

Maternity Pay and Benefits

This advice note summarises the law in England and Wales regarding pay and benefits during maternity leave, including statutory maternity pay (SMP), contractual maternity pay, pay rises, bonuses, pensions and other contractual benefits.

Introduction

A pregnant employee has statutory rights in relation to pregnancy and maternity leave. The employee is entitled to 52 weeks' statutory maternity leave, regardless of length of service; 39 weeks SMP (for those who qualify – see below), is entitled to work for up to ten 'keeping-in-touch' (KIT) days during maternity leave without bringing that leave, or any entitlement during that leave, to an end and is entitled to return to work early from maternity by giving eight weeks' notice.

However, the entitlements to pay and benefits when on maternity leave are more complicated and are addressed below.

Benefits for pregnant employees

For maternity leave purposes, a pregnant employee is not required to inform her employer of her pregnancy until the 15th week before the Estimated Week of Childbirth (EWC). However, she will not be able to benefit from rights such as the entitlement to paid time off for antenatal care, risk assessments and the statutory protection on account of her pregnancy from discrimination or dismissal until her employer is made aware that she is pregnant.

Pregnancy in the workplace

The law requires employers:

- To assess the workplace risks posed to new or expectant mothers or their babies;
- To alter the employee's working conditions or hours of work to avoid any significant risk;
- Where it is not reasonable to alter working conditions or hours, or would not avoid the risk, to offer suitable alternative work on terms that are not substantially less favourable;
- Where suitable alternative work is not available or the employee reasonably refuses it, to suspend the employee on full pay;
- To allow pregnant employees reasonable paid time off during working hours for the purpose of receiving antenatal care, regardless of hours worked or length of service;
- To pay an employee her normal hourly rate of pay during the period of time off for antenatal care.

Types of maternity leave

Compulsory Maternity Leave (CML)

All employees must take a minimum of two weeks' maternity leave starting with the day on which childbirth occurs. This is extended to four weeks for factory workers.

An employer will be guilty of a criminal offence if it allows an employee to work during CML.

Ordinary Maternity Leave (OML)

OML is a period of 26 weeks' leave available to all employees who give birth and comply with the notification conditions (see below) and is available to all employees, regardless of their length and service.

Notice requirement

To qualify for OML, no later than the end of the 15th week before the EWC or, if that is not reasonably practicable, as soon as is reasonably practicable, an employee must notify her employer of:

- The fact she is pregnant;
- The EWC; and
- The date when she intends her OML to start, which must be a date no earlier than the beginning of the 11th week before the EWC.

Additional Maternity Leave (AML)

AML follows immediately after the end of OML and lasts for up to a further 26 weeks.

CML, OML and AML combined give an employee a total entitlement of 52 weeks' statutory maternity leave.

Benefits during OML and AML

During OML and AML, an employee has a statutory right to "the benefit of the terms and conditions of employment which would have applied if she had not been absent," except for the terms and conditions about 'remuneration' (sums payable by way of wages and salary).

Which benefits are remuneration?

- Cars: providing the employee is permitted to use the car for personal use, then it will be classed as a benefit and not remuneration. This applies to mobile phones, laptops or any other similar benefit;
- Cash allowances: if the employee receives a cash allowance in place of a benefit, for example, a car allowance, then whether this is remuneration will depend on the circumstances;
- Childcare vouchers: it is not certain as to whether these are considered to be remuneration. The fact that vouchers are not sums payable to the employee but a future promise to pay a third party for services to the employee, strongly suggests that they should be maintained throughout maternity leave. The HMRC's 'Guidance on statutory maternity leave – salary sacrifice and non-cash benefits' provides that childcare vouchers are non-cash benefits rather than remuneration;
- Holiday accrual: is a non-cash benefit and not remuneration and will continue to accrue during OML.

Statutory Maternity Pay (SMP)

In order to be entitled to SMP a woman must:

- Be an employee. For SMP purposes, this includes office holders whose earnings are taxed the same way as directors, Crown Servants and 'employed earners' for national insurance purposes, such as agency workers other than models and home workers;
- Have been continuously employed for at least 26 weeks at the end of the "Qualifying Week", which is the 15th week before the EWC. The 26-week period must include at least one day's employment in the Qualifying Week;
- Have normal weekly earnings, which are not less than the Lower Earnings Limit for National Insurance purposes;
- Be pregnant 11 weeks before the start of the EWC or have already given birth;
- Give the employer at least 28 days' notice (or, if that is not reasonably practicable, as much notice as is reasonably practicable) of the date she intends SMP to start;

- Supply a certificate (normally a MAT BI) from a midwife or doctor, confirming the date of her EWC. This must be given to the employer either before the birth, no more than three weeks after the birth or, if she has good cause for delay, as soon as reasonably practicable;
- Have ceased work, taken maternity leave, resigned, or have been dismissed for any reason, provided the dismissal or resignation was after the qualifying week, with the exception of extremely premature birth or if the employer dismisses the employee to avoid SMP liability.

Non-eligible individuals may qualify for Maternity Allowance, which is a social security benefit, paid by the job centre.

Start of SMP

The first week of the SMP period will be the eleventh week before the EWC.

However, the employee can change this by identifying, in her notice to the employer, a different date on which she wants the SMP period to start and then ceasing work in accordance with that notice.

The start date of SMP may also change due to premature birth, absence wholly or partly due to pregnancy or child birth on any day on or after the beginning of the fourth week before EWC, or where the employee leaves employment before the date identified in her notice period.

Payment of SMP

Entitlement and the rate payable will depend on the employee's 'normal weekly earnings'. For those employees who are paid monthly, this will be calculated based on the last two pay slips before the end of the Qualifying Week. For weekly paid earners this will be calculated based on the last eight pay slips before the end of the Qualifying Week. This is known as the 'reference period'.

'Earnings' include any remuneration or profit derived from employment, for example, any bonus, commission or overtime payment.

SMP is payable at two different rates:

- First six weeks: the 'earnings-related rate' (90% of the employee's normal weekly earnings);
- Remaining 33 weeks: the 'prescribed rate' or the earnings-related rate, whichever is lower. (Prior to 1 April 2012 the 'prescribed rate' was £128.73 a week, post-April 2012 it rose to £135.45 a week).

Where an employee receives a pay rise after the start of the reference period but before the end of statutory maternity leave, maternity pay will be recalculated to take into account the pay increase as if the pay rise had taken effect from the start of the reference period.

When SMP stops

SMP will stop being payable if:

- The employee returns permanently to work before the end of the SMP period. (except for the permitted 10 keeping-in-touch (KIT) days (see below));
- The employee dies;
- The employee starts a new job with a different employer after the child is born; or
- The employee is detained in custody or sent to prison.

If an employee is dismissed or resigns during her maternity leave, the leave will come to an end. However, if she is still entitled to SMP, she will continue to receive it for the remainder of the SMP period.

If the employee returns to work early but falls sick before the end of the SMP period, SMP is payable again, rather than statutory sick pay. The same applies if she resigns or is dismissed after returning to work but before the end of the SMP period.

Contractual maternity pay

Where an employer provides a contractual right to maternity pay that exceeds the SMP entitlement, the weekly contractual sum payable can be counted towards the SMP liability for that week.

Working during SMP period

Generally, any work done for the employer during the SMP period will extinguish the employee's entitlement to SMP for the week in which the work is done.

Keeping-in-Touch (KIT) days

A woman may work during maternity leave for up to ten days (referred to as keeping in- touch or KIT days) without bringing her OML or AML entitlement to an end. SMP liability in any week is automatically offset by any contractual remuneration. A day's pay for KIT would be offset against the whole SMP for that week. Therefore, it would be to the financial detriment of an employee to work a KIT day unless favourable payment terms can be agreed. An employee cannot be dismissed for refusing to work a KIT day.

Reasonable contact

An employer may make "reasonable contact" from time to time during an employee's maternity leave. This contact may be used, for example, to enable the employer and employee to discuss arrangements for the employee's return to work or to keep the employee informed of important developments at work.

Bonuses during maternity leave

A bonus must be paid where it would ordinarily have been paid but for the employee having taken maternity leave where it relates to any time:

- Before maternity leave;
- When an employee is absent on compulsory maternity leave;
- After she returns to work following statutory maternity leave.

Performance-related bonuses and other regular bonuses such as a Christmas bonus can often be seen as deferred payment for past work and therefore would be payable.

Depending on the circumstances, a claim may be brought under the Equality Act 2010 as a sex-discrimination case, for failure to pay a bonus.

Pensions

During OML and AML

An employer is obliged to maintain a woman's pension benefits as if she were at work, provided she is receiving maternity pay during OML and AML. If the employee is required to make a minimum contribution under the scheme or the employer is required to match a contribution, then the employee will have to continue to make these contributions out of her maternity pay. If the employee is eligible for a pay rise during maternity leave, this must also be taken into consideration in the employer's contributions.

Final salary sacrifice schemes should be maintained as if the employee was not absent.

If an employee is not receiving maternity pay during OML or AML, then the position is uncertain as there is a debate about whether a pension is considered to be remuneration.

Rights on returning to work

If the employee takes only OML or returns before the end of OML, she will be entitled to return to the same job in which she was employed before her absence and:

- Her terms of employment must be the same as or not less favourable than they would have been had she not been absent, unless a redundancy situation has arisen.
- She will be entitled to benefit from any improvements as if she had not been away, such as a pay rise or any other changes to her terms and conditions for her grade or level.

After AML, an employee is generally entitled to return to work to the same job, on the same terms and conditions, as if she had not been absent. However, where the employee has taken any period of AML or a period of at least four weeks' parental leave on top of her OML, and there is some reason (other than redundancy) why it is not reasonably practicable for the employer to permit her to return to the same job (for example, if there has been a reorganisation), the employer has more flexibility:

- The employee is entitled to return to a different job, which is both suitable for her and appropriate in the circumstances;
- The terms and conditions must not be less favourable than they would have been had she not been absent;
- The only circumstances in which the employee is not entitled to a suitable alternative job is where there is a redundancy situation making it not reasonably practicable to give the employee her old job back and there is no suitable alternative vacancy to offer the employee. In those circumstances, the employer can include her in the redundancy pool, subject to the usual principles of fair and non-discriminatory selection.

If you would like further advice on this topic or more specific information please contact Nick Jones on 0117 904 5912 or njones@lyonsdavidson.co.uk.

The purpose of this general advice note is to provide a general summary of information around a specific topic. It should not however be taken as legal advice and should not be relied on as such. We recommend that you always obtain specific legal advice in respect of a particular issue or matter. Please contact our employment team if you have a question about anything related to the subject matter of this note.

T: 0117 904 6000
E: enquiries@lyonsdavidson.co.uk
W: www.lyonsdavidson.co.uk

