

Pregnancy and Maternity Rights: an employers' guide

The protection against discrimination afforded to expectant and new mothers during their maternity leave is broad and can be complicated for employers.

Here's our summary of the main rights to be aware of:

Right to paid time off

Pregnant employees are entitled to a reasonable amount of **paid time off** to attend ante-natal appointments. Employers can ask employees to schedule their appointments around work hours but should accept that employees might have very little control over when appointments are scheduled. The rate of pay is the employee's normal rate of pay.

Right not to be discriminated against in the protected period

The protected period runs from when the employee becomes pregnant to when her maternity leave ends (up to 22 months in practice). Currently under UK law, a female employee will only benefit from the protection against discrimination on the ground of pregnancy **once the employer is aware** of her pregnancy. During the protected period, a pregnant employee does not need a comparator to base her discrimination claim on e.g. if the pregnant employee is regularly late for work because of morning sickness, it would be pregnancy discrimination to discipline her for that, even if her employer consistently disciplines all employees for lateness.

Risk assessment

Once an employer has been notified of an employee's pregnancy, they should conduct a risk assessment of the employee's work and conditions and, if necessary, find alternate work for the remainder of the pregnancy, where there are risks associated with the role, working environment and/or working hours.

Communication

Establishing acceptable forms and the regularity of communication prior to an employee starting their maternity leave is vital. Get the balance right, and the employee will feel engaged and valued; get it wrong and they'll feel bombarded or forgotten about, either of which extremes could be the basis for a discrimination complaint. Establish whether she wishes to receive any regular external or internal publications e.g. copies of industry publications, internal company vacancy lists, company newsletters, invitations to work social events. Where there are significant developments which affect the employee's role, it is important that these are communicated to the employee, sensitively and in a timely fashion.

Pay and benefits including bonuses

While on maternity leave, a female employee's entitlement to remuneration from the employer (including employer pension contributions and, in most cases, discretionary bonuses) is suspended and replaced with maternity pay, whether at the statutory rate or any enhanced amount offered by the employer (provided minimum eligibility criteria are met).

Where a period of maternity leave straddles a bonus year for the purpose of a discretionary bonus scheme, employers should still consider, and give credit, to the employee in respect of her performance and/or

the company's performance in the period before and after her maternity leave, and the 2-week compulsory maternity leave period, and make a **pro-rated payment**.

For non-cash benefits, including holiday, the employee has the right to continue to be provided with those benefits during their maternity leave. For holiday, best practice is to establish with the employee what they would like to do with the holiday which will accrue to them during their maternity leave, and either allow them to take it before the start of their maternity leave or at the end.

Right to return

An employee who takes maternity leave has the right to return to the **same job** or one which is suitable for her to return to an appropriate in the circumstances. Dismissing someone because she is pregnant, or has taken maternity leave, is automatically unfair as well as discriminatory and could result in a significant award of compensation.

Redundancy

(i) Pregnant employees

Making a pregnant employee redundant, because of her pregnancy, or where there is no genuine redundancy situation, is likely to be an automatic unfair dismissal as well as unlawful discrimination. Likewise, selecting a pregnant employee for redundancy using selection criteria which are not fair or are applied in an inconsistent or discriminatory manner, will also be unlawful. If you find yourself in the situation of genuinely needing to make redundancies which affect a pregnant employee, make sure you follow a fair and objective process and, where necessary, make allowances for the pregnant employee.

(ii) Employees on maternity leave

Employees on maternity leave who are provisionally selected for redundancy have additional rights over and above other employees who have also been provisionally selected for redundancy. The right is to be **offered** alternative employment **in preference** to others who are at risk of redundancy. Where the employer omits to make such an offer, whether deliberately or otherwise, any subsequent redundancy dismissal will be both unfair and discriminatory.

Right to request flexible working

The statutory right to request a flexible working pattern is a right which extends beyond new mothers (or fathers) but is commonly exercised by employees who want to return to a part-time role for childcare reasons. Employers should remind employees on maternity leave who want to return to a more flexible working pattern of the need to submit a formal request in writing and, where appropriate, in accordance with the employer's own flexible working policy. Employers are obliged to consider such requests in a **reasonable manner** but can, under the statutory scheme, reject a request where the working pattern that is being proposed is not operationally feasible, based on one of eight statutory grounds for refusal. Nonetheless, it is important for employers to be able to justify any refusal of a flexible working request made for childcare reasons, to mitigate the risk of indirect sex discrimination.

We are recognised experts in field of pregnancy and maternity discrimination. If you are in any doubt whatsoever about the rights or processes to follow in a situation involving a pregnant employee or someone on maternity leave, please get in touch (01904 520160 / info@torquelaw.co.uk).