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Maternity, Paternity and Adoption Leave: New Rights Under the Employment Act 2002

Under the Employment Act 2002 and subsequent subordinate legislation, maternity rights have been enhanced and new rights to paternity and adoption leave have been created. The changes are part of the government’s drive towards family-friendly working practices. They generally apply, subject to exceptions noted below, to children expected to be born on or after 6 April 2003.

Maternity Rights: The Principal Changes

The new maternity leave provisions apply to women whose expected week of childbirth (“EWC”) begins on or after 6 April 2003 (even if their babies are born earlier than expected). The changes do not apply to women whose EWC is before 6 April 2003 (even if their babies are born after that date).

Duration of Maternity Leave: The length of ordinary maternity leave (“OML”) will be increased to 26 weeks from 18 weeks. The right to take OML will be for all employees, regardless of their length of service.

Additional Maternity Leave: Additional maternity leave (“AML”) will also be for 26 weeks directly following OML. To qualify for AML, an employee must now have 26 weeks’ continuous service at the beginning of the 14th week before the EWC. The maximum total leave is therefore increased to one year from the previous maximum of 40 weeks.

Notification Requirements: On or before the 15th week before the EWC (or as soon as reasonably practical thereafter), the employee must notify her employer of the following:

- that she is pregnant;
- the EWC; and
- the date when she wants her OML to start.

(There is no change to how early an employee is able to start OML; the earliest date will continue to the beginning of the 11th week before the EWC.)

The employee can change her mind about when she wants to start her leave, provided she notifies her employer at least 28 days in advance (unless this is not reasonably practical).

There is a new requirement on employers to respond to a woman’s notification of her leave plans within 28 days of receiving the employee’s notice. The employer must write to the employee setting out the date on which he expects her to return to work if she takes her full entitlement to maternity leave.

If the employer fails to respond properly and the employee does not return on time, it will be automatically unfair to dismiss her if she reasonably believed that the maternity period had not finished, or if the employer gave her less than 28 days’ notice of the date on which her maternity leave would end and it was not reasonably practicable for her to return on that date.

The employer cannot write to the employee before the end of her OML to ask the date on which she intends to return to work after her AML. A woman who intends to return to work at the end of her full maternity entitlement will not be required to give any further notification to her employer. There is no longer an obligation on the employee to inform her employer that she has decided not to return to work.
If the employee wants to return to work before the end of any period of maternity leave, she needs to give her employer 28 days’ notice of the date on which she intends to return to work.

**Sickness Trigger:** If an employee is absent from work wholly or partly due to a pregnancy-related illness for the period of 4 weeks immediately before the start of her EWC, the start of her OML will be triggered automatically on the first day after the beginning of the 4th week before the EWC.

**Right to Return:** The right to return after OML and AML remains the same, i.e. after OML it is to the same job (unless the post is redundant) and after AML it is to the same job unless it is not reasonably practicable for her to do so, in which case the right is to return to another job which is suitable and appropriate for her to do in the circumstances.

**Statutory Maternity Pay:** The period of statutory maternity pay (“SMP”) has been extended from 18 to 26 weeks to run concurrently with the OML period. The level of SMP for the first 6 weeks of OML (the higher rate of SMP) is 90% of average weekly earnings. The remaining 20 weeks of OML will be paid at the lower rate of SMP, namely the lower of (a) 90% of a woman’s average weekly earnings, and (b) the weekly rate prescribed in regulations which, from April 2003, will be £100 per week. The increased period of time of SMP will be for women whose EWC begins on or after 6th April 2003. However, the new standard rates will apply from 6 April 2003 to all women getting SMP at that point, regardless of when their EWC is or whether they qualify for the new extended pay period. The current rate of £75 will therefore apply up until 5 April 2003.

**Paternity Leave and Pay: The Key Issues**

**Qualification:** The new paternity leave provisions have effect only in relation to children born on or after 6 April 2003, or whose EWC begins on or after that date. Therefore, unlike the new maternity rights, the EWC might be before 6 April 2003. The employee must have been continuously employed for a period of not less than 26 weeks ending with the week immediately preceding the 14th week before the EWC. The employee must also either:

- be the biological father of the child and have or expect to have responsibility for the upbringing of the child; or
- be married to, or be the partner of, the child’s mother and have or expect to have the main responsibility (apart from any responsibility of the mother) for the upbringing of the child.

A partner is defined as a person, whether of a different sex or the same sex, who lives with the mother and the child in an enduring family relationship but is not a relative of the mother. Therefore, it appears that paternity leave will be available to women as well as men if they meet the remainder of the qualifications. Special provisions apply where both the mother and her partner are employees of the same employer.

**Leave:** An employee who is eligible to take paternity leave may choose to take either one week’s leave or 2 consecutive weeks’ leave in respect of the child. Therefore, employees may not take 2 non-consecutive weeks of paternity leave.

**When Leave can be Taken:** The leave must be taken during the period beginning with the date on which the child was born and must be completed within 56 days of this date, or, where the child is born before the first day of the EWC, 56 days after the EWC.

**Notice:** An employee must give his employer notice of his intention to take paternity leave, specifying:

- the EWC;
- the length of period of the paternity leave; and
- the date on which the paternity leave will begin.

This notice must be provided to the employer in or before the 15th week before the EWC or, if this is not reasonably practicable, as soon as it is reasonably practicable to do so. An employee who has given such notice may vary the date on which the paternity leave should begin, as long as:

- where the variation is for the leave to begin on the date on which the child is born, the notice is given at least 28 days before the first day of the EWC;
- where the variation is to begin on a specified number of days after the day the child is born, that notice is given at least 28 days before the date falling that number of days after the first day of the EWC; and
- where the variation is to provide for a period of leave to begin on a pre-determined date, at least 28 days before that date.
If this is not reasonably practicable, any such notice should be given as soon as it is reasonably practicable to do so. Such notice must be given in writing.

Where the employer requests this, an employee must also give the employer a declaration to the effect that his absence from work will be within the regulations and that he satisfies the conditions of entitlement for paternity leave.

**Right to Return:** Employees are entitled to return to the same job upon completion of paternity leave. During leave, normal terms and conditions of employment continue, other than those relating to remuneration.

**Protection from Detriment/Dismissal:** An employee is entitled not to be subject to any detriment or to be dismissed because the employee took or sought to take paternity leave. If the reason for dismissal is because the employee took or sought to take paternity leave, that dismissal will be automatically unfair.

**Statutory Paternity Pay:** Statutory paternity pay is available for employees who qualify for paternity leave. The rate of statutory paternity pay is the same as the lower rate of SMP, i.e. 90% of the employee’s average weekly earnings or the weekly rate prescribed in the regulations, which from April 2003 is £100 per week, whichever is the lower.

**Adoption Leave and Pay - The Key Issues**

The new adoption leave provisions aim to mirror the new maternity leave provisions.

**Length of Adoption Leave:** There is ordinary adoption leave ("OAL"), which is 26 weeks commencing either on the date on which the child is placed for adoption with the employee by an adoption agency, or on a date no more than 14 days before the expected date of placement. There is also additional adoption leave ("AAL"), which is a further 26 weeks commencing from the last day of OAL.

**Eligibility for Both OAL and AAL:** The employee must have completed 26 weeks’ continuous service with his employer by the time the employee is matched with the child.

The employee must be the adopter of the child, which means a person who has been matched with a child for adoption, or in a case where 2 people have been matched jointly, whichever has been elected to be the child’s adopter for the purposes of the regulations.

The regulations only apply to a child under the age of 18 who has either been matched for adoption with a person who is notified of having been matched on or after 6 April 2003, or who has been placed for adoption on or after that date.

**Notification to Qualify for OAL:** The employee must give his employer notice of his intention to take OAL, specifying:

- the date on which the child is expected to be placed with him for adoption, and
- the date on which the employee has chosen for the period of leave to begin,

no more than 7 days after the date on which the employee is notified of having been matched with a child for adoption or, if this is not reasonably practicable, as soon as it is reasonably practicable.

An employee who has given notice to take OAL may vary the date on which the period of OAL should begin, provided that:

- if OAL is to begin on the date on which the child is placed with him for adoption, the notice of variation is provided at least 28 days before the date specified as the date on which the child is expected to be placed with him, or
- if OAL is to begin on a pre-determined date, the notice of variation is provided at least 28 days before that date,

unless it is not reasonably practicable to give 28 days notice, in which case the notice of variation must be given as soon as it is reasonably practicable to do so.

The above notice must be provided in writing if the employer requests it.

The employer must, within 28 days of receipt of the notice of intention to take adoption leave, respond in writing, stating the expected date of return to work from adoption leave if the full entitlement to OAL and AAL is taken.

An employer may request that an employee must also provide him with evidence from the adoption agency that the employee is an adopter.
Rights during Adoption Leave: During OAL, the employee is entitled to all the benefits of the terms and conditions of employment which would apply to him if he had not been absent, save in respect of remuneration.

During AAL, the employee is entitled to the benefit of his employer’s implied obligation of trust and confidence and any terms and conditions of his employment relating to:

• notice;
• compensation in the event of redundancy; and
• disciplinary and grievance procedures.

Right to Return: An employee who takes OAL is entitled to return to the same job (unless that job has been made redundant). An employee who has taken AAL is entitled to return to the same job that he was employed in before his absence, or if this is not reasonably practicable, to another job which is both suitable for him and appropriate for him to do in the circumstances.

Redundancy During Adoption Leave: If during OAL or AAL, the employee’s post is made redundant, the employer must offer any suitable alternative post that is available with the employer or any associated employer, before the termination of the employee’s existing employment. The alternative employment must take effect immediately after the termination of the existing contract. The new post must be suitable and appropriate for the employee to do in the circumstances and it must be on terms and conditions not substantially less favourable than under the old contract. This mirrors the provisions for redundancy during maternity leave.

Statutory Adoption Pay: Statutory adoption pay (“SAP”) will be available during the 26 weeks of OAL. SAP is similar to both the lower rate of SMP and SPP and will be the lower of 90% of average weekly earnings and the weekly prescribed rate, which from April 2003 will be £100 per week.