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Summary of the law
on pregnancy and maternity

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The Spirit of Brotherhood
by Bernard Meadows

About this booklet

Pregnant women enjoy certain rights at work that give them protection during the period of their pregnancy, as well as during maternity leave.

This booklet is solely concerned with these rights and applies in England, Wales and Scotland (except where indicated) only.

- Legislation
- Ante-natal rights
- Maternity leave
- Statutory maternity pay (SMP)
- Discrimination
- Remedies

Legislation

What laws protect pregnant women and women on maternity leave?

There are a number of legislative provisions giving protection to pregnant women and women on maternity leave.

These include:

- Equality Act 2010 which outlaws discrimination against employees because of the “protected characteristic” of pregnancy and maternity during the “protected period”.
- Employment Rights Act 1996 which sets out rights to health and safety, time off for ante-natal care, maternity leave and unfair dismissal.
- Maternity and Parental Leave etc Regulations 1999 which set out a woman’s entitlement to maternity leave and the notification requirements.
- European law including the Pregnant Workers Directive and the recast Equal Treatment Directive which provide pregnant women or women on maternity leave with protected status.

Ante-Natal Rights

What rights do women have?

Women are entitled to paid time off during working hours to attend ante-natal appointments. Ante-natal care is not defined but is likely to cover medical examinations and relaxation classes. No confirmation of appointment needs to be produced at the first appointment.

The woman should notify the employer of the appointment and, if asked, should provide proof of pregnancy (such as the MAT B1) and a copy of the appointment card.

Primary adopters have a right to paid time off for up to 5 appointments for the purpose of contact with the child or another purpose connected with adoption.

Can her partner attend?

Fathers, partners (including civil partners) and those in a surrogacy relationship also have the right to unpaid time off to attend two antenatal appointments. The time is capped at 6 ½ hours.

The secondary adopter also has the right to attend two pre-adoption appointments. This is unpaid.

Can an employer refuse to give the time off?

An employer must not unreasonably refuse time off. There is nothing in the law which clarifies when a refusal would be unreasonable, but an employer who refuses just because a woman has had a lot of appointments close together will not be acting reasonably.

However, if there is evidence that appointments could have been arranged at times which were more convenient to the employer or outside working hours then a refusal may be reasonable.

If the woman thinks that her employer's refusal is unreasonable, or claims that her employer did not pay her; she can complain to a Tribunal within three months of the date of the missed appointment. She can also claim unlawful sex or pregnancy discrimination and can be awarded compensation.

Who is entitled to these rights?

As with most maternity rights, the woman must be an employee in order to benefit, but agency workers who qualify for rights under the Agency Workers Regulations 2010 are also covered. The entitlement applies from day one of employment.



What about fertility treatment?

Women receiving fertility treatment are not legally entitled to paid time off for ante-natal care. However, failure to allow time off may amount to sex discrimination.

Once a fertilised embryo has been implanted, the woman is entitled to be treated as pregnant, and she will benefit from the rights of a pregnant women and the protection period begins. If the treatment is unsuccessful, the protected period ends two weeks after the date on which it has been confirmed that the treatment was unsuccessful.

Maternity Leave

How long is maternity leave?

All pregnant employees are entitled to 52 weeks of maternity leave, irrespective of how long they have worked for their employer or how many hours they work per week.

This is made up of 26 weeks of ordinary maternity leave (OML), after which the woman has the right to return to the same job; and 26 weeks of additional maternity leave (AML), after which she has the right to return to the same job, or if that is not reasonably practicable, to another job which is suitable and appropriate for her in the circumstances.

The terms and conditions must be no less favourable than if she had not been absent, with continuity preserved throughout statutory maternity leave.

The first two weeks of leave (starting with the date of birth) are known as compulsory leave. It is a criminal offence for an employer not to ensure that the woman takes two weeks of leave once the baby is born. Factory workers are prohibited from working for four weeks after the birth.



Can fathers share the mother's maternity leave?

Fathers or partners of mothers who qualify for Statutory Maternity Leave or Pay may be able to share the mother's maternity leave under the right to shared parental leave and pay.

In addition to the right to maternity, adoption and paternity leave and pay, parents have the right to shared parental leave.

This allows parents who are entitled to maternity and adoption leave and pay to share some of that leave with their partner.

The mother or adopter must take two weeks compulsory leave following the birth or placement but the rest of the 50 weeks' leave and 37 weeks' pay can be shared provided certain eligibility and notification requirements are met.

To qualify for shared parental leave, one partner must be entitled to some form of maternity or adoption leave or pay and have been employed for at least 256 weeks by the 15th week before the week the baby is due. The partner must have worked for at least 26 weeks in the 66 weeks leading up to the week before the baby is due, and earned more than £30 per week.

In order to take the leave, the mother or adopter must first either return to work or give notice to bring their maternity leave and adoption leave to an end (a curtailment notice). A notice of entitlement and intention to take shared parental leave must also be given to the employer at least 8 weeks before the first proposed period of shared parental leave.

If either parent takes 26 weeks' leave or less in total, they are entitled to return to the job in which they were employed before they went on leave. If they take more than 26 weeks as leave and it is not reasonably practicable for their employer to let them return to that job, they can ask their employer to return to one that is similar.

Employees who take shared parental leave are entitled to benefit from all the terms and conditions of employment which would have applied had they not been on leave, with the exception of pay.

What notice does a woman have to give before going on ordinary maternity leave (OML)?

To apply for maternity leave, a woman must tell her employer (although not necessarily in writing) at least 15 weeks before the week in which baby is due:

- That she is pregnant.
- The date when the baby is due (the employer can ask to see evidence such as a medical certificate, MAT BI form).
- The date when she intends to start her maternity leave, but if it is not reasonably practical for the woman to give that much notice, perhaps because the baby is

premature or because she has just started working for that employer; she has to give notice as soon as she can.

If the woman fails to comply with any or all of the notification requirements, or gave them late and cannot satisfy the 'not reasonably practical' test, she loses her right to OML on the intended start date.

What does the employer have to do?

Once the employer knows that the woman is pregnant and the work is of a kind that poses a risk to employees who are pregnant, they should carry out a risk assessment of the workplace, identifying any risks to the employee during her pregnancy and after the birth if she is breastfeeding.

Once the employee has told the employer when she intends to start OML, the employer must write to her within 28 days, telling her when she is expected to return, based on the assumption that she wants to take her full 52 week entitlement.

If the employer fails to tell the woman when her maternity leave ends, they cannot then complain if she does not return on the right date. The woman can, however, complain if she suffers a disadvantage because she comes back late. If she is dismissed as a result, it is likely to be automatically unfair.

What happens if the woman is ill?

If the woman is ill during her pregnancy and it has nothing to do with her pregnancy, she is entitled to claim sick leave in the usual way until the date when she starts OML.

If, however, she is off work with an illness which is wholly or partly to do with her pregnancy any time in the four weeks leading up to the due date, then OML will be automatically triggered.

What terms and conditions apply during maternity leave?

During maternity leave, the woman is entitled to all the same terms and conditions (apart from the right to be paid), had she not been away from work. Equally, she is bound by any obligations under her contract, unless they conflict with her right to take leave. The implied term of trust and confidence still applies, and if breached by the employer's conduct, the woman may be entitled to resign and claim constructive dismissal.

All service-related benefits accrue during OML and AML.

What is the maternity equality clause?

The Equality Act 2010 inserts a maternity equality clause into the woman's contract which states that:

- Any pay increase the woman receives (or would have received had she not been on leave) must be taken into account when calculating her maternity-related pay.
- Any bonus to which she is entitled must be paid at the time she would have received it had she not been on maternity leave.
- Her pay on her return to work must take account of any pay increases she would have received had she not been on statutory maternity leave.

What does this mean in reality?

Although the woman is not entitled to her salary while she is on leave, she is still entitled to receive all benefits in kind such as insurance or the use of a company car.

If the payment relates to work before she went on leave, she should receive it; if it relates to work she would have done had she not been on leave, she may not be entitled to it.

If the payment relates to a longer period (such as a year), she should receive a pro rata amount to reflect the time when she was at work. If the payment relates to the period of compulsory maternity leave, she should be entitled to it.

If her employer refuses to pay her these benefits, she may be able to claim either pregnancy, sex discrimination or equal pay depending on the terms of her contract and whether the maternity clause applies.



She may also be able to claim for unlawful deduction from wages or a detriment under the 1999 Maternity and Parental Leave etc. Regulations at a Tribunal. Strict time limits, three months less one day of the date of detriment, apply.

Special provisions apply in relation to pension so that any pension contributions payable by the employer should continue to be paid up until the end of paid maternity leave.



What are the rules on annual leave?

Paid annual leave (both contractual and statutory under the Working Time Regulations) continue to accrue during OML and AML. The leave should therefore be taken either before or after maternity leave.

If the period of maternity leave coincides with a period of compulsory shut down, case law has established that the woman should be able to take statutory annual leave at some other time, either before or after the maternity leave. However, the law is not certain in this area.

Similarly if the woman is not able to take her statutory entitlement to annual leave within that leave year, she should try to take the statutory leave within the year in which it accrued. This is because under the Working Time Regulations there is no right to carry over statutory leave from one leave year to the next.

However, European case law has held that where a worker has been unable to take her full entitlement to statutory annual leave it may be necessary to allow the statutory leave to be carried forward. Women who may not be able to take their full statutory annual leave should ask if they can carry the leave over until after they return, even if that is in a new leave year and refer their employer to the European case law.

Can employers make contact during maternity leave?

Employers can make reasonable contact with the woman during the leave period to let her know about any changes that are happening.

They might also discuss whether or not she will come into work (perhaps for training purposes) during her leave.

Women are allowed to go into work for up to ten days (known as "keeping in touch" days) during their leave without losing their right to maternity leave or statutory pay. They are not obliged to take up these days, nor is the employer obliged to offer them.

If a woman fails to return to work after a period of ordinary or additional maternity leave, in circumstances where her employer did not notify her of the date at which the maternity leave would end and she reasonably believed the period had not ended, or where the employer gave her less than 28 days notice of the date on which she was expected to return and is dismissed in such circumstances, then the dismissal will be unfair.

What notice do women have to give on their return to work?

Women are not required to give any notice to their employer that they intend to return to work after the end of their full maternity leave. If the woman does not wish to return, she must hand in her notice in the normal way before the end of her maternity leave period.

If the woman wants to return before the end of her statutory maternity leave she has to tell her employer eight weeks before the date of when she intends to come back. The employer can postpone her return until they have received the notice although they cannot postpone her return beyond the 52 week period.

What happens if the employer refuses to allow the woman to return?

If an employer refuses to take someone back, this would constitute an automatically unfair dismissal unless the reason was because the woman had been made redundant and there was no suitable alternative vacancy or if it was not reasonably practical to take her back perhaps because of an internal reorganisation.

In these circumstances the usual rules on unfair dismissal would apply and the woman may also have claims for pregnancy related detriment and sex discrimination.

What rights does a woman have if she is made redundant?

If a woman is made redundant during her maternity leave, her employer must offer her suitable alternative employment (if it exists). The alternative post must be suitable for the employee and appropriate for her to do in the circumstances. She has priority in being offered suitable alternative work over other staff who are not on maternity leave. The terms and conditions should not be substantively less favourable than her old job – for instance they should not be of a lower status.

The obligation on the employer to offer suitable alternative employment applies at the time she is put at risk of redundancy. So, for example, where a redundancy arises because two roles are merged into one, she should be offered suitable alternative employment (if it exists) at the same time she is put at risk and not after a competitive exercise.

Can a woman return to work on different terms and conditions?

Women on maternity leave who wish to return to work on different terms and conditions should check their contract first as some employers allow women to return to work on different terms, such as part-time. Alternatively, a woman could make a statutory request for flexible working. If the request is refused, she may be able to claim she has been indirectly discriminated against because of her sex if the employer cannot show that their refusal is justified.

Statutory Maternity Pay (SMP)

Who is entitled to Statutory Maternity Pay (SMP)?

SMP is the money paid by an employer to a pregnant woman for up to 39 weeks if she satisfies the qualifying conditions.

To qualify for SMP, the woman has to:

- Be pregnant at the 11th week before the expected week of childbirth or have had the baby at that time.
- Be in continuous employment for 26 weeks with the same employer, up to and including the 15th week before the expected week of childbirth (the 'qualifying' week).
- Have average weekly earnings (not less than the lower earnings limit) during an eight week reference period ending with the qualifying week.
- Have given 28 days' notice to her employer as to when they are liable to start paying SMP (or less than that if it is not reasonably practical to give 28 days' notice).
- Have produced a medical certificate (MAT B1) from a doctor or midwife, which gives the date when she is due to give birth.
- Have stopped work.

How much is Statutory Maternity Pay (SMP)?

SMP is paid at a rate of 90% of normal earnings for the first six weeks of maternity leave, followed by a flat rate for the remaining 33 weeks. Current rates (which change every April) can be found at www.gov.uk.

Normal earnings are calculated on the basis of an eight-week reference period prior to the 15th week before the week in which the baby is due. This will include a backdated pay rise that an employer may have awarded to staff even if it postdates the eight-week reference period.

When do women have to pay back SMP?

Never. The only money that an employer could recoup would be contractual maternity benefit that they pay, over and above SMP where conditions apply.

Who can claim maternity allowance (MA)?

MA is a benefit payable to women who do not qualify for SMP. To claim the allowance they need to:

- Have been employed (or self-employed) for at least 26 weeks in the 66 weeks before the expected week of birth.
- Have average weekly earnings over any 13 weeks in the 66 week period of more than £30 per week.
- Be pregnant at the 11th week before the expected week of childbirth

The allowance is paid for a maximum of 39 weeks at a weekly flat rate or 90% of average weekly earnings, whichever is less. It cannot start before the 11th week before the baby is due. The rate increases annually each April. For current rates visit www.gov.uk.

Discrimination

What does the Equality Act say?

The 2010 Equality Act says it is unlawful discrimination (which cannot be justified) for an employer to treat a woman unfavourably because of her pregnancy, because of a pregnancy-related illness, or because of maternity leave during the “protected period”.

However, the unfavourable treatment will only be unlawful if the employer knows, believes or suspects that the woman is pregnant.

This means that if a woman is not paid discretionary pay and benefits because of her pregnancy or maternity she may be able to claim discrimination on that basis. If however she has not received pay or benefits due under her contract the maternity equality clause will apply and she may be able to claim equal pay.

What is the protected period?

The protected period starts when a woman becomes pregnant and continues until the end of her maternity leave, or until she returns to work if that is earlier.

Who is the comparator?

Unlike direct sex discrimination, a pregnant worker does not have to compare the way she has been treated with anyone else. If she is treated unfavourably by her employer because of her pregnancy or maternity leave, for example being denied rest breaks, that would be discriminatory. However, evidence of how other non-pregnant employees have been treated would still be useful in order to prove a claim at a Tribunal.

What about direct discrimination by association or perception?

Discrimination by association or perception does not apply specifically to pregnancy. However, it may be possible to argue that a worker treated less favourably because of their association with a pregnant woman, amounts to associative sex discrimination.

How do workers gather information from their employer?

Workers can use the ACAS (Advisory, Conciliation and Arbitration Service) guidance, 'Asking and responding to questions of discrimination in the workplace', to request information from the employer which is relevant to a potential claim of discrimination.

Although the employer is not under a legal obligation to respond if the case proceeds to an employment tribunal hearing, an employment tribunal may draw an inference if the employer does not respond or its replies are evasive.

What is Early Conciliation?

Early Conciliation is the requirement to contact ACAS before lodging an employment tribunal claim. This can be done over the phone or by completing an Early Conciliation notification form on line on the ACAS website (www.acas.org.uk).

Early Conciliation usually lasts for four weeks, after which a conciliation certificate is issued. The Early Conciliation certificate number must be put on the employment tribunal claim form (ET1). If it is not, the claim form will be rejected and the claim may go out of time.

What remedies are available?

There are two remedies available to a Tribunal:

- Declaration.
- Compensation.

Declaration

A declaration states the rights of the claimant and sets out how the employer and/or any employee involved has acted unlawfully, for example, a finding of pregnancy discrimination.

Compensation

Compensation can be awarded for injury to feelings and financial losses, if there are any. There is no limit on the amount of compensation, which can include loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination.

The amount of compensation for injury to feelings can vary enormously. A Tribunal will take into account the severity of the discrimination and the impact that this has had on her.

Claimants can also ask for compensation for personal injury if they have been seriously affected by the discrimination, particularly in harassment cases which can lead to illness and depression. If so, claimants need to produce a medical report to support their claim.

Recommendations

The Tribunal can make recommendations which will eliminate or lessen the effect of the discrimination on her.

Generally, the recommendation will have a time limit. The purpose of the recommendation is to avoid or reduce the effect of the discrimination that was complained about.

For instance, the Tribunal could recommend that the employer:

- Introduces an equal opportunity policy
- Ensures their harassment policy is more effectively implemented
- Sets up a review panel to deal with equal opportunities and harassment/grievance procedures
- Re-trains staff
- Makes public the selection criteria used for the transfer or promotion of staff

If the employer fails to comply with a recommendation, then the Tribunal may order the compensation be increased.

If the discrimination is about not being appointed to a job the Tribunal cannot recommend that she be given a particular job.

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