



Pregnancy and Maternity and Employment

A Guide for Employers

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1. Introduction

This guide is designed to help employers understand the impact of the Equality Act 2010, which repealed the Sex Discrimination Act 1975, on pregnancy and maternity related issues in employment policy. It contains advice on key aspects of policy and practice illustrated by relevant legal cases and scenario examples, so that you can easily recognise areas of risk. The Equality Act also covers discrimination in relation to the provision of services and public functions, but this and other sections of the Act are not within the scope of this guide.

The guide does not provide full details of statutory maternity pay, leave, notifications and other issues, which are focused on process or entitlements rather than discrimination. For further information about these topics, please see the relevant Guides which are free to enei Members and available on the website. Most employers have amended the policies that guide their employment practice to comply with legislation as it has developed over the years. So, for many, the biggest challenge is now to challenge custom and practice and overcome long-held views, stereotypes and assumptions about the characteristics of different workers.

When considering your approach to equality and inclusion, you should firstly consider where your organisation wants to be on the spectrum between compliance and best practice. enei would encourage you to aspire to best practice, rather than just comply with the law, as if you adopt good practice you will be in a much stronger position to defend yourself if challenged, and complying with the legislation will be much easier.

Every organisation is different and there are no definitive solutions which cater for every situation, only suggestions which may help you decide what suits you best. This document does not provide legal guidance: we recommend you seek authoritative advice when introducing new policies or changing old ones. Further information and advice can be found on the Acas and EHRC websites, and our through our legal partners: [DAC Beachcroft](#), [Eversheds](#) and [Lewis Silkin](#) who have leading employment lawyers with recognised expertise in employment and discrimination law.

2. The Equality Act 2010 and Pregnancy and Maternity

2.1 Introduction

The Equality Act 2010 drew together all previous legislation on discrimination, including the Sex Discrimination Act 1975. Whilst the Equality Act mainly consolidated previous legislation, it did designate pregnancy and maternity as a protected characteristic in its own right, unlike previous legislation, which covered pregnancy and maternity under Sex Discrimination.

The Equality Act is designed to protect people in employment and places responsibilities on employers and some other third parties to ensure this.

Certain "protected characteristics" are identified by the Act, and "pregnancy and maternity" is one of them.

2.2 Summary

Pregnancy and maternity is a protected characteristic under The Equality Act 2010.

Discrimination covers the unfavourable treatment of a woman during the protected period in relation to her pregnancy or illness related to her pregnancy.

Unfavourable treatment includes any discrimination resulting from her asserting her right to take maternity leave, whether it is compulsory, ordinary or additional maternity leave.

The protected period begins when the pregnancy begins and ends at the end of her maternity leave (where she is entitled to ordinary and/or additional maternity leave) or after a period of 2 weeks after the birth (where she is not entitled to ordinary and/or additional maternity leave.) If unfavourable treatment occurs after the protected period but which occurs as a result of a decision made within that period, protection will still apply.

The Act prohibits:

- Direct discrimination; and
- Victimisation

An employer must not directly discriminate against or victimise a person:

- When deciding who to offer employment;
- In the terms on which an applicant is offered employment;
- By not offering the candidate employment;
- In the way they are given or not given access and/or opportunities for promotion, transfer or training, or for receiving any other benefit, facility or service;
- By dismissing them (including constructive dismissal and the expiry and non-renewal of a fixed term contract); or
- By subjecting the employee or ex-employee to any other detriment as a result of their pregnancy or maternity.

There is a specific exception in the Act, relating to non-contractual payments to women on maternity leave, which extends, for example, to the payment of discretionary bonuses. An employer is, however, obliged to maintain a woman's benefits other than contractual pay. She has no right to the payment of her full salary during maternity leave unless this is provided for in her contract of employment.

This means:

- A woman should not receive lower pay or inferior contractual terms for a reason related to her pregnancy.

- A woman should not be dismissed or demoted, denied promotions or training opportunities because she is pregnant or on maternity leave.
- A woman should not be treated unfavourably because of performance issues or absence from work due to pregnancy related sickness.
- You cannot treat a pregnant woman unfavourably because of the costs to the business of covering her work whilst pregnant or on maternity leave.
- You will need to carry out a risk assessment, as failure to do so may constitute discrimination.

There is no provision in the Equality Act 2010 for indirect discrimination in relation to the protected characteristic of pregnancy or maternity. However, many cases would be considered under the indirect discrimination provisions of the protected characteristic of sex.

Although the harassment provision of the Equality Act 2010 does not extend to cover pregnancy and maternity, women who are subjected to detrimental treatment because of acts of harassment relating to their pregnancy and/or maternity, will be able to make a claim of direct discrimination or harassment under the protected characteristic of sex.

There is no provision in the Act for an exception from unlawful discrimination due to genuine occupational requirements linked to pregnancy and maternity, although many cases would be covered by the exception in relation to the protected characteristic of sex.

2.3 Who is Protected?

The Equality Act 2010 provides protection against direct and indirect discrimination, harassment and victimisation in the fields of employment and vocational training to:

- **Job applicants and those applying for vocational training**

The Act applies not only to those who are going to work for you, but those who will undertake vocational training with you, such as apprentices. Similarly, its scope extends to those seeking professional or trade union membership.

- **Employees, both of unlimited duration and fixed term**

Employment (being in an employment relationship) means being employed under a contract of employment (or apprenticeship) and contracted personally to work. The length of contract is irrelevant – it can be indefinite or have an end date, for example, the end of a project.

- **Self-employed and contract workers**

A contract worker is any individual who is employed by one company but supplied to another to work. This includes secondees. If a company has a contract direct with a 'self-employed' worker, then the Equality Act will protect that individual.

- **Temporary, fixed-term and agency workers**

Temporary or agency workers who are employed by agencies, are protected from discrimination by the agency employing them, which has obligations under the legislation. However, the end user company will also be required to protect the workers from discrimination. The Act also covers employment agencies and organisations offering career or vocational advice and guidance. They need to comply with the legislation in how they treat their own employees, those who are placed with clients (on a temporary or contract basis) and those who use their services, for instance, whilst job seeking.

- **Office holders, Crown officials, Police officers, Company Officials and non-executive Directors**
- **Partners**
- **Ex-employees**

When an individual has left your business and then asks for a reference, you must not include remarks or comments about their pregnancy or maternity. You are not allowed to withhold a reference because someone has made a claim of discrimination.

The definition of “worker” is thus wider in the Act than in some other legislation. It includes those employed by you and also those contracted to work for you personally. Throughout this guide, “employee” means someone who is contracted to you under a contract of employment, and is, therefore, someone to whom you may wish to give benefits such as long service awards. “Worker” means anyone who is furthering your business, but not under a contract of employment. For example, you may have a temp from an agency to cover a job during an employee’s sickness absence. That person will not be employed by you, as you are paying an agency to supply them, but while they are with you, they are a worker under the definition in the legislation.

We recommend you seek legal advice if you are at all uncertain over who is and isn’t covered by the legislation; as a general principle it is good practice not to discriminate against anyone connected with your business.

The Act does not cover

- **Volunteers** - Unpaid volunteers are not specifically covered by the Act, although some who are appointed by the Government are (for example, magistrates, because of their status as office-holders). Where unpaid work “forms part of a paid employment relationship” it is likely that the individual will be protected by the Act, such as someone in an unpaid vocational training relationship, like a student teacher on work experience or someone on a work placement.

Relevant legal case

The Court of Appeal has confirmed that an unpaid volunteer, working under an agreement which was "binding in honour only and not a contract of employment" is not protected against discrimination. Arguments that the European Framework Directive, which covers discrimination in "employment and occupation", should be interpreted to cover volunteers failed, with the court noting: "The Directive does not, therefore, seek to give effect to the principle of non-discrimination in all areas of human activity. It limits the scope to what might, in general terms, be described as activities in the labour market." (X v Mid Sussex Citizens Advice Bureau)

The Act may cover:

- **Overseas workers** - Unlike previous discrimination legislation, the Equality Act 2010 does not specify its territorial scope. The Act therefore leaves it to tribunals to determine whether the law applies, depending for example on the connection between the employment relationship and Great Britain.

2.4 Direct Discrimination

Direct discrimination is where someone treats someone else less favourably than they would treat other people, because of their pregnancy or maternity.

Unfavourable treatment on the basis of pregnancy and/or maternity is automatically seen as discrimination.

The protected period begins when the pregnancy begins and ends at the end of her maternity leave (where she is entitled to ordinary and/or additional maternity leave) or after a period of 2 weeks after the birth (where she is not entitled to ordinary and/or additional maternity leave.) If unfavourable treatment occurs after the protected period but which occurs as a result of a decision made within that period, protection will still apply.

Unfavourable treatment includes any discrimination resulting from her asserting her right to take maternity leave, whether it is compulsory, ordinary or additional maternity leave.

Where the unfavourable treatment because of pregnancy or illness caused as a result of pregnancy falls outside of the protected period, it will be dealt with under sex discrimination provisions.

In an Employment Tribunal, the evidence must demonstrate that the claimant has been treated less favourably and that the treatment was a direct result of her pregnancy or maternity leave.

What constitutes less favourable treatment is a matter for the tribunal to decide. A person is treated less favourably if he or she is put at a disadvantage compared to others. Sometimes

the disadvantage is obvious e.g. where he or she is refused a job, but other times it will be less obvious e.g. they were excluded from an opportunity.

Where there is no actual comparator in similar circumstances and there is evidence to support a suggestion of discrimination, the tribunal will create a hypothetical comparator to show how a person of the other group would have been treated.

Where less favourable treatment is found, the next step is to show that the reason the treatment was less favourable was because of pregnancy or maternity. The pregnancy or maternity does not have to be the only reason for the less favourable treatment but it must have been an important factor.

For less favourable treatment to be held on the grounds of pregnancy and maternity, it is necessary for the employer to know or believe the employee to be pregnant, otherwise the case of the unfavourable treatment cannot be established. However, this belief may have been heard on the grapevine rather than through formal notification.

Discrimination by association and discrimination by perception do not apply in the case of the protected characteristic of pregnancy and maternity.

2.5 Harassment

Although the harassment provisions of the Equality Act 2010 does not extend to cover pregnancy and maternity, women who are subjected to acts of harassment relating to their pregnancy and/or maternity, may be able to make a claim of direct discrimination or harassment under the protected characteristic of sex.

Under the Protection of Harassment Act 1997, the employer may be vicariously liable for a course of conduct by one of its employees that amounts to harassment. The harassment may consist of bullying, intimidation or harassment and does not need to be based on a protected characteristic. Employers need to ensure that they have in place an anti-bullying policy that is well publicised to all workers and properly enforced. The employer must also act as soon as they become aware that bullying is occurring.

2.6 Victimisation

Victimisation occurs when someone is subjected to a detriment because they have done a "protected act" or their employer believes they have done so or may do so in the future. The person concerned could claim a detriment if they were put at a disadvantage or could reasonably consider their position to have been made worse. A threat to the person concerned might also be considered a detriment, but an unjustified sense of grievance would not.

The following are protected acts:

- Bringing proceedings under the Equality Act;
- Giving evidence or information in connection with proceedings under the Act;

- Doing anything which is related to the Act's provisions;
- Making an allegation (whether or not express) that someone has contravened the Act.
- Making or seeking a relevant pay disclosure to or from a colleague

Victimisation can never be justified.

Example

"All I said was I thought we should stop picking on her because she's pregnant. She'd had enough. She made a complaint; I stood up for her and then I didn't get promoted."

Comment

Victimisation can also occur when an individual, who has supported a colleague in making a complaint, for example, by being a witness at a tribunal, is disadvantaged or treated unfavourably.

The complainant does not need to compare her treatment to that of a real or hypothetical person to establish victimisation. Under the Equality Act, to establish victimisation she simply needs to show that she was subjected to a detriment in the above circumstances.

An individual is protected from victimisation even if the allegation turns out to be wrong, providing that it was made in good faith.

The motivation of the person committing the act of victimisation may be conscious or unconscious. Those committing the alleged act of victimisation must have knowledge of the protected act.

Liability for acts of victimisation may also extend to acts committed after the end of the working relationship, for example refusing a reference request.

2.7 Instruction to Discriminate

The Act prohibits a person from instructing, causing or inducing another person to discriminate, harass or victimise a third person. The Act also gives an opportunity for both the recipient of the instruction and the intended victim to make a claim, whether or not the instruction is carried out, provided that the recipient of the instruction or intended victim suffers a detriment as a result.

It is unlawful to tell or instruct others to discriminate on your behalf. This is sometimes known as 'knowingly aiding' discrimination.

Example

"The client project manager insisted that we did not put forward Mary for the promotion, as she was due to go on maternity leave in a couple of months. We had no choice".

Comment

By giving this instruction, the client project manager has acted unlawfully.

Example

"I didn't think it was right that Mary wasn't put forward for the promotion just because she was pregnant, so I nominated her anyway, even though I'd be asked not to. I was disciplined for refusing to follow my manager's instructions."

Comment

If you instruct someone to act unlawfully, and they refuse to carry out your instructions, then it is unlawful for you to treat them less favourably.

2.8 Liability

An employer is vulnerable to claims, as well as the individual who carried out the discrimination. Vicarious liability means that you are potentially responsible for any discriminatory act carried out by one of your workers while they are working for you, and that you are liable if you either knew or approved of their actions. This means both you and the individual who carried out the discrimination or harassment, may have to defend your actions.

Employers will have a defence against an act done by one of their employees or agents if they can show they took all reasonable steps to prevent such conduct. This could include having an appropriate policy and proof that the policy has been implemented, including appropriate communication and training.

Those who may be liable for prohibited conduct under the Equality Act 2010 include:

- **Employers** - in relation to job applicants, employees and ex-employees where:
 - The employer discriminates against a job applicant or discriminates against, harasses or victimises an employee in employment;
 - The employer's employees discriminate against a worker during the course of their employment unless the defence of having taken all reasonable steps to prevent discrimination applies; or
 - The employer's agent discriminates, unless all reasonable steps were taken to avoid it.

- **Employees**- who discriminate during the course of their employment will be personally liable. An employee may be named as a respondent in a discrimination claim and can be ordered to pay compensation even if their employer can show that it satisfied the reasonable steps defence. In this case it is not necessary to show that the employee knew that the act was unlawful.
- **Agents** – i.e. those who make work available for people employed by someone else when:
 - They discriminate against contract workers; or
 - The principal's agent discriminates.
- **Others** - who knowingly help another person to do an unlawful act of discrimination.

Example

"I knew her manager wasn't happy about her being pregnant and was making the odd snide remark about her lack of commitment to work and the impact it might have on her career but I didn't think it was a big issue."

Comment

The courts are likely to resolve issues of vicarious liability, but experience from other discrimination legislation shows that it is not how you react to a situation but what you did in advance. You can't wait for an incident before rolling out training or awareness raising programmes. If you hear of instances of discrimination or learn about discriminatory behaviours, you cannot ignore them. This would be seen as condoning discrimination.

2.9 Exceptions

Non-Contractual Payments to Women on Maternity Leave

There is a specific exception in the Equality Act that allows an employer to deny a woman who is on maternity leave a non-contractual benefit relating to pay. Employers are obliged to maintain a woman's benefits except contractual remuneration during ordinary and additional maternity leave, but unless her contract explicitly says so, she is not entitled to full pay during maternity leave.

The provision makes it clear that it does not apply to:

- Maternity related pay- i.e. pay to which a woman is entitled as a result of being pregnant or for time when she is on maternity leave (including pay calculated by reference to increases in pay that the woman would have received had she not been on maternity leave.)
- Pay when she is not on maternity leave; or

- A bonus in relation to the period when she is on compulsory maternity leave.

National Security

There is an exception allowing pregnancy and maternity discrimination in matters that concern national security, where the acts are proportionate for that purpose.

Armed Forces

The armed forces are able to apply a requirement for staff not to be female or pregnant where it is a proportionate means of ensuring the combat effectiveness of the armed forces.

Insurance Contracts

The Act allows employers to treat pregnant employees differently with regard to insurance or risk based matters where the difference is based on reliable actuarial or other data and is reasonable in all circumstances.

Protection of Women

The Act allows employers to treat women differently to comply with laws protecting women in relation to pregnancy or maternity or any other circumstances, which take into consideration the risks that only affect women.

2.10 Positive Action

There are provisions in the Act which justify positive action in certain circumstances, if it is aimed at helping you to achieve a diverse workforce.

More detail can be found in the enei Employer Guide to Positive Action.

2.11 Burden of Proof

One party in an Employment Tribunal will have the benefit of assumption, which means that the tribunal will assume their position is correct if it is not proved otherwise. The other party has the burden of proof, which means they have to give evidence to convince the tribunal of their position.

Usually, an accused party is considered innocent until the other party proves them guilty. However, discrimination law sets down a general principle that discrimination claims are subject to what is known as a reverse burden of proof. This means that the complainant has the benefit of assumption and only has to prove facts from which the tribunal can infer or conclude, in the absence of an adequate explanation, that you have committed an act of discrimination or harassment. You have the burden of proving that you did not commit an act of discrimination or harassment. If you cannot, then the tribunal must uphold the complaint.

2.12 Unenforceable Terms

Terms that constitute, promote or provide for treatment or behaviour that is prohibited under the Equality Act 2010 are unenforceable.

The Act also prohibits contracting out from its provision, except where the contract in question settles a complaint and is either made with the assistance of a conciliation officer or constitutes a qualifying settlement agreement.

2.13 Guidance and Codes of Practice

The Government Equalities Office and the Equality and Human Rights Commission have produced a wide range of explanatory material and non-statutory guidance on the Equality Act.

The EHRC has also produced statutory Codes of Practice on the employment provisions of the Equality Act 2010 and on Equal Pay. The Codes set out clearly and precisely what the legislation means and to apply legal concepts in the Act to everyday situations. They draw on precedent and case law and explain the implications of every clause in technical terms.

Some of the information contained within the Codes has been included within this guide, but you should read the original documents for a comprehensive review.

3. Recruitment and Selection

3.1 Legal Summary

The Equality Act allows you to seek and recruit competent and capable workers. It is how you define competence and how you select on that basis where issues will arise.

Employers cannot discriminate in recruitment on pregnancy or maternity grounds. An employer can't refuse to employ someone because they are pregnant or on maternity leave. All decisions should be based on whether a candidate has the skills to do the job.

A candidate doesn't have to tell the employer that they are pregnant when they apply for a job. However, if they do inform the employer of the pregnancy and are not offered the job as a result, this will be pregnancy discrimination. If the candidate doesn't tell the employer that they are pregnant during recruitment and are offered the job, they must not be dismissed or have the offer withdrawn when the employer finds out about the pregnancy.

All employees on maternity leave should have access to the same opportunities as staff who are at work. Therefore an employer must communicate all vacancies to staff on maternity leave to allow them to consider applying.

3.2 Recruitment Agencies

When you use an agency either to select and place workers or to supply temporary or contract workers to work within your business, your business could be liable for 'end user' claims of discrimination. Don't assume that a professional and credible agency will follow

best practice. An agency will work in the way they believe to be the most efficient and this may involve making assumptions about the type of candidate they target, to reduce the time spent filling your position.

There may also be claims of “instructions to discriminate” levelled at employers who are careless in how they handle and brief suppliers.

Have a formal contract with those on your preferred supplier list to ensure they can provide evidence of non-discriminatory practice in recruitment and selection. Good agencies will be aware of The Equality Act 2010 and will understand your concerns.

3.3 The Application Process

You should consider what information you request from your candidates at the application stage to ensure that your approach cannot be considered to be discriminatory.

Most application forms seek chronological and historical information. This is not unlawful but it may give an indication of gaps in employment, including maternity leave. The use of a bias free application form will minimise the risk of discrimination creeping in to recruitment selection. A “tear off” equal opportunity monitoring form will provide you with monitoring information – see the enei bias free application form.

3.4 Selecting and Appointing

Sifting and selection of candidates needs to be based on competence, capability, skill, ability and relevant experience. Those carrying out application sifts will need to understand that pregnancy and maternity is not a lawful criterion for choosing between candidates.

Example

“Our receptionist is the public face of the organisation; the person on the front desk has to project the right image. I don’t want the first person customers see to be someone who’s heavily pregnant.”

Comment

What someone looks like and whether they are pregnant or not, is not an indication of their competence or capability. A good receptionist warmly and efficiently welcomes visitors, has a clear and precise telephone manner and is able to handle “problem” customers. These competences are of greater importance than a “face that fits”.

Assessment Centres

Many organisations use a variety of techniques to help select candidates for interview. None of the traditional recruitment methods are automatically discriminatory but you should review the results and consider if any of your processes are restricting your pool of talent. If

an applicant is pregnant or applying for the position whilst on maternity leave, consider if their requirements are different to other candidates and try and be flexible where possible.

Interviews

All interviews should be based on competence and skill and be carried out by trained managers. If a panel is used, some attempt at gender diversity for participants should be made. Interviewers should use a standard set of questions as far as possible and results should be noted on a standard score sheet. It is essential to keep accurate records of interviews; we recommend that these be archived for at least 12 months.

Feedback

Good practice is to provide feedback to failed candidates. However, those supplying feedback should be trained to understand the risks of careless or ill thought through comments. Just as in interviews, statements about pregnancy, career gaps as a result of maternity leave or comments about the suitability of a role 'at your stage in life' etc, could be interpreted as discriminatory and support a possible claim.

4. Managing People

The Equality Act protects employees throughout their working lives. This means you could be vulnerable to claims if you discriminate in any area of employment including training, progression or promotion.

4.1 Equality Policies

You should develop a policy, which meets your organisational goals, whether this is focused on eliminating discrimination or using inclusion to achieve business success.

Ensure pregnancy and maternity is included in your equal opportunity statement or policies, particularly if you list the protected characteristics. Failure to do so could be interpreted as a lack of concern on pregnancy and maternity issues.

Try to develop approaches to deal with discrimination and general education of your workforce, that provide support to employees, rather than simply providing a list of things that they shouldn't do. Sometimes we are not even aware of our own prejudices and need help to understand them. We have all been exposed to situations in our lives, which have formed unconscious bias that affects the way we see the world and react to different situations without knowing it.

Example

"She will be going on maternity leave in 4 months so there's no point in letting her start an NVQ as she won't have time to finish it."

Comment

This is discriminating against the member of staff. She may not have time to complete the NVQ in the same timescales as other learners, but she should still be given the opportunity to undertake the training and the flexibility to complete it within appropriate timescales.

Once a policy has been agreed, it is important to train staff on your expectations and procedures. A key element of this training should be to explore the day-to-day prejudices and assumptions about different groups of people, including pregnant workers.

In large organisations, it may take some time for all managers to be fully trained and made aware of their new responsibilities, as well as the risks from mistakes. Communication is the key to effective culture change. You should as a matter of course roll out a 'zero tolerance' programme on discrimination and associated banter.

4.2 Managing Difference

Managers should be encouraged to talk to and treat their workers equally, but also to acknowledge and recognise difference and adjust their behaviour accordingly. All those who reach management levels and have responsibility for other workers should be trained.

Difference should be part of the normal team dynamic. Everyone needs to get on together and accommodate each other's different behaviour and approach. You need to watch out for inappropriate behaviour from the team.

4.3 Communication

Communication is key when managing a pregnant employee or one on maternity leave. From the moment a line manager is informed of the pregnancy to the time when she returns to work after maternity leave; communication should be regular and consistent. The tone should be positive and informative, to demonstrate that the organisation is supportive of the employee and that the employee remains a valuable member of the team when on maternity leave.

Communication before leave will focus on the employee's maternity entitlements, the impact of the pregnancy on work e.g. risk assessments, general support and the details of her expected maternity leave. Once she has started maternity leave, it is important to keep her informed about organisational and people changes, key messages as well as showing a general interest in her and her baby. A line manager who maintains effective communication with a pregnant woman or one on maternity leave is more likely to be given early indications of the expected period of leave and return date, as well as benefit from a fully motivated and engaged employee on her return to work.

4.4 Notification of Pregnancy

There is no requirement for a pregnant employee or job applicant to inform her employer of the pregnancy until 15 weeks before the beginning of the week when the baby is due. If this isn't possible, for example because the employee didn't realise she was pregnant, she must tell you as soon as reasonably possible.

As an employer, you can encourage employees to notify you earlier, to allow you to plan around the maternity leave and carry out your legal obligations, such as Health and Safety Risk Assessments, but ultimately there is no obligation for them to do so until 15 weeks before the baby is due.

When an employee notifies you of her pregnancy, how you react and how you communicate throughout the pregnancy and maternity leave are crucial to ongoing good relationships. An acceptable response when informed of a pregnancy is to congratulate the mother (and father where appropriate) and focus entirely on the good news, without immediate thought to the operational impact on the organisation.

Some women will be concerned about how the pregnancy news will be viewed both by the organisation and by her colleagues; however positive communication both now and throughout the pregnancy and leave will reassure her that she will not be treated differently because she is pregnant and will not be subject to detrimental treatment.

If an employer has heard of the pregnancy from another source, the mother's protected period would begin, even if the mother has not notified the employer of the pregnancy herself.

4.5 Health and Safety Risk Assessments

Good employers seek to protect employees from risk and try hard not to expose them to danger. Some workplaces and/or roles can be hazardous to pregnant women and/or their unborn baby. Ideally risk assessments should be carried out regularly before pregnancy where this is the case, to identify the risks of a particular role on women of childbearing age. However when an employer is notified of a pregnancy, they should immediately consider if work is likely to present a particular risk to the mother or the baby.

This involves reviewing the risk for the individual's specific work, identifying any changes that are necessary to protect her and her unborn baby's health and making any necessary adjustments. Employees should be involved in this process and the assessment should be reviewed throughout the pregnancy to see if any new adjustments are necessary.

Risks could include (this list is not exhaustive):

- Lifting or carrying heavy loads;
- Standing or sitting for long periods;
- Exposure to toxic substances;

- Seating and/or working environments;
- Driving and/or driving conditions; and/or
- Long working hours.

Once you have identified a risk you should remove the risk or remove the employee from the situation that exposes them to it. Solutions could include finding suitable alternative work, changing hours of work or, where this isn't possible, paid suspension from work on health and safety grounds.

If you fail to carry out a risk assessment for a pregnant employee, where it is later seen to be necessary, it may constitute discrimination.

Relevant legal cases

In *Hardman v Mallon t/a Orchard Lodge Nursing Home* the EAT held that a failure to carry out a risk assessment for a pregnant care worker in a nursing home was sex discrimination.

In *O'Neill v Buckinghamshire County Council* the EAT held that there is no general obligation to carry out a risk assessment on employees. The obligation is triggered where:

The employee notifies the employer that she is pregnant;

The work could involve the risk of harm or danger to the expectant mother or her baby; and

The risk arises from the processes or working conditions or physical or biological agents specified in the Pregnant Workers Directive.

4.6 Time off for Antenatal Care

Pregnant workers are entitled to take reasonable paid time off to attend antenatal appointments and classes. However, they are not entitled to do this until they have notified you that they are pregnant. As an employer, you are entitled to request evidence of the appointments from the second appointment onwards.

Antenatal care may include relaxation or parent craft classes as well as medical examinations, as long as a doctor recommends them.

The employer can suggest that appointments are made outside of working hours where possible, but pregnant women are not obligated to do so, and cannot be treated detrimentally if they chose not to.

Any detrimental treatment as a result of an employee asserting her right to attend antenatal appointments would be seen to be pregnancy and maternity discrimination.

4.7 Statutory Maternity Leave

All employees are entitled to 26 weeks of Ordinary Maternity Leave and 26 weeks of Additional Maternity Leave, making one year in total. However, this may or may not be paid – see Pay section.

If an employee wishes to take Statutory Maternity Leave, there are steps they should follow to notify their employer of their intention to take leave.

The employer may request to see the MATB1 certificate, which is provided by a doctor or midwife, to say when the baby is due. The MATB1 is issued when the woman is 21 weeks pregnant.

There is no obligation for the employee to give any indication of how long they expect to take off work or when they plan to return to work and they should not be influenced to do so. Many women will be happy to give an indication to help with organisational planning but there is no obligation for them to do so or to stick with this date if they give one.

An employer cannot discriminate against a pregnant employee or one on maternity leave as a result of their wish to take maternity leave, within the statutory limits.

Employees do not have to take all of their maternity leave entitlement. However, they must take a minimum of 2 weeks compulsory maternity leave (4 weeks if they work in a factory) after their baby is born. If a woman returns to work after this compulsory period (except on a keeping in touch day), her protected period for the purposes of protection against pregnancy and maternity discrimination will end. See enei's Guide to Family Leave for more details.

4.8 Performance Management

Motivating workers is a key factor of future success. Employers need to think now about how to motivate, enthuse and encourage creative thinking and productivity. This applies to all employees, including those who are pregnant and will be taking time off work on maternity leave. Pregnant women and those on maternity leave should be given the same opportunities as all other employees.

Relevant legal case

In *Caisse Nationale d'Assurance Vieillesse des Travailleurs Salaries (CNAVTS) v Thibault* the ECJ found that a woman who was deprived of the right to an annual performance assessment - and, consequently, of the possibility of qualifying for promotion - because she was on maternity leave was discriminated against on grounds of sex within the meaning of the EC Equal Treatment Directive

It is often thought that performance management is a process more suited to large organisations. The truth is that performance management can just be regular conversations

between an employee and their manager. These can be daily, weekly, monthly or even quarterly.

As bias reduces, hidden talent can emerge. A good manager will help all workers perform to their best whatever their difference and will not assume that reduced performance or poor performance is pregnancy or maternity related.

Appraisal

Reasonable and realistic targets must be set for all workers and they should be supported to achieve them.

Regular monitoring of performance scores will support you to identify possible bias. You should, at least, profile those marked as poor performers to help identify whether there is potential management bias.

When monitoring performance management outcomes, you should:

- Regularly discuss and agree training and development needs as part of a performance management/appraisal system.
- Build participation in training on a regular basis into the process.
- Focus performance management on objective measures and outputs to ensure there is no bias.
- Check that criteria for measuring performance work in practice is objective.
- Include performance or behaviours on diversity as criteria in the process.
- Review how employee performance or behaviours on diversity are rewarded or recognised as this could help promote the right behaviours.
- Be able to monitor managers who have a 'discretionary' allocation for performance measurement to ensure there is no bias.
- Monitor poor performance and profile those individuals to check the process is not inherently biased.
- Ensure the performance management process is transparent by giving workers access to the outcomes or findings of managers.
- Encourage or support diversity by including it as a key performance indicator (KPI) or similar competency for senior managers.
- Give managers equality objectives against which they are measured.

To ensure there is no confusion in the future, it is best to keep a simple record of any conversation based on objective and factual information which is dated and signed by both the you and the employee. This will also help to track progress over time. If you fail to record

a conversation about performance, any further drop in performance will mean you have to start again with your process, which wastes time unnecessarily.

Training

The Equality Act covers training whilst in employment, whether the employer or an external supplier provides the training. It is unlawful to exclude someone from training on the grounds of their pregnancy or maternity leave or to treat them differently when they are receiving training (unless this is covered by the positive action provisions.)

You are responsible for the discriminatory actions of individual employees, unless you can prove otherwise. Those who work for you on a contractor or temporary basis should be informed of your policies as soon as they start working with you. All external training suppliers should be vetted to ensure that they are compliant with the Equality Act. The induction training of new employees, should automatically include training on discrimination legislation in particular.

All employees should be regularly encouraged to up-grade their skills and knowledge. You should be able to monitor training take up to ensure that it reflects the company profile.

You will probably have regular appraisal or performance meetings at which training and development needs should be discussed with employees. Managers need to be aware that pregnancy and maternity should not be a factor when discussing training needs or when nominating workers for training or career progression. Where training (and promotion) is based on self-development or self-nomination systems, managers and colleagues should be positive and supportive and not make discriminatory remarks or prejudice the decisions of others.

Example

"I was very upset when I failed the board. When I asked why I wasn't being promoted, they said I hadn't been on the right courses. They started to look a bit worried, when I told them I'd asked to go on them, but my boss had refused, saying there wasn't any point as I was about to go on maternity leave."

Comment

This scenario would be directly discriminatory as the member of staff failed to be promoted as a result of her pregnancy.

Career Progression

All promotions and internal appointments should be treated in the same way as external appointments, with a full and rigorous evaluation to ensure they are not biased. Pregnant employees and those on maternity leave should be made aware of all opportunities so they can decide whether or not to apply. When a woman is on maternity leave, she should be

given access to all vacancies via an intranet site or sent a copy of all advertisements in paper format to her home address. This process should be discussed prior to her leaving on maternity leave to avoid any confusion.

Relevant legal case

In *Visa International Service Association v Paul* an Employment Tribunal held that Mrs. Paul had suffered a pregnancy related detriment and sex discrimination as she was not given the opportunity to apply for a new post whilst on maternity leave, as her employer had made an assumption that she didn't have the necessary experience for the role. The tribunal and EAT agreed that the employer's conduct amounted to a constructive dismissal, even though Mrs. Paul may not have been suitable for the post in question. The employer's failure to notify her of the opportunity was held to have fatally undermined her trust and confidence in it. The dismissal was found to be automatically unfair and the failure to inform her of the vacancy was held to be a pregnancy-related detriment under the Employment Rights Act.

There is a lot of anecdotal evidence that promotions are more about who you know and how you play the system and that best practice on equality is often lost. Some employers use service and/or seniority in identifying suitable individuals for promotion, which could be interpreted as discriminatory. Cultural change should encourage a move away from these traditional methods.

4.9 Absence and Sickness

If a pregnant employee has to take time off from work during their pregnancy because they are ill with a pregnancy-related illness, they should be paid sick pay according to the normal terms of their contract. A pregnant employee cannot be treated less favourably if the illness is related to their pregnancy.

If the employer offers enhanced sick pay on a discretionary basis, this should also be made available to a pregnant employee with pregnancy related illness, to avoid pregnancy related discrimination claims.

It is also unlawful to take pregnancy related sickness into account when dismissing an employee for unacceptable levels of sickness. Where an employer operates a sickness policy, which counts incidents of absence towards a trigger, all pregnancy related absence should be excluded.

Relevant legal case

In *Brown v Rentokil Ltd*, the ECJ made it clear that a woman enjoys protected status from the moment her employer is aware that she is pregnant to the end of her maternity leave.

A clear absence and sickness policy that is seen to operate fairly is essential.

Note that maternity leave starts automatically if a woman is off work, even for one day, because of a pregnancy-related illness in the four weeks before her baby is due.

4.10 Disciplinary Action

An employee cannot be disciplined for any reason linked to their pregnancy or maternity leave.

If an employee is unable to attend a disciplinary meeting due to an illness connected with their pregnancy, the employer must rearrange the meeting to a suitable time. The employee cannot be subject to any detriment as a result of their pregnancy or pregnancy-related illness.

4.11 Redundancy

An employee cannot be selected for redundancy on the basis of their pregnancy or maternity. If absence is used as criteria for selection, all pregnancy-related absence must be excluded.

If an employee is affected by a redundancy situation whilst on maternity leave, they should be included in any consultation process. This includes the right to:

- Nominate themselves for the role of consultation representative;
- Vote for elected representatives;
- Attend any relevant meetings;
- Have access to minutes of meetings; and
- Be notified of any proposals at the same time as all other colleagues.

Pregnant women or those on maternity leave can have preference over other employees for suitable alternative roles.

Relevant legal case

In *McGuidan v TG Baynes & Sons* it was held that the employer's failure to consult an employee about her impending redundancy amounted to direct sex discrimination, as the effective cause of the failure was that it was hoped she would not return to work after maternity leave.

4.12 Returning to Work after Maternity Leave

Employees are entitled to return to the same job after maternity leave, unless this is genuinely not possible, where a suitable alternative should be offered; for example, if the post has become redundant while the employee was on maternity leave.

4.13 Breastfeeding

The UK has one of the lowest rates of breastfeeding in Europe and an analysis of global breastfeeding prevalence found that in the UK only 34% of babies are receiving some breast milk at 6 months compared with 49% in the US and 71% in Norway.

Breastfeeding rates in the UK decrease markedly over the first weeks following birth. In the 2010 UK Infant Feeding Survey, 81% of mothers in the UK initiated breastfeeding, but only 34% and 0.5% were breastfeeding at 6 and 12 months respectively. Figures for England in 2015/16 show that while almost three quarters of mothers started breastfeeding (73.1%), this fell to 43.2% at 6-8 weeks. In Scotland, 49.3% of women were reported to be breastfeeding soon after birth, but only 38.9% at 6-8 week review.

Mothers who are planning to return to work and continue breastfeeding can make a request for flexible working if they have worked for their employer for at least 26 weeks. They can ask for changes in their days, hours or place of work. They may ask to work shorter shifts, to work part-time or to move from evening or night shifts to day work in order to continue breastfeeding. Employers are legally required to give the request serious consideration and can only refuse a request for good business reasons. The employer and employee can agree to make a temporary change in the employee's contract while she is breastfeeding.

There is no explicit statutory right to breaks at work for breastfeeding or expressing milk. However, employers employing women of childbearing age are required by law to assess risks to new and expectant mothers arising from processes or working conditions, physical, chemical or biological agents¹.

Employers are required by law to provide a breastfeeding mother with a place to rest. This could be the same room provided for the woman to breastfeeding or express. The Health and Safety Executive recommends provision of washing facilities and a clean, secure fridge to store milk.

There is useful guidance for employers on breastfeeding available from Maternity Action² and Acas has also published guidance on accommodating breastfeeding employees in the workplace³.

¹ <http://www.hse.gov.uk/mothers/law.htm>

² <https://www.maternityaction.org.uk/wp-content/uploads/2014/11/BORTW-employer-leaflet-FINAL.pdf>

³ <http://www.acas.org.uk/media/pdf/b/s/Acas-guide-on-accommodating-breastfeeding-in-the-workplace.pdf>

5. Pay and Benefits

5.1 Legal Summary

The Equality Act 2010 states that an employer must not discriminate against a person as to the terms on which they offer the person employment.

A woman should not receive lower pay or inferior contractual terms for a reason relating to her pregnancy, and a maternity equality clause is implied in her contract to ensure this. This covers:

- The calculation of any maternity-related pay the employee is entitled to under their contract;
- Bonus payments during maternity leave; and
- Pay increases following maternity leave.

There is a specific exception that allows an employer to deny a woman who is on maternity leave a non-contractual benefit relating to pay. Employers are obliged to maintain a woman's benefits except contractual remuneration during ordinary and additional maternity leave, but unless her contract explicitly says so, she is not entitled to full pay during maternity leave.

Contractual terms include the calculation of maternity pay, bonus payments during maternity leave, pay increases following maternity leave and occupational pension schemes.

The provision makes it clear that it does not apply to:

- Maternity related pay i.e. pay to which a woman is entitled as a result of being pregnant or for time when she is on maternity leave (including pay calculated by reference to increases in pay that the woman would have received had she not been on maternity leave.)
- Pay when she is not on maternity leave; or
- A bonus in respect of times when she is on compulsory maternity leave.

This means that:

- A woman cannot be offered a job on a lower pay rate because she is pregnant or on maternity leave.
- During ordinary paid maternity leave, an employee is entitled to the same benefits that she would get, if she were working her normal contracted hours. This includes:

- Paid holiday;
- Employers' pension contributions;

- Health club membership; and
- Participation in share schemes

Employees will normally but not always be entitled to pay rises and bonuses that they would have received if they had been at work.

5.2 Pay and Maternity Pay

A woman on maternity leave has the right to keep the same terms and conditions as when she was at work. However, there is not an automatic right to receive full pay, unless the contract of employment states so. It is not discrimination to pay reduced pay to a woman during maternity leave (as long as statutory provisions are met.)

Many employees will be entitled to Statutory Maternity Pay- see enei's Guide to Family Leave for more information.

Where a pay review or increase would be awarded during the period of maternity leave, the employee should be given the same opportunities to benefit from this review as all other staff. This includes recalculating maternity payments where appropriate.

Example

Jane is entitled to full pay for the first 6 weeks of her maternity leave, followed by the standard SMP rate. During the first 6 weeks, Jane becomes entitled to an increase in pay because there has been a standard pay award across the organisation she works for. The employer must therefore recalculate her maternity pay to take account of the pay increase.

5.3 Sick Pay

An employee who is absent with pregnancy related sickness is entitled to receive the same sick pay as any other employee on comparable sickness absence. She is not, however, entitled to full pay during the whole period of her absence where other employees would not be entitled to such pay. An employee has the right to be paid whatever their contract of employment says she will be paid when off work sick.

Time taken off sick because of an illness resulting from the pregnancy shouldn't count towards an employee's sickness record at work. This includes any time taken off work because of a miscarriage, but excludes time taken off for IVF as the employee is not pregnant at this stage and therefore not within the protected period. (However, time off for IVF is covered by the protected characteristic of sex.)

An employer must not discipline or dismiss an employee because of pregnancy-related absence. Any action taken is likely to be pregnancy and maternity-related discrimination.

5.4 Annual Leave

Women have the right to build up statutory and contractual holiday entitlement during a period of maternity leave.

Relevant Case Law

In the Portuguese case of *Gomez v Continental Industrias del Caucho* Ms Gomez worked in a factory where employees had to take their leave during the summer shutdown period. Ms Gomez's maternity leave spanned this period and her employer did not let her take the leave at another time. The European Court of Justice ruled that she should be able to take her statutory holiday accrued under the Working Time Regulations outside of the summer shutdown. This means that workers who have holidays at fixed times of the year can argue, on the basis of Gomez, that they should be able to take their leave at another time if they miss out on it because of maternity leave. That is, they should be allowed to take their leave before or after they return from maternity leave.

5.5 Bonus Schemes

All contractual bonus payments due during a woman's period of maternity leave should be paid. However, they may be prorated to exclude the period when the woman was on maternity leave, with the exception of the 2 or 4 weeks' compulsory maternity leave period, which cannot be prorated.

The bonus should be paid at the same time as other employees who are at work, and not held back until she returns to work.

5.6 Insured Benefits

The Act allows employers to treat pregnant employees differently with regard to insurance or risk based matters where the difference is based on reliable actuarial or other data and is reasonable in all circumstances.

5.7 Pensions

The Act provides that an occupational pension scheme must be taken to include a non-discriminatory rule.

6. Leavers

6.1 Legal Summary

The legislation does not stop employees resigning or leaving their job. You may dismiss an employee provided they have a 'fair reason for dismissal', under the Employment Rights Act 1996. Fair reasons include gross misconduct, redundancy, capability and "some other substantial reason".

A pregnant woman or one on maternity leave should not be dismissed as a result of her pregnancy or maternity leave.

6.2 Post Termination

It is important to remember that ex-employees can still bring a claim of discrimination, if they believe they have been discriminated against during or after employment. Bear this in mind, particularly when considering reference requests.

An act of discrimination or harassment committed after the working relationship has come to an end will be unlawful if it would have been unlawful during the course of employment where the discrimination or harassment arises out of or is closely linked to that employment. E.g. a complaint could be brought about discrimination during an appeal about a dismissal, even though the employment has ended or if the employer refuses to provide a reference. If an employer normally provides benefits to ex-employees, a complaint of discrimination could be brought.

7. Monitoring

Understanding the profile of your workforce and their views about work will help you devise and implement your people strategy, to ensure you are getting the most from the talented people you employ. It will also help you defend an Employment Tribunal claim if one is made.

If a claim of sex discrimination or harassment is made, tribunals are likely to look at various aspects of your practice to establish if discrimination has taken place. They could look at statistics; policies, procedures and how you apply them in practice, particularly if that practice is implemented inconsistently.

More about equality monitoring can be found in the enei Employer Guide to Monitoring.



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