What to do if you are pregnant and concerned about Covid-19 and going into work

Introduction

If you are an expectant mother during this time, you will undoubtedly feel concerned about how coronavirus (Covid-19) could affect you, your baby and your pregnancy. With the added impact of working during your pregnancy in such uncertain conditions, we are aware of your need for clear and practical advice to cover any Covid-19 related concerns you may have.

How are you affected by Covid-19 as a pregnant employee?

This overview summarises specific guidance from the NHS, the Royal College of Obstetricians and Gynaecologists (RCOG) and the Health and Safety Executive (HSE) for expectant mothers. The government guidance has also been recently updated. For further information from each source, follow the respective links. Such guidance is frequently updated in the course of any changes to the law and/or with government and health advice, so please ensure to keep yourself informed.

There is no evidence that pregnant women are more likely to get seriously ill from Covid-19, however, pregnant women are classed as people at moderate risk (clinically vulnerable) as a health precaution. This because pregnant women can sometimes be more at risk from viruses like flu, so it is deemed safer to assume that pregnant women are more vulnerable to the effects of Covid-19.

Pregnant workers are advised to continue to be cautious to reduce the risk of severe illness. Following the lifting of most Covid restrictions on 19 July, the most recent government guidance recommends 'minimising the number, proximity and duration of social contacts'.

Pregnant women should not be required to continue going into work unless supported by a risk assessment. This means working from home, where possible. If you are more than 28 weeks' pregnant you should be particularly attentive to social distancing. Health guidance considers you to be at higher risk if you are 28 weeks pregnant and beyond because you have an increased risk of becoming severely ill and of pre-term birth if you contract Covid- 19.

If you are in another high-risk category – for example, you have an underlying health condition, you are disabled or you are from a Black, Asian or Minority Ethnic (BAME) background, then you should seek to follow strict social distancing measures and speak to your GP, midwife or maternity team as soon as possible if you have not been contacted already.

Your employers' duties - Management of Health and Safety at Work Regulations 1999

If you are pregnant and have let your employer know in writing of your pregnancy, your employer should carry out a risk assessment to follow the Management of Health and Safety at Work Regulations 1999 (MHSW) or the Management of Health and Safety at Work Regulations (Northern Ireland) 2000.

As pregnant women are considered clinically vulnerable, where the nature of their role means that they cannot work from home, *and* there is no suitable alternative work available that they could do from home, your employer should consider suspending you on full pay (regulation 16(3) of the MHSW) if the workplace risks from COVID-19 cannot be sufficiently mitigated. Your full pay should be based on your usual earnings, not pay based on your contractual hours; you should not be placed on sick pay. Advice from ACAS on this can be found on the ACAS website.

Regulation 3 of MHSW places a legal duty on all employers to assess the health and safety risks that their employees are exposed to whilst at work. Once the risks have been assessed, the employer is then required to put in place the appropriate health and safety measures to control those identified risks.

Health and Safety at Work and Pregnancy

Upon written notice to your employer that you are pregnant, given birth within the past six months or are breastfeeding, your employer must take action to remove, reduce or control the risk (Regulation 18 of MHSW). If the risk cannot be removed, your employer must take the following action:

> **Action 1** - Temporarily adjust your working conditions and/or hours of work; or if that is not possible
>
> **Action 2** - Offer suitable alternative work (at the same rate of pay) if available, or if that is not feasible;

Action 3 - Suspend you from work on paid leave for as long as necessary, to protect your health and safety, and that of your child.

Information contained in the RCOG guidance on Covid-19 in pregnancy should also be used as the basis for a risk assessment.

If it is not possible to avoid risks to your health and safety, your employer must offer you "suitable" and "appropriate" alternative work. For example, this may include a more paperwork-based role, if it is available. Any alternative work must be similar to your usual role and something that you can do with your skills and experience. The work must also be offered on terms and conditions that are no less favourable than your usual job. Importantly, this means that any alternative job must be offered on the same pay and for the same hours or days. If your employer can only offer you an alternative role on reduced hours, then your normal salary must be continued.

If no alternative and suitable role can be offered, your employer would have to suspend you on full pay for as long as necessary to avoid the risks to your health. This could include where your continued working endangers your health or pregnancy, particularly as the COVID situation has developed negatively whilst your pregnancy has advanced.

We have more general information on health and safety in pregnancy and for breastfeeding mothers on our webpages.

Furlough

If you are unable to work from home, you can ask to be furloughed on the basis that you do not feel safe attending work whilst you are pregnant and that you are clinically vulnerable. Please note that the furlough scheme is currently due to end on 30 September 2021. From 1 August 2021, the government will only be contributing 60% of a furloughed employee's wage, but employers are still expected to make the difference to ensure that furloughed employees receive at least 80% of their wages.

We have detailed pages on furlough. We also have practical steps you can take if your employer refuses to furlough you. If your employer does refuse furlough you should explain in writing that you feel concerned about your health and safety due to your pregnancy.

At this point it may make more financial sense for your employer to furlough you.

If your employer does not pay you while you are suspended, you can claim for an unlawful deduction of wages at the employment tribunal. However, please note that you would not be entitled to suspension on full pay if you unreasonably refuse an offer of suitable and appropriate alternative work.

If you are suspended on full pay or you are absent from work for any pregnancy-related reason, then your employer can start your maternity leave and pay early. The earliest that you can be put on maternity leave by your employer for pregnancy-related absences is 4 weeks before your baby is due. Normally it is up to you when you start maternity leave - you would state this in your maternity leave notice (to be provided by the 15th week before your baby is due).

Equality Act 2010

A breach of the MHSW may also be unlawful discrimination under the Equality Act, depending on the circumstances. There is no length of service qualification, and the Equality Act gives protective rights to a broad range of employees including those who are contract (or agency) workers and apprentices. See our pages on discrimination for more information.

HSE has published a brief guide for new and expectant mothers and their rights under the MHSW.

Under the Equality Act 2010, it is unlawful to discriminate against you because:

- you are pregnant, or
- of a pregnancy-related illness

The protection against pregnancy related discrimination lasts for a specific period of time which starts when you become pregnant. This is called the 'protected period'.

If you have the right to maternity leave, the protected period ends when your maternity leave ends or when you return to work, if this is earlier. All employees, irrespective of length of service, have the right to take maternity leave.

If you do not have the right to maternity leave - for example, because you're not an employee, the protected period ends two weeks after your child was born.

Once you have given birth, it is also unlawful to discriminate against you for one of these reasons:

- you're on maternity leave
- you've been on maternity leave
- you've tried to take maternity leave which you're entitled to

If you think that you have suffered unfavourable treatment because of your pregnancy or maternity, you should get legal advice as soon as possible. It is important to try to resolve it amicably by talking to your employer informally. You could ask for a meeting to discuss any problems at work. Try to keep it constructive and focus on solutions, rather than going over what has gone wrong. It may help to give your employer information on your rights or to set out your concerns in writing. It may also be a good idea to talk it through with your union, your HR department or a more senior manager.

We have a number of FAQs on pregnancy and maternity discrimination on our website.

Pay, Terms and conditions

If you are working from home or in an adjusted role as a result of your risk assessment, your pay and other terms and conditions of their employment stay the same, apart from having to work from home or in an alternative role, on a temporary basis.

If you are working from home, your employer should have a homeworking policy in place which will set our how your employer will carry out risk assessments, how home working will be managed (especially if you are heavily pregnant) and providing who will provide and pay for equipment if required.

For further information on working from home during the pandemic, see the ACAS guidance.

Right to not suffer Detriment and Dismissal as a result of Health and Safety concerns (section 44 and 100 ERA)

As an employee, if you reasonably consider that there is a 'serious and imminent' danger to you, that you may leave the workplace, or take appropriate steps to protect yourself or others. If you think that your workplace is unsafe because of the risk of coronavirus, and you ***reasonably believe that the threat to your health is serious and imminent***, then you can refuse to go to work. The danger can also include danger caused by the behaviour of work colleagues.

Your employer should not treat you unfavourably or dismiss you in these circumstances.

This protection from being treated unfavourably or being dismissed comes from sections 44 and 100 of the Employment Rights Act 1996. It applies to employees, and potentially workers (the Act only refers to 'employees', but EU case law suggests workers could also protected by this right). It applies regardless of how long you have been working for your employer.

Unfavourable treatment or suffering detriment could include disciplinary action or withholding pay by your employer as a result of your refusal to attend work or where you have otherwise sought to lessen the seriousness) of health and safety risks in your employment activities (s 44 ERA 1996). Section 100 ERA 1996 prohibits dismissals in the same circumstances.

s 44 and s 100 ERA 1996 do not currently apply for those self-employed or those categorised as a 'worker' instead of an 'employee'. However, a recent case in the High Court held that a broader definition of worker should be included to benefit from the health and safety protections: *The Independent Workers' Union of Great Britain v The Secretary of State for Work & Pensions and others*.

In situations where this protection applies, you would normally be entitled to stay home on full pay as loss of pay would arguably constitute a detriment.

Remember: It is worth remembering though, that this protection was designed for extreme health and safety emergencies, it was not designed with COVID-19 in mind and its application to the current pandemic is therefore, as yet, untested in the courts. In addition, there is the real risk that your employer could choose not to pay you if do not attend work in these circumstances, at least in the short term and instead will wait for you to bring a claim in respect of your wages for the period of time you did not attend work whilst exercising your s 44 rights. There is currently a huge backlog in Employment Tribunal claims and this could take up to a couple of years.

What is "Serious and Imminent" danger?

It is based on individual circumstances – there is no one size fits all approach.

Whether coronavirus is a "serious and imminent" danger will depend on your particular role and workplace, and whether or not you have any medical conditions and/or the stage you are at in your pregnancy which may place you at higher risk.

It also depends on how much your employer is complying with the government's guidance on working safely during coronavirus.

If your employer is complying with the all the relevant guidance, it is less likely that it is reasonable for you to believe there is a serious and imminent danger. However, it is still possible that you could reasonably believe it is too dangerous for you to go into work. For example, if you are in a role where social distancing is not always possible (e.g. early years childcare) the lack of distancing will go towards increased risk.

Under current circumstances, the risk of contracting Covid-19 as a pregnant woman is likely to be considered a significant health risk and relevant 'danger'. The result is that it is unlikely that employers will be able to successfully defend claims made against them on the basis that Covid-19 is not 'serious', as it is clearly a potentially deadly virus. The question for an employment tribunal to consider will be whether it is ''imminent'. This is likely to be a contentious issue, but so long as you reasonably believe that the danger is 'serious *and* imminent' then you may be protected under s 44 and s 100 ERA 1996, regardless of what your employer believes.

What if my employer says the workplace is "Covid Secure"?

It is important to note that a claim is not likely to be successful if:

1. your employer has taken careful steps to make the workplace Covid-secure; and
2. you were made aware at the time and you have knowledge of the health and safety measures in place.

This may include your employer providing a copy of the risk assessment carried out in line with the employer's obligations under the Management of Health and Safety at Work Regulations 1999, protective equipment (i.e. PPE, facemasks, visors) for employees, using screens or barriers to separate people from each other and increasing the frequency of cleaning measures.

Your employer is obliged to undertake Covid-19 risk assessments to aid in managing risks and protecting people. HSE has produced guidance and practical measures for employers to follow, and you may want to ask for further information on this risk assessment if it has not been provided to you.

Can I refuse to perform certain parts of my role if I feel they are higher risk?

You have protected rights if you have taken 'appropriate steps' to protect yourself and others in light of a 'serious and imminent danger'. A prime example here might be where a pregnant employee refuses to participate in a group activity where facemasks or adequate protection are not being provided by the employer, yet the employee is being expected to work in a confined and unventilated area. The risk of falling severely ill to Covid-19 will be much higher for a clinically vulnerable employee. By refusing (an appropriate step), the employee is likely to be within her protected rights.

However, if your actions as an employee are negligent, or dangerous or unreasonable, then you will not have any protection under s 44 and s 100 ERA 1996.

For further information on what your employer should be doing to mitigate such risks in the workplace, the Government's publication on making your workplace Covid-secure provides specific guidance for each industry sector you may work in.

I have refused to go to work on health and safety grounds and have been dismissed, what are my rights?

Where you have been dismissed as a result of refusing to attend work because of your reasonable belief that your health and safety was in serious and imminent danger, there is no period of qualifying service required to bring a claim of unfair dismissal against your employer (s 100 ERA 1996). Further, any compensatory award element is uncapped. You may be awarded for any detriment suffered and injury to feelings.

For further information on your employment rights under s 44 and s 100 ERA 1996, see Coronavirus and Health and Safety Dismissals: A Guide by Gus Baker (Barrister, Outer Temple Chambers).

What can I do if I believe I am in serious and imminent danger?

If you refuse to go to work because you think there is a serious and imminent danger from

coronavirus, you should tell your employer this in writing. Maternity Action have a template letter you can use as a basis for this.

You should explain in detail why you think it is not safe for you to come into work, including any steps you think your employer has failed to take to protect you and particular factors which increase your risk. You could refer to the government's guidance on working safely during coronavirus, if your employer is not following this guidance.

If your employer is not complying with their health and safety obligations, they could also be in breach of your employment contract (specifically, the mutual duty of trust and confidence). You could use this argument to try to negotiate a period of paid leave until your employer has complied with the government's guidance on working safely during coronavirus.

Grievances

If you are an employee and have tried solving a problem or concern about health and safety informally by talking to your manager but you're not satisfied, you can make a formal grievance complaint in writing.

Your employer should have a written grievance procedure that tells you what to do and what happens at each stage of the process. After raising the grievance you will have a meeting with your employer to discuss the issue. It would be appropriate for this meeting to be held virtually to prevent the risk of being infected by Covid-19.

Mediation is a suitable option for pregnant workers as it can help resolve problems in an informal manner and allow you to maintain an amicable relationship with your employer. Mediation can take place at any time during the dispute.

In the event you are dissatisfied or disagree with your employer's decision, you can appeal.

See ACAS' guide to discipline and grievances at work for further information.

Practical advice: conversations with your employer

During this uncertain period, it is important more than ever for you to communicate regularly with your employer. These discussions can be informal and take account of the following:

- which roles can and cannot be done from home
- who may or may not want to work from home
- any concerns and how best to handle working at home whilst pregnant
- the best ways to improve home working
- reducing workloads in light of the mental wellbeing
- flexible working or reduced hours

Claims in the Employment Tribunal

Depending on your individual circumstances, a refusal to furlough you and/or refusing to suspend you on full pay and refusing all other options you have suggested or further detrimental treatment could mean that you have a range of potential claims against your employer.

Submitting an Employment Tribunal claim should be a last resort that should only taken after exhausting the other next steps we have detailed in this advice (wherever possible and time permitting).

However, if you wish to submit a claim, there are strict time limitations to do so. You must contact ACAS to start early conciliation within three months less a day of your dismissal (for unfair dismissal and constructive dismissal) and within 3 months less 1 day of the act complained of (for discrimination claims).

For further details of the process for bringing an Employment Tribunal claim please see our webpages on Time Limits, Early Conciliation and Starting a claim. You can also find more information on possible compensation.

Please be aware that tribunal claims can be expensive and long, there are delays in the Tribunal system at the moment and many cases will not be heard for around 1 to 2 years and there is no guarantee of success, so this step should be considered cautiously.

It is almost always best to try to resolve the issue with your employer. If you are considering bringing a claim, we recommend that you seek specific legal advice.

Working Families free helpline

Open Monday to Friday - 11am-2pm

0300 012 0312

The telephone helpline is for parents, carers and their advisers. We are an independent charity offering free legal advice on employment rights for parents and carers and in-work benefits for families. You can also use our online form to ask for advice.