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Flexible Working

A Guide



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PARENTAL RIGHTS AND FLEXIBLE WORKING

Parents and other employees with caring responsibilities have certain rights, protected by law, relating to types of leave and also regarding their being considered for flexible working.

Our guide provides an overview of some key points but parental rights and those around flexible working are areas that can be confusing for employers, opening them up to potential pitfalls and breaches of the law.

With this in mind, seeking professional legal advice on issues relating to maternity, paternity and parental leave, and flexible working, is a sensible step.

MATERNITY LEAVE

A pregnant employee (defined as someone with an employment contract) is eligible for Statutory Maternity Leave regardless of how long they have worked for their employer, the hours they work or how much they are paid.

To qualify, they must tell the employer when the baby is due and when they want to start their maternity leave (at least 15 weeks before the week their baby is due).

The maximum Statutory Maternity Leave is 52 weeks, which is made up of:

- 26 weeks of Ordinary Maternity Leave
- 26 weeks of Additional Maternity Leave.

The earliest that Statutory Maternity Leave usually starts is 11 weeks before the week the baby is due. The mother does not have to take the full 52 weeks' leave but must take at least two weeks' leave after their baby is born.

When the employee gives their employer notice that they want to take Statutory Maternity Leave, the employer must write to them within 28 days confirming the start and end dates of the leave. Employees must give employers at least eight weeks' notice if they want to change their return to work date.

MATERNITY PAY

Statutory Maternity Pay (SMP) usually starts at the same time as maternity leave. An employee is eligible for SMP if they:

- have worked continuously for the same employer for at least 26 weeks ending with the 15th week before the week the baby is due
- have average weekly earnings of at least £109
- give the correct notice. This means they must give their employer at least 28 days' notice that they want to take leave to have a baby and the day they want the SMP to start. They must also give proof of pregnancy, such as a letter from their doctor or midwife or a MATB1 certificate.

SMP, which is subject to tax and national insurance deductions, is paid for up to 39 weeks at the same frequency as the employee would normally receive their wages (i.e. weekly or monthly) at a rate of:

- 90 per cent of their average weekly earnings (before tax) for the first six weeks
- the lower of £136.78 (effective from April 2013) or 90 per cent of their average weekly earnings for the next 33 weeks.

Maternity Allowance is usually paid to women who do not qualify for Statutory Maternity Pay at a rate of £136.78 (effective from April 2013) or 90 per cent of average weekly earnings, whichever is lower.

PATERNITY LEAVE

Employees are entitled to take either one or two weeks' Ordinary Paternity Leave if their partner is having a baby. A week is defined as the number of days the employee normally works, so if they only work two days a week, that is their leave entitlement.

To qualify for Ordinary Paternity Leave, the employee must have worked continuously for the same employer for at least 26 weeks ending with the 15th week before the week the baby is due. They must be the child's biological father or husband or partner (including same-sex relationships) of the child's mother and have, or expect to have, responsibility for the child's upbringing.

The employee must tell their employer at least 15 weeks before the week the baby is expected:

- the baby's due date
- when they want the Ordinary Paternity Leave to start
- whether they want to take one or two weeks' leave.

Ordinary Paternity Leave cannot start before the birth and must end within 56 days of the birth.

Additional Paternity Leave enables eligible employees to take up to 26 weeks of leave. This can be taken at any time from 20 weeks after the child is born but it must end by their first birthday. Employees need to give employers at least eight weeks' written notice that they intend to take Additional Paternity Leave.

Employees can only take Additional Paternity Leave if their partner has returned to work and is no longer taking Statutory Maternity Leave or receiving Statutory Maternity Pay or Maternity Allowance.

PATERNITY PAY

Ordinary Statutory Paternity Pay is paid to employees taking Ordinary Paternity Leave for up to two weeks. To be eligible for Ordinary Paternity Pay, the employee must:

- have worked for the same employer continuously for at least 26 weeks by the end of the 15th week before the week the baby is due
- be employed by the employer up to the date of birth
- earn at least £109 a week before tax
- give their employer form SC3 (or the employer's own version) at least 28 days before they want the Ordinary Paternity Pay to start.

The weekly rate of Ordinary Paternity Pay is the lower of £136.78 (effective from April 2013) or 90 per cent of average weekly earnings. It is paid at the same frequency as the employee's usual wages and tax and national insurance will be deducted.

Additional Statutory Paternity Pay (ASPP) is payable to eligible employees (those who meet the qualifying conditions above for Ordinary Statutory Paternity pay) who have given their employers at least eight weeks' notice via form SC7 ASPP. The mother of the child needs to have at least two weeks' remaining of their entitlement to Statutory Maternity Pay or Maternity Allowance before the ASPP is due to begin.

ASPP is given to eligible fathers, partners and civil partners of mothers who have returned to work and no longer claim Statutory Maternity Pay or Maternity Allowance.

ADOPTION LEAVE

Employees can take up to 52 weeks' adoption leave, if they have worked continuously for their employer for 26 weeks, ending with the week in which they are told they have been matched with a child for adoption. Adoption leave is available to individuals or one partner in a couple that is jointly adopting.

The couple must choose which partner takes adoption leave. The other partner may be entitled to paternity leave and pay.

Employees should tell their employer within seven days of their being notified that they have been matched with a child. They must tell the employer:

- how much leave they wish to take
- the date the child will be placed with them
- when they want to start their leave.

The employer must confirm within 28 days the leave start and end dates.

Adoption leave can start up to 14 days before the child starts living with the employee (the date of placement) or, for overseas adoptions, the date the child arrives in the UK or within 28 days of this date.

The employee must tell the employer within 28 days if the date of placement (or UK arrival date for overseas adoptions) changes and give at least eight weeks' notice if they wish to change their return to work date.

ADOPTION PAY

Statutory Adoption Pay (SAP) starts when the employee starts their adoption leave. It is payable at a rate of £136.78 (effective from April 2013) or 90 per cent of average weekly earnings before tax, whichever is lower.

Statutory Adoption Pay is payable for 39 weeks and subject to tax and national insurance deductions.

The employee must give their employer at least 28 days' notice that they want to stop work to adopt a child and when they want their SAP to start. They must also provide proof of the adoption.

The employer must confirm within 28 days how much SAP the employee will receive and when it will start and stop.

Statutory Adoption Pay and leave are not available to people who arrange a private adoption, adopt a stepchild or other family member or have a child through surrogacy.

PARENTAL LEAVE

Parental leave is an entitlement separate to maternity, paternity or adoption leave. It allows employees with one year's service to take a total of 18 weeks' unpaid leave to care for their child.

For each child, a parent can take up to 18 weeks' parental leave up to the child's fifth birthday (or for adopted children, their fifth birthday or fifth anniversary of their adoption, whichever comes first).

For each child who qualifies for Disability Living Allowance, the entitlement is 18 weeks up to their 18th birthday.

The limit on how much parental leave can be taken a year is four weeks, unless the employer agrees otherwise, and the leave should normally be taken in blocks of one week (a week is defined as the length of time the employee normally works in a week).

FLEXIBLE WORKING

Flexible working offers alternative ways of working that better suit employees' needs and can also benefit businesses.

There are various options for flexible working arrangements, including:

- part-time working: working fewer days or fewer hours per day than in a full-time role
- job sharing: two people share the job by splitting the hours between them
- carrying out some or all the work from home
- compressed hours: working full-time hours but over fewer days
- annualised hours: working a certain number of hours over a year, but with flexibility over how and when they work the hours
- term-time working: the employee does not work during school holidays.

Any employee can ask their employer if they can work flexibly and people with caring responsibilities (e.g. for a child or a relative) have a legal right to do so, which is known as making a statutory application.

Those with a legal right to request flexible working include:

- parental responsibility for a child 16 and under or a disabled child under 18. This includes biological parents, legal guardians, adoptive and foster parents and spouses and civil partners of these
- the carer for an adult relative (parents, parent-in-law, adult child, adopted adult child, siblings (including those in-laws), uncles, aunts, grandparents or step-relatives).

When making a request, they must also:

- have worked for their employer for 26 weeks continuously at the date they make the application
- not have made another application to work flexibly under the right during the past 12 months.

The employer does not have to agree to a request for flexible working made as a statutory application (or any other request) but should consider it seriously.

REQUESTING FLEXIBLE WORKING

To make a request for flexible working, the employee should write to their employer, saying whether they are making a statutory application and include details of their caring responsibilities.

They should also set out the kind of flexible working they would like, when they would like to start working flexibly and explain how the business can deal with any impact arising from their working flexibly.

The employer should request a meeting within 28 days of receiving the application to discuss this and notify the employee of their decision within 14 days of the meeting taking place.

If the employer agrees to flexible working they must give the employee a new contract. If they do not agree, they must explain to the employee the business reasons for this and how the employee can appeal.

Employers can only reject an application for one of the following reasons:

- additional costs involved
- impact on ability to meet customer demand
- inability to reorganise work among existing staff
- inability to recruit additional staff
- detrimental impact on quality or performance
- not enough work during the periods the employee proposes to work
- planned changes to the structure of the business.

Employees can only appeal against the employer's decision on the grounds that the employer did not know something important related to the application when they made their decision or if the employee wants to challenge information used by the employer.

Once the employee has notified the employer that they want to appeal, the employer must meet with them within 14 days.

The employer must write to the employee saying what their decision is within 14 days of the meeting.

If the application is still rejected, the employee may be able to take their case to an employment tribunal.

To find out more about how we can help you, please contact us:



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Donna is a solicitor in the Employment team of Mackrell Turner Garrett's London office, where she advises both employers and employees on a full range of contentious and non-contentious issues.

Her experience includes drafting employment contracts and handbooks, advising on grievance and disciplinary procedures and preparatory work prior to employment tribunals, including advising on the advantages and disadvantages of settling cases. She has particular expertise in settlement agreements and managing social media in the workplace.

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