IN THE MATTER OF:

STATUTORY SICK PAY, THE CORONAVIRUS
JOB RETENTION SCHEME AND PREGNANT WORKERS

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ADVICE
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1. This short Advice addresses a specific problem which has arisen in relation to how the Coronavirus Job Retention Scheme (‘CJRS’) applies to the many pregnant women sent home on sick leave by their employers and paid Statutory Sick Pay (‘SSP’) in the mistaken belief by employers that they were required to self-isolate.

2. CJRS reimburses the 80% of the wages, up to a maximum of £2,500 a month, of each individual worker who is ‘furloughed’ as a consequence of the covid-19 pandemic. The guidance on CJRS (the ‘Guidance’) indicates that sick workers can be furloughed. However, the recently published Direction1 on the Scheme, dated 15 April 2020 and made by the Treasury under ss 71 and 76 of the Coronavirus Act 2020, indicates that sick workers cannot be furloughed until the original period for which SSP is payable has expired. We are asked to advise Maternity Action on the legal effects of these provisions in light of recent events regarding pregnant workers.

3. **Background.** On 16 March 2020 the Chief Medical Officer announced that pregnant women were considered a vulnerable group, leading to many pregnant workers being sent home by their employers on the basis that they should ‘self-isolate’ and being paid Statutory Sick Pay (‘SSP’). Subsequently, Public Health England (‘PHE’) published guidance to the effect that pregnant women were at increased risk of severe illness due to coronavirus and

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‘strongly’ advising them to take stringent measures of ‘social distancing’. But self-isolation, according to this guidance, should only take place where an individual develops symptoms.

4. On 13 March 2020 the Statutory Sick Pay (General) (Coronavirus Amendment) Regulations, SI 2020/287, came into force. They amend the SSP (General) Regulations 1982 (the ‘SSP Regulations’) by defining a person who is deemed incapable of work for the purpose of SSP as including an individual ‘isolating himself from other people in such a manner as to prevent infection or contamination with coronavirus’ in accordance with guidance published Public Health England (‘PHE’). As subsequently amended by SI 2020/374 with effect from 28 March, the words ‘in accordance with the Schedule’ were inserted in place of the reference to guidance from PHE. The amended Schedule inserted by SI 2020/374 made clear that for SSP to be payable the person must have symptoms of coronavirus or live with such a person. By a later amendment, via the SSP (General) (Coronavirus Amendment) (No.3) Regulations 2020, SI 2020/427, which came into effect on 16 April 2020, a new para. 5A was inserted in the Schedule, to the effect that people ‘defined in public health guidance as extremely vulnerable and at very high risk of severe illness from coronavirus because of an underlying condition’ were eligible for SSP.

5. At around the same time, on 20 March the Chancellor announced the establishment of the CJRS, Guidance on which was first published on 26 March and the latest version of which is dated 17 April. The Guidance, including in its published form prior to 17 April, indicates that an employer can ‘furlough’ a worker absent on long-term sick leave:

Short-term illness/self-isolation should not be a consideration in deciding whether to furlough an employee. If, however, employers want to furlough employees for business reasons and they are currently off sick, they are eligible to do so, as with other employees. In these cases, the employee should no longer receive sick pay and

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would be classified as a furloughed employee.

6. The Direction published on 17 April, however, is worded differently. In §6.4 it states that where SSP is payable, the relevant period of furloughing ‘in respect of the employee does not begin until the original SSP has ended’. For this purpose ‘original SSP’ is rather awkwardly defined and the paragraph is poorly worded; but the intention behind and meaning of the provision is tolerably clear. It seems to mean that no claim can be made until the period of the original SSP certificate has ended.

7. This means that, for example, a pregnant woman given an SSP certificate of 12 weeks and sent home in March cannot be furloughed until that certificate has expired. In the meantime, she will not receive her full pay and nor will she receive pay pursuant to CJRS but instead she will receive SSP. This, we understand, has happened to many pregnant women following the 16 March announcement.

8. **Is SSP payable to pregnant women sent home?** This is an important question which our advice highlights. It seems clear that many - the majority even - of pregnant women sent home as a result of the announcement on 16 March were not eligible for SSP. In summary:

   (1) The original amendment to the SSP Regulations, coming into effect on 13 March, made eligible for SSP those who were isolating themselves in accordance with published PHE guidance. This amendment was necessary because such persons were not incapable of work on its ordinary meaning and so would not otherwise have been entitled to SSP: see the opening words to regulation 2(1) of the SSP Regulations. The amendment, in our view, did not cover pregnant women because the published PHE guidance was that pregnant women should engage in ‘social distancing’; but it did not say that they should isolate themselves, as the SSP Regulations then required. We doubt the term ‘isolating himself’ should be read more broadly so as to cover anyone

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4 The maximum period of SSP is ordinarily 28 weeks: see s.155 of the Social Security Contributions and Benefits Act 1992. But this limitation was removed in respect of incapacity for work relating to coronavirus by regulation 2 of SI 2020/374.
taking steps of social distancing.

(2) Further, the amendments coming into effect two weeks later, on 28 March by SI 2020/374, did not cover pregnant women unless they had symptoms of Covid-19 or were living with someone who had those symptoms. This is because from that point eligibility for SSP was defined by reference to the new Schedule to the SSP Regulations. The Schedule only included those who had symptoms or were living with someone with symptoms. Pregnant women not falling within either of those classes were not included and so were not eligible for SSP unless they met the ordinary conditions for SSP (i.e. they were incapable of work within the meaning of regulation 2 of the SSP Regulations).

(3) Nor do the later amending Regulations, SI 2020/427, applying from 16 April, affect the position. They apply to those who (i) were ‘extremely vulnerable’ as defined in public health guidance and (ii) were advised by notification to ‘follow rigorously shielding measures’. This was aimed at those with serious health conditions and does not include pregnant women, save for those with significant health disease, such as a heart condition: see PHE’s Guidance on Shielding and Protecting People Who are Clinically Extremely Vulnerable from COVID-19.5

9. On that basis, the result is that most or perhaps all pregnant women sent home by their employers after 16 March in the mistaken belief that they were required to self-isolate and who were paid SSP were not eligible for SSP. Nor, in the absence of an agreement to furlough them, was there a lawful basis for requiring them to stay at home. Since these women were not furloughed, they are entitled to their full pay for the period they were absent from work until their return to work or until there is a valid agreement to furlough.

10. ERA 1996. For completeness, what about s.66 of the Employment Rights Act 1996 (‘ERA’) which makes particular provision for the pay of suspended pregnant women? A woman who is suspended from work ‘on the ground she

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is pregnant’ is entitled to be paid remuneration at the rate of a week’s pay: see s.68, s.69 ERA. The provision bites where the suspension is because of a ‘relevant requirement’ or ‘relevant recommendation’. The recommendations are those set out in Codes of Practice issued by the HSE, so that nothing resulting from e.g. PHE guidance applies. There is currently no such approved HSE Code in relation to the Management of Health and Safety at Work Regulations 1999 (‘MHSWR 1999’, the earlier Code having been withdrawn and replaced by guidance. It follows that, so far as we can tell, there is no ‘relevant recommendation’ to the effect that pregnant women should not work owing to coronavirus.

11. A ‘relevant requirement’ means a requirement ‘imposed by or under...a specified provision of an enactment’ or secondary legislation: see s.66(2). Nothing in the SSP Regulations requires that pregnant women do not work, apart from (perhaps) those who are defined as ‘extremely vulnerable’: see regulation 2 of the SMP Regulations, as amended, and the PHE guidance referred to above. However, where women are suspended on work because of a risk to their or their babies’ health and safety arising from ‘working conditions’ under regulation 16(3) of MHSWR 1999, the duty under s.66 ERA is triggered. This is because regulation 16(3) is worded in mandatory terms – ‘shall, subject to s.67 of [ERA], suspend the employee from work’ – and it is a ‘specified provision’ for the purpose of s.66(2). In these circumstances, the worker will be entitled to be paid remuneration at the rate of a week’s pay unless she unreasonably refused suitable alternative work: see s.68 and s.69 ERA. While the detail of these provisions are complex, their general effect is to ensure the payment of normal remuneration: see British Airways v Moore [2000] ICR 678. So ERA ss 66-70 presents an alternative method by which women suspended from work owing to risks to them or their babies may

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6 See https://www.hse.gov.uk/pubns/priced/hsg65.pdf
7 The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, SI 2020/350, prohibit people leaving their home save for certain reasons, such as travelling to work where it is not possible to work at home (regulation 6). But they do not require pregnant women not to work.
8 See s.241 and Schedule 2 of ERA and the Suspension from Work (on Maternity Grounds) Order 1994, regulation 2(a). By mistake the 1994 Regulations continue to refer to MHSWR 1992 in article 2(a), even after the amendments made by the MHSWR 1999 (which revoked MHSWR 1992); instead, the article refers to the previous power of suspension in regulation 13A(3) of MHSWR 1992. A court would no doubt correct the error and read it as referring (now) to regulation 16(3) of MHSWR 1999.
recover full pay. Employers cannot contract out of these rights: see ERA s.203.

12. **Furloughing under the Direction.** There is an apparent conflict between the Direction and the Guidance in respect of sick workers. How is it to be resolved? The Direction made pursuant to statutory authority will, in our view, trump the Guidance. It sets the strict legal boundaries on HMRC’s powers, as is made clear by its referring to s.71 and s.76 of the Coronavirus Act 2020.

13. In principle the Guidance might generate a substantive legitimate expectation that pregnant women on sick leave could be furloughed and entitled to CJRS pay, permitting employers who relied on it to bring a public law challenge. Such an argument would face formidable problems. First, the Guidance was only amended so as to permit furloughing of workers currently off sick on 9 April – that is, after the announcement of 16 March. The earlier Guidance, dated 4 April, said that employees off sick could only be furloughed ‘once they are no longer receiving SSP’. Second, the general rule is that a legitimate expectation cannot require a public body to take a step which it has no legal power to take: see *Rowland v Environment Agency* [2005] Ch 1. HMRC would be acting unlawfully and *ultra vires* if it paid out beyond the terms of the Direction because it defines what are its functions: see s.76. It might be possible, we suppose, to argue that HMRC has another source of a power to make such payments so that it was not *required* to comply with the Direction. But there is no obvious alternative statutory source of a power to make payments.

14. But assuming the Direction is the relevant legal source, what is the result of our analysis? According to §6.3 of the Direction, a worker is not entitled to furloughing ‘Where SSP is payable or liable to be payable (whether or not a claim to SSP is made)’ until the original SSP certificate has expired. Where SSP is not payable, then an employer may furlough an employee under CJRS where the conditions for furloughing are otherwise met. In the case of the women with which this Advice is concerned, they were not furloughed and nor were they entitled to SSP. They were, then, always entitled to their full

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9 See Laws LJ in *Nadarajah v Secretary of State for Home Department* [2005] EWCA Civ 1363
pay.

15. **End note.** The conclusion we have arrived at requires tracing through a legal labyrinth. It seems many employers may wrongly have assumed women were eligible for SSP. By the same token, many may still consider that pregnant workers are not eligible for furloughing. It is sensible, we consider, that the correct legal position should be clarified as soon as is practicable: pregnant women should not be paid SSP if they are sent home unless they are eligible under the SSP Regulations (which few will be, absent an underlying or separate health condition); such workers, if suspended under a contractual power, should be paid full pay; and pregnant workers are eligible for furloughing and are not excluded by §6.3 of the Direction.

16. It follows, too, from our analysis that pregnant women sent home on sick leave by their employers and paid only SSP because their employers believed they were required to self-isolate are contractually entitled to their full pay during the period of their absence on ‘sick-leave’. If their employers do not pay the full sum owed in wages, then those women may bring claims for unlawful deductions from wages in the Employment Tribunal (‘ET’): see s.23 ERA. In addition, a women has notified her employer of her pregnancy and was suspended owing to risks to her health and safety, she should be entitled to remuneration under ss 68 of ERA at the rate of a week’s pay, a claim for which is brought in the ET (s.70 ERA). Further, women will also have claims under the Equality Act 2010 (‘EA 2010’) because the reason they were sent home was because of their pregnancy. This amounts to direct pregnancy discrimination under the EA 2010 (ss.18 and 39) and is unlawful. A woman may therefore bring a claim in the ET for compensation for the injury to her feelings caused by being sent home on reduced pay, in addition to the pay due to her.

17. A woman wishing to bring a claim in the ET in respect of her pay or for pregnancy discrimination must **bring her claim within three months.** She must first notify ACAS pursuant to the ‘early conciliation procedures’ and

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10 Alternatively, a claim for breach of contract could be brought in the ordinary courts.
this will modify the time limit in the circumstances explained here: https://www.acas.org.uk/making-a-claim-to-an-employment-tribunal.

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