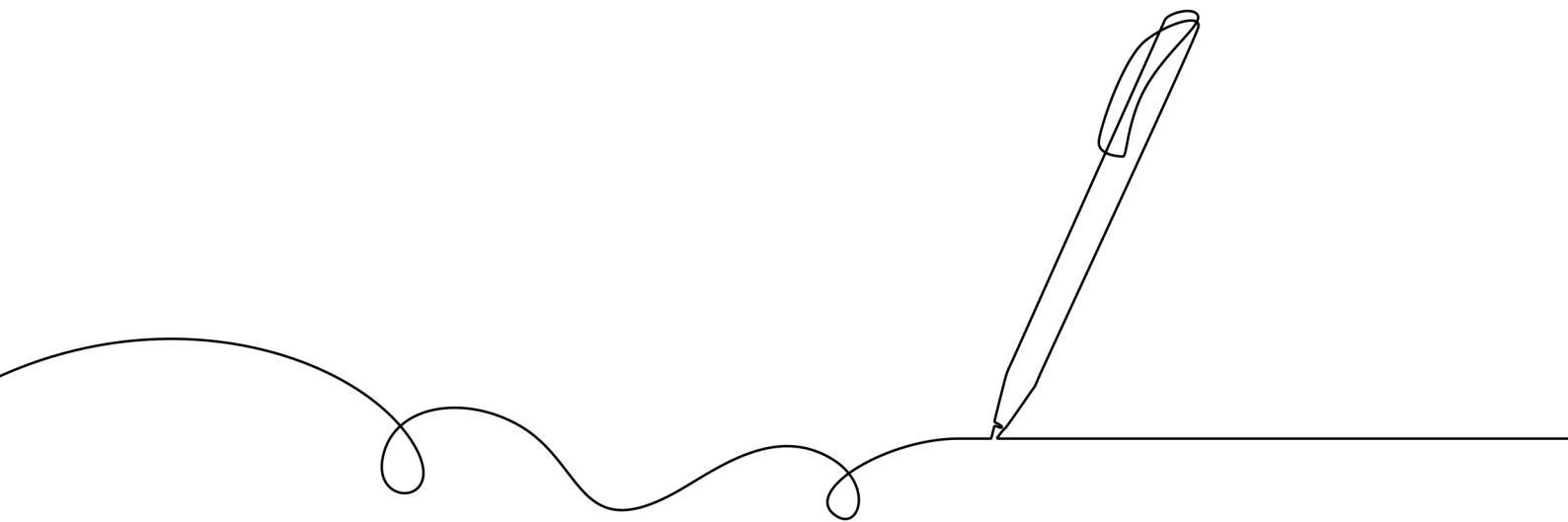


# SUMMARY OF THE LAW ON PREGNANCY AND MATERNITY



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

This booklet summarises the basic statutory rights that are available to pregnant woman at work.

- LEGISLATION
- ANTE-NATAL RIGHTS
- MATERNITY LEAVE
- STATUTORY MATERNITY PAY
- DISCRIMINATION
- REMEDIES

## LEGISLATION

### What laws protect pregnant women and women on maternity leave?

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

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

The information contained in this booklet is not a substitute for legal advice. You should talk to a lawyer or advisor before making a decision about what to do.

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## ANTE-NATAL RIGHTS

### What rights do women have?

Women are entitled to paid time off during working hours to attend ante-natal appointments. Ante-natal care is not defined but is likely to cover medical examinations and relaxation classes.

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

### Can an employer refuse to give the time off?

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

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

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

## WHO IS ENTITLED TO THESE RIGHTS?

In order to receive protection under the Employment Rights Act 1996, the woman must be an employee in order to benefit, but agency workers who qualify for rights under the Agency Workers Regulations 2010 are also covered.

Under the Equality Act 2010, those who are in 'employment' are protected. Employment is defined as employment under a contract of employment, a contract of apprenticeship or a contract personally to do work. This is a lower threshold than an 'employee' and is more akin to worker status. Your legal adviser will be able to identify what your employment status is how this affects which claims you could raise.

The entitlement applies from day one of employment, unless it is in relation to statutory maternity pay which is only paid following 26 weeks continuous service with the employer.

## WHAT ABOUT FERTILITY TREATMENT?

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

Once a fertilised embryo has been implanted, the woman is entitled to be treated as pregnant.

## MATERNITY LEAVE

### How long is maternity leave?

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

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

The terms and conditions must be no less favourable than if she had not been absent, with seniority rights preserved as they were at the start of her AML period.

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

## **WHAT NOTICE DOES A WOMAN HAVE TO GIVE BEFORE GOING ON ORDINARY MATERNITY LEAVE (OML)?**

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

- That she is pregnant.
- The date when the baby is due (the employer can ask to see evidence such as a medical certificate, MAT B1 form).
- The date when she intends to start her maternity leave, but if it is not reasonably practical for the woman to give that much notice, perhaps because the baby is premature or because she has just started working for that employer, she has to give notice as soon as she can.

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

## WHAT DOES THE EMPLOYER HAVE TO DO?

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

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

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

## WHAT HAPPENS IF THE WOMAN IS ILL?

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

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

## WHAT TERMS AND CONDITIONS APPLY DURING MATERNITY LEAVE?

During maternity leave, the woman is entitled to all the same terms and conditions (apart from the right to be paid), had she not been away from work. Equally, she is bound by any obligations under her contract, unless they conflict with her right to take leave.

All service-related benefits accrue during OML and AML.

## WHAT IS THE MATERNITY EQUALITY CLAUSE?

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

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

## WHAT DOES THIS MEAN IN REALITY?

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

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

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

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

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

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

## FLEXIBLE WORKING

### What are the rules on annual leave?

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

If the period of maternity leave coincides with a period of compulsory shut down, case law has established that the woman should be able to take statutory annual leave at some other time, either before or after the maternity leave.

Similarly if the woman is not able to take her statutory entitlement to annual leave within that leave year, she should try to take within the year in which it accrued.

This is because under the Working Time Regulations there is no right to carry over statutory leave from one leave year to the next.

However, in *HM Revenue and Customs v Stringer*, the European Court held that it may be necessary to allow leave to be carried forward. As such, women should request that they be allowed to defer the annual leave that they have accrued - but not been able to take because they have been on maternity leave, until the following leave year.

## **CAN EMPLOYERS MAKE CONTACT DURING MATERNITY LEAVE?**

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

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

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

## **WHAT NOTICE DO WOMEN HAVE TO GIVE ON THEIR RETURN TO WORK?**

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

If the woman wants to return before the end of her AML she has to tell her employer eight weeks before the date of when she intends to come back. The employer can postpone her return until they've received that notice although not past the end of the 52 week period.

## **WHAT HAPPENS IF THE EMPLOYER REFUSES TO ALLOW THE WOMEN TO RETURN?**

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

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

## **WHAT RIGHTS DOES A WOMAN HAVE IF SHE IS MADE REDUNDANT?**

If a woman is made redundant during her maternity leave, her employer must offer her suitable, alternative employment (if it exists) on no less favourable terms. She has priority in being offered alternative work over other staff who are not on maternity leave. The terms and conditions should not be substantially less favourable than her old job - for instance, they should not be of a lower status.

Employees at risk of redundancy who wish to return to work on different terms and conditions should tell their employer in advance of their return that they wish to do so. This is because a Tribunal will take into account whether the new job poses problems for the woman, such as increased travelling time and greater childcare costs and whether the employee has responded to offers when deciding if the alternative job was suitable.

## STATUTORY MATERNITY PAY

### Who is entitled to Statutory Maternity Pay (SMP)?

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

To qualify for SMP, the woman has to:

- Be pregnant at the 11th week before the expected week of child birth or have had the baby at that time.
- Be in continuous employment for 26 weeks with the same employer, up to and including the 15th week before the expected week of childbirth (the “qualifying” week).
- Have average weekly earnings (not less than the lower earnings limit) during an eight week reference period ending with the qualifying week.
- Have given 28 days' notice to her employer as to when they are liable to start paying SMP (or less than that if it is not reasonably practical to give 28 days' notice).
- Have produced a medical certificate (MATB1) from a doctor or midwife, which gives the date when she is due to give birth.
- Have stopped work.

## HOW MUCH IS SMP?

SMP is paid at a rate of 90% of normal earnings for the first six weeks of maternity leave, followed by a flat rate for the remaining 33 weeks. The current rate is £187.18 (which change every April) can be found at <https://www.gov.uk/maternity-pay-leave/pay>.

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

## WHEN DO WOMEN HAVE TO PAY BACK SMP?

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

## WHO CAN CLAIM MATERNITY ALLOWANCE?

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

- Have been employed for at least 26 weeks in the 66 weeks before the baby is due. Please note that this benefit is not available to those who hold 'worker status'.
- Have average weekly earnings more than £125 per week. As a general rule, your earnings will be averaged over a period of at least 8 weeks up to and including the last pay day before the end of the qualifying week

## **DISCRIMINATION**

### **What does the Equality Act say?**

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

However, the unfavourable treatment will only be unlawful if the employer knows, believes or suspects that the woman is pregnant, whether by formal notification or through the grapevine.

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

### **WHAT IS THE PROTECTED PERIOD?**

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

## WHO IS THE COMPARATOR?

Unlike direct sex discrimination, a pregnant worker does not have to compare the way she has been treated with anyone else. If she is treated unfavourably by her employer because of her pregnancy or maternity leave, for example being denied rest breaks, that would be discriminatory.

## WHAT ABOUT DIRECT DISCRIMINATION BY ASSOCIATION OR PERCEPTION?

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

## WHAT REMEDIES ARE AVAILABLE?

There are three remedies available to a Tribunal:

- Declaration.
- Compensation.
- Recommendations.

## DECLARATION

A declaration states the rights of the claimant and sets out how the employer and/or any employee involved has acted unlawfully.

## COMPENSATION

Compensation can be awarded for injury to feelings and financial losses, if there are any. There is no formal limit on the amount of compensation, which can include loss of earnings (past and future), loss of pension, interest and any other outlays associated with the discrimination. Although there is no formal cap, the government publishes yearly statistics on tribunal awards, including median awards.

The amount of compensation for injury to feelings can vary enormously. The person's age and vulnerability may be considered, and also the severity of the discrimination.

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

## RECOMMENDATIONS

The Tribunal can make recommendations that will benefit the individual employee.

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

## SHARED PARENTAL LEAVE

This entitlement allows parents to share the mother's entitlement to maternity leave and Statutory Maternity Pay.

It will operate alongside the existing rights to Maternity Leave, Adoption Leave and Paternity Leave and replaces Additional Paternity Leave.

## 1. Shared Parental Leave (SPL) Eligibility

SPL allows eligible parents to share the mother's maternity leave. To qualify:

### **Mother/primary adopter must:**

- Be entitled to Statutory Maternity Leave or Adoption Leave.
- Have stopped or given notice to end maternity/adoption leave (SPL can start after maternity leave).

### **Both parents must:**

- Have responsibility for the child's care.
- Provide proper notice to the employer of their intention to take SPL.

### **Employment requirement:**

There is no strict 26-week continuous employment test for SPL itself. Any parent meeting the notice and care requirements can take SPL.

## 2. Shared Parental Pay (ShPP) Eligibility

ShPP allows parents to receive statutory pay while on SPL. To qualify:

### **Mother/primary adopter must:**

- Qualify for Statutory Maternity Pay (SMP) or Maternity Allowance.

### **Father/partner must:**

- Be the child's father, mother's husband/partner, or adopter.
- Have at least 26 weeks' continuous employment by the 15th week before the expected week of childbirth (EWC).
- Have worked for the same employer until the week before ShPP starts.
- Meet the earnings threshold: average weekly earnings of at least £390 (gross) in 13 of the 66 weeks before the 15th week before EWC.

### **Shared responsibility requirement:**

Both parents must share the care of the child during SPL.

More detail of the notice requirements and other rights in relation to Shared Parental Leave can be found at <https://www.gov.uk/shared-parental-leave-and-pay>.

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For more information visit:

**[TalkToThompsons.com](http://TalkToThompsons.com)**

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