

Paternity leave and pay



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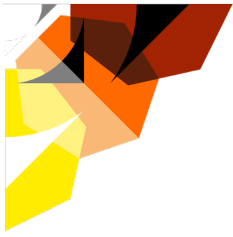
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The law relating to paternity leave and pay is not as developed or as complicated as maternity legislation, but employers still need to be aware of the legal position. In this Inbrief, we summarise the rules and look at some practical issues.

Terminology

Some useful terms are:

SPL (statutory paternity leave): either one whole week or two continuous weeks of leave.

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

SPP (statutory paternity pay): payable to eligible employees during SPL.

The basic right

The statutory entitlement to paternity leave is to one period of leave. The employee can choose between taking that period as either one week or two consecutive weeks of leave. There is no legal right to take SPL in days or in two separate non-consecutive weeks. The amount of time is the same even if more than one child is being born (such as twins).

Employees will be eligible for SPL if they:

- ▶ are the biological father of a child, or if they are the mother's spouse, 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;
- ▶ are taking the leave to care for the child or to support the mother in caring for the child;

- ▶ have not already taken shared parental leave in respect of the same child (see below); and
- ▶ give the employer the required notice and (where requested) the necessary evidence of entitlement.

Employees still qualify for SPL if the baby is stillborn after 24 of pregnancy or born alive at any point in the pregnancy but does not survive.

SPL is only available to eligible employees, not to other types of workers or the self-employed.

The earliest SPL can be taken is the date of the child's birth and it must finish within 56 days of the birth (or, if the baby is born early, within 56 days of the first day of the EWC).

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 also be found [here](#).

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 £156.66 per week from 6 April 2022.



Some employers may offer enhanced contractual paternity leave and pay.

When does SPP start and stop?

SPP is paid for either the one or two weeks taken as SPL. The employee must give notice to their employer by the end of the 15th week before the EWC stating:

- ▶ whether they want to receive one or two weeks of SPP and when they want their SPP to start; and
- ▶ that they are the child's father or mother's partner and will be responsible for the child's upbringing, and that they are taking leave to care for the child or support the mother in caring for the child.

Starting and returning from paternity leave

Starting SPL

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

- ▶ how much SPL they wish to take (either one whole or two continuous weeks);
- ▶ the EWC (or the date of birth if the baby has already been born); and
- ▶ the date they wish SPL to begin.

Employees can change the start date, broadly speaking on 28 days' notice.

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 SPL must be:

- ▶ an isolated period of leave; or
- ▶ the last of two or more consecutive periods of statutory leave which did not include: (i) any period of

parental leave of more than four weeks; or (ii) any period of statutory leave (maternity, adoption, shared parental and parental leave) which when added to any other periods of statutory leave (excluding parental leave) taken in relation to the same child means that the total amount of statutory leave taken in relation to that child totals more than 26 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 same pay and status.

Keeping in contact during paternity leave

As SPL 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 their leave. In practice, most employers will make arrangements with the employee as to how contactable they will be during SPL.

Given that employees on SPL 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 when they are on leave. 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

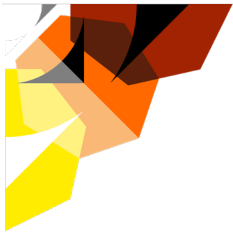
During SPL, the contract of employment is still in force and the employee is entitled to benefit from all the terms of the contract except those relating to remuneration (i.e. wages or salary). This is the same rule that applies to maternity leave and means that the employee will be entitled to accrue annual leave and enjoy contractual benefits such as health insurance or a company car. The continuation of the contract also means that the employee's continuity of service continues to accrue during SPL. 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 SPL. 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 may make contributions at a pro rata rate reflecting the reduced pay.

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 SPL. 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 SPL. 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 SPL. 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. 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 SPL.

Detriment and dismissal

It is unlawful to dismiss an employee or subject them to a detriment on the grounds that they have taken (or propose to take) SPL, or because their employer believed that they were likely to take SPL. An employee who is dismissed for this reason will have a claim for automatically unfair dismissal.

“Detriment” is broad and includes any disadvantage suffered by an employee. So, for example, an employee on SPL should not be treated less favourably in relation to promotion opportunities or pay increases.

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. This includes the birth of a child to a surrogate mother where the employee (and their partner) expect to obtain a parental order.

The rules for SPL and SPP in adoption cases are fairly similar to those in respect of a new birth, although there are some technical differences (particularly in relation to overseas adoptions) 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.

Shared parental leave

Shared parental leave allows parents to share statutory maternity leave and pay between them and can be taken immediately after SPL or at a later date. SPL is not available if the employee has already taken any shared parental leave in respect of the same child. This means that an employee who wishes to take shared parental leave should use their SPL and SPP entitlement first. Please see our Inbrief on shared parental leave for further details.

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