



## Protection of pregnant women at work during the Covid-19 pandemic

1. Maternity Action's Legal Working Group consists of leading practitioners specialising in pregnancy, maternity and sex discrimination law from the public, private, voluntary and trade union sectors. This briefing aims to set out the legal position in relation to health and safety at work for pregnant women during the Covid-19 pandemic.
2. Compliance with safety and safety regulations has always been difficult for pregnant women to enforce and calls to the Maternity Action advice line in the early days of the pandemic continue to highlight the difficulties pregnant women face in trying to access risk assessments and get the adjustments needed to be able to continue to work safely. It is important that public guidance is consistent with health and safety law.
3. The early weeks of the pandemic have been fast-moving and legal advice has changed in response to the developments. This briefing note reflects the law as it stands on 31<sup>st</sup> March 2020. This reflects current lockdown restrictions and may change as restrictions are relaxed.

### Vulnerable groups

4. On the 16<sup>th</sup> March 2020 the Prime Minister announced that, as Covid-19 is a new virus, pregnant women are considered to be one of the vulnerable groups who should be particularly careful to practice social distancing. Government guidance<sup>1</sup> advises that pregnant women should work from home wherever possible, avoid public transport and social contact.

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<sup>1</sup> <https://www.gov.uk/government/publications/covid-19-guidance-on-social-distancing-and-for-vulnerable-people/guidance-on-social-distancing-for-everyone-in-the-uk-and-protecting-older-people-and-vulnerable-adults>

5. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 350, state that:

These Regulations are made in response to the serious and imminent threat to public health which is posed by the incidence and spread of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) in England.

And, that vulnerable groups include:

- (i) any person aged 70 or older;
- (ii) any person under 70 who has an underlying health condition, including but not limited to, the conditions listed in Schedule 1;
- (iii) any person who is pregnant.

6. These regulations introduced a stricter 'lockdown' and came into force on the 26<sup>th</sup> March 2020 restricting the operations of businesses and movement, specifying that travel must only be for:

"the purposes of work or to provide voluntary or charitable services, where it is not reasonably possible for that person to work, or to provide those services, from the place where they are living".

#### Employers' obligations in relation to risks at work

7. Employers' obligations are set out in the Management of Health and Safety at Work Regulations 1999, SI 3242 (MHSW Regs). These require all employers to undertake a workplace risk assessment and, if they employ women of childbearing age and the work could involve risks, they must assess risks to new and expectant mothers.
8. Following notification in writing that a woman is pregnant, breastfeeding or has given birth in the last six months, an employer must take reasonable action such as altering working conditions or hours of work. Regulation 16 (3) further states that:

(3) If it is not reasonable to alter the working conditions or hours of work, or if it would not avoid such risk, the employer shall, subject to section 67 of the 1996 Act suspend the employee from work for so long as is necessary to avoid such risk.

Before being suspended on full pay a woman is entitled to be offered any suitable alternative work available. It must be suitable and appropriate for the woman concerned and must be on similar terms and conditions<sup>2</sup>.

9. These obligations apply to *workplace* risks such as heavy lifting and carrying, standing for long periods, workplace temperatures etc. but also to stress at work and long hours. Recent case law<sup>3</sup> says that the risk assessment must take into account: 'the individual situation of the worker in question in order to ascertain whether her health or safety or that of her child

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<sup>2</sup> The European Framework Directive on Safety and Health at Work (Directive 89/391 EEC) requiring employers to take steps to make work safer and healthier was implemented by the UK government and provides for the employer to bear the cost of taking such measures as are required under the legislation, and not the worker.

<sup>3</sup> Elda Otero Ramos v Servicio Galego de Saúde and Instituto Nacional de la Seguridad Social. C-531/15

is exposed to a risk.’ This should include any pre-existing health conditions and consideration of her individual job.

### Infectious disease

10. The MHSW Regs, regulation 16 (4) makes an exception for infectious disease and only requires employers to treat it as a workplace risk if there is a level of risk of infection which is:

‘in addition to the level to which a new or expectant mother may be expected to be exposed outside the workplace.’

11. In the early days of the pandemic when all workplaces were open, an increased risk of exposure only applied in certain workplaces such as hospitals. Since the closure of all but essential businesses and public services under the Coronavirus Restriction Regulations above, women working in public-facing roles such as in care work, schools, supermarkets and pharmacies, who are not able to do their jobs from home are protected by the MHSW Regs as the risks of exposure to Covid-19 are higher than ‘outside the workplace’. Pregnant women in these workplaces are entitled to special protection, as set out above, including reasonable adjustments or suspension on full pay (if no suitable alternative work is available) and failure to provide this may be sex discrimination.

### Serious and imminent danger

12. In view of the recognition in the Coronavirus Restriction Regulations above that Covid-19 represents a serious and imminent danger to public health there is one further provision<sup>4</sup> that protects employees against unfair treatment and dismissal where:

(d)in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e)in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

13. Whether the steps taken by the employee at the time were reasonable will be judged by reference to all the circumstances including, the employee’s knowledge at the time and the facilities and advice available. An employee in the health or care sectors, for example, who has not been provided with Personal Protective Equipment (PPE) and has left the workplace to avoid contact with patients with confirmed or suspected Covid-19 must not suffer a detriment such as loss of pay.

### Risk assessment

14. In view of the above we consider that there is a clear legal obligation on employers to assess the risks from Covid-19 for pregnant women who are unable to work from home. This

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<sup>4</sup> Employment Rights Act 1996, ss 44 and 100

applies to all pregnant women, regardless of how many weeks' gestation<sup>5</sup>. The risk assessment must take into account:

- their job,
  - any pre-existing health conditions,
  - use of public transport,
  - social distancing guidance on minimising social contact and maintaining 2m distance.
15. Assessment must include the risk to the employee within the workplace as compared to outside the workplace. Currently, if an individual is outside the workplace, they will be subject to the Coronavirus Restrictions Regulations and leaving their homes only in very limited circumstances. The risk to be assessed therefore must include the risk of getting to/from work in circumstances where they are only being exposed to this risk in order to reach the workplace.
  16. If the employer is unable to provide work that meets the requirements set out above, a pregnant woman must be suspended on full pay if no suitable alternative work is available.
  17. Employees are also expected to take responsibility for assessing the risks and if they consider there is serious and imminent danger of infection they can remove themselves from the workplace without loss of pay under the provisions above. This suggests that employees' choices must be respected and if an employee forms their own reasonable belief that they are at risk of infection they must not be subjected to any detriment.
  18. For those working in health and social care settings, for example, who are being asked to work without PPE, the employer would be expected to provide suspension on full pay (unless suitable alternative work is available) for so long as is necessary to avoid the risk.

### Furlough provisions

19. Furlough under the Coronavirus Job Retention Scheme<sup>6</sup> is available in the private sector or in the public sector where public funding is not available, and can be used where vulnerable groups are unable to work temporarily because of the pandemic. Employers can claim reimbursement for 80% of an employee's wage costs. The guidance specifies that employees maternity rights are not affected by being on furlough and specifically states that furlough can be used to cover employers' contractual maternity pay costs. This suggests that it can also be used to cover the costs of suspension on health and safety grounds.

### Summary

20. In our view, in order to comply with existing health and safety law and current Government guidance on mitigating the risks of infection of Covid-19, particularly amongst vulnerable groups, it is imperative that risk assessments are carried out in relation to pregnant women and action is taken to remove risks.

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<sup>5</sup> See: <https://www.rcog.org.uk/en/guidelines-research-services/guidelines/coronavirus-pregnancy/covid-19-virus-infection-and-pregnancy/> But note: a reduced risk prior to 28 weeks' gestation does not mean that the special protection provided during pregnancy in relation to workplace risks does not apply.

<sup>6</sup> <https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme>

21. Unless the risk can be lowered to a reasonable level e.g. by working from home or providing PPE, the pregnant employee should be suspended on full pay until such time as she can work safely.
  
22. At whatever stage of pregnancy, if a pregnant employee forms a reasonable belief that she is at a serious and imminent risk of danger, she is obliged to care for her own safety. If she chooses to leave the work environment to protect herself, she cannot be subjected to any detriment such as loss of pay.

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