



Work, Families & Parental Rights



The following material represents an informed opinion on the likely impact and interpretation of the Regulations. It is not meant to be an authoritative interpretation of the law, nor should it be taken as such. In addition, until there have been precedents set in the appellate courts then the law may be interpreted differently by the Employment Tribunals.

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Work & Families

"Thousands of working families and carers are set to benefit from the legislation. The government recognises the difficulties many face in trying to juggle work and family life, and the new rights will **help make life easier** for people across the country."

Alistair Darling, Trade & Industry Secretary, 22/06/2006



The laws surrounding maternity, paternity and adoption provisions have been notoriously complicated and have succeeded in confusing both employers and employees alike. Any attempt to simplify the rules and eligibility criteria in these areas is cautiously welcomed, but just how much will things be made easier?

This document is presented from the employer's perspective and identifies the requirements of the relevant legislation. It is not meant to be an authoritative interpretation of the law, nor should it be taken as such. In addition, until there have been precedents set in the appellate courts then the law may be interpreted differently by the Employment Tribunals.

Legal Overview

In 2004 the government published *“Choice for parents, the best start for children: a ten year strategy for childcare”*. This document led to the publication of a consultation document in February 2005 entitled *“Work and Families: Choice and Flexibility”* - the first use of the phrase “Work and Families”. Although this led to the Work and Families Bill, which became the Work and Families Act 2006, the phrase has now replaced “family friendly” as the umbrella descriptor of parental rights.

The legislation providing or all of the rights discussed in this document is set out below:

- Statutory Maternity Pay (General) Regulations 1986
- Social Security (Maternity Allowance) Regulations 1987
- Social Security Contributions and Benefits Act 1992
- The EC Pregnant Workers Directive 1992
- The Management of Health and Safety at Work Regulations 1992
- Employment Rights Act 1996 (ERA)
- Employment Relations Act 1999 (EReIA)
- Maternity and Parental Leave etc. Regulations 1999 (MPL)
- Paternity and Adoption Leave Regulations 2002 (PAL)
- Employment Act 2002
- Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002
- Maternity & Parental Leave etc (Amendment) Regulations 2002 & 2006
- Paternity & Adoption Leave (Amendment) Regulations 2002 & 2006
- Work and Families Act 2006

This list is not exhaustive, but does provide an idea of the sheer volume of legislation enacted in order to provide the basic rights outlined below. There are various guides, published by such august bodies as Acas and the DTI, but no official source has yet attempted to bring them all into one volume.

Maternity Rights

The following rights apply to all pregnant **employees**, regardless of their length of service, whose baby is due **on or after 1st April 2007**.

Risk Assessment

Employers are required to carry out a risk assessment of the employee's role. This must clearly identify any risks to the employee and her child whilst she is pregnant, and any risks after she has had the child (particularly if she intends to breastfeed).

It is worth noting that the duty under Regulations 3(1) and 13A(1) of the Management of Health and Safety at Work Regulations 1992 to carry out health and safety risk assessments arises not only when an employer employs a pregnant woman **but whenever they employ someone of child-bearing age**.

These provisions were reinforced by the EAT in the case of *Day v T Pickles Farms Ltd (1999 IRLR 217)* in 1998. It was in this case that they confirmed the health and safety requirement was intertwined with the Sex Discrimination Act. Subsequent cases before the appellate courts have confirmed that an employer who fails to carry out a risk assessment is already guilty of sex discrimination.

Further, in the case of *Bunning v GT Bunning and Sons Ltd (2005 EWCA Civ 983)* the Court of Appeal held that the employer's failure to conduct a proper risk assessment was capable of being a repudiatory breach of contract. This means that an employee can resign and claim constructive dismissal in addition to sex discrimination.

Ante Natal Appointments

Pregnant employees are allowed time off to attend ante-natal appointments. S55 (1) of ERA appears to give carte blanche to an employee to take whatever time off is required, but a complaint to tribunal can only be made where the employer *"has unreasonably refused to permit her to take time off as required by section 55"* (S57(a)).

In reality, whilst the employee can claim the time off to attend, they will only be paid for that time off if the employer deems it reasonable. We have no experience of employers who take a sensible approach to this matter falling foul of an Employment Tribunal.

This would mean that an employer can ask the employee to try and organise appointments for early or late in the day, and can stipulate that time off would only be given for the time it takes to get to the appointment, attend it and then return to work.

Employers are entitled to ask to see appointment cards or all but the first appointment.

Maternity Leave

“The new rights will mean mothers can spend more time with their newborn babies during the vital early days of a child's development, rather than feeling they have to go back to work earlier than they would really like.”

Jim Fitzpatrick, Employment Minister, 28/09/06

All employees are now entitled to take up to 52 weeks maternity leave, regardless of their length of service, where they give birth to a live child or have a still birth after a pregnancy lasting at least 24 weeks. Employers should always assume that an employee will take the full 52 weeks unless they specifically state otherwise.

There are three types of maternity leave, and regardless of which type she is on the individual remains an employee of the organisation (and is counted as being continuously employed) throughout her absence.

The three types of leave are:

1. Ordinary Maternity Leave (OML)

This is the first 26 weeks of maternity leave. During this period an employee is:

- entitled to the benefit of the terms and conditions of employment (except remuneration) which would have applied if she had not been absent, and
- bound by any obligations arising under those terms and conditions (except in so far as they are inconsistent with the employee's right to take OML)

(adapted from S71 ERA and Reg 9 MPL)

This means that if there are additional perks, e.g. company car or gym membership, then the employee should retain those during OML.

Employers should note that this includes the benefits which would arise from any pay rise, in particular the effect that would have on the calculation of statutory maternity pay (SMP). Following the case of *Alabaster and Woolwich plc* (2005 ICR 695) the Statutory Maternity Pay (General) (Amendment) Regulations 2005 were amended to the effect that that any pay rise awarded after the beginning of the period used to calculate SMP (i.e. the eight-week period ending with the 15th week before the expected week of childbirth (EWC)) but before the end of the maternity leave period must be taken into account when calculating the amount of SMP payable.

Therefore, if the employer awards a pay rise which is effective at any time from the start of the period used to work out SMP and the end of maternity leave, he must recalculate the SMP payable to the employee and pay the balance owed to her.

The earliest this period of leave can begin is 11 weeks before the EWC (Reg 4(2)(b) MPL), and the latest it can start is the actual date of birth (S72(2) ERA).

If an employee is off work with an illness which can be “*wholly or partly because of pregnancy*” (S72(b) ERA) at any point from **4 weeks** before the EWC then the employer can enforce the commencement of maternity leave from that point.

2. Additional Maternity Leave (AML)

This is the second 26 weeks of maternity leave. An employee taking AML is not entitled to the benefit of all the terms and conditions available to an employee on OML, unless her contract provides otherwise.

She is, however, entitled to the benefit of her employer's implied obligation to her of trust and confidence, and any terms and conditions of employment relating to:

- notice of termination of the employment contract by her employer;
- compensation in the event of redundancy, or
- disciplinary or grievance procedures.

(adapted from Reg 17 MPL)

She is also bound by her implied obligation to her employer of good faith, and any terms and conditions of employment relating to:

- notice of termination of the employment contract by her;
- the disclosure of confidential information;
- the acceptance of gifts or other benefits, or
- her participation in any other business.

(adapted from Reg 17 MPL)

3. Compulsory Maternity Leave

An employee is required by S72 ERA to commence maternity leave on the birth of her child. Reg 8 MPL prevents that employee from returning to work before the end of a period of 2 weeks beginning with the date of birth (or 4 weeks in a factory environment). This period is the compulsory maternity leave period.

Annual Leave during Maternity Leave

Employees on maternity leave retain their entitlement to statutory annual leave (currently four weeks' paid leave per year) throughout both OML and AML.

If the employee is also entitled to contractual annual leave (that is, annual leave that is provided by her contract, on top of the four weeks statutory minimum provided by law) she will continue to accrue this additional, contractual entitlement during OML. She does not, however, have an entitlement to continue accruing contractual annual leave during AML unless her contract expressly gives her this right.

This flies completely in the face of the current position with regard to annual leave and long term absence. It could be argued that this provision represents positive discrimination in favour of pregnant women, since there is currently no right for men to be absent from work and have this statutory protection (although this position may change when the rules on Paternity Leave are changed).

Notification Requirements

An employee who is pregnant is required to inform her employer of the fact that she is pregnant by the **15th week before the expected week of childbirth** (around the 25th week of pregnancy).

She is also required to notify her intentions with regard to:

- When she wants her maternity leave and pay to start;
- Her intended date of return **if she is not planning on taking the full 52 weeks leave.**

Employers can request that this notification is made in writing. The employee should also provide her maternity certificate (MAT B1) at the same time. This form will have been provided by her midwife at around the 21st week of pregnancy.

Once this notification has been received then the employer should write to the employee confirming the expected return date and setting out their entitlement to pay.

An **employee** who wants to change the start date of their maternity leave **must give 28 days notice**.

An **employee** who wants to change their date of return from maternity leave **must give 8 weeks notice** of that change.

Employers can postpone the date of any return to work until **the earliest** of either the end of what would have been 8 weeks notice, the original date of return or the end of the maternity leave period.

Maternity Pay

There are three types of maternity pay.

1. Statutory Maternity Pay (SMP)

In order to qualify for SMP an employee must:

- have 26 weeks continuous service by the 15th week before the EWC; and
- have average earnings which are no lower than the lower earnings limit which applies to National Insurance for a specified period.

Once an individual has qualified for SMP then they are entitled to:

- 6 weeks at 90% of their average earnings; and
- 33 weeks at £112.75 or 90% of their average earnings, whichever is lower.

This amount is still payable by the employer if the employee leaves employment after the start of the 15th week before the EWC. In addition it is also payable in the event of a stillbirth after 24 weeks of pregnancy.

2. Maternity Allowance (MA)

Employees who do not qualify for SMP may qualify for MA if they meet the following criteria:

- They have been employed or self-employed for 26 weeks in the 66 weeks before the EWC; **AND**

- They earned at least £30 per week on average during a 13 test period; **AND**
- They have stopped work in order to have the baby.

The claim form for MA runs to 38 pages. It is not means tested and the provisions largely mirror those of SMP. Anyone who qualifies will receive £112.75 per week for up to 39 weeks.

The rate of these two statutory benefits increases every year. The figures quoted are valid for April 07 – March 08 only.

3. Contractual Maternity Pay

In common with other statutory provisions, the minimums set out under SMP and MA can be enhanced in the employee's contract.

It is the stated intention of the current government to extend the provisions for paid maternity leave to the full 52 weeks by the end of the current parliament. This means that it could happen as early as 2008.

Keeping in Touch Days

As well as reinforcing the accepted good practice that employers and employees absent on maternity leave should keep in contact with each other the Work and Families Act 2006 introduced the new concept of "keeping in touch" (KIT) days.

This allows an employee to agree to do up to 10 days' work during the maternity leave period. This work need not be confined to the normal contractual role but can include training or anything else agreed between the parties.

Any paid time with the employer will count as one KIT day - so if the employee only does 2 hours work then this will count as a whole day for the purposes of calculating KIT days and their impact on SMP.

If the employee works for no more than 10 days then their SMP will be unaffected. However, any day worked in excess of the 10 will result in the loss SMP.

Employees cannot be compelled to undertake KIT days and any attempt to make them do so, or the imposition of a sanction for refusal to do so, will constitute a detriment. (Reg 12A(6) MPL). In addition, undertaking any KIT days does not extend the period of maternity leave by the same amount of time.

Breastfeeding

Employees who intend to breastfeed their babies should inform the employer. If they do so then this needs to be taken into consideration during the risk assessment.

Once they return to work then an employer must provide facilities for the employee to rest and store expressed milk.

These requirements have been identified by the DTI in relation to the EC Pregnant Workers Directive 1992, but we have been unable to locate the exact statutory reference.

Returning to Work

It should not need re-iterating to most employers, but returning to work is not the same as actually attending work at the end of the maternity leave period. It has long been established that any indication from the employee that she has not resigned (e.g. handing in a sick note or arranging annual leave to commence immediately at the end of the leave period) constitutes a 'return to work' or the purposes of the relevant maternity legislation.

1. Right to return after ordinary maternity leave

All employees on Ordinary Maternity Leave - regardless of their length of service, or the hours they work - are entitled to return to the same job with terms and conditions as if they had not been away, **provided that the return to work immediately follows a single period of leave which did not include any AML.** (Regs 18(1) and 18A(1)).

This means that on her return the employee is entitled to enjoy her seniority, pension rights and similar rights as they would have been if she had not been absent, including pay rises, etc.

Under the MPL Regulations there are two exceptions to an employee's right to return to her old job following OML:

- where the employee is returning from having taken either two or more consecutive periods of statutory leave which include any period of AML or additional adoption leave, or a period of parental leave lasting more than four weeks, and it is not reasonably practicable for a reason other than redundancy for the employee to return to the same job.

In these circumstances, the employee has the same rights as someone returning directly from AML.

- where a redundancy situation has arisen during maternity leave, and for that reason it is not reasonably practicable to allow the employee to return to her old job. (Reg 18(4)).

The employee **must** be offered any suitable alternative vacancy on terms and conditions which are '*not substantially less favourable to her*'. (Reg 10). In reality she should be offered this alternative in preference to those still in work – which is another instance of legally sanctioned positive discrimination.

2. Right to return after additional maternity leave

Like an employee returning from OML, an employee returning from AML is "*is entitled to return from leave to the job in which she was employed before her absence*" (Reg 18(2)).

Where it is not reasonably practicable (for a reason other than redundancy) for an employer to permit an employee to return to her old job after taking AML, the employer can offer her another job that "*is both suitable for her and appropriate for her to do in the circumstances*". (Reg 18(2)).

There is still a requirement on the terms and conditions of the suitable and appropriate job to be "*not less favourable than those which would have applied if she had not been absent.*" Reg 18A(1)(b))

Just as with OML, the period of AML counts towards continuity of employment for the purposes of statutory employment rights such as unfair dismissal, redundancy and minimum notice periods.

However, unlike OML, a period of AML does not count towards seniority or pensionable service, or any other contractual right which depends on a period of qualifying service, for example a service-related pay increment. Instead, the employee is entitled to the pension and seniority rights that would have applied had the two periods either side of the AML been continuous (Reg 18A(1)(a)).

Adoption Leave

Adoption leave and pay may allow one member of an adoptive couple to take paid time off work when their new child starts to live with them. Paternity leave and pay may be available for the other member of the couple, or an adopter's partner.

Adoption and paternity leave are available whether a child is adopted from within the UK or from overseas.

The rights of those adopting mirror the rights to pay and leave under current Maternity and Paternity rules. Most changes are titular:

- Ordinary Maternity Leave becomes Ordinary Adoption Leave
- Additional Maternity Leave becomes Additional Adoption Leave
- Statutory Maternity Pay becomes Statutory Adoption Pay
- There is no equivalent for Maternity Allowance.

All qualifying criteria are mirrored as are the rights during periods of leave.

Paternity Leave

Who is Eligible?

Employees must satisfy the following conditions in order to qualify for paternity leave. They must:

- have or expect to have responsibility for the child's upbringing
- be the biological father of the child or the mother's husband or partner
- have worked continuously for their employer for 26 weeks ending with the 15th week before the baby is due.

Employers can ask their employees to provide a self-certificate as evidence that they meet these eligibility conditions.

It is worth noting that, despite the misnomer in the name, paternity leave can be taken by women in same sex relationships or who have adopted and are assuming the secondary carer role.

Length of paternity leave

Eligible employees can choose to take either one week or two consecutive weeks' paternity leave (not odd days).

They can choose to start their leave:

- from the date of the child's birth (whether this is earlier or later than expected), or
- from a chosen number of days or weeks after the date of the child's birth (whether this is earlier or later than expected), or
- from a chosen date later than the first day of the week in which the baby is expected to be born.

Leave can start on any day of the week on or following the child's birth but must be completed:

- within 56 days of the actual date of birth of the child, or
- if the child is born early, within the period from the actual date of birth up to 56 days after the first day of the expected week of birth.

Only one period of leave is available to employees irrespective of whether more than one child is born as the result of the same pregnancy.

Statutory Paternity Pay (SPP)

During their paternity leave, most employees are entitled to SPP from their employers. In order to qualify, individuals need to be employees earning above the lower earnings limit for National Insurance purposes.

The rate of Statutory Paternity Pay is the same as the standard rate of SMP, i.e. £112.75 per week (currently) or 90% of average weekly earnings, whichever is less.

Employees who have average weekly earnings below the Lower Earnings Limit for National Insurance purposes do not qualify for SPP. These employees may be able to get Income Support while on paternity leave.

Notice of intention to take paternity leave

Employees must inform their employers of their intention to take paternity leave by the end of the 15th week before the baby is expected, unless this is not reasonably practicable. They must tell their employers:

- the week the baby is due
- whether they wish to take one or two weeks' leave
- when they want their leave to start.

Employees can change their mind about the date on which they want their leave to start providing they tell their employer at least 28 days in advance (unless this is not reasonably practicable).

Employees must tell their employers the date they expect any payments of SPP to start at least 28 days in advance, unless this is not reasonably practicable.

Proposed Changes

It is the current government's stated intention to introduce an additional amount of paid paternity leave. The proposals included:

- Up to 26 weeks of paid absence to care for a child in addition to the current Paternity Leave of two weeks within 8 weeks following the birth or placement of a child.
- That the mother must have returned to work and have some of her entitlement to SMP, MA or SAP remaining at the time of her return in order that the father/partner may qualify for leave and pay. It is not the Government's intention that both parents be out of the workplace at the same time;
- That leave must be taken in one continuous block;

- It is anticipated that the first six month period of leave will be reserved for the mother. Therefore the father may not commence a period of APL and Pay before the child is 20 weeks old.
- That the father/partner must have satisfied the average earnings requirement over the LEL in the 8 weeks up to and including the 15th week before the week in which the baby is due;
- Arrangements that allow both parents to take up to six months each paid leave with the child, i.e. an equal share and responsibility for care;
- 'Keeping in Touch' days will enable fathers to work for up to 10 days during periods of maternity/adoption leave without the loss of statutory pay for that week and without ending their period of leave.

The government response to the consultation was published in November 2006. Further consultation will be undertaken on the implementation of the proposed new rights.

Flexible Working

Originally a right for parents of young children, this right has been extended by the Work and Families Act 2006 to include carers. In essence it is the legal right to request to work, alter their hours of work, their times of work or request to work from home; **and have the request reasonably considered.**

An application can be made only in order to help the employee to care for either a child or an adult who requires it. This may cover a range of circumstances - for example, it may enable the employee to spend more time with their children or it may help an employee to continue caring for an adult at the point where a professional care worker's day's work finishes.

Under the legislation, applications cannot be made for any purpose other than caring for a child or for an adult in need of care.

Who is Eligible?

General Eligibility

Those seeking to make a request under this right must:

- be an employee (who has entered into or works under a contract of employment – agency workers or members of the armed forces are not eligible); **AND**
- Have 26 weeks continuous service at the time of making the request; **AND**
- Not have made another application to work flexibly in the 12 months prior to the one being made.

There are additional eligibility criteria depending upon the 'status' of the employee making the request:

Parents must:

- have a child under six or a disabled child under 18; **AND**
- have parental responsibility for the child (this includes biological parents, legal guardians, adoptive and foster parents and spouses of these, including same sex partners as long as they have parental responsibility for the child); **AND**
- be making the application in order to be able to care for the child.

A **carer** is someone who is caring for:

- A person married to, or the partner or civil partner of the employee; **OR**
- A near relative of the employee; **OR**
- Be neither of the above but lives at the same address.

The definition of a near relative will include parents, parents-in-law, adult child (including an adopted adult child), siblings (including those who are in-laws), uncles, aunts, grandparents and step-relatives.

Including near relatives is estimated to provide the right to request flexible working to around 1.5m carers (assuming the definition of someone needing care will be those in receipt of Disability Living Allowance or Attendance Allowance) – around 80% of those caring for adults.

Government figures estimate that around half of the carers who currently work non-flexibly and a proportion of those that do will make a request under the new provisions in a single year. This could result in between 260-350 new requests per 1,000 per annum.

How must the application be made?

The employee must comply with the following requirements:

- the application must be made in writing, stating that it is being made under the statutory right to apply for flexible working;
- the application must confirm either the employee's relationship to the child or the status of the individual they are caring for;
- the application must set out the employee's proposal and explain what effect the employee thinks this will have on the employer's business and how this may be dealt with;
- the application must specify a start date for the proposed change giving the employer reasonable time to consider the proposal and implement it;
- the application must state whether a previous application has been made and if so the date on which it was made;
- the application must be dated.

How must the employer respond to the applicant?

In order to comply with the procedural requirements the employer must:

- arrange a meeting with the employee within 28 days of receiving the application to discuss the request. This meeting is not required if the employer agrees to the terms of the application and notifies the employee accordingly within 28 days of receiving the application.
- allow the employee to be accompanied by a work colleague if they so wish
- notify the employee of their decision within 14 days of the date of the meeting. This notification will either:

- accept the request and establish a start date and any other action or
- confirm a compromise agreed at the meeting or
- reject the request and set out clear business reasons for the rejection together with notification of the appeals process.
- arrange to hear the employee's appeal within 14 days of being informed of the employee's decision to appeal. The employee must be allowed to be accompanied by a work colleague if they so wish.
- notify the employee of the decision on the appeal within 14 days after the date of the meeting. The notification will either:
 - uphold the appeal, specify the agreed variation and start date or
 - dismiss the appeal, state the grounds for the decision and contain a sufficient explanation of the refusal.

The employer and the employee can agree to extend any of these time limits. The employer must record this agreement in writing, specifying the period to which the extension relates and the date on which the extension is to end. A copy of this record must be sent to the employee.

If the application is approved the variation in contractual terms is a permanent one and the employee has no automatic right to change back to their previous pattern of work, unless the application seeks the variation for a specified time period only. A trial period may be agreed.

On what grounds can applicants be refused?

Applications for flexible working arrangements can be refused only for the following reasons:

- the burden of additional costs;
- detrimental effect on ability to meet customer demand;
- inability to re-organise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality;
- detrimental impact on performance;
- insufficiency of work during the periods the employee proposes to work;
- planned structural changes.

Originally, if a request was refused then the Employment Tribunal was supposed to ensure that the parties had followed the correct procedure. However, in the case of *Commotion Ltd vs Ruddy* (2006 IRLR 171) Judge Burke QC made the point that *"What the Tribunal were addressing was, in a practical sense, the true nature of the employer's grounds for rejecting Mrs Ruddy's request..... We are quite satisfied that they came to a conclusion which it was open to them to reach"*.

This is a departure from how the original legislation was written and is a warning to employers that simply adhering to the letter of the law will not suffice – reasons for refusing flexible working requests can (and in our experience will) be scrutinised.

Parental Leave

Established in the MPL Regulations 1999 (as amended) the right to parental leave is a right to take unpaid time off work **to look after a child or make arrangements for the child's welfare**. Parents can use it to spend more time with children and strike a better balance between their work and family commitments.

Who is eligible?

Under Reg 13(1) an employee who has:

- been continuously employed for a period of not less than a year; and
- responsibility for a child,

is entitled to be absent from work on parental leave for the purpose of caring for that child.

The Regulations define 'responsibility for a child' as having either parental responsibility or, he has been registered as the child's parent under any provision of section 10(1) or 10A(1) of the Births and Deaths Registration Act 1953[7].

In addition, the child must be under the age of 5 (or 18 in the case of a disabled child). Where the child has been adopted the leave lasts until the 5th anniversary of the date of the adoption, regardless of the age of the child.

The Entitlement

Parents are entitled to a period of 13 weeks unpaid leave per 'qualifying' child. This means 13 weeks during the entire period between, for example, birth and the child's 5th birthday and not (as some employees have tried to claim) 13 weeks per year!

Applying for Leave

In the absence of any contractual provisions to the contrary, the default provisions set out in Schedule 2 of the MPL Regulations set the requirements for the taking and administration of parental leave.

In order to take leave and employee must:

1. Produce such documentary evidence as requested by the employer to prove entitlement to the leave (e.g. a copy of the birth certificate or adoption papers);
2. Give 21 days notice of the commencement date of the leave period;

3. Specify the beginning and end dates of the leave period.

Where the leave is to be taken by the father at the time of the birth or adoption of a child he must also specify the date of either the EWC or EWP (whichever is applicable).

An employer can postpone a period of parental leave **for up to 6 months**, provided the employee is given written notice of the postponement, the reasons for it and the new dates on which leave could be taken **within 7** days of being notified of the intention to take leave.

Restrictions

Leave can only be taken in multiples of one week. If an employee elects to take less than this at any one time then the period they are absent is counted as a week for the purposes of identifying how much parental leave has been taken.

In addition to this, an employee may **not** take more than **four weeks'** leave in respect of any individual child during a particular year. For the purposes of the Regulations a year is the 12 month period following the date when an employee first became entitled to take parental leave in respect of that child.

In practical terms this means that an employee may only take 4 weeks between each of the child's birthdays.

Terms and Conditions during Leave

An employee is entitled to benefit from his or her employer's implied obligation to him or her of trust and confidence during parental leave, and any contractual terms and conditions relating to:

- notice periods;
- any compensation if the employee is made redundant;
- the business' disciplinary or grievance procedures.

The employee is bound by his or her implied obligation of good faith during parental leave and by any contractual terms and conditions relating to:

- notice periods;
- disclosure of confidential information;
- acceptance of gifts, or other benefits;
- the employee working for someone else.

The employment contract continues during an absence on parental leave, unless it is terminated by the employer or employee. This means that an employee continues to benefit

from his or her statutory employment rights during parental leave. **They are entitled to return to their old job** (subject to the leave being no more than 4 weeks, otherwise the right to return is similar to that of AML).

The employee **is** entitled to accrue statutory paid annual leave during a period of parental leave. Any additional entitlement is down to what is expressly written in the contract. Like AML, the lack of an express provision means that an employee **will not accrue any contractual element of leave** during a period of parental leave. In practice, this will be easy to calculate if 4 weeks is taken. However, if an employee only takes a week's leave the calculation becomes more convoluted (and arguably not worth the effort!).

The continuation of other terms and conditions during parental leave, such as access to a company car or mobile phone, and perks such as health club membership, remains a contractual matter between the employer and employee.

Time off for Dependants

Introduced in the Employment Relations Act 1999, this is the right to a reasonable amount of unpaid time off work to deal with unexpected or sudden emergencies and make any longer term arrangements. The emergency **must** involve a dependant of the employee.

Who is eligible?

Any employee. There are no qualifying criteria in respect of length of service, but there are in terms of the definition of dependant.

Definition of Dependant

According to S57A(3) of the ERA a dependant is defined as any of the following:

- A spouse;
- A parent;
- A child;
- A person who lives in the same household (but not an employee, tenant, lodger or boarder);
- A person who reasonably relies on the employee:
 - for assistance when they fall ill or are injured; or
 - to makes arrangements for the provision of care

(references to illness/injury include mental & psychiatric illnesses & injuries).

The Amount of Time Off

The right is to a reasonable amount of time off, but (helpfully!) the amount is not fixed. Employers should allow sufficient time off for the employee to deal with the immediate problem and put any alternative arrangements in place.

An example could be a situation where a child has chicken pox. Under these provisions their parent could request a day or two to make alternative childcare arrangements. The parent could not, however, expect the entire week off (although there is nothing to stop an employer granting that if they so wish).

Employment Tribunal Remedies

An individual who is refused any of the rights mentioned outlined above, or who suffers a detriment for trying to avail themselves of those rights can apply to an Employment Tribunal. In the majority of cases it is up to the tribunal to award such compensation as is just and equitable in the circumstances to a successful claimant. It is worth noting that any dismissal for a pregnancy related reason is automatically unfair.

In cases relating to Maternity, Adoption, Paternity Rights and Flexible Working requests some employees may be inclined to add a subsequent claim that the refusal to allow these rights, or the detriment suffered as a result of trying to claim the right, amounts to an act of discrimination on the grounds of sex.

If an Employment Tribunal upholds a claim of sex discrimination against an employer it can:

- Make a declaration that there has been unlawful discrimination;
- Award compensation (the amount of which is technically uncapped);
- Recommend that an employer take steps to avoid the particular form of discrimination reoccurring.

If it upholds a claim against named individuals then it will make a declaration to that effect and award compensation.

The amount of compensation awarded is guided by the principles laid out in the case of *Vento vs. Chief Constable of West Yorkshire (CA 2003, IRLR 102)* where the Court of Appeal established (for the first time) an official banding system for injury to feelings (not to be confused with psychiatric or personal injury) awards which were to be used by the lesser courts:

- The top band should normally be between £15,000 and £25,000 and should apply only to the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. Only in very exceptional cases should an award of compensation for injury to feelings exceed £25,000;
- The middle band of £5,000 to £15,000 should be used for serious cases which do not merit an award in the highest band; and
- Awards in the lowest band of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In general, awards of less than £500 should be avoided, as they risk being regarded as so low as not to be a proper recognition of injury to feelings.

It is worth noting that the lowest band awarded in Birmingham Tribunals in recent years has been £750 (and is rising).

In addition, recent case law has shown that all of the guilty parties in a discrimination claim can, under certain circumstances, be held jointly and severally liable for the tribunal award. This means that individuals could be pursued for the whole amount of the award made (Way and anor v Crouch, EAT, 2005 IRLR 603).

In reality it is unusual for individuals to be held jointly liable. However, in our experience, tribunal awards against those who perpetrate or encourage (including by inaction) acts of discrimination do range between £500 and £1,000 on average. Any such award is enforceable through the County Court.

Glossary

AAL	Additional Adoption Leave (the second 26 weeks of adoption leave)
AML	Additional Maternity Leave (the second 26 weeks of maternity leave)
ERA	The Employment Rights Act 1996
EReIA	The Employment Relations Act 1999
EWC	Expected week of childbirth
EWP	Expected week of placement (the adoptive equivalent of the EWC).
MA	Maternity Allowance
MAT B1	The certificate of pregnancy issued by a midwife. It is necessary to receive this in order to pay SMP.
MPL	The Maternity and Parental Leave etc Regulations 1999
OAL	Ordinary Adoption Leave (the first 26 weeks of adoption leave)
OML	Ordinary Maternity Leave (the first 26 weeks of maternity leave)
SAP	Statutory Adoption Pay
SMP	Statutory Maternity Pay
SPP	Statutory Paternity Pay

Contact Us....

Please feel free to contact us if you need any help or advice with an employment issue, or if you want to discuss what you have heard today in more detail.

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