she does not have to accept them.

However, should they come to an agreement, she can work up to 10 KIT days while on maternity leave. This should be at a pay rate no less than her usual pay.

The employee must not exceed the number of KIT days she is allowed to work, otherwise she risks being seen as having ended her leave and maternity pay and returned to work.

If she is agreeable, KIT days might be used to help her weigh up a return to work and any request for flexible working. But neither an agreement to generally stay in contact or KIT days should replace any refresher induction or training on her return to work.

Impact of other protected characteristics

It is not uncommon for the different protected characteristics of pregnancy and maternity, and sex to interact. But whether a complaint amounts to discrimination because of pregnancy and maternity, or her sex, ultimately rests with an Employment and Equality Tribunal. This can be a complicated area.

The law says that after the protected period in pregnancy and maternity has ended, an action after that time might still amount to unfavourable treatment because of

pregnancy and maternity. That would be if it stemmed from an action or decision within the protected period. Or, after the period, a woman might claim her treatment because of her pregnancy or maternity amounted to less favourable treatment because of her sex.

If a job applicant/employee is treated unfairly because she is thought to be pregnant or taking maternity leave, whether this perception is correct or not, she may have a claim for sex discrimination.

Further, depending on the nature of unwanted behaviour towards an employee who is pregnant or planning to take maternity leave, she might be able to claim harassment because of her sex or sexual orientation.

Avoid stereotyping

Employers and employees should avoid making assumptions about women because they are pregnant or on maternity leave. Such guesswork can often be done without realising – this is known as unconscious bias. Whether intended or not, stereotyping often has negative connotations and repercussions. For example, this might include assumptions that someone who is pregnant or on maternity leave may:

- have more time off work because they are pregnant
- have chosen to become a mother rather than commit to a career
- be less reliable when they return to work after maternity because of the demands of raising children.

Making such assumptions and uninformed decisions about employees or job applicants is likely to be discriminatory.

Support employees with premature or sick babies

Employees who have given birth early, or whose new-born baby may be sick, will need special support. Advice for employees and employers can be found on Acas web page Workplace support for parents with premature or sick babies, at www.acas.org.uk/prematurebabies MIRS regards this advice as also representing best practice in the Isle of Man.

In circumstances, where the employee's baby is stillborn after the 24th week of her pregnancy, she is entitled to statutory maternity leave and may qualify for contractual maternity pay or maternity allowance. For support when a baby dies, go to a stillbirth charity – for example, Sands at www.sands.org.uk or Tommy's at www.tommys.org.uk

Raising and handling complaints

How an employee should raise a complaint of alleged discrimination, including the option of raising the matter with a trade union representative, and how the employer should handle it, are explained in companion guide **Discrimination: what to do if it happens**. Also, employers should be aware that after dealing successfully with a complaint of discrimination, there can be further steps. For example, it is useful to think of how any future instances might be prevented. Find out more in the companion guide, **Prevent discrimination: support equality**. Both guides are at www.mirs.org.uk/equality



Manx Industrial Relations Service (MIRS)

The Manx Industrial Relations Service (MIRS) is an independent organisation funded by Government and we provide a free, impartial and confidential service on any employment relations matter. We are here to help employers, employees and trade unions work together for the prosperity of the Isle of Man.

Information in this booklet has been revised up to the date of the last reprint – see date below. For more up-to-date information go to the MIRS website www.mirs.org.im

Legal information is provided for guidance only and should not be regarded as an authoritative statement of the law, which can only be made by reference to the particular circumstances which apply. It may, therefore, be wise to seek legal advice.

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