

Parental Leave

This advice note summarises the law in England and Wales regarding parental leave, an employee's right to parental leave, his rights during and following parental leave, the procedural requirements for requesting parental leave and when an employer can refuse or postpone the leave.

Introduction

Parental leave is a form of statutory unpaid leave available to some working parents.

The entitlement is provided in addition to statutory maternity, paternity and adoption leave. It can last up to 13 weeks (or 18 weeks where the leave is to care for a child entitled to disability living allowance) and can be flexible in terms of the time at which it is taken and the way in which the total leave entitlement may be split up into a number of shorter periods.

Eligibility

In order to be eligible to take parental leave, a person must:

- Be an employee (excluding members of the police service or armed forces or crew members engaged in share fishing);
- Have been continuously employed for a period of not less than one year; and
- Have, or expect to have, responsibility for a child. In practice, this normally includes:
 - Both birth parents (whether or not they are living with the child);
 - Adoptive parents;
 - Parents under a surrogacy arrangement, who have secured, or expect to secure, legal parental responsibility; or
 - Others who have legal parental responsibility for a child, such as a guardian.

Length of leave entitlement

An eligible person is entitled to take 13 weeks' parental leave for each child or 18 weeks' parental leave for each disabled child. (In March 2013 the period of leave will increase from 13 to 18 weeks for those requesting leave to care for nondisabled children).

A 'week' is the period that the employee is normally required to work, so, if an employee works three days a week, then one week's leave would amount to just three days. If an employee has an irregular work pattern, then the total period for which the employee is normally required to work in a year is divided by 52 weeks to give an average working week.

The leave cannot be transferred from one eligible person to another and remains at a maximum of 13 (or 18) weeks per child no matter how many times their employment changes. So an employee who has already taken six weeks' parental leave and then goes to work for a new employer would only have seven weeks' leave remaining to take with that employer.

Minimum and maximum length of leave

Employees are not entitled to take parental leave for less than one week or in anything other than multiples of a week and the maximum period of leave cannot exceed four weeks a year for any individual child. These provisions do not apply to parents of a child entitled to Disability Living Allowance.

A year is:

- A period of 12 months, beginning on the date of birth or placement of an adopted child; or
- Where an employee leaves one employer for another, the year starts once the employee has built up 12 months' continuous service.

The period in which leave can be taken

The period in which leave can be taken depends on the particular circumstances:

- If the child was born on or after 15 December 1999, the leave may be taken up until the child's fifth birthday;
- If the child was adopted on or after 15 December 1999, the leave may be taken up until the fifth anniversary of the date of placement or the child's 18th birthday if sooner;
- If the child is entitled to Disability Living Allowance, the leave may be taken up until the child's 18th birthday.

Statutory parental leave: procedural requirements

The employee may only take parental leave under the default scheme if three conditions have been fulfilled:

Production of Evidence

The employee has complied with a request by the employer to produce evidence as may reasonably be required of:

- The employee's responsibility (or expected responsibility) for the child in question;
- The child's date of birth or the date on which the adoption placement began; and
- The child's entitlement to a disability living allowance where applicable.

Notice

The employee has given at least 21 days notice to their employer that they wish to take parental leave including the dates on which the period of leave is to begin and end.

- If the father of a child wishes to take parental leave immediately upon the birth of a child, the 21-day notice period is calculated from the beginning of the expected week of childbirth (EWC). The notice must specify the EWC and the duration of the period of leave required. Provided that notice is given in accordance with these conditions, the parental leave can start immediately upon the birth of the child, regardless of when that actually occurs;
- In the case of adoption the employee must notify the employer of the expected week of placement (EWP) of a child within the 21-day notice period or as soon as is reasonably practicable. The notice must specify the EWP and the duration of the period required.

The employer has not postponed the period of leave

An employer is not entitled to postpone parental leave, where an employee wishes to take parental leave immediately upon the birth of a child or on the placement of a child for adoption. In all other circumstances, an employer is entitled to postpone an employee's leave where it considers that the operation of its business would otherwise be unduly disrupted. Justifiable reasons include: work of a seasonal nature, peak periods or where a key employee is working on a critical project.

Postponement can be for up to six months from the beginning of the period when the employee originally wanted to take the parental leave, except where this would result in the leave being carried over after a disabled child's 18th birthday. In no circumstances can parental leave be taken for someone over the age of 18.

Any postponed leave must be the same length as the employee's original request. The employer cannot reduce the length of the employee's leave or split up a period of leave into two or more shorter periods and the employer cannot postpone a period of leave that has already been postponed once. Before postponing leave, the employer must:

- Consult with the employee over the date to which leave should be postponed;
- Give notice of the postponement to the employee in writing (no later than seven days after the employee gave notice to take parental leave) stating the reason for the postponement and the new beginning and end dates of the period of leave that the employer will permit the employee to take.

Terms and conditions during leave

Certain terms and conditions of the employment contract will continue to apply during parental leave. Since the employment contract still subsists (albeit in a limited form) during parental leave, employees will continue to benefit from statutory rights and limited contractual rights during the period of absence, such as:

- Accrual of statutory holiday entitlement (the accrual of contractual holiday may vary depending on the contract);
- Accrual of the employee's continuity of service;
- The employer's implied obligation of trust and confidence;
- Any contractual terms and conditions relating to notice periods, compensation for redundancy and disciplinary and grievance procedures;
- To be paid their normal salary during their statutory notice period (unless the contractual notice period exceeds the statutory notice period by at least one week).

At the same time, the employee remains bound by:

- The implied obligation of good faith (or fidelity) towards the employer;
- Any contractual terms and conditions relating to notice periods, disclosure of confidential information, acceptance of gifts or benefits and their freedom to participate in another business, for example, by working for a third party.

Remuneration and benefits

The terms and conditions related to pay or other benefits within an employee's employment contract are suspended whilst an employee exercises his or her right to parental leave. This means that pay, contractual holiday entitlement (in excess of the statutory holiday entitlement), bonuses and pensions may be affected and will be dependant on the terms of the contract.

Wages

Statutory parental leave is unpaid. However an employer is free to make a discretionary payment or to provide for payment in the employee's contract.

Lower-paid employees may be able to take advantage of tax credits or other social security benefits available during periods of unpaid parental leave.

Bonuses

Whether the bonus is payable is dependant on the nature and form of the bonus payment and the wording of the contract. If the bonus is a performance-related bonus it might be reasonable to reduce the payment, pro rata, to take into consideration any parental leave.

Pensions

Seniority and pension rights under a defined benefit pension scheme should be unaffected. However, an employer will not have to keep up any contributions to a money purchase pension scheme provided the leave is unpaid. Where the leave is paid by virtue of a contractual scheme, contributions must be made based on the amount of pay the employee is receiving. This also applies to any compulsory employee contributions.

Returning to work

An employee's rights on return to work vary depending on the circumstances of the parental leave taken.

Employees are entitled to return to the job in which they were employed following:

- Parental leave for an isolated period of four weeks or less;
- Parental leave for a period of four weeks or less, which was the last of two or more consecutive periods of statutory leave, which did not include any period of additional maternity leave or additional adoption leave. This would include a return following ordinary paternity leave of two weeks followed by four weeks parental leave.

A 'job' is defined as "the nature of the work which [the employee] is employed to do in accordance with her contract and the capacity and place in which she is employed". Therefore, an employee does not have the right to return to carrying out exactly the same tasks, as they did before the leave if the contract permits a change in tasks. This is the same for hours, working methods etc.

In cases that do not fall within either of the above categories, employees will still have the right to return to the same job in which they were employed prior to the parental leave, unless that is not reasonably practicable for the employer. In such a case, the employee will have the right to return to another job, which is both suitable and appropriate for the employee to do in the circumstances.

Terms and conditions on return to work

On the return to work (whether to the same or to an alternative job), an employee is entitled to:

- Return on terms and conditions not less favourable than those which would have applied if they had not been absent. There is no restriction on the employee returning to work on more favourable terms;
- The same seniority, pension rights and similar service-based rights as if the employee not been absent on parental leave.
- The period of leave is not discounted when calculating continuity of service for the purposes of statutory rights such as unfair dismissal and redundancy pay.

Schemes for non-statutory parental leave

An employer is able to depart from the statutory parental leave by agreeing enhanced parental leave rights with the employee. If no agreement is reached then the statutory provisions above apply.

If an employer wishes to offer more favourable terms then it can do so in the employment contract. Then, an employee is able to choose between the contractual terms or the statutory rights.

However, the terms cannot be less favourable than the statutory provisions. If an employer wishes to implement a scheme that is in any way less favourable to employees, it must do so by way of workforce agreement and, even then, the parties cannot agree to exclude the entitlement to parental leave altogether.

Two conditions must be fulfilled to disapply the default scheme:

- The employee's contract of employment must contain a provision for an entitlement to absence from work for childcare purposes; and
- That provision must incorporate (or operate by reference to) a workforce or collective agreement, or a part of it.

Claims for detriment or dismissal

An employee must not be subjected to any detriment or dismissal for taking or seeking to take parental leave, or declining to sign a workforce agreement relating to parental leave, or performing or proposing to perform any functions or activities as a representative or candidate of the workforce.

Unless an employee makes it clear that they are relying on the right to take parental leave any, detriment or dismissal cannot be regarded as having been suffered as a result of taking, or seeking to take, the leave.

A complaint under these categories must be made to the Employment Tribunal within three months of the detriment suffered by the employee or within three months of the dismissal, unless the Employment Tribunal is satisfied that it was not reasonably practicable for the employee to have submitted their claim in that time.

The employment tribunal can make a declaration that the employee has suffered such detriment and award compensation to the employee or, if dismissed, it may order re-engagement or pay compensation.

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.

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