

Maternity: frequently asked questions

Below are some frequently asked questions (FAQs) about maternity leave. Although these FAQs highlight some key issues relating to Employment law, they are not comprehensive and the answers should not be treated as a substitute for seeking professional advice on a specific issue.

Q: Am I allowed to ask a woman at a job interview whether she is or intends to become pregnant?

A: There is no ban on questions about pregnancy, but avoid them if possible, as they could be construed as evidence that you intend to discriminate on grounds of sex. Questions about childcare commitments should also be avoided, unless you can show that they are relevant to the job requirements and you ensure that you ask both men and women the same question.

Q: When can an employee start ordinary maternity leave?

A: A pregnant employee can start ordinary maternity leave any time after the beginning of the 11th week before the week in which the baby is due.

Q: An employee who has only recently joined us has announced that she is pregnant. Is she entitled to maternity leave?

A: Yes. She will be entitled to ordinary maternity leave (26 weeks), plus additional maternity leave (another 26 weeks), irrespective of her length of service, provided that she gives you proper notice.

In most cases, employees will also be entitled to maternity pay or maternity allowance.

In order to qualify for ordinary maternity leave, your employee must notify you by the end of the 15th week before the week in which the baby is due (or if that is not reasonably practicable, as soon as is reasonably practicable) of:

- her pregnancy;
- the expected week of childbirth;
- the date on which she intends to start ordinary maternity leave.

Q: I only have three employees. If one of them disappears on maternity leave, I don't have to keep her job available for her, do I?

A: You have to keep the same job available for those who return from ordinary maternity leave, and the same or a similar job available for those who return from additional maternity leave. The small firms' exemption – previously available to those who employed five people or fewer – from unfair dismissal claims if there was no job for a woman returning from additional maternity leave, has been withdrawn.

The elements to be considered in deciding whether a woman has returned to the 'same' job are:

- its nature;
- the woman's 'capacity' (i.e. function) in doing it; and
- where it will be performed.

Q: Under what circumstances do I have to pay statutory maternity pay (SMP)?

A: Statutory maternity pay must be paid to any pregnant employee, provided that she:

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- has 26 weeks' continuous service by the 15th week before the week in which the baby is due;
- has average weekly earnings of £97 per week for the eight weeks up to and including the 15th week before the week in which the baby is due;
- has produced medical evidence of the week in which the baby is due; and
- has given 28 days' notice of the date on which she wishes to start SMP.

Statutory maternity pay lasts for 39 weeks although there are plans to increase this to 52 weeks for babies born from April 2011.

If an employee does not qualify for SMP, she may well qualify for maternity allowance.

Q: A new employee has just announced she is pregnant. Surely we can just dismiss her?

A: No. As a general rule, if you dismiss an employee for a reason connected with pregnancy (or maternity leave or parental leave), you will be liable for unfair dismissal as well as sex discrimination.

Q: We have a part-timer who has just announced that she is pregnant. What is she entitled to?

A: To be treated no less favourably than a full-timer. Like a full-timer, she has the right to return to her job after maternity leave.

Q: We can't function without someone doing the job of a pregnant employee. Can we take on a replacement?

A: Yes - but make it plain that you are recruiting her (or him) to provide maternity

cover and will employ her on a temporary or fixed term contract. If the maternity cover lasts for one year or more, the replacement will acquire the right not to be unfairly dismissed. In those circumstances, if there is suitable alternative employment available and you fail to offer it to the replacement, you may be liable for unfair dismissal.

Q: The replacement has turned out to be much better than the pregnant employee she replaced. Can we keep her and move the pregnant employee sideways?

A: If the new mother is taking ordinary maternity leave, you must keep her original job open for her. If she is taking additional maternity leave, she has the right to come back to her original job or, if that is not reasonably practicable, to a suitable alternative job. You could have a hard job demonstrating that it was not reasonably practicable to reinstate her. The key point is that she has a statutory right to return to her old job and this outweighs any consideration about the relative merits of the replacement.

However, she also has the right to ask for part-time work, which might solve your problem.

Q: Do I have to put up with a pregnant employee who keeps on disappearing for maternity appointments?

A: Yes. A pregnant employee is entitled to paid time off for ante-natal care, which may include parenting and relaxation classes. You could, however, ask for evidence of the appointments.

Q: I've got a pregnant employee who seems to be permanently sick. How much time off do I have to give her?

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A: You should treat her in the same way as you would treat any other sick employee, and allow her to take sick leave in accordance with your sickness procedure.

Is her illness pregnancy-related? If so, avoid taking any detrimental action against her during her pregnancy and maternity leave, on account of her illness. Otherwise, you leave yourself open to a claim for sex discrimination and unfair dismissal.

If the employee is absent from work wholly or partly because of pregnancy, during the four weeks before the week in which the baby is due, the ordinary maternity leave period will start automatically, even if the employee intended it to start at a later date.

Q: How much notice of return does a new mother have to give, and can we postpone her return?

A: She does not have to give you any notice at all if she intends to return to work at the end of her maternity leave. If she intends to return before that, she should now give you at least eight weeks' notice. If she fails to give adequate notice, you can postpone her return to give yourselves eight weeks' notice. You cannot postpone her return to a date later than the end of her ordinary or additional maternity leave, except with her agreement.

Q: An employee who has had a baby said she was coming back a month ago, but keeps on sending sick notes instead. What can we do?

A: The employee does not lose her right to return to work. Therefore, you should treat her in the same way as any other employee

on sick leave, including paying her normal sick pay entitlement, whether contractual sick pay or Statutory Sick Pay.

If the sickness continues you may eventually want to consider dismissing her, in which case you will have to implement your full dismissal procedures. In assessing her sickness record, you must ignore any periods of sick leave for a pregnancy-related illness during her pregnancy and maternity leave.

Alternatively, you and the employee could agree to postpone her date of return from maternity leave.

Q: An employee wants to come back on a part-time basis. This does not suit us. What can we do?

A: You are obliged to give the request careful consideration. If you decide not to grant it, you must provide the employee with good business reasons for your decision. You must be able to show that these reasons are objectively justified, in order to avoid liability for sex discrimination. You should try to be flexible in your approach, as far as possible. The fact that the job has not been done on a part-time basis before will not in itself justify refusing the employee's request.

Parents of children under sixteen or disabled children under 18 have the right to apply to work flexibly, provided that they have the qualifying length of service (26 weeks) and have not made another application within the preceding 12 months.

Carers of adults now have the same right. Employers must deal with such applications

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under a specific procedure.

If you turn down a request from a qualifying employee, he (or she) may make a claim against you in an Employment Tribunal on the grounds that you have failed to comply with the procedure, or that your decision to reject the application for flexible working is based on incorrect facts.

Q: How much is statutory maternity pay?

A: There are two rates of Statutory maternity pay (SMP). For the first six weeks, SMP is paid at the higher rate, i.e. 90% of the employee's normal weekly earnings. Following a recent case at the European Court of Justice, 'normal weekly earnings' will have to include any pay rises made up to the end of her maternity leave, although the government has yet to decide how the law will be changed to implement this. For the remaining 33 weeks, SMP is paid at the lower rate, currently £124.88 (until April 2011), or 90 % of the woman's average earnings if this is less than £124.88 per week.

There are plans to extend SMP to 12 months by the end of the next Parliament. The government is also proposing to introduce a new right for mothers to transfer a proportion of their maternity leave and pay to fathers.

Q: Who actually pays SMP?

A: You, as employer, pay it. But you can recover 92% of the amount of SMP paid by deducting that amount from your National Insurance Contributions payments to HM Revenue and Customs. If you are a small employer, you may recover 100% of SMP paid plus an additional 4.5% compensation. You qualify as a small employer if your NI

contributions amount to not more than £45,000 a year.

Q: What do I need to know about making someone redundant during pregnancy or maternity leave?

A: Don't do it, if you can possibly avoid it. Unless you are closing down a whole site, or a whole section, you may find it difficult to rebut the suspicion that you have selected this employee for redundancy because she is pregnant or on maternity leave, which could leave you open to penalties for unfair dismissal and sex discrimination.

If a redundancy situation arises during an employee's ordinary maternity leave or additional maternity leave, you must consider whether it is reasonably practicable to continue to employ her in her existing job. This will involve considering whether the employee on maternity leave, or some other employee, should be selected for redundancy. If you decide to select the employee on maternity leave, you must offer her any suitable vacancy that is available, or pay redundancy pay, just as with the other employees affected.

Q: We have taken away an employee's company car while she is on ordinary maternity leave. She says this is unlawful. Is it?

A: Yes. During the ordinary maternity leave period, she is entitled to all of her normal terms and conditions of employment, except 'remuneration' (cash wages or salary).

However, an employee on additional maternity leave is entitled to much more limited terms and conditions of employment, unless her contract of employment provides otherwise. She would not be entitled to

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retain her company car during additional maternity leave, unless her contract of employment contained a provision to that effect.

Q: What do we have to give mothers (and fathers) by way of parental leave, and do we have to pay them for it?

A: Fathers are entitled to up to two weeks' paid paternity leave at or around the birth of the child, for the purpose of caring for the child or supporting the mother. They must have at least 26 weeks' service with you by the 15th week before the expected week of childbirth. They must be the biological father of the child or the husband or partner of the child's mother. They must also have, or expect to have, responsibility for bringing up the child.

Any employee who has at least one year's service with an employer is also entitled to take up to 13 weeks' unpaid parental leave for the purpose of caring for a child. Parental leave may be taken until the child's 5th birthday or, in the case of an adopted child, until five years after the placement of the child. In the case of a disabled child, an employee may take up to 18 weeks' parental leave at any time until the child's 18th birthday.

Entitlement to parental leave is in respect of employment with all employers. So when you are taking on new employees, it is advisable to check with their previous employers as to how much parental leave, if any, they have taken.

Parental leave may be taken in blocks or multiples of one week, up to a maximum of four weeks per year.

Q: Do I have any obligations in respect of a pregnant employee's health and safety?

A: Yes. You must ensure that all pregnant employees take off at least two weeks (four weeks, in the case of employees who work in factories) to care for the baby after its birth. In addition, you must assess the health and safety risks posed both to pregnant workers, and to workers who have recently given birth and who are breastfeeding.

If this assessment reveals that the health or safety of the employee is threatened, you must take all reasonable measures to avoid the risk. If there is still a risk, you must alter the employee's working hours or conditions of work, if this would remove the risk and it is reasonable to do so. Otherwise, you must suspend the employee on full pay for as long as is necessary to protect her health or safety, or that of her baby.

Q: We have a pregnant part-timer, who earns about £60 a week. What is she entitled to?

A: She will qualify for maternity allowance, providing:

- she has been employed (or self-employed) for at least 26 weeks (including part-weeks) within the 66 weeks up to and including the week in which the baby is due to be born; and
- she has earned at least £30 a week in at least 13 of those weeks.

Maternity allowance is now payable for up to 39 weeks (previously 26 weeks) at a standard weekly rate of £124.88 (until April

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2011), or 90% of average weekly earnings if this is less than £124.88.

Q: What evidence do I need of the date the baby is due, before I can reclaim SMP?

A: You need:

- a completed form MAT B1 from your employee; or
- a letter from her doctor or midwife.

This letter must show:

- the employee's name;
- when the baby is due (expected week of childbirth);
- the date of the medical examination;
- the date of signing;
- the signature of the doctor or midwife;
- the doctor's stamp, or the midwife's PIN number.

For further information, please contact Nick Hobden on 01892 510000 or by e-mail at nick.hobden@ts-p.co.uk.

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