

February 2012

Sickness during pregnancy and maternity leave

This information sheet sets out your rights and benefits if you are ill during pregnancy and maternity leave and on return to work.

Sickness during pregnancy

Can I get sick pay if I am off sick during pregnancy?

You have the same rights to paid sick leave as any other employee (apart from the last four weeks of pregnancy, see next question). If you are not well during your pregnancy, you should follow your employer's normal sickness reporting procedures. Your employer should record any pregnancy-related sickness absence separately from other sick leave, so that pregnancy-related sickness absence is not used as a reason for disciplinary action, dismissal or redundancy.

You are entitled to receive the same sick pay as other employees. If you qualify, you will be entitled to Statutory Sick Pay (SSP). If your employer normally pays sick pay, over and above SSP, you should be entitled to that in the usual way. If your employer refuses to pay sick pay during pregnancy, you could have a claim for sex discrimination. You are entitled to however much sick pay is stated in your contract. Once you have used that up, you should be entitled to SSP. See the question below about maternity pay and SSP.

How much is Statutory Sick Pay (SSP)?

SSP is £85.85 per week (April 2012-April 2013). SSP is paid by your employer once you have been off for four or more consecutive working days. To qualify for SSP you need to earn at least £107 a week (April 2012-2013) on average in the eight weeks before you fall ill. SSP is payable for up to 28 weeks.

For more information on SSP and how to calculate it see www.hmrc.gov.uk.

Do I have to start my maternity leave early if I am off sick?

It is normally up to you to decide when you wish to start your maternity leave. However, if you are off sick with a pregnancy-related

illness in the last four weeks of your pregnancy, your employer can ask you to start your maternity leave. Your employer can ignore the odd days of illness, if they wish, for example, if they have organised maternity cover and you were not due to start maternity leave until nearer the birth. If you do have to start your maternity leave in the last four weeks of pregnancy, you should give your employer notice, as soon as reasonably practicable, of the start of your leave and that you are absent because of pregnancy-related illness. Your maternity leave and pay will start on the day after the first day of absence from work.

To work out the last four weeks of pregnancy:

Find the Sunday at the start of your expected week of childbirth. Count back four Sundays. This is the start of the 4th week before the week your baby is due.

What is a pregnancy-related illness?

A pregnancy-related illness includes any condition that is linked to your pregnancy. If you or your employer are unsure, you should seek advice from your GP.

Your rights to maternity leave and pay

All employees are entitled to 52 weeks maternity leave.

You will qualify for Statutory Maternity Pay (SMP) if you have been in the same job for at least 26 weeks by the end of the 15th week before your baby is due and you earn at least £107 per week (April 2012-April 2013) on average in the calculation period for SMP. SMP is paid for 39 weeks. You get 90% of your average earnings for the first six weeks. You will then get a flat rate of £135.45 per week (April 2012 to April 2013) for 33 weeks or 90% of your average earnings if you earn less than £135.45. If you do not qualify for SMP you may be able to claim Maternity Allowance (MA) from the Jobcentre Plus. This is paid for 39 weeks at the flat rate of £135.45.

If I am ill during my pregnancy will it affect my maternity pay?

Your SMP could be affected if you are off work or your earnings are reduced during the calculation period for SMP. See the box below for how to work out the calculation period for SMP. The first 6 weeks of your SMP will be paid at 90% of your average earnings during the calculation period. If your average earnings during the calculation period are lower than normal because you were receiving SSP during part of the period, your SMP during the first six weeks will be reduced. If you received SSP during the whole of the calculation period, your average earnings will be below the Lower Earnings Limit of £107 (April 2012-April 2013). This means that you will not qualify for SMP from your employer but you should apply to your local JobCentre Plus for Maternity Allowance.

Calculation period for SMP

The calculation period for SMP is the eight weeks (if you are paid weekly) or two months (if you are paid monthly) before the end of the qualifying week. The qualifying week is the 15th week before the week your baby is due. Find the Sunday immediately before the day your baby is due and count back 15 weeks. That is your qualifying week. If your baby is due on a Sunday, count back 15 weeks from your due date.

My job is very tiring, do I have to take sick leave or maternity leave?

You should not have to take sick leave if you are well enough to go to work. Taking sick leave unnecessarily can reduce your maternity pay (if you receive SSP) or can trigger your maternity leave early (from 36 weeks). You are entitled to a risk assessment during your pregnancy. Your employer should look at whether there are any risks to your health and safety, for example, standing for long periods. Your employer has a duty to make reasonable adjustments to your job and to alter your working conditions or hours, if necessary. If there is still a risk to your health and safety your employer must offer you suitable alternative work or suspend you on full pay.

Can I work up to the birth of my baby?

Yes, it is up to you to choose when you wish to start your maternity leave. You can work up to the birth and your employer must continue to monitor any health and safety risks at work up to the birth. If you are off sick with a pregnancy-related illness or suspended on health and safety grounds in the last 4 weeks your employer can start your maternity leave.

Can my employer dismiss me if I take sick leave during pregnancy?

No, it is automatic unfair dismissal and sex discrimination to dismiss a woman for a reason connected to her pregnancy. This applies from day one of your employment and regardless of how many hours you work. Casual workers, agency workers, freelancers and self-employed women are protected by sex discrimination law.

Sickness during maternity leave***Can I claim sick pay during maternity leave?***

No, you are not entitled to 'remuneration' during maternity leave (OML and AML). 'Remuneration' means your normal pay and includes sick pay. If you wish to receive sick pay, instead of your maternity pay, you will have to give eight weeks notice to end your maternity leave early and then follow your employer's sickness procedures to receive sick pay. Once you are well enough to work you will have to return to work as you cannot go back onto maternity leave and pay.

Can I claim SSP during maternity leave?

If you normally get SSP when you are off sick, you cannot get SSP during the 39 week Statutory Maternity Pay/Maternity Allowance period. If you do not qualify for SMP/MA you still cannot get SSP for the first 18 weeks. Government guidance (see HM Revenue and Customs and Department for Work and Pensions) suggests that SSP is payable during AML if:

- your period of sickness begins after the end of the 39 week maternity pay period (18

weeks if you do not qualify for SMP/MA), and

- you meet the normal qualifying conditions for SSP.

In practice, it is difficult to meet the qualifying conditions for SSP during AML because your period of sickness **MUST** begin after the end of the maternity pay period and you must earn at least £107 a week on average in the eight weeks immediately before your period of sickness begins. Contractual maternity pay and SMP count as earnings, but not MA.

Advice from HMRC and DWP suggests that you do not have to end your maternity leave to receive SSP but can continue to receive it during AML if you meet the qualifying conditions. The SSP Regulations state that in order to qualify for SSP you must be in 'gainful employment'. Although you are still counted as being an employee during AML, it is not clear whether you are counted as being in 'gainful employment' during AML and each case will be considered on an individual basis. If you think you qualify for SSP during your AML, you should provide your employer with a sick note and follow your employer's usual sickness procedures. If your claim for SSP is refused you should seek advice. While the law remains unclear, you can only be sure of qualifying for SSP after the maternity pay period if you meet all the normal qualifying conditions for SSP and your maternity leave has ended.

Do I have to pay back my maternity pay if I do not go back to work?

You can get SMP and MA for 39 weeks even if you do not plan to go back to work or if your employment ends during the SMP/MA period, for example, if you are made redundancy. You do **not** have to pay SMP or MA back if you decide not to return to work. If your employer has given you extra contractual maternity pay you only have to repay it if that was agreed in advance or specifically stated in your maternity policy. You only ever have to repay the extra contractual pay, never the SMP/MA part of your maternity pay.

Do I have to tell my employer how much maternity leave I am going to take?

No, your employer should assume that you will be taking all of the maternity leave to which you are entitled. If you decide not to take all of your maternity leave you should give your employer notice that you are returning to work early. If you are not well enough to return to work after maternity leave you can take sick leave in the normal way.

Do I have to give notice of my return from maternity leave?

You do not need to give any notice of return if you are going back to work at the end of maternity leave. You simply go to work on the day that you are due back which will be the day after the end of the 52 week period. If you want to return to work before the end of your maternity leave, you must give your employer at least 8 weeks notice of the date you will be returning. If you return to work without giving 8 weeks notice, your employer is entitled to postpone your return for the full notice period but your employer cannot postpone it beyond the end of your maternity leave period.

What should I do if I do not want to go back to work?

You should resign in the normal way, giving the notice required by your contract or the notice period that is normally given in your workplace. If you do not have a written contract or nothing has been said you should give at least a week's notice.

Sickness after the end of maternity leave***What happens if I need more time off work?***

If you are not well enough to return to work you are entitled to take sick leave as normal. However, once you are well enough to return to work, you cannot stay off work after your maternity leave has ended as you will lose your right to return to work if you do not go back at the end of your 52 weeks' leave.

If you need more time off you could:

- ask your employer if you can take annual leave immediately after your maternity leave. All employees are entitled to at least 28 days paid annual leave. This can include paid Bank Holidays. Annual leave should be agreed with your employer in the normal way and you should not be treated less favourably because you have been away on annual leave. Your normal holiday entitlement continues to accrue during maternity leave so you may have some holiday owing to you.
- ask your employer if they will agree to a further period off work. You should ask your employer to confirm this agreement in writing and to confirm that you will have the right to return to the same job.
- take some Parental Leave at the end of your maternity leave. You are entitled to take up to 13 weeks parental leave up until your child's 5th birthday. Parents of disabled children can take up to 18 weeks parental leave up to the child's 18th birthday. Parental leave can normally only be taken in blocks of a week, up to four weeks a year but your employer may be more flexible. You must give at least 21 days notice to take parental leave. Parental leave is usually unpaid unless your employer offers paid leave. You need to have worked for your employer for one year to qualify for parental leave.

What happens to my annual leave if I have been on maternity leave and sick leave for a long time?

You continue to accrue annual leave during sick leave and maternity leave. If you have been away from work for a long time you may have accrued a large amount of leave. You will need to discuss with your employer when you can take this leave so that you do not lose it. Under the Working Time Regulations all workers are entitled to 28 days statutory annual leave. You are not currently allowed to carry forward any statutory annual leave to the next leave year

but the government is going to amend the regulations in the Autumn 2012 to allow annual leave to be carried forward if you have been away from work because of maternity, paternity or other types or parental leave. If you are not allowed to carry forward any outstanding leave because of maternity leave you should seek legal advice if you wish to make a claim.

If you have been on sick leave it is likely that you will only be allowed to carry forward up to 20 days of your statutory annual leave entitlement. This information will be updated when the new regulations are available. You should note that you are entitled to take annual leave during sick leave, therefore, you can ask to receive paid holiday during your sick leave in order to avoid losing any holiday that has not been taken in the current leave year.

Am I entitled to sick pay if I cannot return to work at the end of maternity leave?

If your employer normally pays sick pay when you are off sick you are entitled to sick pay if you are not well enough to return to work at the end of your maternity leave (either OML or AML). You should follow your employer's normal sickness reporting procedures at the end of maternity leave.

You will need to check your employer's sick pay policy to find out how long their sick pay lasts. If you remain off sick for longer than your employer's sick pay lasts, you may then be able to get Statutory Sick Pay or Employment and Support Allowance (formerly) Incapacity Benefit.

Can I get Statutory Sick Pay if I am not well enough to return to work?

Statutory Sick Pay is paid after four consecutive days of sickness absence to employees who have earnings of at least £107 per week (April 2012 – April 2013) in the previous 8 weeks. You are not entitled to SSP for any period of sickness that began during the 39 week SMP period (or 18 weeks if you were not entitled to SMP). If your period of sickness begins after the end of the 39 or 18 week SMP period you may qualify for SSP if your earnings were high enough. This means that you must call in sick immediately after your SMP period, not during the SMP period. You

should be entitled to SSP if you claim it after the end of your 39 week Statutory Maternity Pay period as SMP counts as earnings and you have given the correct notice to end your maternity leave early. Maternity Allowance does not count as earnings. You will **not** be able to claim SSP after a period of unpaid additional maternity leave if you have not had average earnings of at least £107 per week in the previous 8 weeks. SSP lasts for 28 weeks and after this you may be able to get Employment and Support Allowance (formerly Incapacity Benefit) or other means-tested benefits.

If you do not qualify for SSP you may get Employment and Support Allowance. You should get advice from your local Jobcentre Plus or Citizens' Advice Bureau.

Can my employer dismiss me if I am not well enough to return to work after maternity leave?

Once your maternity leave has ended you are treated as if you are 'back at work' even if you are not well enough to actually go into work. You should be treated in the same way as any other employee who is off sick. You and your employer should follow the normal sickness procedures. You are protected against unfair dismissal and sex discrimination.

What if I am off sick for a long time?

If you are off sick for a long time, your employer's normal sickness policy applies. However, when calculating your time off sick, your employer should **not** take into account any pregnancy-related sickness absences or your time off on maternity leave. You may have a claim for unfair dismissal and/or sex discrimination if you are dismissed in circumstances where a sick man would not have been dismissed or your employer takes into account pregnancy-related sickness absence or absence on maternity leave.

What happens if I need time off to care for my child after I return to work?

In addition to time off listed above, you are also entitled to urgent unpaid leave to care for a dependant in an emergency. The leave can be used if a dependant falls ill, gives

birth or is injured or there is a sudden problem with arrangements for care of the dependant (e.g. if your childminder falls ill). You are only entitled to take the time off necessary to deal with the emergency and to make arrangements for the care of the dependant. You should tell your employer why you are absent as soon as possible and when you expect to return to work.

Can I ask to reduce my working hours on return to work?

The law gives all employees with a child under 17 the right to ask for flexible work. You must have been employed for at least 26 weeks. You need to make an application to your employer. Information and application forms can be found on the government website www.bis.gov.uk. Any change to your hours of work will normally be permanent, unless you and your employer specifically agree to a temporary change. If you want to reduce your hours for a few months to ease your return to work after a period off sick, you must make sure that this is agreed with your employer from the outset.

You will need to think carefully about what type of flexible work you want and how it would fit in with your job. Your employer must seriously consider your request and can only refuse for certain business-related reasons e.g. where it would have a detrimental effect on customers or on performance. If your employer refuses your request you can appeal and you should seek advice from one of the organisations listed below. If your employer still refuses, you may be able to resolve it through mediation, see ACAS. You may have a claim for indirect sex discrimination if your employer refuses to allow flexible work for childcare reasons. You may have a claim for disability discrimination if your employer treats you less favourably because of a disability or refuses to make reasonable adjustments to your job. Sickness by itself is not a disability but disability includes a physical or mental impairment which has a substantial and long-term adverse effect on

your ability to carry out normal day-to-day activities.

Are there any other benefits I can claim?

Once your baby is born you can claim Child Benefit. From April 2013, Child Benefit will not be payable to families with a higher rate tax payer. You may be able to claim Child Tax Credit and/or Working Tax Credit depending on your family income. If you are off sick and receiving SSP you are treated as working, so you may qualify for Working Tax Credit. For more information and an application form, telephone the Tax Credit Helpline on 0845 300 3900.

If you or your partner are receiving Income Support, income-based Jobseekers Allowance or Child Tax Credit of more than the family element you may be entitled to a Sure Start Maternity Grant of £500 for your first child (or if there are no other children aged under 16 in your family). Claim on form SF100 (Sure Start), available from Jobcentre Plus offices, from 11 weeks before the baby is due until 3 months after the birth.

Employment and Support Allowance (formerly Incapacity benefit) is payable to people who cannot work because of illness or disability, see www.direct.gov.uk/en/disabledpeople/financialsupport/esa

Where to go for more help

Maternity Action

Advice on maternity rights and benefits
www.maternityaction.org.uk
Helpline 0845 600 8533

ACAS

advice on employment law:
08457 47 47 47 www.acas.org.uk

Community Legal Service

how to find a legal adviser in your area
0845 345 4345
www.communitylegaladvice.org.uk

Citizens Advice Bureaux:

See your local phone book or www.citizensadvice.org.uk or www.adviceguide.org.uk for benefits and other information

Department for Business, Innovation and Skills

Information on employment law and the right to ask for flexible work

Department for Work and Pensions:

information on benefit entitlement
www.dwp.gov.uk

EHRC

Advice on discrimination and human rights law www.equalityhumanrights.com
0845 604 6610 - England
0845 604 8810 - Wales
0845 604 5510 - Scotland

HMRC Tax Credit Helpline: 0845 300 3900
HMRC Employee Helpline: 0845 302 1479
HMRC E14 Employer's Help Book for SSP:
www.hmrc.gov.uk

Law Centres Federation: how to find free local legal advice: 020 7428 4400
www.lawcentres.org.uk

Gingerbread: information line and leaflets on benefits and maternity rights for one parent families: 0808 802 0295
www.gingerbread.org.uk

TUC

Advice on union and employment matters. Know Your Rights Helpline: 0870 600 4 882

Working Families

Rights at work 0800 013 0313
www.workingfamilies.org.uk

This information sheet was produced in February 2012. It is important to get up-to-date advice.

More Maternity Action information sheets

- [Pregnant at work 2012](#) – a brief guide to your rights to maternity leave and pay
- [Rights at work for fathers and partners](#) – a brief guide to rights for fathers and partners
- [Additional paternity leave and pay](#) – new rights for fathers and partners
- [Time off for working parents](#) – rights to paternity leave, adoption leave, parental leave and time off in an emergency
- [Child friendly working hours](#) – rights to ask for changes in your working hours to fit with your childcare or other caring responsibilities
- [Money for parents and babies](#) – benefits for families
- [Common maternity pay questions](#) – how to qualify for Statutory Maternity Pay, Maternity Allowance and Employment and Support Allowance.
- [Rights for parents with more than one job](#) – rights for parents working more than one job
- [Redundancy during pregnancy and maternity leave](#) – your rights if you are made redundant
- [Dealing with pregnancy and maternity-related problems at work](#) – how to deal with problems at work
- [Pregnancy discrimination](#) – what is pregnancy discrimination and what you can do about it
- [Discrimination during maternity leave](#) – what you can do about discrimination during maternity leave
- [Pregnant during maternity leave](#) – your rights if you become pregnant on maternity leave
- [Breastfeeding on return to work](#) – your rights if you wish to continue breastfeeding on return to work
- [Sickness during pregnancy and maternity leave](#) – rights and benefits during sick leave

- [Breastfeeding in public places](#) – your right to breastfeed when you are out and about

- [Polish language information](#) - rights at work for mothers, fathers and partners; your right to breastfeed when you are out and about
- [Spanish language information](#) – your rights at work

- [Maternity rights for migrants](#) – information for EU nationals and other migrants
- [Maternity rights for refugees and asylum seekers](#) – information for refugees, asylum seekers and refused asylum seekers

Available at www.maternityaction.org.uk