

Employment law

Maternity rights

This guide summarises statutory maternity rights and the impact of case law on maternity rights.

Statutory maternity rights comprise:

- maternity leave
- maternity pay
- time off for ante-natal care
- protection against dismissal and detriment during pregnancy and maternity leave

Maternity leave

Qualification

There are three types of maternity leave:

- **Ordinary Maternity Leave (OML)** which lasts for 26 weeks and applies to all women regardless of their length of service.
- **Additional Maternity Leave (AML)** which gives the woman the right to an additional 26 weeks' leave starting from the end of OML. Since April 2007 this is also regardless of length of service.
- **Compulsory Maternity Leave (CML)** which is a period of two weeks from the date of childbirth (or four weeks if the woman works in a factory), during which the employee is prohibited from working due to the fact that she has recently given birth. The employer **must not ask or allow the employee to work** during this period as it is a health and safety requirement and any breach is a criminal offence

An employee may also enjoy a contractual right to maternity leave. If so, she may not exercise this and her statutory right separately, but may take advantage of whichever right is more favourable.

Notice requirements

Although there is no service requirement for OML, a woman who wishes to exercise this right must give her employer notice of her pregnancy and the expected week of childbirth no later than the end of the fifteenth week before the week the baby is due (or if she cannot comply with this, as soon as reasonably practicable). This notice need not be in writing, but if her employer requests she must produce a medical certificate from her doctor or midwife, which confirms her expected week of childbirth. She must also give notice of the date she intends to start her OML (her 'notified leave date') and this must be in writing if her employer so requests. The notified leave date cannot be before the start of the eleventh week before her expected week of childbirth.

The employee can change her notified leave date as long as she gives the employer 28 days' notice. The employer must notify the employee of the end date of her maternity leave within 28 days of receiving her notification.

If the woman is absent due to a pregnancy-related illness, or childbirth, after the start of the fourth week before the expected week of childbirth, and this is before her notified leave date, or before she has notified her employer of this date, her OML starts to run automatically from the date of her absence.

Notification is only required for the beginning of OML, so no additional notification is needed for the start of AML. Her AML commences on the day after the last day of her OML.

Rights and obligations during leave

During OML

During her absence on **OML** the woman is entitled to the terms and conditions of employment she would normally enjoy under the contract except she has no entitlement to 'remuneration'. This is defined as covering only sums payable by way of wages or salary. The following should be noted.

- Pension contributions and benefits in kind, such as a company car, private health cover, etc, are outside this definition and the employee remains entitled to them.
- It is likely that payments in lieu of benefits in kind (eg payments made as an alternative to a company car) would also be outside the definition of 'remuneration' and should be paid during maternity leave.
- Bonuses paid to all staff may need to be paid during maternity leave depending on the type of bonus scheme; in limited circumstances they can be restricted to a pro-rata payment covering only the time actually at work and on the two weeks' CML.
- In some circumstances bonuses or commission which relate to that employee's **individual** performance may be paid pro rata.
- Statutory and contractual holiday entitlement still accrue during OML.
- If a woman is entitled to Statutory Maternity Pay (SMP) or Maternity Allowance (MA), she is not entitled to Statutory Sick Pay for her 26 weeks of SMP or MA entitlement. Special rules apply if she is not entitled to SMP or MA.

During AML

The same entitlement to benefits as outlined above during OML now also applies during AML. In this regard there is no longer a distinction between OML and AML.

It should also be noted that employer's pension contributions at the full rate must continue as long as the employee is on paid maternity leave. SMP now extends into the period of AML (39 weeks in total) so it applies to all employees who qualify for SMP. Employees entitled to contractual maternity pay beyond 39 weeks will also continue to have the benefit of employer's pension contributions.

Keeping in touch days

An employer may make reasonable contact with an employee during maternity leave, for example, to notify of changes happening in the workplace. Where both the employer and employee agree, the employee may attend up to ten days of work during maternity leave without losing her entitlement to maternity leave or pay. These are known as 'Keeping in touch' days (KIT) and may be useful to make arrangements for the employee's return or, for example, allow her to attend training days. There is no obligation for an employer to offer KIT days or for an employee to accept them, but the days should be paid at an agreed rate. If the employee is receiving SMP, the amount of SMP for that week can count towards the pay for the KIT day.

Return to work

The employee is entitled to return to work at the end of her OML or AML without giving notice.

She need only give notice if she intends to return early, in which case she must give at least eight weeks' notice to her employer stating the day she proposes to return. An employer may postpone her date of return if she has not given the requisite notice, provided that he does not postpone it beyond the end of the relevant maternity leave period.

An employee returning from OML is entitled to return to her original job on the existing terms and conditions unless a redundancy situation has arisen, in which case special rules apply. She will also be entitled to any increases or increments that would have been made in her period of absence.

After AML the employee is entitled to return to her original job if that is reasonably practicable. If it is not reasonably practicable, the employee should be offered a similar job on terms and conditions that are no less favourable than her original job.

For contractual rights accrued on the basis of length of service, the period of AML now has to count in calculating length of service for the accrual of seniority or pension rights, etc.

Maternity pay

Statutory Maternity Pay (SMP) is payable to all eligible employees who are pregnant or who have just given birth. It is not dependant on them returning to work.

Entitlement

To be eligible the employee must:

- have been continuously employed for at least 26 weeks ending with the 15th week before the expected week of childbirth
- have normal weekly earnings for eight weeks ending with the qualifying week, of not less than the lower earnings limit then in force for payment of NICs
- be absent from work due to pregnancy or childbirth

Note: a woman not entitled to be paid SMP by her employer may be entitled to MA, which is paid by the Benefits Agency.

Notice requirements

To take advantage of maternity pay, the employee must have given proper notification to the employer, in or before the 15th week before the EWC, of the date that she expects her SMP to start. The employee may change her mind about when she wants her maternity leave and SMP to start but she must give 28 days' notice to the employer (or less than that if 28 days' notice is not reasonably practicable).

Rates of pay

SMP is payable for up to 39 weeks. The first six weeks are paid at 90% of the woman's average weekly earnings (known as the earnings-related rate) taken as at the relevant period. The remaining weeks are either at the SMP prescribed rate (£124.88 per week as at 4 April 2010) or at 90% of her weekly wage if the employee earns less than the prescribed rate.

If an employee has a contractual entitlement to pay whilst on maternity leave, she will be paid this or her SMP, whichever is more favourable to her.

Under the Statutory Maternity Pay (General) Regulations 1986, which were amended in 2005, any pay rise awarded between the period for calculating an employee's SMP and the end of maternity leave has to be taken into account, even where the pay rise is not backdated. It is also possible that employees may claim the benefit of pay rises for maternity pay prior to the 6 April 2005 under European law and our advice should be sought in that case.

Right to time off for antenatal care

A pregnant employee has the right not to be unreasonably refused time off work during working hours to receive antenatal care and to be paid for such time off.

Her employer may request confirmation of her pregnancy from her doctor or midwife, and confirmation of her appointments (save for the first appointment).

She may make a complaint to a tribunal if her employer unreasonably refuses time off, or fails to pay her for time off. She must make her complaint within three months of the time of the relevant appointment, and if her complaint is upheld the tribunal must award compensation equivalent to the amount of pay she would have received had the time off been allowed.

Risk assessment

The Management of Health and Safety at Work Regulations 1999 place an obligation on employers to carry out a risk assessment for all employees, which specifically includes an assessment of potential risk to the health and safety of a new or expectant mother or that of her baby. Risks might be heavy lifting, or exposure to certain substances, but are not limited to these and could include any processes or working conditions, which must be properly assessed. Regard must also be had to mothers who are still breastfeeding. In respect of a pregnant employee, failure to carry out such a risk assessment has been found to be sex discrimination.

Protection against dismissal/detriment

A dismissal for pregnancy or some reason connected with pregnancy, either during pregnancy or maternity leave will **be automatically unfair**.

Similarly, any selection for redundancy would be automatically unfair if the employee can show that the reason or principal reason was connected with her pregnancy or maternity leave.

However, dismissal at the end of AML will not be unfair where:

- it is not reasonably practicable for a small employer (as defined) to offer her original or a similar job
- it is not reasonably practicable for an employer to allow the employee to return to her original or similar job and she has unreasonably refused to accept an appropriate alternative offer from an associated employer
- her original job is no longer available because of redundancy and there is no suitable alternative work which could be offered to her

Special care must be taken in these circumstances as it is easy to fall foul of the law. It should be remembered that in addition to an unfair dismissal claim, a woman may have a claim of sex discrimination for which there is no limit on compensation.

It is also unlawful for an employer to subject an employee to any detriment (short of dismissal) or treat her less favourably by reason of her pregnancy, childbirth, or because she took or sought to take maternity leave. A woman who believes she has suffered a detriment or been treated less favourably can complain to a tribunal (within three months of the employer's action, or failure to act), and if the tribunal finds in her favour it can award compensation.

Can an employee return part-time?

Contrary to popular belief, there is no statutory right to return to work part-time, but a refusal to allow an employee to work part-time may amount to sex discrimination if the employee suffers a detriment or is put at a disadvantage. In addition, parents of children under 17 (under 18 if the child is disabled) and certain carers of adults have a statutory right to request to work flexibly. There is a specific procedure in relation to such requests and refusal may only be on certain specified grounds – please request our client guide on flexible working.

To avoid discrimination claims, an employer must be able to justify objectively any refusal to allow an employee to work part time, whether the request is made at the end of a period of maternity leave or otherwise.

It is important that any request to work part time should be looked at on its own merit and a blanket policy in respect of this issue must be avoided.

Contact

For further information or advice, please contact the employment team at employmentinfo@bllaw.co.uk

SOUTHAMPTON

T: 023 8090 8090

F: 023 8090 8092

OXFORD

T: 01865 248607

F: 01865 728445

LONDON

T: 020 7405 2000

F: 020 7814 9421

PORTSMOUTH

T: 023 9222 1122

F: 023 9222 1123

This publication is not a substitute for detailed advice on specific transactions and problems and should not be taken as providing legal advice on any of the topics discussed.

Blake Laphorn uses the information it holds about you to contact you where necessary if (for instance) you have registered to attend a seminar that we are hosting or have requested information regarding the services that we provide. We will also use it to administer, support, improve and develop our business and to contact you for your views on our services, as well as to let you know about other products and services which we offer which may be of interest to you. We may send them by post, telephone or fax, email or SMS. If you would rather NOT receive further information by any particular format, or at all, or if your details need updating, please contact Jina Patel on 020 7814 5449 or by email at jina.patel@bllaw.co.uk.

We will not disclose any of your personal identifiable information to any third parties without your express permission to do so, unless we believe that we should do so to comply with the law.