

EIS Advice re pregnancy risk assessments

Summary

- There is no automatic right to work from home as a result of pregnancy during this Covid 19 period
- There is an absolute right to a bespoke risk assessment, both in terms of public health guidance re Covid 19 and existing employment law
- Said risk assessment should consider all relevant factors, including clinical advice and the ability of pupils to maintain 2m physical distancing from the teacher
- Mitigations should consider a full range of options: working from home, enhanced physical distancing, required wearing of face coverings by pupils and staff, smaller class size etc.
- Any perceived staffing difficulty in covering arrangements for a mitigation e.g. working remotely is not an acceptable reason for rejecting such an option where it is deemed appropriate
- The employer retains a duty of care to the employee which must be demonstrated.

Pregnant Employees – Returning to School

Individual Risk Assessments

As public health advice has been updated, the starting position now is that pregnant employees need not be excluded from returning to working at school. However, each pregnant person is clearly in a unique situation (in relation to where they work, their health, their pregnancy etc.). As such, if your employer has not already contacted you to discuss undertaking an individual risk assessment and you are concerned about returning to school, you should make contact with your employer straight away. (You could contact your head teacher directly, or may want to contact HR.) It is important that the risk assessment carried out is personal to you, as that way your specific circumstances can be taken account of properly. The outcome of the risk assessment may be that alternative ways of working are agreed – for example, additional mitigations may be put in place or it could be agreed that it is best that you continue to work from home or from a different location.

There is an SNCT Circular, 20-74, which I quote from below

Paragraph 9:

“(9) Pregnant Staff

Councils are required, under The Management of Health and Safety at Work Regulations 1999, to conduct risk assessments for pregnant employees. Where there are confirmed cases of coronavirus in a workplace, Councils should seek medical advice on the management of risk. Thereafter relocation to another work location should be considered in the first instance.”

You will see from this that although general advice around Covid 19 may have changed, there is already Health and safety legislation around risk assessments, which remain in force.

You have noted that there are inconsistencies between different local authorities in relation to their approach to undertaking risk assessments and how identified risks may be mitigated. In this regard,

you have asked that a blanket policy across all authorities is sought. We can attempt to ensure this through the SNCT, but it is unlikely to produce an early result. The EIS will undertake, however, to communicate directly with all Councils outlining the terms of this advice.

It is noted that the Scottish Government has not taken a position on pregnant employees returning to school that is different to their position on other employees returning. Again, the EIS will raise this directly with the Scottish Government. The default is that pregnant workers will return when others do. Considering this, risk has to be considered taking account of an individual's specific circumstances, looking at their pregnancy, any health conditions and the work they do (which should include considerations around class sizes and ventilation but could also include consideration of the numbers of pupils a teacher will be in contact with). Such assessments will inevitably produce different outcomes for different employees. For that reason, the best course of action for those returning to school during their pregnancy is to liaise with their individual employer on how they can best be protected and supported, and then to contact their LA secretary if they are not content.

If you are concerned that your employer has not undertaken the assessment timeously, or about the contents or outcome of the assessment, you should raise these concerns directly with them. If the issues have not resolved, we would advise that you get in touch with your EIS LA secretary as soon as possible to raise your concerns with them. Contact details for LA secretaries can be found [here](#). As these issues are being dealt with locally, your LA secretary is best placed to liaise with your employer in relation to your specific concerns.

The Scottish Government guidance must be considered when a risk assessment is being undertaken. That guidance is clear that employers should be supportive – 'Managers should have sensitive, supportive conversations with staff that consider their health, safety, physical and psychological wellbeing, as well as personal views/concerns about risks. Wellbeing support services should also be promoted to staff.'

We cannot advise that members refuse to attend work unless they have been provided specific advice on this in consideration of their particular situation; instead, concerns should be brought to the LA secretary's attention as soon as possible and escalated where necessary. There is provision in employment law, Section 44 for short, which allows an employee not to attend work if they hold a genuine and reasonable belief that they would be in serious and imminent danger if they did so but it may be contested by the employer and so is not a guaranteed outcome, which is why we advise members to seek support and advice before deploying such an option. It may be that we would advise a member, where there is an impasse, to seek a medical suspension which can facilitate ongoing payment or create an easier opportunity to challenge a Council which tried to withhold salary.

You will appreciate these latter options are not without risk which is why we advise seeking advice from the Union.

Royal College of Obstetricians and Gynaecologists (RCOG) Advice

It is highlighted on the [RCOG website](#), in a note dated 31 July 2020, that the joint RCOG, RCM and FOM document entitled *Occupational health advice for employers and pregnant women* was written at the peak of the pandemic and that as national policy on social distancing and shielding has significantly shifted since then, the guidance is no longer current in relation to safety at work. As such, previous advice from the RCOG on returning to work can no longer be referred to. Instead, it is noted on their website that 'specific guidance on how and when pregnant women can safely work

should be advised on an individual basis, following employer-led workplace and individual risk assessments.'

In the same note it does say that the RCOG clinical advice for pregnant women, in particular those who are at 28 weeks' gestation, stands, although most advice for women who are at 28 weeks' gestation only relates to healthcare workers. In section 2.1 of the document, however, clinical risks to women in their third trimester are referred to, and so employers should be directed to any such relevant clinical advice that remains in-date when undertaking risk assessments. Further to this, the RCOG notes that if you are in your third trimester (more than 28 weeks' pregnant) you should be particularly attentive to social distancing. On its website 'RCOG recommends that employers use the clinical advice when performing mandatory risk assessments for their pregnant employees, along with other sector-specific advice published'.

Some pregnant employees will be deemed higher risk (for example, BAME teachers/those with underlying health conditions) and this should also be considered in any risk assessment undertaken.

PPE and Testing

The EIS has been clear that sufficient protective measures should be in place for schools returning. If a teacher feels that the measures in place fall short, they should raise their concerns with their employer (and then their LA secretary, if necessary).

No member of staff should be told that they cannot wear a mask in school. If this happens, concerns should be raised with the employer in the first instance and then the LA secretary if the issue has not been resolved.

As you will know, from an EIS perspective, we have been clear that pro-active testing of school communities should be in place. We also think that more should be done around senior pupils, who are young adults rather than children – smaller class sizes being an option.

Guidance from the Equality and Human Rights Commission

The Equality and Human Rights Commission (EHRC) Guidance (GB wide) is that a risk assessment for all pregnant workers and new and breastfeeding mothers must take into account:

- their job;
- any pre-existing health conditions;
- use of public transport;
- social distancing guidance relating to coronavirus (noting that pregnant workers have been considered to be in a clinically vulnerable category to date, and such workers should strictly follow physical distancing); and
- whether the workplace risk is greater than in everyday life outside the workplace, including getting to and from work.

The EHRC guidance notes that if a risk is identified in the workplace which is greater than the risk outside the workplace, employers must make reasonable changes to avoid that risk, such as:

- adjusting working conditions or hours;
- providing a suitable place to rest for breastfeeding mothers that allows social distancing guidance to be followed – it is also good practice to provide reasonable facilities and breaks.

If this is not possible, then the guidance is that employers must:

- offer a suitable alternative job where the terms are similar and not substantially less favourable; or
- suspend the pregnant person on full pay if no other suitable work can be found.