



Maternity Entitlement Guidance Note



The legislation is contained in the Employment Rights Act 1996, and the Maternity and Parental Leave etc Regulations 1999. Case law and the provisions of the Sex Discrimination Act 1975 also influence maternity entitlements.

Time off for antenatal care

Regardless of length of service, all pregnant employees are entitled to reasonable paid time off to attend pregnancy related medical examinations, within working hours. This may also include reasonable time off for parent craft and/or relaxation classes. Time off must be at the normal rate of pay, and where pay varies, it should be calculated as an average of the previous 12 working weeks.

Employers may require employees to produce appointment cards (except for the first visit). Where employers refuse reasonable requests for time off, the employee may bring a claim at an employment tribunal. If the case is found in favour of the employee the tribunal can make an order that the employer pays to the employee the amount they would have received, had the time off been granted.

Leave entitlement

Employees are entitled to 52 weeks' maternity leave following the birth of a child (or a still birth after a pregnancy lasting at least 24 weeks). Employees must take a minimum of 2 weeks' compulsory leave following the birth of their child. In factory occupations the compulsory maternity leave period is 4 weeks.

Where there is pregnancy related sickness absence within the 4 weeks before the expected week of childbirth (the "EWC") maternity leave automatically commences.

Legislation divides maternity leave into two periods of 26 weeks. Ordinary Maternity Leave (OML) is the name given to the first 26 weeks' leave and Additional Maternity Leave (AML) is the second period of 26 weeks.

Statutory Maternity Pay

Statutory Maternity Pay (SMP) period lasts for 39 weeks and starts on any day of the week to align pay with the start of maternity leave. The first 6 weeks' SMP are paid at 90% of wages and then there is a flat rate for the next 33 weeks.

Notification

Employee's Obligation

Maternity leave can commence no sooner than the beginning of the 11th week before the EWC and no later than the actual date of childbirth. To commence maternity leave, the employee must notify the employer (in writing if requested) in or before the 15th week before her EWC (or, if that is not reasonably practicable then as soon as it is reasonably practicable).

She must state that she is pregnant, her EWC and the date she intends to start her maternity leave. The EWC will be specified on a MATB1 medical certificate that can be obtained from her midwife or GP and the employee should provide this to the employer no earlier than 20 weeks before the EWC.

The medical certificate needs to be supplied to the employer in order to qualify for any statutory maternity pay, if eligible. The employee can vary the date on which she intends to start her OML, as long as it is not before 11 weeks before the EWC, provided that she gives the employer notice of the new date 28 days before the date originally notified, or 28 days before the new date on which she intends her OML to start, whichever is the earlier.

If that is not reasonably practicable then as soon as is reasonably practicable.

Employer's Obligation

Within 28 days of receipt of the employee's notification the employer must write to the employee confirming the date on which her maternity leave will end. This will be for a 52 week period and will be the end of AML.

Return to work

A woman returning to work at the end of her entitlement to maternity leave is not required to give her employer notice of her return. It is assumed that the employee will return on the expiry of the period of 52 weeks' maternity leave. However, if she intends to return to work earlier than the end of her leave, she must give the employer no less than 8 weeks' notice of the intended date of return.

If an employee attempts to return to work earlier than the end of maternity leave without providing 8 weeks' notice, the employer may postpone her return until the 8 weeks' notice is given, but the employer cannot postpone the employee's return to a date which falls after the expiry of the maternity leave.

An employee who has been continuously employed for a year may qualify for unpaid parental leave for up to 4 weeks following the birth, subject to notice requirements.

If the employee does not wish to return to work at all they must give their employer contractual notice, or statutory notice, whichever is greater.

On the expiry of maternity leave, if the employee is unable to return to work due to sickness absence, contractual sickness arrangements apply.

Employees have the right to return to the same job following OML. Following AML the law states that the entitlement is to return to the job in which they were employed before the absence, or if it is not reasonably practicable, to another job which is both suitable and appropriate in the circumstances. Employees also have the right to return to their job on no less favourable terms and conditions. In the event that the employee commences another period of OML immediately following a period of AML her right to return to work will be the same as at the end of AML. These rights also apply to employees who have an EWC on or after 05 October 2008.

Where an employee finds that their employer has not complied with the above, they can bring a claim to an employment tribunal. There is no minimum service requirement for such complaints. If the tribunal finds that the employee has been unfairly dismissed or selected for redundancy, it can order reinstatement in the same job, re-engagement in a similar job, or if these options are not practical it can order the employer to make an award of compensation.

Contractual Benefits during OML and AML

Terms and conditions for employees with an EWC up to and including 04 October 2008

With any contractual benefits employers need to be aware that employees should not be treated less favourably on the grounds of pregnancy or maternity. For employees with an expected week of childbirth up to and including 04 October 2008, the law states that during OML all terms and conditions continue to apply apart from remuneration.

Although service continues throughout AML, the terms that continue are restricted to the following:

- implied terms of trust, confidence and good faith
- notice of termination
- contractual redundancy compensation
- discipline and grievance
- disclosure of confidential information
- acceptance of gifts or other benefits
- participation in any other business

Holiday entitlement

The statutory minimum holiday entitlement set out in the Working Time Regulations 1998 accrues throughout both OML and AML. A pregnant employee may request and take holiday prior to maternity leave commencing and take any remaining days at the end of the maternity leave. Contractual holiday entitlement above the statutory minimum holiday entitlement continues for OML but not automatically for AML. It is for the employer to decide the entitlement.

Company cars

Employees who have the private use of a company car are entitled to retain the car for the period of OML, but there is no automatic entitlement to this for AML. It is for the employer to decide the entitlement.

Terms and conditions for employees with an EWC on or after 05 October 2008

Employees with an expected week of childbirth on or after 05 October 2008 are entitled to the same terms and conditions of employment during OML and AML (in other words the full 52 weeks' leave) as if they had not been absent, with the exception of remuneration. This means that those contractual benefits enjoyed during OML have to be extended for the AML period. Employees accrue full contractual holiday entitlement throughout the whole of their maternity leave and also keep their company cars for the 52 weeks.

Examples of contractual benefits to be provided during OML and AML:

- life assurance and private health insurance
- annual leave
- private use of a company car
- childcare vouchers
- gym membership

Information about benefits for all employees (whether the EWC is before or after 05 October 2008)

Pension scheme

Employer's pension contributions should continue during any period of paid maternity leave when the employee is in receipt of SMP, contractual maternity pay or both. The employer's contributions are calculated as if the employee were receiving normal remuneration. Any employee's contribution is based on what she actually receives during the maternity leave period (i.e. SMP, contractual maternity pay or both).

Bonuses

Bonuses awarded for performance should take into account the time spent at work during the bonus year. A bonus must be paid in full to an employee during the compulsory two week period of maternity leave which has to be taken immediately following the birth. This is extended to four weeks if the employee works in a factory.

If a bonus is considered to be remuneration (i.e. a payment of money by way of wages or salary), it need not be paid during OML or AML apart from the compulsory leave period mentioned above. Factors which may go towards identifying a bonus as remuneration are whether it is contractual or part of a structured discretionary scheme, considered part of the salary, pensionable or a reward for performance. Most bonus schemes will fall into the category of remuneration.

Where there is a bonus which is a one-off payment such as a bonus paid for being in the Company's employment on its twenty-fifth anniversary, this may be considered a benefit and not remuneration and should therefore be paid in full. As there are many different types of bonus schemes, employers should take further advice on the payment of bonuses during maternity leave.

Car allowances

There is an argument that a car allowance could be considered to be part of remuneration and therefore need not be paid during OML or AML. There is no case law on this point but a car allowance is taken into account for the calculation of SMP purposes (90% of earnings for the first six weeks) which may reinforce the argument that it is remuneration.

Holidays in general

Employers should make arrangements with employees so that they can take their annual leave before or after the maternity/adoption leave. Employers should make sure that any bank holidays which form part of the statutory minimum holiday entitlement should be taken as paid leave outside the maternity/adoption leave period.

Health and safety

Under the Management of Health & Safety at Work Regulations 1999 employers are required to carry out a risk assessment on any job carried out by a pregnant employee, and take all possible measures to minimise or remove hazards. Where there is a risk that is considered to be harmful and there are no suitable alternative positions the employer is obliged to suspend the employee on full pay until the risk no longer applies, i.e. for the whole pregnancy if necessary.

Protection against unfair treatment or dismissal

Regardless of length of service, employees must not be subject to detrimental treatment on the basis that they are pregnant, have given birth, have taken or intend to take maternity leave and benefits or if they are suspended on health & safety grounds. This is in addition to having protection against dismissal or selection for redundancy on pregnancy related grounds.

New or expectant mothers are also offered protection by the Sex Discrimination Act 1975. It is direct discrimination to refuse employment to a person on the grounds of pregnancy, or to dismiss them on the grounds of pregnancy or childbirth.

In addition, it may amount to indirect discrimination to refuse requests for part-time working without having given serious consideration to the request and having substantial and objective business reasons. Employees should make any part-time requests in good time in order that employers can properly consider and respond to the request. There is also a statutory right and procedure to request flexible working. (See the Flexible Working Datasheet). If the employer rejects an application for part-time working without good reason, and the matter has not been resolved, the employee may make an Employment Tribunal claim.

Keeping In Touch Days

Women, who have an EWC on or after 01 April 2007, have the opportunity of Keeping in Touch days. This is a new concept and gives a woman, who is on maternity leave, the possibility of working for her employer without bringing the leave to an end. Work can be any work, which is under her contract of employment and may include any training or activity undertaken with the purpose of keeping in touch with the workplace.

Some employers may not consider keeping in touch with women on maternity leave, perhaps because they are concerned not to be seen to be too intrusive. It is however, not good practice and can backfire for an employer. If an employee is not brought up to speed by the employer on workplace matters, such as re-organisations or details about job vacancies (which could mean potential promotion), whilst she is on maternity leave, she could allege sex discrimination because of less favourable treatment.

There is no obligation on an employer to compel an employee to work during the keeping in touch days or any requirement for an employee to work at all during a keeping in touch day, but as mentioned above, you should still keep an employee on maternity leave informed up-to-date on workplace matters.

The Regulations specifically state that reasonable contact from time to time between an employee and her employer which either party is entitled to make during the maternity leave period (for example to discuss an employee's return to work) shall not bring the maternity leave period to an end.

An employee is protected from detrimental treatment and unfair dismissal if she undertook, considered undertaking or refused to undertake the keeping in touch days.

What to pay employees during Keeping in Touch days?

Statutory Maternity Pay continues during Keeping in Touch days. Employers and employees should agree in advance what the employee should be paid during a keeping in touch day. If the employee will carry out her normal work or training, presumably the employee would not agree to work for anything less than her normal wage! In this situation the employer and employee can agree to pay her the normal wage, but SMP can be used as an offset.

This datasheet is an outline of the position at the time of writing. No part of this datasheet should be copied or transmitted to any third party or non-association member. Advice on any specific problem is always available from the BAseline advisors on 0844 5618133.