

The new maternity maze

Female employees gained new rights to maternity leave in 2003.

The following sets out the main legislative provisions. However, employers should always bear in mind that they may have given their employees greater rights in their contracts of employment than are set out in this leaflet.

26 Weeks Ordinary Maternity Leave Period

Every female employee has the right to 26 weeks ordinary maternity leave (instead of the old 18 weeks) as long as she gives her employer 28 days notice before she leaves, of her pregnancy, the expected week of the birth and when she intends her leave to begin.

In addition this notice must be given in the 15th week before the expected week of childbirth [E.W.C], if reasonably practicable. The employee can later change her mind and alter the start date of her maternity leave on giving 28 days notice of change or as soon as reasonably practicable.

Once the employee has given this notice, the employer must respond in writing within 28 days confirming when the employees return to work date will be. The employer can request that the notification be in writing and that the employee produces a medical certificate.

The basic rule is that the employee can choose when the leave begins but:

- It cannot start earlier than the 11th week before the week when the baby is due
- If she is off work sick because of the pregnancy after 28 days before the birth

the maternity leave must start then. The employee must then notify the employer as soon as reasonably practicable that she is absent because of pregnancy.

- It must start when the baby is born. It is a criminal offence for an employer to allow an employee to return to work during the two weeks from the day she gives birth.
- An employee can return to work before the end of the 26 week period if she gives her employer 28 days' notice.

Additional Maternity Leave

Additional maternity leave begins immediately after the end of the ordinary maternity leave and finishes 26 weeks' later, producing a total maternity leave period of 52 weeks. It is now available to women with 26 weeks employment ending with the 15th week before the expected week of childbirth. The qualifying period for additional maternity leave is now the same as that for Statutory Maternity Pay.

As long as she has given the correct notification for ordinary maternity leave, the employee does not have to give any notification in order to take additional maternity leave, it is assumed that the employee will take her full entitlement.

The employer can no longer write to the employee asking for confirmation as to whether or not she intends to return to work, as the presumption is that she will at the end of her full entitlement. Whilst the employer may still make informal enquiries, the employee need not reply.

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The Employee's rights while on Maternity Leave

Employers should check their employees' contracts of employment to see what they are bound to give their employees while on maternity leave. Under the legislative provisions, the woman is entitled to all her contractual and non-contractual benefits except remuneration during the 26 week ordinary maternity leave period. For example, she will be entitled to the continued benefit of any insurance and to accrue paid holiday entitlement. Most women will qualify for Statutory Maternity Pay or Maternity Allowance during this period.

The contracts of employees continue during additional maternity leave. However, the only provisions applying during that period are the following:

- The employer's duty of trust and confidence to the employee and the employee's obligation of good faith to the employer
- Contractual notice of termination
- Compensation in the event of redundancy
- Disciplinary or grievance procedures
- Terms preventing the employee from disclosing confidential information
- Terms about the acceptance of gifts by the employee
- Terms about the employee's entitlement to participate in any other business.

There is no entitlement to pay or any other benefits during additional maternity leave.

The employee will be entitled to any pay increase on her return to work which she would have received if she had not been absent.

The employer must continue to make usual pension contributions while the employee is receiving statutory or contractual maternity pay.

N.B. The entitlement to paid holiday under the working time regulations is not affected by maternity leave.

The Employee's return to work

If the employee takes 26 weeks maternity leave she is entitled to return to the same position on the same terms and conditions.

If the employee takes additional maternity leave, the employee is entitled to return to the same position unless this is not reasonably practicable. The employer must then offer her a suitable alternative position.

On her return, the employee is entitled to pay equal or better than she would have received had she not taken any maternity leave. There must be no reduction in her seniority and pension rights from those she enjoyed when she started her additional maternity leave. Other terms and conditions must be no less favourable than if the employee had not taken additional maternity leave.

If the employee's job becomes redundant during the ordinary or additional maternity leave period, the employee must be offered any alternative suitable and appropriate employment with the company or any associated company. Her role, place of work and other terms and conditions must not be substantially less favourable.

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Employers should note that, if they dismiss any woman or select her for redundancy for a reason related to her pregnancy or for taking maternity leave, such a dismissal will be automatically unfair. It is unlawful to treat a woman less favourably for those reasons.

The legislation does not give an employee a direct right to return part-time if she has been full-time. However, new rules are now in place so that an employer must consider an employees' request for flexible working arrangements. In addition, an employer's refusal to allow this could lead to a claim of sex discrimination.

What happens if employees do not follow the rules?

Employees will not lose their rights if they fail to notify the employer or return on the due date. They should be treated by the employer like any employee who does not comply with rules (i.e. a disciplinary matter). If the employee cannot return to work because she is sick at the end of the ordinary or additional maternity leave period, she should be treated like any sick employee.

Risk Assessments and Ante-Natal Care

Under Health & Safety regulations, if the workforce includes women of child-bearing age, an employer must carry out a risk assessment of any danger at work to pregnant or breast-feeding women or new mothers. If they find that there is a risk to such women, the employer must then take all necessary preventative action. This may even mean altering the employee's conditions of work, offering her suitable

alternative work or, if all else fails, suspending her on full pay, to avoid the risk.

A pregnant employee has the right not to be unreasonably refused paid time off during working hours for ante-natal care appointments.

Update on Maternity Rights

SMP entitlement is 26 weeks. The rate of SMP is 90% of your average weekly earnings with no upper limit for the first 6 weeks then £106.00 or 90% of your average weekly earnings if this 90% rate is less than £106.00 for the remaining 20 weeks.

Employers can re-claim 92% of SMP payments from the Government and if your National Insurance Contributions are less than £40,000 per year, you can re-claim 100% of the payments with additional compensation.

Although this information sheet highlights the key issues relating to maternity legislation, it should not be considered comprehensive and is not a substitute for seeking professional advice on specific issues.

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