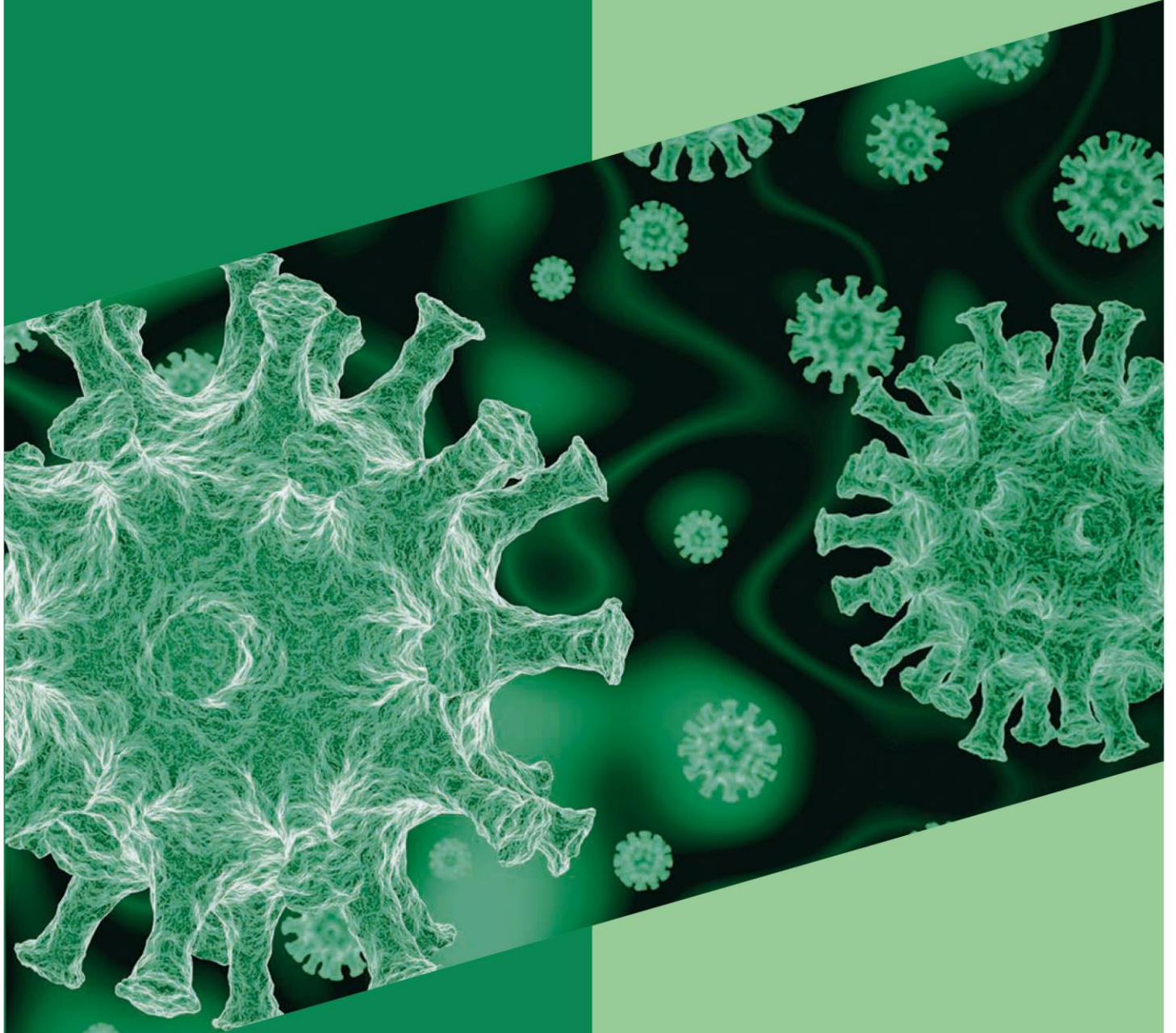


Bargaining Support Group



**COVID-19 pandemic
Bargaining in
support of
pregnant workers**

UNISON
the public service union

UNISON will seek to update this guidance as developments unfold and applies across the UK. If negotiators have any comments on this guidance or any experiences that could be usefully incorporated in the guidance, please contact Bargaining Support at bsg@unison.co.uk



COVID-19 pandemic Bargaining in support of pregnant workers

Introduction

This short guide is intended to assist negotiators when supporting pregnant workers during the COVID-19 pandemic.

The guide highlights best practice in health and safety, and terms and conditions for this group of workers.

Maternity Action's briefing on the protection of pregnant women at work during the COVID-19 pandemic <https://maternityaction.org.uk/wp-content/uploads/Briefing-H-S-during-Covid-19-FINAL-PDF.pdf>

More guidance for UNISON reps on COVID-19 www.unison.org.uk/coronavirus-rights-work/covid-19-advice-reps
and from bargaining support www.unison.org.uk/bargaining-guides.

Social distancing

With the easing of lockdown at varying rates within Scotland, Wales, Northern Ireland and England, the [government advice for pregnant women](#) remains clear.

Pregnant women are defined as **“clinically vulnerable, meaning you are at higher risk of severe illness from coronavirus. You are advised to stay at home as much as possible and, if you do go out, take particular care to minimise contact with others outside your household.”**

These [measures include](#) (as advised by the Royal College of Obstetricians & Gynaecologists)

- avoiding contact with someone who is displaying symptoms of coronavirus (COVID-19). These symptoms include high temperature and/or new and continuous cough a high temperature [and/or a loss of, or change to, your sense of smell or taste]
- avoiding non-essential use of public transport when possible
- working from home, where possible.

Working from home

The government has [advised employers to “help people to work from home”](#).

Employers should not expect any worker to travel to work and continue working at their normal workplace unless it is not possible to work from home.

The simplest way of preventing transmission of COVID-19 is to completely eliminate any work-related travel and social contact, and this can best be achieved by employers instructing and facilitating workers to work from home.

More guidance on home working

www.unison.org.uk/content/uploads/2020/04/Homeworking-model-policy-and-bargaining-guidance-April-2020-2.docx

Redeployment

If the job isn't suitable for homeworking, then the employer should consider whether the pregnant worker could be temporarily redeployed to a role that would allow home working for the duration of the COVID-19 pandemic, on full pay.

In the case of pregnant women or breastfeeding mothers, consideration of redeployment is also a step demanded by the Management of Health and Safety at Work Regulations 1999 if any identified risk cannot be removed.

However it is important that pregnant workers are not forced to take on different roles in order to keep their job. Agreement should be on a voluntary basis and with proper support provided by the employer such as additional training.

Any redeployment is likely to mean a variation in the employment contract unless there is a 'flexibility clause' in the worker's contract that allows a change to the job and duties.

More guidance on redeployment

www.unison.org.uk/content/uploads/2020/05/Covid-19-Pandemic-Bargaining-over-Redeployment-v3.pdf

Shielding

Under [government advice](#), women who are pregnant and have significant heart disease, congenital or acquired, are regarded as extremely vulnerable and at very high risk of severe illness of COVID-19. They should be undertaking shielding measures which includes staying at home as much as possible and keeping visits outside to a minimum. They should also be making every effort to work from home and the employer is expected to help them to do this.

More government guidance on shielding

www.gov.uk/government/publications/guidance-on-shielding-and-protecting-extremely-vulnerable-persons-from-covid-19

Employers should consider the medical suspension on full pay of pregnant workers who are shielding themselves (see section on page 6) and who are unable to work from home. This would be fairest option under health and safety and equality legislation.

Alternatively workers who are undertaking shielding measures can be furloughed under the government's [Job Retention Scheme](#) (to be slowly wound down until the end of October when it will cease).

The government also state that "Statutory Sick Pay is available as a safety net in cases where you [those who are shielding] are unable to work or to be furloughed under the Coronavirus Job Retention Scheme."

However, such treatment might breach legal protections for pregnant workers and suspension on full pay is what should be called for. Employers should be careful to avoid the unlawful discrimination of individuals who have protected characteristics (eg disability, pregnancy) under the Equality Act 2010.

More guidance on furloughing and the Job Retention Scheme

www.unison.org.uk/content/uploads/2020/04/Job-Retention-Scheme-QA.pdf
www.unison.org.uk/content/uploads/2020/04/Job-Retention-Scheme-Bargaining-Guidance.pdf

Self-isolation

As with all workers, if the pregnant worker develops symptoms of COVID-19 however mild or have tested positive for the virus, they should stay at home and not leave for at least 7 days from when their symptoms started.

If the pregnant worker is living in the same household as someone who starts displaying symptoms or has tested positive for the virus, the government states that they should self-isolate at home for 14 days.

However, the clinically vulnerable (and this includes all pregnant women) or extremely clinically vulnerable (pregnant women with significant heart disease) are advised by the government to move out of their home and to stay with friends or family for the duration of the home isolation period of 14 days. If that is not possible, then they should observe strict social distancing rules.

The [government guidance](#) states: “those who are clinically vulnerable or clinically extremely vulnerable should be supported to take precautions to minimise their contact with other people in your household, regardless of whether others have symptoms or not.”

More government guidance on self-isolation

www.gov.uk/government/publications/covid-19-stay-at-home-guidance/stay-at-home-guidance-for-households-with-possible-coronavirus-covid-19-infection

Additionally, if a person is contacted by the [NHS test and trace service](#) because they have been in close contact with someone who has tested positive for coronavirus, they will need to self-isolate.

Workers who are self-isolating but cannot do their work at home, should by law, at least receive statutory sick pay. Employers may also provide contractual sick pay.

Employers should however consider the ‘medical exclusion’ of pregnant workers who are self-isolating (see below) as a much fairer option.

Medical exclusion

An employer should apply medical exclusion to prevent infection to the rest of their workforce where it is believed an employee may carry a particularly high threat of being contagious. This would be the case where self-isolation is necessary.

In effect, the employer is instructing its workers not to attend the workplace on the basis of a government demand, and therefore the employer must continue with full payment.

Medical exclusion clauses are sometimes established elements of collective agreements, most commonly in NHS trusts, given the extra dangers of transmitting an illness to patients. Local government employers have also acknowledged that in some cases they will need to allow staff who can't work from home to stay at home

on full pay.

Due to the unprecedented threat of COVID-19 an argument can be made that such exclusions should apply more widely and the general duties under the Health and Safety Act (Health and Safety Order 1978 in Northern Ireland) to protect staff should be interpreted in this way.

Continuing work at the normal workplace

As [Maternity Action highlight in their guidance](#), “all employers have a duty to assess workplace risks and this must specifically include risks to pregnant women and new mothers *at whatever stage of pregnancy*.” Employers already have a legal obligation to assess the workplace risks for pregnant employees and their unborn children, and breastfeeding mothers who have returned to work. This continues but now must also address the potential risk of contracting COVID-19.

If it is not possible for a pregnant worker to work from home, it is essential that the employer undertakes a risk assessment of each individual pregnant worker’s working environment and specifically looking at their role within it. If the employer undertook a risk assessment prior to the COVID-19 pandemic, they should carry out a new assessment to consider these particular circumstances.

As COVID-19 is an infectious disease the employer’s duty to take health and safety action only applies if there is a “level of risk at work which is in addition to the level to which a new or expectant mother may be expected to be exposed outside the workplace.”

Even with the easing of lockdown restrictions, most workplaces are still likely to have a higher risk of infection than outside, unless stringent social distancing and other measures can be assured. And for those working in a public or patient-facing role such as in health and social care, there is an undoubted higher risk of infection than outside the workplace.

Therefore, the employer must carry out a COVID-19 risk assessment and take [reasonable action to remove the risks](#) of contracting the virus. As stated by the [Health and Safety Executive](#), this action includes: “planning for clinically extremely vulnerable (shielding) workers who must not work outside the home; planning for people working at home who have someone shielding in their household; helping workers at increased risk to work from home, either in their current role or an alternative role; where people at increased risk cannot work from home, offering them the safest available roles.”

If it is not possible to avoid the risks by taking such action, and no suitable alternative work is available, then the employer should suspend the pregnant worker on full pay (see section below).

The risk assessment must be kept under review throughout the worker’s pregnancy and as lockdown restrictions change.

[Maternity Action outline in their guidance](#) that “the risk assessment must take into account:

- their [the pregnant worker’s] job,
- any pre-existing health conditions,
- use of public transport,
- social distancing guidance on minimising social contact and maintaining 2m distance.”

It could be unlawful discrimination on the grounds of pregnancy if an employer unreasonably pressurises a pregnant worker to go to work or disciplines them for not going to work when they have a reasonable belief that they are at risk of infection.

Maternity Action briefing on the protection of pregnant women at work during the COVID-19 pandemic <https://maternityaction.org.uk/wp-content/uploads/Briefing-H-S-during-Covid-19-FINAL-PDF.pdf>

Maternity Action have also produced a **model letter** that the pregnant worker can use, with the support of their union, to write to their employer requesting health and safety protection during pregnancy

<https://maternityaction.org.uk/covidmaternityfaqs/write-to-your-employer-for-health-and-safety-protection-during-pregnancy/>

Medical suspension

Where the nature of a pregnant worker’s role means there is no suitable alternative work available that could be done from home, the employer should consider suspending the employee for medical reasons on full pay in line with requirements for the risk assessment of pregnant workers under The Management of Health and Safety at Work Regulations 1999.

Regulation 16 (3) in particular 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.”

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.”

However, if the worker is not able to follow necessary social distancing and other measures advised by the government within the workplace, then the risk is clearly higher than outside the workplace.

Full pay should be based on their usual earnings, not just the pay based on their

contractual hours. As the [government confirms](#), suspension “will last as long as the employee, or their baby, is in danger... The employee has the right to normal pay (including bonuses) for up to 26 weeks, as long as they’ve been in their job for a month or more.”

Branches and reps should try to negotiate to extend this period if necessary dependent on the duration of the COVID-19 pandemic and accompanying risks.

The [Health and Safety Executive \(HSE\)](#) confirms this requirement in their guidance on expectant mothers (www.hse.gov.uk/mothers/faqs.htm) :

“If a significant health and safety risk is identified for a new or expectant mother, which goes beyond the normal level of risk found outside the workplace, you must take the following actions:

- **Action 1:** Temporarily adjust her working conditions and / or working hours; or if that is not possible
- **Action 2:** Offer her suitable alternative work (at the same rate of pay) if available; or if that is not possible
- **Action 3:** Suspend her from work on paid leave for as long as necessary to protect her health and safety, and that of her child.”

Pregnant workers should not be put on sick pay (which ultimately could also affect the amount of maternity pay they will receive) nor forced to use annual leave or unpaid leave. Pregnant workers should only be paid sick pay if they are actually sick.

UNISON Case

After the employer’s risk assessment identified a COVID-19 risk for a pregnant member of UNISON working in social care, arrangements were made with the employer to change the woman’s duties to office work with no direct client contact, except for one day a week.

Clearly this day of work, when she was expected to support clients directly, continued to be an ongoing risk and caused great concern and anxiety to the member. In spite of trying to resolve the issue with her employers, the member’s suggestions were not listened to.

UNISON then assisted the member with her formal grievance, citing the Management of Health and Safety at Work Regulations and the employer’s responsibility to provide suitable work or, if none was available to suspend the worker on full pay in line with HSE guidance.

The matter was eventually successfully resolved with the employer who agreed to place the member on furlough with full pay.

Maternity leave and pay

Employees who are pregnant during the COVID-19 pandemic can start maternity leave as usual. Statutory maternity leave and pay entitlements do not change and the normal rules apply.

However, it should be noted that if the employee is furloughed before the start of their maternity leave or they are self-isolating and only receiving statutory sick pay, this reduction in income may impact on the maternity pay due to them if it reduces their average weekly earnings.

It is important for reps and branches to negotiate with employers a fairer approach by basing entitlement to maternity pay on *normal* pay during the 8-week calculation period, rather than any lower rate of furlough pay or sick pay. Rules were introduced by the government, meaning that any qualifying employee going on maternity leave on or after 25 April 2020 will get their statutory maternity pay or maternity allowance based on 100% of their salary rather than the reduced furlough rate, but this does not cover those furloughed before that date.

Government guidance appears to show that an employee who is on maternity leave could also be furloughed by the employer. In this case the employer could claim for enhanced contractual maternity pay element through the [Job Retention Scheme](#). (This is also the case for contractual adoption, paternity and shared parental pay.)

But employees who only receive statutory maternity pay during their leave with employers who do not provide any enhanced maternity pay, may be better off to be furloughed from *work*, rather than to be furloughed from maternity leave. But there are risks involved to the mother in pursuing this. The woman will need to give notice to end their maternity leave (although they must take a minimum of 2 weeks' compulsory maternity leave.) And they will not be able to return to maternity leave at a later date, should the employer end the furlough. An employer can end a worker's furlough at any time and the overall Job Retention Scheme is being slowly wound down by government, ending completely at the end of October.

Once the employee has ended their maternity leave, but if they continue to be furloughed, the amount they then receive via the Job Retention Scheme should be based on their normal salary and not on the contractual maternity pay.

Further information

NHS COVID-19 advice during pregnancy

www.nhs.uk/start4life/pregnancy/coronavirus-covid19-advice-during-pregnancy/#faq-where-can-i-get-information-on-coronavirus-and-pregnancy

The RCOG have also updated their [occupational health guidance for pregnant healthcare workers](#) (as of 22 May 2020) stating that:

“Following a risk assessment with their employer and occupational health, pregnant women should only be supported to continue working if the risk assessment advises that it is safe for them to do so. This means that employers must remove any risks (that are greater in the workplace than to what they would be exposed to outside of the workplace), or else they should be offered suitable alternative work...

If alternative work cannot be found, advice on suspension and pay should be sought from the relevant trade union and/or staff representative...

Some working environments (e.g. operating theatres, respiratory wards and intensive care/high dependency units) carry a higher risk of exposure to the virus for all healthcare staff, including pregnant women... Where possible, pregnant women are advised to avoid working in these areas with patients with suspected or confirmed COVID-19 infection.”

The guidance is of relevance to any pregnant worker who is unable to work from home and has a public-facing or patient-facing role.

www.rcog.org.uk/globalassets/documents/guidelines/2020-05-22-occupational-health-advice-for-employers-and-pregnant-women-during-the-covid-19-pandemic.pdf

Bargaining checklist

More guidance for UNISON reps on COVID-19

www.unison.org.uk/coronavirus-rights-work/covid-19-advice-reps

and from bargaining support www.unison.org.uk/bargaining-guides

- Can the pregnant worker work from home?
- If working from home is not possible can the pregnant worker be reasonably redeployed to other duties that can be carried out from home? It will need the pregnant worker's agreement and appropriate support from the employer such as training and IT equipment.
- If the pregnant worker is regarded as extremely clinically vulnerable and should be shielding but are unable to work from home, has the employer considered their suspension on full pay?
- If the pregnant worker is continuing to work at their normal workplace, has the employer made special provision for pregnant workers and undertaken individual COVID-19 risk assessments?
- Has the employer put in place sufficient measures to eliminate or minimise risks for pregnant workers including strict social distancing and isolation measures as required, handwashing and alcohol-based hand sanitisers, and use of personal protective equipment (PPE) where appropriate?
- If the pregnant worker is continuing to work at their normal workplace, can they follow government guidance on social distancing not only whilst at work but during their travel to and from work?
- Has the employer considered the suspension of pregnant workers on full pay if they are not able to work from home and action cannot be taken to address all the risks identified in the risk assessment at their normal workplace, and if suitable alternative employment is not available to allow the pregnant worker to work from home?
- Has the employer considered the medical exclusion on full pay those workers who need to self-isolate because they have contracted COVID-19 or a member of their household has contracted COVID-19?