



MATERNITY LEAVE AND EMPLOYMENT CONSIDERATIONS

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Introduction

An employer should be aware of their legal obligations in connection with maternity leave, as well as other considerations in respect of their management of the employee.

During Pregnancy

An employee who is expecting should give their employer at least 15 weeks' notice before the baby is due. In addition, they should provide the employer with a MAT B1 form to confirm their pregnancy, which is usually available after the 20 week scan. During the pregnancy, the employee is entitled to reasonable time off to attend antenatal appointments, including scans, pregnancy related checks, relaxation classes, parental classes etc, assuming they are advised by a doctor, nurse or midwife. This is a right available from day 1 of employment and is irrespective of whether the employee is full time or part time.

An employer must carry out an individual health and safety risk assessment for all pregnant employees and make any necessary adjustments if a risk is assessed. If an adjustment cannot be made, the employee must be suspended on full pay until the risk is removed or maternity leave starts. In this scenario, an employer can deem that maternity leave commences 4 weeks before the due date, or if there is less than 4 weeks until the due date, maternity leave will start automatically.

If a pregnant employee is off work due to a pregnancy related sickness at any time after the 4th week before the due date, maternity leave is deemed to have already started.

Statutory Maternity Leave ("SML")

Eligible employees, as set out below, are able to take up to 52 weeks' maternity leave. The first 26 weeks is known as Ordinary Maternity Leave ("OML") and the remaining 26 weeks as Additional Maternity Leave ("AML"). Leave can be taken any time from the 11th week before the expected week of childbirth, unless the baby is born before this date. Employees must take at least two weeks (four weeks if a factory worker) after birth before returning to work – this is for health and safety reasons and an employer will be guilty of a criminal offence, if this is breached.

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To be eligible for SML, an employee must;

- have an employment contract – it does not matter how long they have worked for the employer
- give the correct notice. An employee must tell their employer at least 15 weeks before the baby is expected both the due date and when they want to start their maternity leave – (this start date can be changed with 28 days' notice).

Statutory Maternity Pay (“SMP”)

SMP for eligible employees can be paid for up to 39 weeks, usually as follows;

- The first 6 weeks at 90% of the Average Weekly Earnings (AWE)
- The remaining 33 weeks at £172.48 or 90% of the AWE if lower

To be eligible for SMP, which is not the same criteria as eligibility for SML, an employee must:

- Be on the payroll in their qualifying week, which is the 15th week before the expected week of childbirth
- Give the correct notice, which must be at least 28 days' notice before the employee wishes to start their SMP
- Provide proof of pregnancy, generally by way of the MAT B1 certificate
- Have been continuously employed by the employer for at least 26 weeks up to any day in the qualifying week
- Earn at least £123 a week gross, on average, for 8 weeks prior to the qualifying week.

There is no requirement for an employee to intend to return to work to be entitled to SMP.

AWE are calculated as an average of the employee's earnings for the 8 week period, up to and including, the last pay date before the end of the qualifying week.

SMP will usually start when the employee takes their maternity leave and, in line with SML, will automatically start if an employee is off work for a pregnancy related illness in the 4 weeks before the due date of the baby.

Most employers can recover 92% of their SMP from HMRC, by way of a reduction to the monthly PAYE/NIC payment to HMRC. Similarly, most small employers, whose Class 1 National Insurance contributions were less than £45,000 in the previous tax year, can recover 103% of SMP.

SML - Keeping In Touch (“KIT”) and contact days

Employees are permitted to work for up to 10 days during their maternity leave and these are called KIT days. They are optional and both the employer and employee need to agree to them. Prior to such days being undertaken, it should be agreed between the two parties what work is to be undertaken and the basis for the pay. The number of hours worked on a given day will always count as one of the 10 days permitted, even if it is only for a few hours.

In addition to KIT days, employers are allowed to make reasonable contact with the employee to discuss their return to work, developments at work, promotion opportunities etc and this is not counted towards the 10 days.

Holiday

An employee on maternity leave is entitled to the same amount of holiday as if they were working, which includes an entitlement to bank holidays. The amount of holiday accruing is the contractual entitlement and is not limited to the statutory minimum of 28 days, although care needs to be taken regarding the additional leave, as this must be taken in line with the employee's contract. It is recommended that the employee and employer agree how any additional leave is taken to ensure that it is not lost, as the employee's contract may state that such leave cannot be permitted to be carried forward into another holiday year. An employee is always entitled to carry over the statutory entitlement to the following holiday year when they return to work.

Benefits

An employee on maternity leave is entitled to receive the same benefits as if they were working. This includes items such as medical insurance, company cars, club membership etc. Items such as a mobile phone and/or company car can be kept during maternity leave provided they were provided for personal use (and hence were a benefit in the first place). As has been noted in a previous Briefing on Salary Sacrifice and Child Care Vouchers, the provision of these during maternity leave, is statutorily less clear, but given the very low number of situations where this will be a consideration, it is considered prudent to continue to provide such vouchers throughout maternity leave.

Pension Contributions

During the first 26 weeks of maternity leave, an employer must continue to pay full pension contributions as if the employee was working normally. The employer's contributions are based on the employees' normal pay; if the employee makes contributions (and this is not through a salary sacrifice scheme where such contributions are then automatically employer contributions), the employee will pay at the rate of their normal employee percentage, but based on their SMP or enhanced maternity pay, rather than their normal pay.

Employer pension contributions also continue to be made when an employee is being paid maternity pay during any additional maternity leave ("AML") period. Where an employee is on AML which is not being paid, there is no obligation for the employer to pay pension contributions. [As previously published](#) in the context of Salary Sacrifice and Pensions, there is a view that under European employment law, this may not be compliant, and whilst the UK left Europe some time ago, we are still governed by the majority of their laws.

Bonuses

The payment of bonuses is a particularly difficult area and whether or not a bonus has to be paid during maternity leave is largely dependent upon whether it is considered to be part of a remuneration package or not. If it is, the employer will not be obliged to pay it; however, if it is contractual (and therefore deemed a benefit as opposed to remuneration) the employer must pay it to the employee. For example, a bonus based on personal performance is remuneration and hence not payable for the period the employee is on maternity leave, whereas an employer wide bonus, such as a Christmas bonus, would be contractual and therefore payable. Any bonus accruing when the employee was still working will need to be paid and the time the employee is deemed to be working should include the first two weeks of compulsory maternity leave. In addition, employers should always check the employment contract to ensure that the wording does not imply a different treatment, more favourable to the employee, which should be adopted.

Pay Reviews

An employee has a right to a pay review as if they were still working. If a pay review is performance related, the employer must rate the employee's performance based on when the employee was working.

Return to Work

It is assumed, unless the employee tells the employer otherwise, that the employee will take 52 weeks' leave and there is no need for the employee to do anything if this is the case. If the employee wishes to return earlier than 52 weeks, then a minimum of 8 weeks' notice must be given, although the employer could agree to less notice. Similarly, if the employee previously indicated a return date and wants to make this later, they must give at least eight weeks' notice before the original return date.

Should the employee decide not to return, they must give notice in accordance with the employment contract, but this does not change the eligibility for SMP.

When an employee does return, if this is after 26 weeks of Maternity Leave, the employee has a right to return to the

same job, terms and conditions as if they had not been away. For an employee who has taken more leave, they are entitled to return to the same job, or if this is not practical for the employer to offer this, for example due to a business reorganisation, the employer must offer the employee an alternative job, which is both suitable and the terms and conditions must be no less favourable than the previous job.

Redundancy – protected rights

Employees on maternity leave, and for a six month period after returning from such leave, have the right to be offered any suitable alternative job, ahead of other members of staff, in a redundancy situation. The only exceptions to this is when the business is closing or the employment is ceasing in the area in which the employee works.

The Protection from Redundancy (Pregnancy and Family Leave) Act 2023 came into force on 24 July 2023 which extends the priority status to pregnant employees and those who have recently returned from maternity leave. However, further regulations are required regarding the details of the new protection and these are not expected to come into force before April 2024. There has been very limited information released to date indicating what the changes are likely to entail.

Other types of Maternity Related Leave

In addition to maternity leave, there are various other types of leave, such as paternity leave, adoption leave, parental leave, parental bereavement leave and shared parental leave. These will be the subject of another briefing, as the rules regarding these other types of leave can be complex, especially in respect of shared parental leave, which when taken, will interact with maternity leave.

Conclusions

Whilst employees taking maternity leave is a fairly common occurrence, the rules surrounding maternity leave, and the various other associated types of leave, are complex. It is important that employers have written policies covering this type of leave and that they are followed to ensure the equitable treatment of employees.

This guidance outlines the procedures and processes that need to be followed – care needs to be taken, as anyone on maternity leave has special protected rights, and as always it is important to discuss with the employee their thoughts on when they want to start their leave, their concerns, the taking (or not) of annual leave and their return to work, together with any flexible working requests. There are numerous other rules with the above highlighting the main factors arising for both employees and employers.

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