

Endometriosis: law and best practice for employers

Introduction

Endometriosis is a long-term condition where cells, similar to the ones in the lining of the womb, are found elsewhere in the body. Each month these cells react in the same way to those lining the womb, building up and then breaking down and bleeding. Unlike the cells in the womb that leave the body as a period, this blood has no way to escape. This can cause inflammation, pain and the formation of scar tissue.

The disease affects one in 10 women and those assigned female at birth from puberty to menopause. Around 1.5 million people in the UK are currently living with the condition.

The impact of endometriosis can vary significantly from person to person, with some having none or limited symptoms and others having very severe symptoms that impacts their day-to-day life. Symptoms may be intermittent or continual and could include:

- Chronic pelvic pain
- Painful periods
- Bladder and bowel problems
- Difficulty getting pregnant
- Fatigue

The average diagnosis time in the UK is currently 8 years, and many will experience some of the above symptoms for a significant amount of time before receiving a formal diagnosis.

This guide is to assist employers when managing employees who suffer from endometriosis with legal considerations and other issues that may arise.

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Statutory Sick pay

Employees who are unfit to work may be entitled to statutory sick pay (SSP), as long as their average weekly earnings are not less than the Lower Earnings Limit (at time of writing, £120 per week).

Regardless of an employee's normal rate of pay, the SSP rate (at time of writing) is £95.85 per week. This figure is updated every April; the following link can be used to check entitlement: <https://www.gov.uk/statutory-sick-pay>.

SSP will not be paid for first three days of sickness (known as the 'waiting period'). If an employee is unfit to work after this time, they will be entitled to SSP for up to 28 weeks.

If an employee has multiple periods of absence within an 8-week period, this will be considered 'linked' for SSP purposes and the 28-week entitlement. If there are more than 8 weeks between absences, the 28-week entitlement renews and the absence period is considered separate for SSP purposes.

An employee who is unfit to work will be entitled to SSP if the following criteria is met:

1. They are unable to work due to sickness for 4 consecutive days
2. They notify their employer of their sickness (as per the employer's sickness policy, or in the absence of a policy, within 7 days)
3. They provide a self-certification form for less than 7 days absence, or a GP 'fit note' for periods of sickness lasting longer than 7 days.

Self-certification forms are often available in the GP surgery but can be downloaded from the following:

<https://www.gov.uk/government/publications/statutory-sick-pay-employeesstatement-of-sickness-sc2>

Intermittent sickness

Due to the three-day waiting period before SSP begins, employees who suffer menstrual related conditions may be adversely affected. They may not have symptoms for longer than three days and they may have multiple periods of absence within an 8-week period. It would be good practice to consider flexible working arrangements with employees who you know

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suffer from long-term conditions but experience intermittent symptoms (discussed further below).

Long term sickness

After 28 weeks of absence due to sickness, you are no longer obliged to pay SSP and your employee will receive the appropriate benefit directly from the government. There is no carry forward or SSP entitlement so unused entitlement in one year cannot be added to another.

Who bears the cost?

The first 28 weeks SSP is funded by you as the employer.

Zero hours contracts

There are complications around zero hour's contracts since the 3-day waiting period for SSP is calculated against 'qualifying days'. You may need to take advice on this from an Employment Law expert.

Employer's sick pay

Many organisations contract to pay sick pay beyond SSP. There is no general legal requirement to do so, but once you have issued a contract saying you will pay more, you should honour your own contract of employment and relevant HR policies. You should ensure that the policy is applied equally to all employees and any discretion allowed in the policy is applied fairly so that it cannot be said that employees have been treated differently or "discriminated" against because they possess a "protected characteristic" such as their sex or disability (see further on this below).

Sickness and holidays

If your employee falls sick during annual leave, they are entitled to request having holiday back to you in exchange for sick leave. An employee should then be paid at the appropriate sick pay rate for the period they were sick on annual leave.

If an employee is on long-term sick leave, they can request to take their annual leave during this period. You should take further advice if you are considering rejecting a holiday request for someone who is on sick leave. You are at risk of a disability discrimination claim if you do not take the proper considerations.

Annual leave is a health and safety measure and you should ensure that an employee takes their statutory annual leave entitlement. The current statutory entitlement is 28 days for a five-day a week worker, part time workers are entitled to annual leave on a pro-rata basis.

Equality and Sex Discrimination

The Equality Act 2010 gives protection against unlawful discrimination in respect of nine "protected characteristics" which include sex, race, age, disability etc. A woman is therefore protected if she has been treated less favourably than a man. There are a number of different

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types of discrimination including direct and indirect discrimination, harassment and victimisation. Employers should therefore always be careful not to treat two employees differently without good reason as otherwise inferences could be drawn to say that the treatment is because of an individual's gender.

Bear in mind that when Employment Tribunals decide cases of direct discrimination, they need to consider why the Claimant was treated less favourably and therefore what the reason was for the conscious or unconscious behaviour. In such cases, there may not be a blatant act of discrimination such as an employer saying *"we are not promoting you as you are a woman suffering from endometriosis and have had too much time off work"*. It instead could be that the Employment Tribunal needs to draw inferences from the surrounding facts in order to conclude that unlawful discrimination has taken place. In this respect, inferences could be drawn from the "unconscious bias" of individuals within organisations if there is no good explanation for the reason for the difference in treatment.

For example if an injured rugby playing male employee is allowed months off work and his manager is also male and interested in rugby, it could then be discriminatory treatment to dismiss a female employee with gynaecological problems who has also had time off due to sickness absence. The organisation will need to have a good reason for the difference in treatment which is a non-discriminatory reason.

Harassment

As endometriosis only affects women and those assigned female at birth, harassment could occur if a woman is subjected to unwanted behaviour that is related to her sex which has the purpose or effect of:

- Violating her dignity; or
- Creating an intimidating, hostile, degrading, humiliating or offensive environment for her.

Equality and Disability Discrimination

Definition of Disability

For the purposes of employment law, a person will be deemed to have a disability if they have a physical or mental impairment, which has a **substantial** and **long-term** adverse effect on their ability to carry out **normal day-to-day activities**.

Breaking the definition down further:

- 'Substantial' = more than minor or trivial
- 'Long-term' = has lasted or is likely to effect a person for at least 12 months
- 'Normal day-to-day activities' = things people do on a regular or daily basis like sleeping, eating, walking etc

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A person who meets the above criteria will receive protection from discrimination under the Equality Act.

Endometriosis is a long-term condition that can cause severe pain and intrusive symptoms. The symptoms of endometriosis may cause a woman, or those assigned female at birth, to have an adverse effect on their ability to carry out day-to-day activities.

It is good practice to ensure you consider whether an employee may be disabled under the Equality Act when a medical condition has been disclosed to you. **If you are unsure whether an employee is disabled under the definition, it is strongly advised that you seek further advice from an Employment Law expert who may advise that you speak to an Occupational Health Practitioner.**

Reasonable adjustments

If an employee meets the criteria for a disability, they are entitled to put in a request for reasonable adjustments that would enable them to continue working, or would reduce the disadvantage suffered because of the disability. The employer is obliged to meet the costs of any reasonable adjustments agreed.

The onus is on the employer to consider what adjustments should be made, however it is good practice to discuss with the employee what adjustments they feel would benefit them.

You may find it helpful to have a conversation with your employee to establish the typical effects of their endometriosis at work. The symptoms of endometriosis may be worse at certain times of the month or have a different impact on particular tasks. You can then consider how the effects of the symptoms will affect the business and consider reasonable adjustments that could be made.

An example of reasonable adjustments that could be made are as follows:

- Re-assigning work or duties
- Reducing working hours
- Flexible working hours
- Allowing for home working
- Arranging for special equipment to be provided
- Allowing time off for medical appointments

If your employee has made a request for reasonable adjustments and you are thinking of refusing or suggesting an alternative adjustment, **please take advice before you arrive at a decision.**

You could risk having a disability discrimination claim made against you if you do not handle the request for reasonable adjustments correctly.

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Occupational health

You may consider that an occupational health report is necessary in circumstances such as:

- To help determine whether an employee is disabled (under the definition above). **Be aware:** Even if an occupational health report states that an employee is not disabled, you will be expected to make your own decision based on the facts. You cannot solely rely on an occupational health report to make this decision. Or;
- To provide recommendations for reasonable adjustments that you can put in place for your disabled employee.

A GP can certify that your employee suffers from endometriosis but they have limited ability to help with what adjustments might be useful in the workplace. Obtaining an occupational health report may be able to assist with suggestions for reasonable adjustments to improve day-to-day tasks.

Not all occupational health consultants are fully familiar with endometriosis and it is often necessary for the various medical practitioners to work together, with your employee's consent, to collect the appropriate data and make recommendations.

It is good practice to allow employees to put their own suggestions forward for reasonable adjustments. A collaborative approach will assist in putting in place the right adjustments.

Ordinary flexible working request

All employees with 26 weeks' continuous service are eligible to make one flexible working request in a 12-month period.

This is different to an employee making a request for reasonable adjustments under the Equality Act. All employees have the right to make flexible working requests – but employers are not obliged to grant them, simply to consider them. This is less of an obligation than when a disability adjustment request is made.

A flexible working request from an employee must relate to one of the following:

- A change to the hours they work
- A change to the times when they are required to work
- A change to the place of work (including working from home)

As an employer, you have an obligation to deal with these requests in a reasonable manner. It would be good practice to arrange a meeting with the employee who has made the request as soon as possible. This will give you and the employee the chance to discuss the practicalities of the request and their reasons for making it.

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You should consider the benefits of the request to the employee and consider whether there is a legitimate business reason to reject the request. The flexible working request can only be rejected for one of the following reasons:

1. The burden of additional costs;
2. Detrimental effect on ability to meet customer demand;
3. Inability to reorganise work among existing staff;
4. Inability to recruit additional staff;
5. Detrimental impact on quality;
6. Detrimental impact on performance;
7. Insufficiency of work during the periods the employee proposes to work; or
8. Planned structural changes

An employee may have a claim against you if you do not consider the request for flexible working properly, so you must consider a rejection carefully and seek advice if you are unsure.

If it is considered that the request may be in relation to a disability, the request will need to be dealt with as an adjustment (as above).

Benefits of flexible working for an employer

Flexible working can provide plenty of benefits for the workplace, such as:

- Employee retention – if an employee’s situation has changed, instead of losing them to a competitor, allowing flexible working may encourage retention. In turn, you will save on recruitment and training costs;
- Gets the most out of employees – allowing employees to work in a way that suits their home environment means they are more likely to work efficiently;
- Shows forward-thinking and a willingness to accommodate; and
- Builds trust with employee, which is extremely important for working relationships.

Benefits and credits

Benefits, tax credits and allowances are changing very rapidly and it is a good idea to encourage your employee to check each year what they are entitled to and how to apply. Sometimes varying the hours contracted for (with consent) can make a radical difference to their earnings without costing you a great deal.

Data protection and confidentiality

Information about your employee’s health, or medical conditions is categorised as ‘sensitive data’ under the Data Protection Act. Information about health means more than just medical reports and medical certificates - it also includes information held by you, which

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might be in emails between you and your employee or their manager or an occupational health advisor, as well as formal documents, computer records and physical file records.

Privacy

Your employee is entitled to refuse to disclose information about their health. You cannot force your employee to agree to disclose their medical history or information.

However, if an employee does disclose information regarding their health, you must ensure you consider appropriate safeguards to protect this data.

Data protection

The Data Protection Act 2018 provides rules for how personal data should be managed. Data regarding health is considered 'special category data'.

Extra care must be taken when dealing with special category data as the consequences for mismanaging it is severe. An employee may have a claim for a data breach, as well as a claim for a breakdown in mutual trust and confidence, if data regarding their health is mismanaged.

You must consider how health data will be used and ensure that it is kept securely. Health data can only be used if it is absolutely necessary and careful considerations should be made on who needs to have access to this information.

It is good practice to ensure that data regarding an employee's health is:

- Held securely on an employee's file – the data should not be available for everyone to see
- Only passed to an employee's colleagues if they **need** to know – you should take careful consideration of who needs to know about an employee's health, and consider how much information is necessary to provide. It may not be necessary for the full medical details to be disclosed to all the employees' colleagues
- Consent is obtained from an employee to share information regarding their health with specific colleagues
- Discuss with your employee how you will use the data and agree who will have access to the data
- Ensure that all colleagues who have been agreed to have access to the data are aware it is strictly confidential

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You may find it helpful to read the relevant employment code 'Quick guide to employment practices code'), it can be found at https://ico.org.uk/media/for-organisations/documents/1128/quick_guide_to_the_employment_practices_code.pdf

Showing support and seeking advice

It can be daunting for an employee to share details regarding their health with you, or make a request for flexible working. It is always good practice to show your support for your employee and work with them to find solutions to improve their work environment.

If you are unsure about any of the topics mentioned in this note, you would be advised to seek guidance from an Employment Law expert and obtain the appropriate training for managers within your organisation.

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