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# together

## Families and Pregnancy: The Top Five Legal Issues

26 March 2014

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# Five Key Topics

- 1. Pregnancy and maternity leave and pay
- 2. Shared Parental Leave
- 3. Time off for dependents
- 4. Flexible working
- 5. Redundancy during maternity leave

# 1. Pregnancy and maternity leave and pay

## Overview

- Time off for antenatal appointments
- Up to 52 weeks' maternity leave
  - 2 weeks' compulsory maternity leave
  - 26 weeks' ordinary maternity leave
  - 26 weeks' additional maternity leave
- Statutory maternity pay for up to 39 weeks
- Enhanced maternity pay
- Right to return to the same job
- Protection from dismissal, detriment or discrimination

# Statutory Maternity Pay Calculation

- SMP is payable for 39 weeks
  - first 6 weeks - “earnings related rate” (90% of normal weekly earnings)
  - following 33 weeks - “prescribed rate” (or earnings related rate if lower) currently £136.78 a week
- Normal weekly earnings
  - monthly paid employees – last 2 pay slips before the end of the Qualifying Week
  - includes bonus, commission and overtime payments
  - excludes pension contributions and payments under share incentive schemes

# Pay reviews and impact of pay increases

- Pay reviews
  - ensure employees on maternity leave included
- Impact of pay increases
  - employees should receive the benefit of any pay rises awarded during their absence
  - salary increases should not be pro-rated for employees who have been absent on maternity leave
  - timing of pay rise and whether enhanced maternity pay is offered is key to whether SMP must be recalculated to include pay rises

# Contractual Bonuses

- Contractual bonus must be paid for parts of the bonus year
  - before maternity leave starts
  - during compulsory maternity leave
  - on return from maternity leave
- Pro rate bonuses for periods spent on maternity leave (other than compulsory maternity leave)
- Annual leave taken before or at the end of maternity leave should also be included in bonus calculations

# Discretionary Bonuses

- Position is less clear cut
- Suggested approach – use contractual principles
- Christmas / loyalty bonus?

# Benefits

- During SML employee has benefit of all terms and conditions except those related to remuneration
  - remuneration - sums payable to the employee by way of wages and salary
- All contractual benefits will continue
  - annual leave, health club membership, private medical/dental insurance, private use of company car
- Cash allowances less clear cut – issue of double recovery
  - car allowance



# Holidays

- During maternity leave contractual terms other than those relating to remuneration continue
- Statutory paid annual leave entitlement under Working Time Regulations (28 days) and any additional contractual entitlement accrue during maternity leave
- Common scenario for full time employees in UK to have 25 days annual leave plus 8 public/bank holidays
- Legal position unclear in relation to whether “contractual entitlement” includes bank and public holidays - right to time off or a right to remuneration?

## 2. Shared Parental Leave Overview

- Children and Families Act 2014 received Royal Assent on 13 March 2014
- Shared Parental Leave will be introduced from 5 April 2015
  - Draft shared parental leave pay/leave regulations were published on 5 March 2014 and are now being consulted on before being laid before Parliament in the summer
  - Good practice guides and information booklets are currently being prepared and are expected late summer

# Aims

- Government commitment to become the most family friendly Government in the world
- Reduce gender bias in women's careers
- Address inequalities in the workplace
- Widen the talent pool for businesses
- Shared care with greater flexibility and choice for families
- Improving retention of qualified and talented employees
- Increase fathers' involvement in early stages of their child's life

# Current Position

- Ordinary Paternity Leave (OPL) and Ordinary Statutory Paternity Pay (OSPP)
- Additional Paternity Leave (APL) and Additional Statutory Paternity Pay (ASPP) (if mother/adopter has not exhausted full right to SMP/SAP)
  - Mother/primary adopter must have returned to work from SML or SAL
  - Statutory minimum entitlement is to one period of APL to last between 2 and 26 weeks taken 20 weeks after child's birth/placement for adoption and ends 12 months' after child's birth/placement for adoption

# Proposed Changes

- Current maternity entitlement will remain as default position for employed mothers
- Qualifying parents will be able to share up to 50 weeks of leave and 37 weeks of pay
- Time limit for taking shared parental leave is 52 weeks from birth

# Proposed Changes – Fathers & Adopters

## Fathers

- “Day one” right to take unpaid leave to attend 2 antenatal appointments – from 1 October 2014
- Fathers will retain entitlement of 2 weeks paternity leave
- Additional paternity leave will be abolished and replaced with right to shared parental leave

## Adopters

- Statutory adoption leave to become a “day one” right
- Statutory adoption pay to mirror statutory maternity pay
- Qualifying adopters will be eligible for shared parental leave

# Proposed Changes – Structure of Leave

- Leave may be taken by parents concurrently or at different times and taken flexibly, in separate blocks (of no less than one week), if agreed with their employer
- Employees will need to propose the pattern of leave they wish to take and discuss with employers
- Employers will not have to agree the proposals or discuss with other employers
- Default position is that leave will be taken in one continuous block with employee specifying start date

# Proposed Changes – Structure of Leave Example

- For example:
  - a mother takes the first 8 weeks' leave;
  - 44 weeks of statutory leave remain;
  - this may be taken either by both parents together (22 weeks); or
  - this could be shared between the parents with the mother taking (for example) a further 12 weeks and the father then taking the remaining 32 weeks



# Proposed Changes – Notice Requirements

- 8 week notice period to end maternity leave and pay and begin shared parental leave and pay
- If notice given before birth mothers will have an option to retract this for up to 6 weeks after birth
- Employees to provide a non-binding indication of expected leave pattern as part of the notification of eligibility and intention to take shared parental leave
- 8 week notice period for employees to notify a specific period of leave, inclusive of 2 week discussion period

# Proposed Changes – Notice Requirements (cont.)

- Cap of 3 notifications for periods of leave to be taken (includes changes to previous notifications)
- Provisions to be included for changes beyond the cap by mutual agreement with the employee
- Both parents to complete a form to notify their employers of intention to take shared parental leave
- Information required:
  - names and NI numbers of mother and father/mother's partner
  - total maternity leave and pay/allowance taken

# Proposed Changes – Statutory Shared Parental Pay & Employee Protections

- Statutory Shared Parental Pay (SSPP) will be available to those who are eligible for SMP
- SSPP will be at same rate as SMP
- Eligible adopters will also benefit
- Employees will have the same protection as employees on SML
  - e.g. contractual terms (apart from pay) and benefits (such as leave accrual) will continue

# Proposed Changes – Right to return & KIT days

- Right to return to the same job from any period of leave that totals 26 weeks or less in aggregate, even if leave taken in discontinuous blocks
- If leave exceeds 26 weeks' employees only have the right to return to the same or similar job
- Up to 20 “KIT-style” days per parent whilst on shared parental leave in addition to 10 KIT days available during maternity leave

# Considerations for Employers

- New policies and procedures will be required
- Employers should consider if they wish to offer enhanced shared parental pay schemes
- Change in culture for many employers
- Employers will need to manage the risk of less favourable treatment and/or discrimination
- Organisational challenges to find cover where leave is broken into blocks of time unless role is project based

## Considerations for Employers (cont.)

- Additional administrative burdens for employers as shared parental leave will be more complex to manage and leave will need to be monitored
- Risk of fraud
- Employers may see an increase in flexible working / parental leave requests if uptake of shared parental leave is high
- Unpaid parental leave – from 2015 each parent has the right to 18 weeks of unpaid parental leave for each child up to the age of 18

### 3. Time off for dependants

# What is the right?

- To take a reasonable amount of unpaid time off work
- To make necessary action to deal with particular situations affecting a dependant



# Who has the right?

- Employees
- No length of service requirement
- Male and female employees
- Full and part-time employees

# When can time off be taken?

- Dependant leave can be taken when it is necessary:
  - to assist a dependant who is ill, has given birth, is injured or assaulted
  - to arrange care for an ill or injured dependant
  - to deal with the death of a dependant
  - to deal with the disruption or breakdown of care arrangements
  - to deal with an unexpected incident involving a child during school hours

# Who is a dependant?

- The employee's spouse, civil partner, child or parent (but not grandparent), or a person who lives in the same household (but not a tenant, lodger or boarder)
- Anyone who reasonably relies upon the employee for help when they are ill, give birth or are injured or assaulted, or to make arrangements for care.

# How much time?

- Reasonable amount of time to take necessary action
- Will depend upon the nature of the incident and the employee's individual circumstances
- Time to “deal with immediate crisis”
- A tribunal should take into account the individual circumstances and ignore disruption to employer's business
- Where long term care is needed, employee is entitled to time off work to make arrangements for longer-term care but does not enable employee to provide that care

# Claims and Remedies

- Potential claims
  - Automatic unfair dismissal
  - Protection from detriment
- Remedies
  - Re-engagement, re-instatement or compensation for unfair dismissal
  - Declaration and/or just and equitable compensation for detriment

# What must the employee do?

- Tell the employer:
  - The reason for the absence
  - How long they expect to be away from work (unless it is not reasonably practicable to do this until the employee returns to work).
- Notification does not need to be in writing and should be made as soon as reasonably practicable.

# Practical steps for employers

- Have a policy, publicise the policy, enforce the policy consistently
- Make clear that breach of the policy will result in disciplinary action being commenced
- Where employer requests evidence of leave, ensure that it has reasonable grounds to make the request and that it does so in a non-discriminatory manner.

## 4. Flexible Working

- Overview
- Remedies/risks
- Changes to the law



# Overview

- Right to request
- Eligible employees
  - 26 weeks' continuous service
  - Responsibility for child or dependant adult
  - No flexible working application in previous 12 months
- Statutory request procedure
- Accept request
  - Permanent change to terms and conditions
- Reject request
  - Employee not eligible
  - Eight specific statutory grounds for refusal

# Eight grounds for refusal

- 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

# Remedies / Risks

- Limited remedies under relevant legislation
  - Procedural issues
  - Wrong reason for refusal or incorrect facts
- Compensation
  - Up to 8 weeks' pay
  - Statutory cap on a week's pay applies (currently £450)
- Unfair dismissal
  - Automatically unfair
- Sex discrimination
  - Direct
  - Indirect

# Practical tips

- Take note of the statutory time limits for dealing with requests and appeals
- Consider trial periods or temporary changes
- Consider alternative solutions
- Research job market
  - Availability of part time workers
- Be consistent
- Maintain records

# Proposed changes to flexible working regime

- Children and Families Act 2014 received Royal Assent on 13 March 2014
- Coming into force on 30 June 2014
- Extend right to request to all employees with 26 weeks' continuous service
- Replace statutory procedure with new duty to act reasonably within reasonable period (deal with requests in writing within 3 months including appeals)
- New ACAS statutory code of practice and best practice guide
- Consider revising existing policies/procedures

## 5. Redundancy during maternity leave

- Automatically unfair to select an employee as redundant for reasons connected with:
  - pregnancy or maternity leave
  - adoption or parental leave
  - dependent care leave
  - making a flexible working request
  - KIT days

# Selection process

- Adjusting scoring process to take account of maternity leave
  - Eversheds Legal Services Ltd v De Belin [2011] IRLR 448 (EAT)

# Regulation 10 MPL Regulations – Suitable Alternative Roles

- Where employee on maternity is placed at risk of redundancy she is **entitled** to be offered a suitable alternative role in preference to other at risk employees
- New role must be both **suitable** in relation to the employee and **appropriate** for her to do in the circumstances
- Capacity and place in which she is to be employed and the other terms and conditions of employment must **not be substantially less favourable**



# Regulation 10 MPL Regulations – Suitable Alternative Roles (cont.)

- *Simpson v Endsleigh Insurance Services Ltd 2011 ICR 75, EAT*
- Factors to consider when assessing if a role is a suitable available vacancy:
  - Job responsibilities
  - Seniority
  - Salary differentials (either way)
  - Location
  - Experience/new training required

# Regulation 10 MPL Regulations – Suitable Alternative Roles (cont.)

- Failure to comply is automatically unfair dismissal
- Failure to comply is NOT discriminatory

# Presenters



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# Any Questions?

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