Pregnant at work? Your top ten questions on workplace rights answered

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BDBF Partner, Paula Chan and Managing Associate, Emily Plosker regularly advise senior professional women, including employees, LLP members and partners on their workplace and employment rights during pregnancy. Together they have decades of experience representing pregnant women and mothers, helping them to enforce their employment rights. As mothers of young children themselves, they bring the perspective of their own experience of being pregnant at work. In this article, they answer the top ten questions asked by women who are pregnant at work or planning a pregnancy.

1. When should I tell my employer that I am pregnant?

The law does not require you to tell your employer you are pregnant until the 15th week before the week your baby is due (referred to as the 'expected week of childbirth'), which is when you around are 25 weeks' pregnant. We recommend telling your employer early as it is only once your employer has knowledge of your pregnancy, that you are protected under various pieces of legislation.

For a long time, there has been a "12-week rule" about when to tell others that you are pregnant. However, in our experience, this is a bit outdated, and many women now feel comfortable telling people before the 12-week scan, particularly at a time when miscarriage and fertility treatment are finally becoming less 'taboo'.

Ultimately, it is your body and your pregnancy, and you need to feel comfortable with whatever decision you make.

2. Should I tell my employer I am planning a pregnancy or undergoing fertility treatment?

Whilst there is no protection against pregnancy discrimination unless you are pregnant, you may have a claim for sex discrimination if you are treated less favourably because you are planning a pregnancy or undergoing fertility treatment.

If you are planning a pregnancy, it may be a good idea to notify your employer especially if the process of becoming pregnant is causing you stress or affecting your work. It may also be sensible to speak to your employer if your journey involves fertility treatment, such as IVF which may involve the need for time off work and/or invasive medical treatment.

If your employer knows what you are going through, they are better placed to support you, and in our experience good employers will offer support. Some employers also have fertility policies which may entitle you to paid time off work to seek treatment and, in some cases, offer financial support for fertility treatment such as IVF.

3. What are my rights at work when I am pregnant?

When you are pregnant at work you will have some or all of the following rights:

- Paid time off for ante natal care.
- A workplace risk assessment.
- Maternity leave (employees only).
- Statutory maternity pay or maternity allowance (LLP members and partners are not entitled to statutory maternity pay but may be entitled to maternity allowance).
- Shared parental leave (available to employees only where the co-parent meets certain eligibility criteria).
- Statutory shared parental pay (employees only).
- Protection against unfair treatment (usually referred to as pregnancy detriment) and dismissal. These rights only apply to employees but there is separate provision which protect agency workers.

- Protection against discrimination. This right to protection against discrimination extends to workers, as well as employees. This means, for example, that partners and LLP members are protected against discrimination.

4. What are my rights at work in relation to ante natal appointments?

When you are pregnant you will normally be asked to attend an ante natal appointment when you are around 8 weeks' pregnant (usually called the "booking appointment") and scans at around 12 and 20 weeks. After the first antenatal appointment, you will need to show your employer evidence of your pregnancy (MAT B1 form) and the appointment card (if requested).

Pregnant employees and agency workers have the right to take paid time off to attend antenatal appointments (i.e. scans, medical appointments but also ante-natal or parenting classes if recommended by your doctor). Certain employees and workers have the right to take unpaid time off to accompany a woman to an antenatal appointment (subject to certain criteria).

Your employer is only able to refuse time off for you to attend an antenatal appointment where it is reasonable to refuse. However, there is no guidance in the legislation or case law telling us what amounts to a reasonable refusal.. A refusal of a request to take time off without a good reason is more likely to be reasonable, when compared to a medically advised need to attend an urgent scan due to a concern about your baby (such refusal would never be reasonable).

Where there has been an unreasonable refusal, you may have a claim in the Employment Tribunal either in relation to the refusal or a broader discrimination claim.

5. When should employers carry out a pregnancy risk assessment?

All employers have a legal duty to protect the health and safety of their employees and any persons who are affected by the employer's work or business. It is a legal requirement for all workplace risk assessments to include risks to female workers of childbearing age, even if there are no pregnant employees at the time of the risk assessment.

Once you have told your employer about your pregnancy, they should immediately check their existing workplace risk assessment to ensure that it is still valid and does not require any significant changes (albeit your employer should be doing this at regular intervals in any event)).

Where the work is of a kind that could cause a special risk to a pregnant employee, employers have a legal duty to: (I) assess workplace risks to new or expectant mothers or their babies; (ii) alter the employee's working conditions of hours of work to avoid any significant risk; or (iii) in the alternative, to offer suitable alternative work on the same terms; or (iv) if there is no suitable alternative work, to suspend the employee on full pay.

The Health and Safety Executive (HSE) has a guide for protecting new and expectant mothers at work. HSE sets out a variety risks of common risks which include work-related stress and long hours.

If an employer fails to carry out a risk assessment, or ignores any of its findings, this could give rise to an Employment Tribunal claim for maternity, pregnancy discrimination, or sex discrimination in the case of breastfeeding mothers.

6. Can I be made redundant whilst I am pregnant?

Whilst it is unlawful for your employer to make you redundant because you are pregnant, it can dismiss you if you are genuinely redundant. If you are made redundant because you are pregnant, you will have various potential Employment Tribunal

claims, including a claim for automatic unfair dismissal and pregnancy discrimination. You can claim uncapped compensation at the Employment Tribunal if you have this kind of claim.

Women selected for redundancy whilst on maternity leave have special legal protection. They have the right of first refusal to any suitable alternative vacancies, without any competitive process or the need to attend an interview. This means mothers on maternity leave jump the queue ahead of other potentially redundant employees. There are Employment Tribunal cases in which a more senior and better paid role was found to be a suitable alternative rolethat should have been offered to an employee on maternity leave without any competitive process.

There are plans to extend this legal protection to cover the pregnancy period and six months after the return from maternity leave, however, it is not clear when these changes will come into force.

Whilst LLP members and partners do not have the same statutory protection against unfair dismissal or redundancy rights, it is unlawful to terminate a LLP member’s membership or a partner’s partnership because they are pregnant.

7. When should I start my maternity leave?

Some women like to start maternity leave early in order to have time to prepare for the baby’s arrival or because they start feeling more tired or unwell closer to their due date. Others prefer to work as close to their due date as possible in order to maximise time off on maternity leave with their baby. Whilst in most cases this will be a matter of personal choice, if you are an employee, you cannot start maternity leave before the 11th week before the expected week of childbirth (which is when you are around 29 weeks’ pregnant).

There two exceptions to this rule. First, if you are absent from work for a pregnancy-related reason after the fourth week

before the expected week of childbirth, but before the planned start date for maternity leave, the maternity leave will begin automatically on the day after the first day of absence. Second, if your baby is born early your maternity leave will start the day after your baby is born.

The Governments intends to introduce the right to 12 weeks' neonatal leave and pay for parents of babies under 28 days who spend more than 7 days in hospital. However, this legislation is not expected to be introduced until April 2023. Until that time, some employers have already extended their own maternity leave policies to include neonatal leave, so that parents of premature babies, who will often have longer periods of time in hospital, do not unfairly exhaust their maternity or paternity leave. It is, therefore, worth checking whether your employer has a similar policy in place.

8. How much maternity leave am I entitled to?

Employees are entitled to up to 52 weeks' maternity leave. The first 26 weeks are referred to as "Ordinary Maternity Leave" or OML. The second 26 weeks are referred to as "Additional Maternity Leave" or AML. Employees continue to accrue paid holiday during their maternity leave, and some employees choose to add their accrued holiday entitlement to the end of their maternity leave to extend the period of time off before returning to work (though this extended period will be a period of annual leave and not maternity leave).

Employees may also be entitled to exchange up to 50 weeks' worth of their maternity leave for shared parental leave, which is a form or leave that may be shared with a co-parent.

Employees with at least one year's service are also entitled to up to 18 weeks' unpaid leave for each child up to the age of 18, for the purposes of caring for that child. The benefit of taking parental leave (even though it is unpaid) is that you have the benefit of certain contractual rights during that

time and also have the right to return to the same job (or suitable alternative job).

LLP members and partners do not have the right to statutory maternity leave or parental leave but their entitlement to take time off (often paid) is usually covered in the LLP agreement or partnership deed.

9. What is my entitlement to maternity pay?

Employees with 26 weeks' continuous service when they reach the end of the 15th week before the expected week of childbirth are entitled to Statutory Maternity Pay (SMP). This is:

- 90% of your average weekly earnings (before tax) for 6 weeks; and
- £156.66 or 90% of average weekly earnings (whichever is lower) for the next 33 weeks (the rate of pay increases in April each year).

You can read more about this **here**.

You may also have an entitlement to enhanced company maternity pay. This might mean you are entitled to a period of full pay, or a combination of full pay and half pay for example. Details of any enhanced entitlement can usually be found in an employer's maternity policy, employee handbook or the contract of employment itself. Many enhanced pay policies are premised on the employee returning to work for a certain period of time after maternity leave.

LLP members, partners and other workers are not entitled to Statutory Maternity Pay, but they may be entitled to Maternity Allowance (MA) either £156.66 a week or 90% of your average weekly earnings (whichever is less) for 39 weeks. If you are self-employed, you may be able to receive between £27 to £156.66 a week for 39 weeks depending on how many Class 2 National Insurance contributions you have made in the 66 weeks

before the baby is due. You can read more about this here.

10. What can I do if I have been discriminated against at work during pregnancy?

There are a number of things you do in this scenario. Deciding on the right strategy will depend on a number of factors, including the strength of your case and the outcome you are looking to achieve. What is right for one person, may not be right for another.

If ultimately, you feel that you want to stay in the business and that the discriminatory behaviour you're experiencing is something you feel can be resolved, then raising a grievance and starting Employment Tribunal proceedings may not be the right step. That is because it can be difficult to maintain the employment (or partnership) relationship if there is a dispute, whether internal or external, or both.

If the discriminatory behaviour you are experiencing is having a significant impact on your career prospects because of your pregnancy or maternity leave (such as not being promoted or you have not received the expected level of bonus) or your health or that of your baby, you may wish to take more formal action. The first step for employees will normally include raising a formal grievance. Not only will this put on the record the complaints you have and will require your employer to take action, but you will also be protected going forward from any retaliatory treatment (known as a victimisation claim). There may be a different complaints process for partners set out in the LLP agreement or partnership deed.

It is important that either before or at the point when you submit a grievance or formal complaint that you keep a record of the discriminatory treatment you are experiencing and ensure that any evidence is preserved (e.g. by ensuring emails are not permanently deleted). This will help form the basis of your grievance and any Employment Tribunal claim you may want

to issue in the future.

It is important to note that there are short time limits for bringing discrimination claims in the Employment Tribunal. Broadly, you will have three months less one day of the discriminatory treatment (or the last incident if there is a continuing course of discriminatory treatment) to start a claim, which requires you to notify ACAS and submit an ACAS early conciliation form. Whilst the government has said that it is looking into increasing the time limit to 6 months, this may not come into force as law for some time. You can read more about ACAS Early Conciliation **here**.

Given the complexities involved in raising complaints of discrimination, we always recommend seeking legal advice as early as possible, to ensure that your position is protected, you have someone fighting your corner if things become difficult, and to give you the best options going forward.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss your rights during pregnancy or maternity leave, pregnancy or maternity discrimination or any issues relating to the content of this article, please contact employment lawyers Paula Chan (paulachan@bdbf.co.uk) or Emily Plosker (emilyplosker@bdbf.co.uk), or your usual BDBF contact.

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