



**Linky  
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**Employment Partner from law firm Edwin Coe looks at the employment rights (in plain English!) of anyone undertaking in-vitro fertilisation (IVF) or other fertility treatments.**

Linky Trott has a wealth of experience and advises on a full range of employment issues. She has both Employment Tribunal and High Court experience and has obtained and resisted a number of High Court injunctions to enforce or resist post termination restraints and to protect confidential information.

She also advises on data protection, commercial agents and the Conduct of Employment Businesses and Employment Agency issues.

Linky understands that when a business or a senior executive has an employment related issue, it frequently requires immediate and urgent attention and Linky is consistently praised by clients for her speed of response and turn around time.

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# EMPLOYMENT LAW RIGHTS FOR THOSE UNDERGOING FERTILITY TREATMENT

**T**here is a range of legislation in the UK that creates rights and entitlements for pregnant employees and their partners.

These include all the protections that most of us are familiar with such as the right to maternity leave, the right to time off for antenatal care, the protection from dismissal and (for some) the right to maternity pay.

## ***Those familiar 'pregnancy' rights and entitlements apply as from the 'protected period'***

There is also an obligation for an employer to carry out a risk assessment for a pregnant employee, and whilst there is a tendency for employees who are pregnant as a result of fertility treatment to delay informing their employer that they are pregnant, (because of the inherent risks in a such a pregnancy), it would be advisable to inform ones employer as soon as possible so that any required health and safety steps can be implemented sooner rather than later.

Those familiar 'pregnancy' rights and entitlements apply as from the 'protected period' which begins when a woman becomes pregnant

and ends either at the end of Ordinary Maternity Leave (OML) or Additional Maternity Leave (AML), where some form of maternity leave has actually been taken. For those who have lost a baby during pregnancy (for example, where the IVF implantation fails), the protected period ends two weeks from the end of the pregnancy.

The complication for those undergoing IVF or IUI is identifying when, precisely, the protected period starts. For those undergoing IVF, the protected period starts when fertilised egg(s) are implanted i.e. Embryo Transfer. The same would apply to those who are undergoing Intra Cytoplasmic Sperm Injection (ICSI), Mitochondrial Donation (MI) and In Vitro Maturation (IM). There is no specific guidance for those undergoing IUI but logic dictates that the protected period will start when the woman becomes pregnant. The same would apply to those undergoing Donor Insemination (DI) and Gamete Intra Fallopian Transfer (GIFT).

Aside from the statutory rights and entitlements that exist once a woman is within the protected period, the next question that arises is whether or not there is any other form of protection before the protected period? The answer lies in the general protections against sex discrimination.

## For those undergoing IVF, the protected period starts when fertilised egg(s) are implanted

European case law says that the dismissal of a woman on account of pregnancy is direct sex discrimination because pregnancy only affects women. Undergoing IVF is a state that only affects women also and therefore logic suggests that, that too would be direct sex discrimination, even though legally they are not 'pregnant' before the fertilised egg(s) are implanted. This was considered in a 2009 case which confirmed that where a woman is at an advanced stage of IVF treatment i.e. between the follicular puncture (egg collection) and the transfer of the fertilised egg(s) into the uterus, she could bring a claim for direct sex discrimination but not otherwise. This means that there is only a very narrow window immediately prior to the transfer of the fertilised egg(s) within which a dismissal by an employer would amount to direct sex discrimination.

There are however other circumstances where claims for direct and/or indirect sex discrimination could be asserted if a woman undergoing IVF is treated less favourably than a man, or an employee who is not undergoing fertility treatment. The example given by the Equality and Human Rights Commission in its Code of Practice is where an employer allows a man to take a week off work to have cosmetic dental surgery but refuses a woman's request for a weeks leave to have IVF. That would be discriminatory against the woman. Employees should

therefore consider their treatment in comparison to colleagues (for example, difficulties over sickness absence or time off work) to see if they are being discriminated against.

The position for the partner (male or female) of a woman undergoing fertility treatment is less well protected during the course of that treatment and before the start of the protected period, unless there is an offence against the general principles of discrimination (for example, a man is allowed paid time off to attend a fertility appointment with his wife, but a lesbian partner is not allowed paid time off to attend a similar appointment).

## ***The complication for those undergoing IVF or IUI is identifying when, precisely, the protected period starts.***

The best advice for employees who wish to protect themselves against any less favourable treatment either before or after IVF or other fertility treatment is to inform their employers as early as possible that they are undergoing such treatment, and if difficulties arise, speak to an employment lawyer.