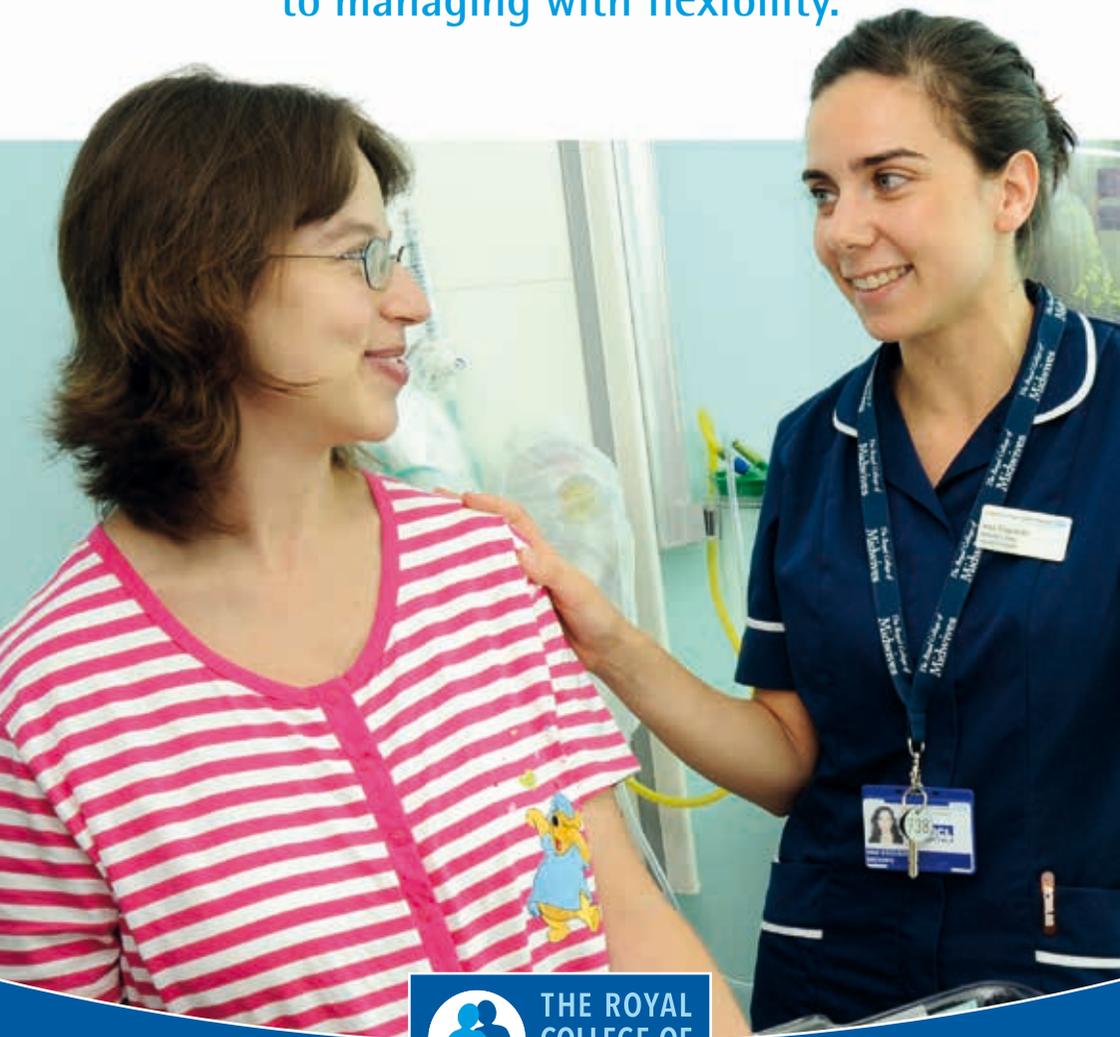


Facilitating women's choice of midwife:

RCM Guidance: Practical approaches to managing with flexibility.



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Introduction

All UK maternity strategies have at their heart the need for personalised maternity care, based around women's needs not organisational convenience and maximising the opportunities for continuity of carer.



Achieving this can be a challenge for many units and inevitably tensions sometimes arise when an individual midwife's wish to respond to an individual woman seemingly clashes with the efficient running of a service. It's easy for this to become a source of conflict between management/employer and practitioner unless arrangements are clear. Misunderstandings about what constitutes a 'private arrangement', a 'personal arrangement' or a 'flexible arrangement', working outside of contract or contracted hours, indemnity and vicarious liability only serve to muddy the water. We've tried here to set out the various scenarios that are likely to occur and provide a perspective on how they can be managed.

In each of the four UK countries there are arrangements for pooling risk to protect individual NHS organisations from the cost of litigation. Through these schemes all NHS employers provide vicarious liability for the acts/omissions of their employees occurring during the course of employment. The schemes do not cover individual midwives directly; it is the NHS organisation (employer) that is the member of the scheme. In general terms, where a member Trust/Board notifies a claim on the basis that the staff concerned (midwife) was acting within his/her contract of employment at the time of the events giving rise to the claim, the schemes will automatically accept the validity of that claim. Therefore irrespective of who a midwife is caring for, where care is delivered or the flexible working arrangements in place: changed shifts, on-call, working beyond shift etc.; as long as the employer is clear that the midwife is working within the terms of her/his contract, the schemes will respond.

It is fairly easy to describe the situations at either end of the spectrum: a midwife is working on her designated shift in a hospital environment providing care (covered) through to a midwife takes on care for a woman without reference to or as part of her contracted work (not covered). However, RCM members have sought guidance on situations between these where the employer, the woman or the midwife herself have sought flexibility of working arrangements in order to provide continuity of NHS care. We have identified 5 possible scenarios. In all of these scenarios, we have deliberately started with the women's wishes, needs and preferences, rather than framing the issue in terms of what midwives want to do.

Most maternity services should be able, with planning, good communication and flexibility to accommodate women's choices and there should be no need for private, personal or out of NHS agreements between women and NHS employed midwives that fall outside of the bounds of the employment contract. What we know is that where midwifery staff wish to be flexible to meet the needs of individual NHS patients and where they have their manager's support to do this, the NHS Litigation Authority have confirmed that CNST (Clinical Negligence Scheme for Trusts) arrangements do apply. This should leave no individual midwife or her manager in any doubt that vicarious liability is in place. In thinking through how midwives and their managers can accommodate individual women and work flexibly, the RCM has consulted with the LSAMO (Local Supervisory Authority Midwife Officer Forum) forum, the lead midwife at NHS England and the NHS Litigation Authority.

Scenarios of flexible midwifery care

- **Scenario 1:** A woman is cared for by a team of NHS midwives antenatally and asks for one particular midwife to be available at her birth. The midwife concerned wishes to make every endeavour, including working flexibly with her colleagues around shifts and other commitments to try and give that woman every chance of receiving continuity of carer.
- **Scenario 2:** A woman has been receiving antenatal care from a particular NHS midwifery team, but makes a request that a different midwife employed in the same Trust/Board, not directly involved in her antenatal care, be available to attend her birth. This midwife is likely to be a friend or relative of the woman or perhaps her midwife from a previous pregnancy. The midwife concerned wishes to make every endeavour, including working flexibly with her colleagues around shifts and other commitments to try and give that woman her choice of care giver.
- **Scenario 3:** A woman has been receiving antenatal care from a particular NHS midwifery team, but makes a request that a different midwife employed in a different Trust/Board, not directly involved in her antenatal care, be available to attend her birth. This midwife is likely to be a friend or relative of the woman or perhaps her midwife from a previous pregnancy. The midwife concerned wishes to make every endeavour, including securing permission from both her employer and the second Trust/Board to facilitate the woman's choice.
- **Scenario 4:** A woman makes a private arrangement with a midwife, outside of the scope of NHS care for midwifery care including attendance at her birth. This midwife working independently may or may not charge a fee and may or may not also have a paid job in the NHS.
- **Scenario 5:** A woman unexpectedly goes into labour without being able to access her NHS maternity team. A midwife who by coincidence is in the vicinity steps in to help her give birth/ act as her midwife during the birth. This is known as a Samaritan Act.



Scenario 1: A woman is cared for by a team of NHS midwives antenatally and asks for one particular midwife to be available at her birth. The midwife concerned wishes to make every endeavour, including working flexibly with her colleagues around shifts and other commitments to try and give that woman every chance of receiving continuity of carer.

RCM Advice to midwives and their managers

Most maternity services aim to organise the provision of antenatal and postnatal care through community based teams so that women get to know 'their' midwife and form a trusting relationship with her.

In some units, intrapartum care is organised separately and women are routinely delivered by someone they have never met. In other units the team providing antenatal and postnatal care also endeavour to attend the deliveries of the women in their combined caseload, to increase the chances of a woman being delivered by a midwife she has previously met. Regardless of how services are organised, there will be occasions when an individual woman requests that an individual midwife be available to deliver her. Given that midwives work shifts, that almost 50% are part time and that there are other calls on their time: running clinics, undertaking mandatory training, sick and annual leave as examples; this is not always easy to arrange. For midwife managers, ensuring services are covered can make the flexibility required to facilitate these arrangements a challenge. Where a woman makes such a request we would suggest:

1. The woman's desires and choices are clearly documented in a care plan and discussed amongst the team involved in her care as early as possible
2. The midwife who is directly concerned discusses the request with her manager and if necessary her HOM to determine how best to support this woman's choice and how best to manage other workload and commitments.
3. Teams have regular conversations between themselves and with their managers about how to support each other in working flexibly when required

In these circumstances, the midwife is continuing to deliver NHS care within the bounds of her employment contract, regardless of whether she is technically working on a day off. In these circumstances the employing Trust/Board remains vicariously liable for the care provided by the midwife. NHSLA (National Health Service Litigation Authority) advice is that where midwives change their shift or working pattern with the agreement of their manager, they will be deemed to be working within their employment contract. In other words CNST arrangements apply.

Should a HOM or midwife manager be unable to support flexible working and adjustments within the team to provide cover for this situation, this decision needs to be clearly communicated both to the woman and the midwife concerned. This may be because for genuine operational reasons it is not possible to give the guarantees.

A midwife acting in direct contravention of her employer's expressed direction, for example, attending the woman on a day off without permission could be in breach of contract and could be subject to disciplinary action and/or referral to the NMC. In such circumstances the Trust/Board could refuse to provide vicarious liability for the care she provided. This is clearly a situation to be avoided and where management do feel unable to support staff working flexibly to meet women's choices, we would recommend all steps are taken to find a solution as early as possible, perhaps involving an RCM representative.

Scenario 2: A woman has been receiving antenatal care from a particular NHS midwifery team, but makes a request that a different midwife employed in the same Trust/Board, not directly involved in her antenatal care, be available to attend her birth. This midwife is likely to be a friend or relative of the woman or perhaps her midwife from a previous pregnancy. The midwife concerned wishes to make every endeavour, including working flexibly with her colleagues around shifts and other commitments to try and give that woman her choice of care giver.

RCM Advice to midwives and their managers

There are many occasions when women have existing relationships with a particular midwife. It may be that a trusted midwife delivered her previously; it may be a colleague, friend or relative.

In such circumstances it is not unusual for a woman to request that a particular individual attend her birth, regardless of whether or not she has been involved in her antenatal care.

Again, for the midwife concerned and for the service there is an operational challenge – how to work sufficiently flexibly to meet one woman's request whilst maintaining a high quality service for all women. Again this challenge requires the collaboration and cooperation of a wider team and midwifery management.

When a woman makes such a request we would suggest

1. The woman's desires and choices are clearly documented in a care plan and discussed amongst the team involved in her care as early as possible.
2. The midwife directly concerned discusses the request with her supervisor of midwives¹ and/or manager to ensure she has thought through the professional and ethical implications of providing care to someone with whom she has a personal relationship.

1. We recognise that with supervision being removed from statute in 2017 new arrangements to provide midwives with professional support in their workplaces will come into effect from April 2017.

3. The midwife who is directly concerned discusses the request with her manager and if necessary her HOM to determine how best to support this woman's choice and how best to manage other workload and commitments.
4. The midwife, SOM and midwife manager ensure they are familiar with and make use of Trust/Board and any other professional guidelines relating to caring for friends/relatives.
5. Teams have regular conversations between themselves and with their managers about how to support each other in working flexibly when required.

In these circumstances, the midwife is continuing to deliver NHS care within the bounds of her employment contract, regardless of whether she is technically working on a day off. The key point is that the midwife is not doing anything that her employers and managers are not aware of. In these circumstances the employing Trust/Board remains vicariously liable for the care provided by the midwife. The NHSLA makes no distinction between providing care to women generally or friends/relatives during a normal shift. In terms of other arrangements it expects this to be done with the specific agreement of management to either change shifts or attend as a supernumerary.

Should a HOM or midwife manager be unable to support flexible working and adjustments within the team to provide cover for this situation, this decision must be clearly communicated both to the woman and the midwife concerned. This may be because for genuine operational reasons it is not possible to give the guarantees. A midwife acting in direct contravention to her employer's expressed direction, for example, attending the woman on a day off without permission could be in breach of contract and could be subject to disciplinary action and/or referral to the NMC. In such circumstances the Trust/Board could refuse to provide vicarious liability for the care she provided. This is clearly a situation to be avoided and where management do feel unable to support staff working flexibly to meet women's choices, we would recommend all steps are taken to find a solution as early as possible, perhaps involving an RCM representative.

Scenario 3: A woman has been receiving antenatal care from a particular NHS midwifery team, but makes a request that a different midwife employed in a different Trust/Board, not directly involved in her antenatal care, be available to attend her birth. This midwife is likely to be a friend or relative of the woman or perhaps her midwife from a previous pregnancy. The midwife concerned wishes to make every endeavour, including securing permission from both her employer and the second Trust/Board to facilitate the woman's choice.

RCM Advice to midwives and their managers

The issue of a woman having an existing relationship with an individual midwife who she wishes to attend her birth, can be further complicated if the midwife concerned is not employed at the Trust/Board or unit at which the woman is booked for care.

Seeking agreement for a midwife to be able to work within a unit or area not covered by her employer will require greater foresight and planning. With appropriate planning and good communication between the woman, the midwife, the midwife's employer and the Heads of Midwifery in the Trusts/Boards concerned, it should be possible to issue an 'honorary contract' permitting a midwife from another unit to work within it on an ad hoc and probably one-off basis. Alternatively the midwife might join the bank of the hospital concerned. At the very least she could join the woman as a supporter, not providing direct midwifery care.

When a woman makes such a request we would suggest

1. The woman's desires and choices are clearly documented in a care plan and discussed amongst the team involved in her care as early as possible.
2. The midwife directly concerned discusses the request with her supervisor of midwives² to ensure she has thought through the professional and ethical implications of providing care to someone she has a personal relationship.

2. We recognise that with supervision being removed from statute in 2017 new arrangements to provide midwives with professional support in their workplaces will come into effect in April 2017.

3. The midwife who is directly concerned discusses the request with her HOM and with the HOM of the unit in which she wishes to work.
4. A formal honorary contract needs to be issued governing the terms on which a midwife from one unit is permitted to work within another.
5. The midwife, SOM and midwife managers ensure they are familiar with Trust/Board and any professional guidelines.

In these circumstances, the midwife is continuing to deliver NHS care within the bounds of her employment contract, regardless of whether she is technically working on a day off, now extended to include the second Trust/Board. In these circumstances the Trust/Board at which she attends the birth and with whom she now has an honorary contract assumes vicarious liability for the care provided by the midwife. The NHSLA is alert to the risk presented by an individual, not necessarily subject to a Trust/Board's governance arrangements working in an unfamiliar environment. It has previously discouraged the practice of issuing honorary contracts to sole practitioner independent midwives. It does however recognise that NHS employed midwives do routinely work in more than one organisation, for example bank midwives and it therefore will advise on a case by case basis.

However, should a HOM or midwife manager be unable to support flexible working and adjustments within the team to provide cover for this situation, or refuses to issue an honorary contract; this decision needs to be clearly communicated both to the woman and the midwife concerned. This may be because for genuine operational reasons it is not possible to give the guarantees. If there is no honorary contract in place, there will be no vicarious liability.

A midwife acting without an honorary contract would be in breach of contract and could be subject to disciplinary action. She would also be in breach of her Code of Practice and could face a referral to the NMC. In such circumstances both Trust/Boards concerned could refuse to provide vicarious liability for the care she provided. This is clearly a situation to be avoided and where management do feel unable to support staff working flexibly to meet women's choices, we would recommend all steps are taken to find a solution as early as possible, perhaps involving an RCM representative.

Scenario 4: A woman makes a private arrangement with a midwife, outside of the scope of NHS care for midwifery care including attendance at her birth. This midwife working independently may or may not charge a fee and may or may not also have a paid job in the NHS.

RCM Advice to midwives and their managers

Some women chose to employ or engage independent/private/self-employed midwives who operate outside of the NHS for some or all of their pregnancy care.

Whether or not money changes hands, these are essentially private arrangements. The situation can be complicated because women have every right to continue to access NHS maternity care and some Independent Midwives also work part-time in NHS units. It is therefore essential that everyone is clear about the status and arrangements being made. Independent Midwives are responsible for securing their own appropriate Medical Malpractice Insurance. To practice without this is a breach of their code and could lead to a referral to the NMC. Some NHS organisations will issue honorary contracts to Independent Midwives. This can only be done on a case by case basis where the HOM is assured that the Independent Midwife is able and willing to work within hospital guidance and protocols. Such arrangements need to be the subject of good governance. Where they do not exist Independent Midwives must be able to transfer care to an NHS hospital and these arrangements must be clearly articulated and documented.

Where a woman chooses to use an Independent Midwife, we suggest the following:

1. Independent Midwives are clear and unambiguous with women about their status, working outside of the NHS and women's rights to return to NHS care at any point.
2. The Independent Midwife supports the woman to book at her local maternity unit and access screening and scanning services.
3. The Independent Midwife informs the HOM that the woman has chosen to use her and there is an open communications link to coordinate care.

4. If the woman using an Independent Midwife delivers in hospital, the Independent Midwife will transfer care to an NHS midwife and will remain as friend/supporter only.
5. Where Trust/Board's are willing to provide honorary contracts to Independent Midwives, these should clearly set out the terms on which they are permitted to have access to NHS facilities.

In this situation an Independent Midwife attending a woman at a home birth would be personally liable for the care she provided. In the circumstances of an Independent Midwife attending the birth of a woman in a hospital with which she held an honorary contract, the Trust/Board would assume vicarious liability, unless explicitly exempt from the honorary contract. An Independent Midwife attending the birth of a woman in a hospital without an honorary contract would also be personally liable for the care she provided.

The RCM's Medical Malpractice Insurance is designed to respond in cases where an employer's policy does not. However because they do not have an employer, Independent Midwives are excluded from the RCM's MMI policy.

Scenario 5: A woman unexpectedly goes into labour without being able to access her NHS maternity team. A midwife who by coincidence is in the vicinity steps in to help her give birth and act as her midwife during the birth. This is known as a Samaritan Act.

RCM Advice to midwives and their managers

Midwives continue to carry a professional responsibility to provide care, even when they are not working.

There are rare circumstances when a woman goes into labour at a place and time without her normal care givers present. Any midwife who is available in that emergency situation would be expected to step in regardless of whether she is working or where she happened to be, to provide emergency assistance.

All RCM members are covered by the RCM's Medical Malpractice Insurance for Samaritan Acts worldwide. Samaritan Acts are defined "*as nursing, midwifery or therapeutic care performed in an emergency situation where you are present by chance or in response to any general emergency call*". The NHS would assume responsibility for the on-going and continuing care of a woman admitted as an emergency whether booked or unbooked and vicarious liability would extend to any staff caring for her.





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