

## Maternity The New Provisions

### Introduction:

All employers need to be aware that new regulations regarding Maternity come into effect on 1<sup>st</sup> April 2007. These have been introduced under the provisions of **The Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2006**. There are important changes to existing arrangements regarding:

- Maternity leave
- Statutory Maternity Pay
- Notification periods for an employee who intends to return to work early.

There are also new provisions that are intended to help communication during leave, and to make things easier when the employee comes back to work. These provisions:

- Allow the employer to maintain reasonable contact during maternity leave
- Introduce 'Keeping In Touch' Days that allow the employee to return to work for up to 10 days during her maternity leave, without affecting her leave or benefits.

There are two very important points to note.

Firstly, the new regulations apply to **all** employers, **regardless of size**.

Secondly, there are no transitional arrangements from the existing set of regulations to the new regulations. It is the **expected** date of birth of the child that is key. Quite simply, if the baby is expected on or after 1<sup>st</sup> April 2007, then the new rights and provisions apply. If it is nevertheless born early, and arrives before 1<sup>st</sup> April, the new regulations will still apply.

It is also worth noting that if the baby is expected on or before 31<sup>st</sup> March 2007, but arrives late and on or after 1<sup>st</sup> April, the **old** regulations and provisions will apply.

### Leave:

All employees going on maternity leave will be entitled to take up to 52 weeks off work. This will consist of 26 weeks Ordinary Maternity Leave (OML), followed immediately by 26 weeks Additional Maternity Leave (AML). Employees will no longer have to have qualifying service in order to be eligible for Additional Maternity Leave.

It may be asked why maternity leave isn't simply deemed to be 52 weeks, and why it comprises 26 weeks OML and then 26 weeks AML. The reason is that there are important differences in the way these operate both during the leave itself, and when the employee returns to work.

During Ordinary Maternity Leave, the employee must continue to receive all her contractual benefits other than salary. Those benefits might for example include healthcare, share schemes, or a company car. Holiday will also accrue at the *contractual* rate. Eligibility for bonus would depend upon the nature and rules of the scheme, but the general principle is that if the bonus is based primarily on company or team performance it should be paid.

During Additional Maternity Leave, the employee will not be entitled to receive contractual benefits unless it has been agreed otherwise. However, as a minimum, holidays will continue to accrue at the statutory rate – and may accrue at the contractual rate if the contract itself, or a separate agreement, so provides. Note though that during this period contractual obligations such as notice, redundancy compensation, the employer's implied obligation of trust and confidence, and the employee's obligation of good faith continue to remain in force.

When returning from Ordinary Maternity Leave (i.e. after 26 weeks or less), the employee is entitled to return to the same job on the same terms and conditions as if she had not been absent, unless a redundancy situation has arisen.

When returning from Additional Maternity Leave, the employee is also normally entitled to return to the same job on the same terms and conditions as if she had not been absent, unless a redundancy situation has arisen. However, if there is a reason other than redundancy which means that it is not reasonably practicable for her employer to take her back to the same job, she is entitled to be offered suitable alternative work.

### **Statutory Maternity Pay:**

Qualification: Most employees who qualify for maternity leave will also qualify for Statutory Maternity Pay (SMP). The conditions are that the employee must:

- Have 26 weeks service (whether full or part-time) by 15<sup>th</sup> week before the Expected Week of Childbirth
- Have average earnings that are not less than the Lower Earnings Limit for NI contributions; currently that figure is £87.00 per week (with effect from April 2007).

If she does not meet those conditions, she may be eligible to claim Maternity Allowance from the Department of Work and Pensions.

Duration: SMP is payable for up to 39 weeks – which means it is payable for all of the Ordinary Maternity Leave period, and the first half of the Additional Maternity Leave period.

Amount: SMP is paid at two rates. The first six weeks are paid at 90% of the employee's average weekly earnings. The next 33 weeks are paid at the lesser of 90% of her average earnings, or £112.75 (note that this flat rate is the figure with effect from April 2007)

Employers are free to pay their employees at a higher rate than the statutory requirements.

If the employee comes back to work before her entitlement to SMP has run out, payment does of course stop.

### **Communication:**

The new Regulations have made provisions that encourage communication between employers and their employees who are on maternity leave. During the maternity leave period the employer and the employee may make 'reasonable contact' with each other. What forms that will take, and how often contact is made, is up to the employer and employee to agree. It is suggested that this be discussed before the employee begins her leave, so each is clear from the outset.

Whatever is agreed, employers need to note that they *must* keep the employee informed about any opportunities for promotion. We would point out that failure to keep an employee informed about such opportunities has the very real potential to lead to a claim of sex discrimination.

Employers should also remain aware of the need to inform any employee on maternity leave of any other information relating to her job that she would normally be made aware of if she was working. Remember that this needs sensitive, clear and involving communication, because it is all too easy to cause distress to someone who is away from the workplace by giving her an incomplete picture, or by not giving her the chance to ask questions.

Some employers are appointing 'Maternity Mentors' from within their workforce to support employees throughout the period from the time when they are first planning their leave, through the leave itself, and into the return-to-work stage. This approach, coupled with the new Regulations that support and encourage communication, and reintegration on return from leave, has proved beneficial to both employers and employees alike.

### **'Keeping In Touch' Days:**

This is a new provision that is particularly intended to help employees with the process of resuming work. 'Keeping In Touch' Days are different from the 'reasonable contact' that is described in the section above. They are days on which the employee can carry out work for the employer, and the key points are that:

- There can be up to ten such 'Keeping In Touch' Days during the maternity leave.
- The type of work can be anything that the employee would normally do and be paid for, and could include attendance on training courses and at conferences.
- Such days do not affect the maternity leave in any way – they don't change how long it lasts or when it will end.

- Any work carried out on any day will count as one full day – although if someone works a shift that crosses midnight, and that is something she would normally do, that can count as one 'Keeping In Touch' Day.
- Any such arrangement should be by agreement. There are no rights for either the employer or the employee to *require* such days. However, if the employee is offered the opportunity to work such a day or days and she turns it down, it is unlawful for her to suffer *any* detriment as a result – and she certainly cannot be dismissed.
- If the 'Keeping In Touch' Day or Days occur during the period when the employee is receiving Statutory Maternity Pay, she should still be paid it.

Additionally, the regulations make it clear that the employee is entitled to be paid for any work she does on Keeping In Touch' Days – although it is left up to the employer and employee to agree what that payment will be. Whatever that agreed payment is, employers must remember the need both to pay at least the National Minimum Wage, and to ensure that women and men are paid equally for work of equal value. Employers may well consider it more straightforward to pay normal contractual salary – or, where SMP is still being paid, to 'top up' that payment to normal salary levels.

### **Returning to Work, Notification and Timescales:**

If an employee is coming back to work after maternity leave, and it is on the date she originally agreed with the employer – whether that is after the full 52 weeks leave or some shorter period – there is no legal requirement for her to give the employer any notice of her return. However, if she wants to return earlier than was agreed, she now has to give at least *eight* weeks notice of her return. If she doesn't, the employer has the right to postpone her return until the full eight week period has passed. If she turns up early anyway, the employer is not obliged to pay her during the period of postponement. Employers do need to be absolutely certain though that they gave the employee appropriate notification of when her leave was due to end – if they didn't, then the employee is not obliged to give the eight weeks notice.

Similarly, if the employee had not planned to take the full period of maternity leave, but now wishes to return later than she had originally intended, she must give the employer eight weeks notice – and that is eight weeks before the *original* return date.

She may also change her mind yet again – but again the eight week rule applies. That notice must be given eight weeks ahead of the *earlier* of the old or the new return date.

If an employee decides that she does not want to return to work after her maternity leave ends, she needs to give her employer normal contractual notice. However, the Government wants to help employers by encouraging employees to give as much notice as possible. Thus, it has made it clear that as long as she specifies the date on which she wants her employment to end – and that could be as far ahead as

date she was due to return – then her resignation does not automatically end her entitlement to maternity leave or pay.

### **More Useful Information**

The summary above deals with the key changes that have been introduced in relation to Maternity. Other aspects such as provisions for ante-natal care, and for when maternity leave and pay begin remain essentially the same. However, and despite the new and clearer regulations, this is still a complex topic. Employers may therefore find some of the following information helpful when managing employees on maternity leave.

#### **Holidays:**

It is important to understand that paid holidays should only be taken before maternity leave begins, or when it has ended. Some employers want to help their employee when her maternity pay has ended and, recognising that the employee has accrued holiday (whether this accrued during her maternity leave, or before she went off), want to pay her holiday pay. This must not happen, for two reasons:

- Taking holiday during maternity leave will simply bring the maternity leave to an end
- Paying for holiday instead of taking it is not permitted under the provisions of the Working Time Regulations; the only time unused holiday can be paid for is when an employee leaves.

If an employee has not used up all her accrued holiday before her maternity leave is due to begin, and the holiday scheme rules do not allow full 'carry-over' into the next holiday year, the employee may be able to defer the start of her maternity leave, and take paid holiday beforehand. In that way, she will lose neither holiday, maternity leave or pay.

#### **Redundancy:**

There are unfortunately occasions when an employee on maternity leave is, after due consultation, declared redundant. If she is receiving maternity pay, the obligation to complete those payments still falls on the employer, who should continue payments for the full 39-week period. Some employers ask whether they can simply pay any outstanding balance of the 39-week entitlement as a lump sum when the employment is formally terminated. Whilst this is possible, there are likely to be higher NI costs for both employer and employee in such circumstances.

#### **Temporary Cover:**

It is frequently necessary for employers to cover the role of someone on maternity leave by engaging the services of an employee on a fixed term contract. Employers should therefore be aware of the requirements of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and, if the temporary

employee works part time, of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and subsequent amendments.

Whilst it may have been made clear to the temporary employee that his/her role will come to an end when the maternity leaver comes back to work, there are nevertheless some important considerations to note:

- Although the temporary employee's contract is for a fixed term, its conclusion must be handled correctly. If that fixed term contract is not renewed, then the employee is regarded as having been dismissed. It therefore follows that the termination process should follow the statutory 3-step procedure. The employee should also be considered for any suitable roles that may be available.
- It should be remembered that any employee with one year or more of service has the right not to be unfairly dismissed. With employees now having the opportunity of taking up to one year of maternity leave, and allowing for training, handover periods, the taking of accrued holiday and possible parental leave, it is easy to see how the services of a temporary employee might often be required for periods well in excess of one year.

If the temporary employee should become pregnant, then she too will have an entitlement to maternity leave and pay. Her leave would normally continue to the end date of the contract, unless there was a reasonable expectation that the contract would continue beyond that point. And if she has worked for the employer continuously for at least 26 weeks into the 15<sup>th</sup> week before the expected week of childbirth, the employer will also be liable to pay the full 39 weeks SMP.

#### ..... And There's More

We would remind readers that, as their title suggests, **The Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2006** also make provisions for employees who are adopting, for prospective fathers to benefit from Paternity Leave and Statutory Paternity Pay, and for parents to take unpaid Parental Leave during their child's early years.

**The Work and Families Act 2006** also indicates the further developments that can be expected within the term of the current Government. In relation to parenthood, these are likely to include:

- The extension of payment for maternity leave to one year
- The right for employed fathers to take up to 26 weeks Additional Paternity Leave, some of which could be paid, if the mother returns to work. This will be introduced alongside the extension of maternity pay to 12 months.