

XpertHR Weekly Podcast

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- Jeya Thiruchelvam: Hello and welcome to XpertHR Weekly with me, Jeya Thiruchelvam. Last December, a breastfeeding mother caused a furore in Claridges by breastfeeding her twelve-week old baby without a cover while having Christmas tea at the exclusive hotel. She was asked to use the cover by a waiter in accordance with the hotel's policy but was left upset and humiliated by the whole debacle. This incident highlights that managing a breastfeeding employee requires sensitivity and diplomacy and today I'm joined by Felicity Alexander, who's here to tell us how to do just that and remind us of the employer's obligations around breastfeeding employees. Hi Felicity.
- Felicity Alexander: Hello Jeya.
- Jeya Thiruchelvam: So tell us, what should an employer be thinking about when a new mother is about to return to work? [0:00:51.5]
- Felicity Alexander: A return-to-work plan is key when a mother is returning to work. An important part of that plan is breastfeeding.
- Jeya Thiruchelvam: And do you think that employers should go as far as having a breastfeeding policy? [0:01:01.5]
- Felicity Alexander: Definitely, yes. It's a good idea for an employer to put in place a breastfeeding policy. All mothers are different when it comes to breastfeeding. Not all mothers want to or are able to breastfeed their babies for long. For some mothers, however, continuing to breastfeed their babies when they return to work will be very important. They may wish to do this by expressing milk while they're at work and storing the milk in a fridge, building up a supply for the baby. Other mothers may wish to breastfeed their babies while they are at work. This may be practical if there is a workplace crèche or someone can bring the baby into the workplace.
- Jeya Thiruchelvam: So aside from giving some clarity to the situation, what are the other tangible benefits of having a breastfeeding policy? [0:01:39.4]

- Felicity Alexander: Having a breastfeeding policy may help to overcome any embarrassment from employee and line manager when raising and discussing breastfeeding. Another advantage is that the policy will help ensure employees are treated consistently and employees will know in advance what they can expect to receive in the way of support. The policy also indicates the employer's commitment to supporting a new mother and her baby.
- Jeya Thiruchelvam: And how does an employer know then if a mother is breastfeeding? [0:02:04.5]
- Felicity Alexander: A breastfeeding employee should notify her employer in writing that she is breastfeeding, ideally before she returns to work.
- Jeya Thiruchelvam: And why is that so important, aside from the obvious? [0:02:15.8]
- Felicity Alexander: If an employee does not notify her employer in writing that she is breastfeeding, she will not be able to benefit from certain rights that we will be discussing in a moment. It's a good idea in any case for the employee's line manager to raise the issue of breastfeeding when discussing the employee's return to work.
- Jeya Thiruchelvam: And why is that beneficial for the employers? [0:02:34.0]
- Felicity Alexander: It will enable the employer to find out in advance what the employee's intentions are and how it needs to or can respond, both in relation to facilities and breaks required by the employee. These breaks may need to be built into flexible working arrangements. We'll talk about facilities and breaks in a moment.
- An employer should also ask an employee to notify the employer when she ceases breastfeeding, as the employer has continuing obligations in respect of breastfeeding mothers.
- Jeya Thiruchelvam: And how long then do these obligations last? [0:03:02.2]
- Felicity Alexander: The obligations last all the time a mother is breastfeeding. The time for which a mother breastfeeds her baby varies considerably. This is why it's important for a mother to tell her employer that she's no longer breastfeeding, although there is no obligation for her to do so.
- Jeya Thiruchelvam: And there are probably risks, aren't there, in the workplace which may impact breastfeeding mothers which don't impact other people, so is it a legal requirement to have a risk assessment for a new mother returning to work? [0:03:26.9]

- Felicity Alexander: There is a legal requirement under the Management of Health and Safety at Work Regulations 1999 for every employer to make an assessment of the risks to the health and safety of all its employees. This is a Regulation 3 assessment. If the employer has women of childbearing age in its business and the Regulation 3 assessment indicates that the work is of a kind which could involve risks to the health and safety of a new or expectant mother, or to that of her baby, then the assessment must also include an assessment of the risks to the new or expectant mother or that of her baby.
- Jeya Thiruchelvam: That's really interesting. So you mentioned the concept there of 'women of childbearing age' and a risk assessment being done in relation to them, but that's really an ever-expanding concept. So who actually falls into that group? [0:04:11.7]
- Felicity Alexander: There is no actual definition of the age range for 'women of childbearing age'. So given that it is possible for women in their 50s and 60s to become pregnant, a prudent employer could treat all women as being childbearing age and this has the advantage that when a new female employee joins, she would be covered by the assessment.
- Jeya Thiruchelvam: And you also mentioned new mothers, in terms of risk assessment. So is there a definition of a 'new mother'? [0:04:36.4]
- Felicity Alexander: A 'new mother' is defined as someone who has given birth in the previous six months. Breastfeeding mothers are expressly covered by the Management of Health and Safety at Work Regulations in the definition of 'an expectant mother' and because of the risk to the health and safety of their baby.
- Jeya Thiruchelvam: So does an employer conduct another individual risk assessment then, specifically for the expectant, new or breastfeeding mother? [0:05:01.0]
- Felicity Alexander: No. An employer is not legally required to conduct another individual risk assessment for expectant, new or breastfeeding mothers, but employers may choose to do so as part of a process to make a decision about what action should be taken.
- Jeya Thiruchelvam: Okay. So that's interesting, because some people might have assumed that is an obligation. They don't have to conduct another risk assessment. But are there any situations in which they do have to do that? [0:05:23.7]
- Felicity Alexander: There are a number of situations. These are when the previous assessment may no longer be valid or there has been a significant change in the matters to which it relates. If an

employee decides to breastfeed her baby for many months after birth, the employer may need to regularly review the risks while she's breastfeeding.

Jeya Thiruchelvam: So going back to basics then, what is the purpose of these risk assessments? [0:05:44.9]

Felicity Alexander: The purpose of the risk assessments is for the employer to identify health and safety risks that may affect those working in the employer's business and enable the employer to put in place preventative and protective measures to control those risks.

Jeya Thiruchelvam: And what sort of risks are we talking about that might actually affect a breastfeeding mother? [0:06:03.1]

Felicity Alexander: Risks may arise from processes or working conditions or physical, biological or chemical agents.

Jeya Thiruchelvam: Okay, that sounds really technical, so can you give us some examples of those types of risks? [0:06:14.5]

Felicity Alexander: Some chemicals may enter the mother's milk and so pass to the baby, causing harm. Examples of these types of chemicals are lead, mercury and other heavy metals, organic solvents and volatile chemicals, pesticides and radioactive materials. Some of these can cause harm.

Jeya Thiruchelvam: And do we have any guidance then on what sort of chemicals or materials might impact a breastfeeding mother? [0:06:37.1]

Felicity Alexander: The only express guidance is that set out in a council directive in 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or who are breastfeeding. That's referred to in the Management of Health and Safety at Work Regulations 1999 and expressly states that lead and lead derivatives as well as mining are risks that breastfeeding mothers shouldn't be exposed to.

Jeya Thiruchelvam: What does an employee do if it can't avoid the risks to a breastfeeding mother and the baby that she's breastfeeding? [0:07:12.2]

Felicity Alexander: There are a number of steps the employer must take under the Management of Health and Safety at Work Regulations and the Employment Rights Act 1996 but only if the breastfeeding employee notifies her employer in writing that she is breastfeeding.

- Jeya Thiruchelvam: Okay, so that's why you mentioned that the notification in writing was so important earlier. So that triggers this mandatory obligation for employers. So tell us about what those steps are then, that they have to take if they can't avoid the risks. [0:07:37.6]
- Felicity Alexander: Under the regulations, the employer must – if it is reasonable to do so and would avoid the risks – alter the employee's working conditions or hours of work.
- Jeya Thiruchelvam: What about, though, if the employer's stuck between a rock and a hard place, if it's not reasonable to alter the working condition or hours of work or if it did, if that wouldn't avoid such a risk? [0:07:56.0]
- Felicity Alexander: Well in those cases, then under Section 67 of the Employment Rights Act 1996, the employer must offer suitable alternative work for an employee where it is available.
- Jeya Thiruchelvam: Okay, so to drill down even more then, what is suitable work? [0:08:10.8]
- Felicity Alexander: For alternative work to be suitable for an employee, firstly the work must be of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances. Secondly, the terms and conditions applicable to her for performing the work must not be substantially less favourable to her than the terms and conditions applicable to her for performing the work she normally performs.
- Jeya Thiruchelvam: And, not to look on the pessimistic side of things, but what happens if the employer doesn't have any suitable alternative work? [0:08:38.2]
- Felicity Alexander: Then the employer must suspend the employee from work for as long as is necessary to avoid such risk and pay her while she's suspended. But if the employee has unreasonably refused the suitable alternative work offered by the employer, the employer does not have to pay the employee.
- Jeya Thiruchelvam: So we've talked a lot about employees so far. Do these rights just apply to employees, because we all know that agency workers are an increasing part of the labour force. [0:09:01.5]
- Felicity Alexander: Since 2011, a hirer is under the same obligation as an employer to alter the working conditions or hours of a breastfeeding agency worker if the risks to the agency worker or baby cannot be avoided, where it is reasonable to do so.

- Jeya Thiruchelvam: And again, what happens then if it's not reasonable for the hirer to alter the working conditions or hours of an agency worker, or if doing that wouldn't avoid the risks? [0:09:25.6]
- Felicity Alexander: The hirer must immediately inform the temporary work agency, who must end the supply of that agency worker to the hirer.
- Jeya Thiruchelvam: Okay, so moving on in the process then, after the new mother returns to work and the employer has taken account of the risk assessment and made any necessary changes, what else does the employer have to do? [0:09:42.7]
- Felicity Alexander: A breastfeeding mother may wish to express milk for her baby while she is at work. To do this, she will require a suitable room (perhaps lockable), a fridge to store the milk and sufficient breaks.
- Jeya Thiruchelvam: And is a toilet suitable? Because this is what a lot of the big department stores offer, isn't it? [0:09:58.4]
- Felicity Alexander: Yes. It isn't really suitable and neither is a sick room really, because of hygiene issues.
- Jeya Thiruchelvam: And is the employer under an obligation to provide the things that you mentioned, so for example a fridge, a lockable room? [0:10:10.5]
- Felicity Alexander: The only obligation on an employer is to provide suitable facilities for a breastfeeding mother at work to rest. That's under the Workplace Health, Safety and Welfare Regulations 1992. This is the same obligation that applies in relation to a pregnant woman, with the difference being that it is a continuing obligation for as long as a mother is breastfeeding. Suitable facilities can be a designated room with a bed for an employee to lie down where necessary.
- Jeya Thiruchelvam: And is there any guidance? You've mentioned various regulations during today's interview but is there any guidance that exists that could help employers further? [0:10:43.4]
- Felicity Alexander: There's guidance from the Health and Safety Executive that encourages employers to provide a private, healthy and safe environment for employees to express and store milk. ACAS have recently produced a guide entitled, [Accommodating Breastfeeding Employees in the Workplace](#). This sets out good practice and recommends that employers provide a private, hygienic, safe and secure area. It may be possible for employers to designate that the facility that they have set aside for pregnant or breastfeeding mothers to rest for breastfeeding employees to use to express milk.

- Jeya Thiruchelvam: You also mentioned that one of the things that employers might provide is a fridge that breastfeeding mothers can store their milk. So what about the fridge? [0:11:23.4]
- Felicity Alexander: Employers should consider supplying a separate fridge for expressed milk or a separate area in a fridge at the very least. Apart from other employees' sensitivity or unwanted curiosity or comment, an employee may not wish to store the expressed milk along with other items that can be found in the workplace fridges.
- Jeya Thiruchelvam: What about the breaks then, that an employee needs to express milk? So going back to adjusting somebody's hours or giving additional breaks et cetera? [0:11:50.0]
- Felicity Alexander: Breastfeeding employees are not entitled to any extra rest periods. She's only entitled to the statutory rest period of twenty minutes when working six hours or more under the Working Time Regulations 1998, and any contractual breaks such as a lunch break. If this issue is discussed before the employee returns to work, the employer may agree to some flexibility in the employee's working hours to allow the employee to have the breaks she requires.
- Jeya Thiruchelvam: Okay. So that's an interesting distinction then. So she is allowed, then, to have breaks to rest but...
- Felicity Alexander: ...she's not entitled to additional breaks to express milk or to breastfeed, that's right.
- Jeya Thiruchelvam: In practice, though, do employers provide additional breaks? [0:12:29.2]
- Felicity Alexander: It's difficult to know. In practical terms, a breastfeeding mother returning to work is unlikely to require long breaks. It's more a question of the employer being flexible over the timing of the breaks and if longer breaks are required, the employer either arranging these as part of a flexible working arrangement or agreeing to accommodate the employee for a specific period.
- Jeya Thiruchelvam: Okay, so that gives us a really good insight into what employers are required to do. What's the penalty or the consequences of employers then, for not providing the facilities that we've been talking about? [0:12:57.7]
- Felicity Alexander: A breach of the Workplace Health, Safety and Welfare Regulations 1992 in failing to provide an area for a breastfeeding mother to rest is an offence. The refusal to provide facilities may be an act of sex discrimination under the

Equality Act 2010, as expressing milk and breastfeeding is an issue that affects only women.

Jeya Thiruchelvam: And I suppose most compellingly perhaps, employers may also just want to follow best practice and provide support for new mothers and their babies, to make sure that these mothers actually do come back to work.

So we've discussed an employee expressing milk, but what should an employer do if an employee wishes to actually breastfeed her baby? Are there any other issues that an employer needs to consider? Presumably there are. [0:13:38.0]

Felicity Alexander: Yes. The issues are really the same. It may be that some new mothers wish to breastfeed their baby while at work. There may be a workplace crèche or it may be possible for someone to bring the baby into work or for the employee to travel home if she lives nearby.

Jeya Thiruchelvam: Okay, so in terms of practical things, what should the employer be doing? [0:13:55.6]

Felicity Alexander: The employer, as we've said, is not under any legal obligation to provide breastfeeding facilities or to provide additional breaks, but may wish, as a good employer, to provide appropriate facilities and flexibility around breaks. In terms of a room for a breastfeeding mother, the same factors as we've discussed for a room for a mother to express milk apply, but in addition it would be helpful if there were facilities close by so a baby's nappy can be changed. Really it's best if the employer discusses this with the employee because all mothers are different as to what is useful for them.

There may be issues related to the suitability of bringing a baby into the workplace, both practical and with respect to health and safety. An employer may be able to overcome these hurdles and show a commitment to supporting the mother and recognise the importance to the mother to continue breastfeeding her baby while working, so creating the optimum working environment for the mother.

Jeya Thiruchelvam: Thanks very much Felicity, that was a really, really useful look at the issues around breastfeeding. [0:14:52.9]

Felicity Alexander: Thanks Jeya.

Jeya Thiruchelvam: So we have lots of resources on breastfeeding on the site, so what are some of the key resources that we have? [0:15:00.0]

Felicity Alexander:

One of most useful resources is a model breastfeeding policy. Employers will find that very useful if they don't already have a policy in place.

Jeya Thiruchelvam:

Thanks again Felicity. That brings us to the end of this week's XpertHR Weekly, which you've been listening to with me, Jeya Thiruchelvam. We're back next Friday but until then, it's goodbye from us.