

TUCKNER SIPSER

Know Your Rights About **Pregnancy** and **COVID-19** at Work

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women's rights in the workplace LLP





PREGNANT EMPLOYEES AND COVID-19

How is COVID-19 Affecting Your Pregnancy at Work?

The novel coronavirus (COVID-19) pandemic has been with us for about a year. There are three vaccines available, but we still don't know when life will get back to normal. But life goes on, and people still get pregnant.

You may know that federal laws require employers to provide **reasonable accommodations** to employees enduring various pregnancy-based conditions.

- Severe morning sickness.
- Gestational diabetes.
- Gestational hypertension.
- Orthopedic challenges.
- Severe anxiety or other pre- or postpartum emotional difficulties.
- Other known limitations of pregnancy that affect certain major life activities, such as sleeping, walking, eating, standing, lifting, or bending.

Did you know your employer must also make accommodations to protect you from COVID-19 if you are pregnant?

Your company can't fire you or treat you badly because you've asked for this legally protected accommodation. That is illegally prohibited **retaliation**.

Does COVID-19 Affect Pregnancy?

Studies have found that pregnant women are at a greater risk from COVID-19.

Guidance from the Centers for Disease Control and Prevention (CDC) and the World Health Organization (WHO) indicate that pregnant people are at an increased risk for severe illness and death from COVID-19. They also have an increased risk for other adverse outcomes, such as preterm birth.

According to the WHO, pregnant women or recently pregnant women who are older, overweight, and have pre-existing medical conditions such as hypertension and diabetes seem to have an increased risk of developing severe coronavirus illness. When pregnant women develop severe disease, they also seem to require hospital stays in intensive care units more often than non-pregnant women of reproductive age.

Due to changes in women's bodies and immune systems, obstetricians and scientists know that pregnant women can be badly affected by some respiratory infections. It's important they take precautions to protect themselves against contracting COVID-19.

Making Sure You Have a Safe Pregnancy at Work

These findings and recommendations from the WHO and the CDC show that healthy, "normal" pregnancy is an "underlying condition" and a risk factor for developing severe illness from exposure to the coronavirus and becoming seriously ill. This status treats pregnant working women just like other temporarily or permanently disabled people.

Traditionally, employers give reasonable accommodations to people having temporary or permanent disabilities that affect major life functions. These same protections have been extended to all working women dealing with pregnancy-based medical issues.

Are you pregnant, working, and anxious about contracting COVID-19, or otherwise dealing with a pregnancy-based medical condition? You are entitled, as a matter of law, to serious consideration and flexibility resulting from a reasonable accommodation.

- Working remotely
- Taking additional time off
- Other temporary adjustments

The goal of a reasonable accommodation is to permit you to remain safely employed through full-term, enjoy a reasonable maternity leave, and then return to work.

YOUR RIGHTS IN THE WORKPLACE

If you work in New York City, or other states or cities with broader Pregnant Workers Fairness Laws, you are entitled to this flexibility **just because you're pregnant**. Otherwise, it's sex discrimination, since only women require this type of flexibility.

Federal Laws Covering Pregnancy in the Workplace

Federal laws require employers with at least 15 employees to reasonably accommodate employees enduring various pregnancy-based medical conditions and limitations in the same way they must accommodate all temporarily disabled non-pregnant employees.





The Americans with Disabilities Act Amendments Act of 2008 vastly broadened the American with Disabilities Act of 1991 by now including various categories of physical, emotional, medical and orthopedic challenges, as well as other known limitations of pregnancy. The ADAAA requires employers to treat these limitations of pregnancy the same as employers must do for non-pregnant employees with disabling conditions.

You are also covered by the federal Civil Rights Act, which protects you from discrimination based on sex. As a woman, sex is inseparable from pregnancy.

Protections for pregnant workers, or employees considering getting pregnant and worrying about the security of their jobs, are also quite strong, due to the federal Pregnancy Discrimination Act of 1978, and a Supreme Court ruling from 2015. That case held that if you need flexibility during the course of your pregnancy from your employer (if your employer has at least 15 employees), your employer must at least engage in a conversation (an “interactive process”) with you to determine:

- Your needs related to your pregnancy.
- Your ability to do your job.
- The essential functions of your job.
- Whether any limitations, temporary flexibility or so-called reasonable accommodations should be implemented for you as a pregnant woman.
- Whether you’re dealing with pregnancy-related medical conditions or challenges.

New York State Laws about Pregnancy and COVID-19

There are many states, including New York, New Jersey, and Connecticut, that go further than the federal law in terms of protections for pregnant working women.

For instance, in New York State pregnancy is one of the **underlying conditions**, along with “comorbidities” such as heart disease, hypertension, chronic kidney, liver and pulmonary disease, etc., entitling pregnant women to get the COVID-19 vaccine starting as early as February 2021, along with anyone over the age of 65, as even healthy, young pregnant women face substantially greater health risks from COVID-19.

New York City Laws on Pregnancy and COVID-19

If you work in New York City, you are protected even more. You’re entitled to flexibility **just because** you’re pregnant. You don’t need a letter from an OB to get certain pre- or postpartum, flexible accommodations from your employer. That flexibility has now been expanded to your COVID-19 concerns, even if you’re enjoying a healthy pregnancy.



FAQS: FREQUENTLY ASKED QUESTIONS

If you're pregnant, employed, and concerned about exposure to COVID-19, you may have specific questions about how to protect yourself, your unborn child, and your job.

If you work for any employer in certain jurisdictions, such as New York City, you're entitled to this flexibility of accommodation to protect against COVID-19 just because you're pregnant. These rules are almost as job-protective anywhere within New York State (even outside of New York City), but under the state law, it's not just your pregnancy that entitles you to flexibility, there must be some pregnancy-based challenge you're facing that your OB can easily document for you, and it doesn't have to be particularly serious. So, severe morning sickness, gestational hypertension, orthopedic limitations and pain due to weight gain, insomnia, gastrointestinal problems, etc., as long as these challenges are pregnancy-related, you're entitled to flexibility.

Is being pregnant a risk factor for COVID-19?

Yes, being pregnant is a serious risk factor for developing severe illness from the virus that causes COVID-19. As of December 23, 2020, the US Centers for Disease Control and Prevention added the **state of being pregnant at any age** to the list of "underlying medical conditions," a.k.a. "comorbidities," that present increased risk for developing severe illness from the coronavirus. Severe illness from COVID-19 is defined as hospitalization, admission to the ICU, intubation or mechanical ventilation, or death.

Can I get accommodations at work to protect against COVID-19 because I'm pregnant?

Yes. In New York City, you only need to be pregnant to ask for a reasonable accommodation if you are concerned about your health or the health of your baby due to possible exposure to the coronavirus that causes the illness COVID-19. If you would like any flexibility in your job, request accommodations from your employer **in writing**.

If you have any medical problems with your pregnancy, you can ask for these reasonable accommodations, anywhere in New York State or in the United States.

What kind of accommodations can I ask for to protect myself from COVID-19 while I'm pregnant?

You will need to speak to your employer about your request for flexibility (a.k.a., a reasonable accommodation), but some examples include:

- ❑ Changes to your work schedule.
- ❑ Changes in your ability to work, for example, do you need temporary "light duty."
- ❑ Taking off time.
- ❑ Working remotely from home.
- ❑ Changes to your commuting time.
- ❑ Changes in how you get to work if you are concerned about mass transit.

Do I need a note from my OB to prove I need protection from COVID-19?

If you can get your obstetrician to support your request with a confirmatory medical note, that is great. But in certain jurisdictions such as New York City is not necessary.



I just found out I'm pregnant? How do I protect myself, my baby, and my job?

If your obstetrician will support your request for light duty or any other commuting or time and attendance adjustments, that's very helpful. But it's not necessary.

- 1 Identify the pregnancy-based issue or concern in advance and consider what flexibility you will need from your employer to allow you to make it safely through a full-term pregnancy.
- 2 Ensure that you leave a "paper trail" of all requests, actions, and responses from your employer by documenting everything in writing to your employer. Send it to the most appropriate and important person you deal with, e.g., the HR Director, a corporate officer, the business owner, or any person in upper management.
- 3 Send your request so you can prove someone received it. If you send an email, copy yourself, and put a return receipt on the email. Ensure that the subject line mentions your request for pregnancy-based reasonable accommodations. If possible, send your initial letter by FedEx, UPS, or USPS, so you can have "tracking" proof that it was delivered, and when your company signs for it.
- 4 Cooperate with your company's **interactive process** regarding your flexibility requests or with the investigation into your protected complaint of pregnancy discrimination, if that's what's occurring. Continue to document all conversations and requests along with any medical support for your claims (or requests) and then document your company's responses, and/or any backlash you suffer.



My employer is discriminating against me because I'm pregnant. What do I do?

- 1 First, **don't quit!** Even if you're dissatisfied with your company's response to your requests, and even if you feel the situation is hopeless, as you will forfeit your legal leverage and probably won't even qualify for unemployment benefits.
- 2 Then, **continue to document** your requests for flexibility and reasonable accommodation or complaints of pregnancy discrimination in writing to your employer. Follow-up in writing throughout the so-called **"interactive process"** or **"cooperative dialogue"** that your employer must engage in with you. Keep a documented record and paper trail of your protected requests, the company's responses, and their ultimate decision on your requests or complaints.
- 3 If you need or want further assistance, contact an employee rights law firm such as Tuckner Sipser. You can also contact any employment lawyer who concentrates their practice in the city or state where you work. They will be most familiar with the laws and civil procedures in your jurisdiction to empower you.

You may then wish to retain a law firm to help you navigate a difficult employment relationship based on your sex or gender (and pregnancy and perceived disability), and most employee-side law firms offer free consultations and often work on "contingent fee" arrangements when appropriate.

- 4 File a court complaint or charge of discrimination with the US Equal Employment Opportunity Commission (EEOC) or a comparable state or city administrative agency. Do not do this by yourself before contacting a lawyer, as filing this complaint or charge often commits you to a time-sensitive legal process that may compromise your optimal legal leverage and overall best negotiating strategy.




If you have any questions about your own or a loved one's pregnancy-based work situation, please feel free to contact me. I'm Jack Tuckner, an employee rights lawyer with Tuckner, Sipser, Weinstock & Sipser, LLP, a New York City and Poughkeepsie, NY employee rights law firm that concentrates its practice in gender specific issues in the workplace. Mention this e-book and we will happily consult with you free of charge to discuss how we may be able to assist you with your particular workplace challenges.

And even if you work elsewhere in the US, many other states and cities have similarly expansive protections for pregnant and lactating employees, and if your state or city doesn't provide generous protection, as long as you work for a company with at least 15 employees anywhere in the United States, you are entitled to flexibility if you have a pregnancy-based medical condition or even **pregnancy-based anxiety** related to the pandemic, your employer may be required to grant such request unless it can demonstrate that it would cause the company a so-called **undue hardship**.



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