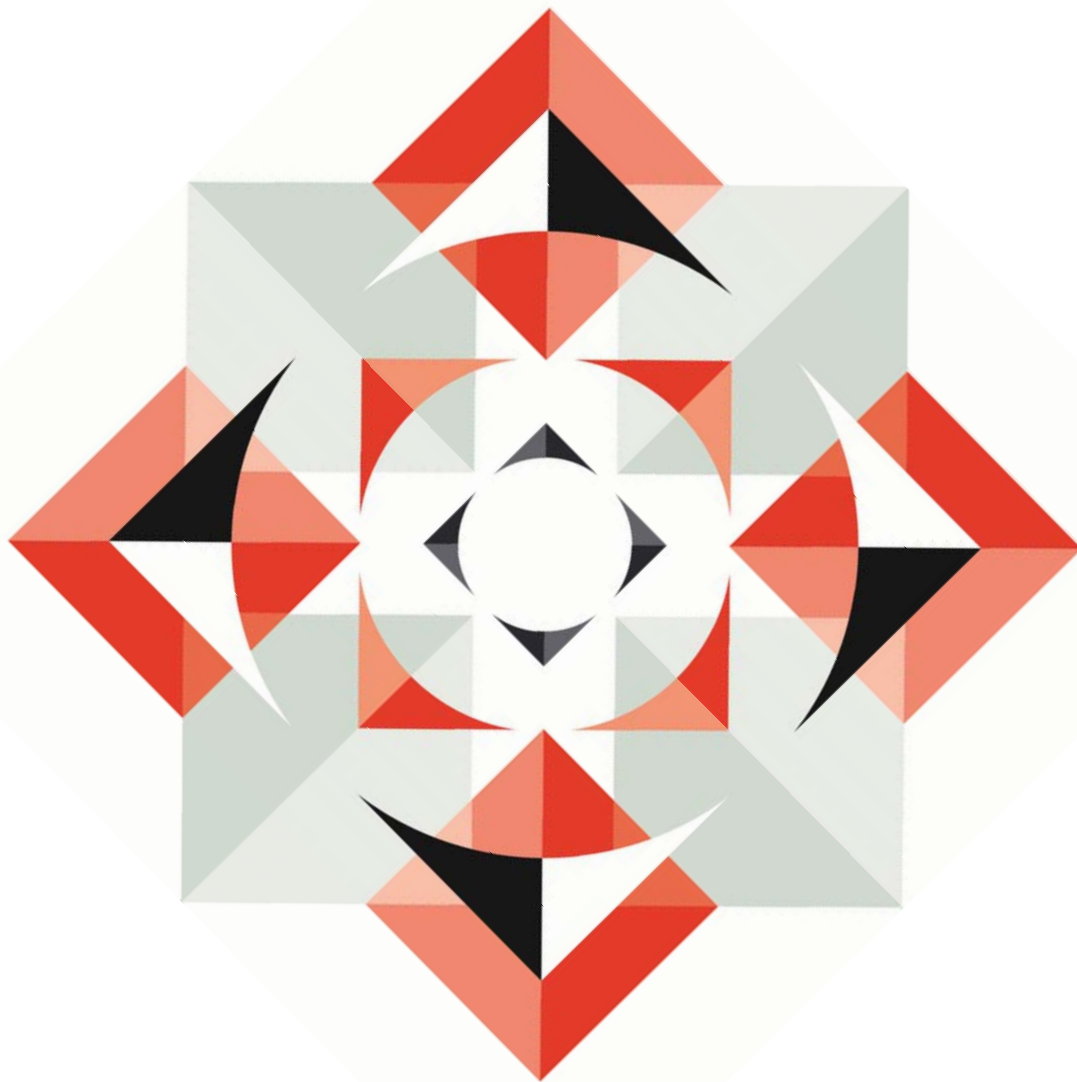


Paternity leave and pay



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Introduction

The law relating to paternity leave and pay is not yet as developed or as complicated as maternity legislation. However, since the introduction of additional paternity leave and pay for fathers of children due on or after 3 April 2011, administering it has certainly become more of a headache for employers.

In this Inbrief, we summarise the legal position on paternity leave and pay and look at some practical issues.

Understanding the jargon

Unfortunately, the terminology in this area makes it all the more complicated to understand. Some useful terms are:

OPL (ordinary paternity leave): either 1 single week or 2 continuous weeks' leave.

APL (additional paternity leave): a minimum of 2 continuous weeks and maximum of 26 continuous weeks' leave.

SPL (statutory paternity leave): refers to any period of paternity leave whether OPL and APL.

EWC (expected week of childbirth): the week (measured from Sunday to Saturday) in which the woman is expected to give birth. Many of the employee's rights are calculated by reference to this date, even if the child is actually born earlier or later.

OSPP (ordinary statutory paternity pay): payable to eligible employees during all of OPL.

ASPP (additional statutory paternity pay): payable to eligible employees during some or all of APL.

SPP (statutory paternity pay): refers to the OSPP and ASPP paid by the employer to the employee during some or all of SPL. Most of the money paid over can be recovered from HMRC.

KIT days (keeping in touch days): during APL, an employee may attend work for up to 10 'keeping in touch' days without bringing paternity leave to an end.

A note on adoption

SPL and SPP may also be available to employees whose spouse, partner (including same sex partner) or civil partner has been individually matched for adoption, or where the couple has been jointly matched for adoption and the other partner has chosen to take statutory adoption leave and pay.

The rules for SPL and SPP in adoption cases are fairly similar to those in respect of a new birth, however, there are some technical differences which we have not covered here. In order to understand how SPL and SPP work in adoption cases, please assume that:

- > any reference to a child's mother also refers

to the spouse, partner (including same sex partner) or civil partner who has chosen to take statutory adoption leave and pay; and

- > any reference to the date of birth also refers to the date of placement for adoption.

The basic right

Ordinary Paternity Leave

Employees will be eligible for OPL if they:

- > are the biological father of a child, or if they are the mother's husband, partner (including same sex partner) or civil partner
- > have been continuously employed for at least 26 weeks by the start of the 14th week before the EWC
- > have, or expect to have responsibility for the child's upbringing, and
- > are taking the leave to care for the child or to support the mother in caring for the child

OPL must be taken for either one single or 2 consecutive weeks. The earliest it can be taken is the date of the child's birth and it must be taken within 8 weeks of the birth.

Additional Paternity Leave

The principle behind APL is that rather than the mother taking the entire 52-week period of maternity leave herself, she may choose to take only part of her maternity leave so that the father may take the APL instead. However, to encourage the mother to spend the early months with the child, the earliest an employee can take APL is from the 20th week after birth. Therefore an employee could take 2 weeks' OPL soon after the child's birth, return to work and then take APL at a later date.

Employees will be eligible for APL if:

- > they satisfy the conditions above relating to OPL (save that the leave should just be to care for a child)
- > the child's EWC is on or after 3 April 2011, and
- > the mother has returned to work before the end of her maternity leave

It remains to be seen how easy it will be for



employers to check whether the mother has returned to work, as in most cases this will require some co-operation from the mother's employer.

APL must be taken for a minimum period of 2 weeks up to a maximum period of 26 weeks. The earliest it can be taken is 20 weeks after the birth and it must end within one year of the birth.

Where a mother is not entitled to maternity leave (for example because she is self-employed) an employee may still be eligible to take APL if the mother is entitled to maternity allowance and has returned to work.

Starting and returning from paternity leave

Starting OPL

In order to take OPL, employees must write to their employer in or before the 15th week before the EWC, confirming:

- > how much OPL they wish to take (either 1 single or 2 continuous weeks)
- > the EWC; and
- > the date they wish OPL to begin

Starting APL

In order to take APL, employees must write to their employer at least 8 weeks before they wish to take APL, confirming:

- > the EWC and the child's *actual* date of birth; and
- > the dates on which they wish to take APL

In addition to giving the above leave notice the employee must self-certify their eligibility to take APL by giving "written declarations" to their employer: one from the employee and one from the mother. The purpose of the declarations is to confirm that the parent seeking to take paternity leave is the father of the child, will have responsibility for bringing up the child and is taking leave in order to care for the child. In her declaration the mother is also required to confirm that she does intend to return to work and the date she will do so.

The employer should write to the employee within 28 days of receipt of the leave notice

confirming the start and end dates of APL.

Employers are entitled to request copies of the child's birth certificate, and the name and address of the mother's employer. It remains to be seen whether employers will actually take this opportunity. Given the likely delay in obtaining information from the mother's employer, it may be that employers will take the information given by their employees on trust.

Rights on return

In most cases, the employee has the right to return to the same job. This right depends on the employee satisfying various conditions. The period of leave must be:

- > an isolated period of leave; or
- > the last of two or more consecutive periods of statutory leave (not including additional maternity leave, adoption leave, or a period of parental leave exceeding four weeks)

Any employees who fall outside these two categories have the right to return to an alternative job which is 'suitable and appropriate', if it is not reasonably practicable for them to return to their own job. A suitable alternative role will ordinarily be one which requires similar skills and experience and which preserves the pay and status the employee enjoyed before they took paternity leave.

Keeping in contact during paternity leave

Given that ordinary paternity leave lasts for a maximum of two weeks, it is unsurprising that there is no specific legal provision for keeping in contact with an employee during OPL. In practice, most employers will make arrangements with the employee in question as to how contactable they will be during their paternity leave.

Employers will already be aware of the existence of KIT ('keeping in touch') days for employees on maternity leave. Similar rules have been put in place for employees on APL. The purpose of these is to ensure that the employee can attend work a few times during paternity leave without bringing their paternity leave and any entitlement to paternity pay to an end. The employer and employee should agree what work will be carried out and what rate of pay the employee will receive. KIT days do not apply to employees on OPL.

Given that employees on paternity leave are protected against being subjected to a detriment because they have taken paternity leave (see below), it is worth making sure that they are kept updated about important developments in the workplace, whether they are on OPL or APL. In particular, it is essential that they be given an opportunity to participate fully in any consultation process which may be taking place (for example, in relation to proposed redundancies, a TUPE transfer or a change to contractual terms and conditions).

Rights during paternity leave

During paternity leave, the contract of employment is still in force and the employee is entitled to benefit from all the terms of the contract except those relating to remuneration (i.e. wages or salary). This is the same rule that applies to women on maternity leave and means that the employee will be entitled to accrue annual leave and enjoy contractual benefits such as health insurance or a company car. Similarly, the employee continues to be bound by their contractual obligations, such as the duty of fidelity.

Pensions

The employer must continue to make pension contributions throughout paid paternity leave. These contributions cannot be reduced to reflect any reduced pay the employee is receiving, but must be at the rate of normal pay. The employee, on the other hand, may make contributions at a pro rata rate reflecting the reduced pay.

During any unpaid period of leave the employer is not obliged to make pension contributions (unless this is required by the employee's contract).

Bonuses

One area which has often proved tricky in relation to maternity leave is bonus payments. It is to be assumed that similar principles will apply to employees on paternity leave. Therefore, if a bonus is considered to be 'remuneration', the employer will not be obliged to pay it to the employee to the extent the bonus relates to any period during paternity leave. However, if it is a contractual benefit, the employer will have to pay it to the employee regardless of the fact

that they are on paternity leave. Broadly speaking, if a bonus is based on personal performance, it will be 'remuneration', whereas if it is a general staff-wide bonus (such as a Christmas bonus) it should be treated as a contractual benefit. This could be particularly complex where the employee starts paternity leave part-way through a bonus year. Given the complexities of the law relating to maternity leave and bonuses, it is also worth seeking specialist advice on this issue in relation to paternity leave.

Detriment, dismissal and redundancy

It is unlawful to dismiss an employee or subject them to a detriment short of dismissal on the grounds that they have taken (or propose to take) paternity leave. An employee who is dismissed for this reason will have a claim for automatically unfair dismissal.

'Detriment' broadly includes any disadvantage suffered by an employee. So, for example, an employee on paternity leave should not be treated less favourably in relation to promotion opportunities or pay increases.

Employees on APL who are at risk of redundancy must be offered suitable alternative employment (including any suitable role with an associated employer) in priority over other employees at risk of redundancy. If the employer does not do so, the employee will have a claim for automatic unfair dismissal. The same right does not apply to employees on OPL.

Statutory paternity pay

Eligibility

Most employees who are eligible to take SPL will be eligible for SPP. The only additional requirement is that the employee's earnings must not be less than the Lower Earnings limit for National Insurance purposes. This mirrors the statutory maternity pay scheme.

How much SPP is paid?

The weekly rate will be either 90% of the employee's normal weekly earnings or the prescribed statutory rate, whichever is lower. The prescribed statutory rate is set by the

Government each tax year and is £139.58 per week from 6 April 2016.

When does SPP start?

OSPP is paid for either the one or two weeks taken as OPL.

ASPP will be paid during APL for the period equivalent to the number of unexpired weeks of statutory maternity pay or allowance the mother has remaining when she returns to work, if any. This is subject to a minimum of two weeks and a maximum of 26 weeks.

When does SPP stop?

SPP stops on the date that the employee returns to work (or when their eligibility ends).

Administering SPL and SPP

Forms for the employee to complete when claiming SPL and SPP can be found on the HM Revenue & Customs website at www.hmrc.gov.uk. Guidance for employers can be found on the Government's Business Link website at www.businesslink.gov.uk.

Shared parental leave

In 2015 the Government implemented a new regime of shared parental leave and pay. The new regime has replaced additional statutory paternity leave and pay. Please see our shared parental leave Inbrief for further details.

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