

Parental leave and time off to care for dependants

Employees have the right to take parental leave and the right to take time off work to care for dependants in the event of family emergencies. Parental leave entitles both parents to take up to 13 weeks' unpaid leave in respect of each child under five. Parents of disabled children can take up to 18 weeks leave up to the child's eighteenth birthday.

The Maternity and Parental Leave etc Regulations 1999 provide that employers and their workforces may, within limitation, agree their own arrangements for exercising parental leave by way of individual, collective or workforce agreement but a default system will apply where no such agreement has been made.

Both parental leave and time off to care for dependants are unpaid.

This guide summarises both rights, and gives guidance on which elements may be varied by agreement.

Parental leave

Who is entitled to parental leave?

The right will apply to any employee who has, or expects to have, parental responsibility for a child, and who has one year's continuous service with the employer. The right does not extend to workers who are not employees. Both parents may exercise the right in respect of each child.

An employee will have responsibility for a child if he or she has 'parental responsibility' under the Children Act 1989, or if he or she has been named on the birth certificate.

Members of the Police, the Armed Forces and those engaged in share fishing are excluded.

There are certain situations where it may not be clear whether or not an employee has parental responsibility.

- **Unmarried fathers** - will not acquire parental responsibility automatically, but if the father has been registered on the birth certificate he will qualify for parental leave. Alternatively, he may have acquired parental responsibility by way of court order or formal agreement with the mother. Note that a father who is married to a mother at the date of birth or subsequent to the birth will automatically acquire parental responsibility.
- **Adoptive parents** - will be entitled to take parental leave, as they will be given parental responsibility when the Adoption Order is made.
- **Others, such as guardians or grand-parents** - may acquire parental responsibility.
- **Step-parents and foster carers** - will not be entitled to parental leave unless they have acquired formal parental responsibility.

The key elements of the right

There are key elements which will apply as a minimum in every case, unless different terms have been agreed as a matter of contract between the employer and the employee.

The key elements are as follows.

- The right to unpaid leave is available to all employees (full-time and part-time) who qualify as set out above.
- The employee can take parental leave up to their child's 5th birthday or fifth anniversary of placement date for adoption (or 18th birthday in the case of adoption if that is sooner).
- The employee can take up to 13 weeks' leave in respect of each child under five or 18 weeks' leave in respect of each disabled child.
- Leave is for the purpose of caring for the child.
- The employee's contract continues while he is on leave, with certain minimum terms and conditions remaining 'active'.
- The employee will be entitled to return either to the same job, if the leave was for a period of four weeks or less. If the leave was for a longer period, the employee is entitled to return to the same job or if that is not reasonably practicable, to a similar job which has the same or better terms and conditions as the old job.
- Parents of disabled children born on or after 15 December 1994 are entitled to parental leave up to their child's eighteenth birthday.

These elements can be varied but only if the rights are improved upon. For example, an employer may decide to relax the qualification requirements to include step-parents or foster carers, but may not tighten the requirements.

What will count as caring for a child?

The Regulations in respect of parental leave do not specify what will be regarded as caring for a child.

The DTI guidance on parental leave gives examples as follows:

- to spend more time with young children
- to accompany a child during a stay in hospital
- to check out new schools
- to settle a child into new childcare arrangements
- to enable the family to spend more time together, for example taking the child to stay with grandparents

This is obviously very broad, and covers a very wide range of circumstances.

If it is found that an employee is misleading the employer and taking leave for reasons other than caring for a child then the normal disciplinary procedure should be followed to deal with any dishonesty in this respect.

Arrangements for exercising parental leave

In the absence of any other agreement under contract or collective or workforce agreement, the statutory default system will apply in relation to the procedure for exercising the right to parental leave. In contrast to the key elements, the provisions of the default system may be altered to provisions less favourable to employees either under the contract of employment or by a collective or workforce agreement. In practice, this is only likely to occur under a collective or workforce agreement where there is a trade off for another more favourable provision being included.

Specific elements of the default scheme

Conditions of entitlement

Firstly, the default scheme provides that an employee may be required to show evidence of his entitlement to take parental leave, that is that he has parental responsibility for a child under the age of five or a child entitled to disability living allowance.

Notice

The scheme also requires that an employee provides 21 days' notice of taking leave. In the case of an expectant father, he should give notice at least 21 days before the expected week of childbirth. Provided he does so, he is likely to be entitled to leave as soon as the baby is born, even if it is premature and born before the end of the notice period.

Postponement of leave

The default scheme provides that the employer may postpone parental leave except in the case of leave beginning on the date of childbirth or placement of a child by adoption. Postponement is allowed in circumstances where the employer considers that "the operation of his business would be unduly disrupted if the employee took leave during the period identified". The employer should, in such circumstances, consult with the employee before determining an alternative date for the period of leave. The employee must be informed in writing within seven days of his giving notice of leave of the reason for postponement and the alternative start date.

Parental leave cannot be postponed for more than six months. It should be noted that if the postponement results in the relevant child being over the maximum age limit, by the alternative start date, this will not prevent the employee taking the period of leave.

Maximum and minimum leave allowances

Maximum and minimum periods of leave are also set out in the default scheme (and may therefore be varied). These are below.

- An employee may only take leave in multiples of a week which means that he/she may not take less than one week at a time. Case law has confirmed that an employee cannot take one day and count it as one week's entitlement under the default scheme. The whole week must be taken. This provision does not apply where the relevant child is a disabled child that is in receipt of disability living allowance.
- An employee may not take more than 4 weeks' leave in respect of each child during a year. Each year is counted from the date on which the employee became entitled to take parental leave in respect of the child in question.

Can service with a previous employer count when asking for leave?

Parents must have worked for their current employer for one continuous year by the time they wish to take parental leave. Previously transitional provisions allowed service with a previous employer to be taken into account but this no longer applies.

Note that employers should not ask about periods of parental leave at interview, as this may be seen as discrimination. Alternatively, the employer may choose to ignore any previous periods of leave taken, which would comply with DTI guidance on best practice.

Although the contract of employment will continue, the terms relating to remuneration will not apply during the period of leave. Other contractual terms will also be dormant during this period.

The contractual rights during leave

These are reduced while the employee is on parental leave. The contract remains in force but only certain terms will be deemed to remain 'live'. The position of the employee is directly in line with that of an employee on Additional Maternity Leave. The employee does not accrue seniority, pension and similar rights during the period of parental leave.

The right to return to work

Where more than four weeks parental leave is taken, either separately or immediately after a period of maternity leave, the right to return is exactly the same as that for a woman returning from **additional maternity leave**. This means, in essence, that the employee is entitled to return to the job in which he/she was employed before the period of absence, unless it is not reasonably practicable for the employer to permit him/her to return to that job. In such a case a similar job which has the same or better status, terms and conditions as the old job must be offered.

For an isolated period of parental leave of less than four weeks an employee is entitled to return to his or her old job.

Where parental leave of less than four weeks follows immediately upon a period of maternity leave, then:

- if it was **ordinary maternity leave**, the woman is entitled to return to her old job
- if it was **additional maternity leave**, the woman is entitled to return to the same job she would have been entitled to return to at the end of AML

Penalties for non-compliance

An employee can make a complaint to a Tribunal that the employer has either unreasonably postponed a period of parental leave or has prevented or attempted to prevent the employee from taking such leave.

The time limit for complaint is three months.

If the complaint is held to be well founded, the Tribunal must declare that and may also award such compensation as it considers just and equitable, taking into account the employer's behaviour as well as any loss incurred by the employee.

There may also be a complaint if the employee is subjected to any detriment as a result of taking or seeking to take parental leave or that he/she declined to sign a workforce agreement in respect of such leave or acted as a representative in connection with this.

If the situation above results in a dismissal, or a dismissal arises because an employee sought to assert his statutory rights, such a dismissal will be regarded as **automatically** unfair.

There is also potential for sex discrimination claims. These could be in relation to direct discrimination, such as if an employer seeks to apply different rules for granting or refusing parental leave between male and female employees. It is also possible for indirect discrimination claims to arise in the case of women who are refused parental leave or suffer detriment or dismissal for seeking to take parental leave, as the proportion of women who are taking parental leave is higher than that of men.

Time off to care for dependants

Who is entitled to time off to care for dependants?

This right (under the Employment Rights Act 1996) applies to any employee, but does not extend to workers who are not employees.

The right does not apply to members of the police service, armed forces or masters or crew engaged in share fishing paid by the catch.

Key elements of the right

The employee is entitled to take a 'reasonable' amount of unpaid time off during working hours to deal with unexpected or sudden emergencies involving a dependant of the employee and to make any necessary longer-term arrangements.

Employees do not have to complete a qualifying period of service in order to take time off under these provisions.

The amount of time off that an employee is allowed to take is not specified and this will therefore depend on the circumstances of the emergency. In most cases, one or two days should be sufficient.

The employee is entitled to take time off to take action that is necessary to:

- provide assistance when a dependant falls ill, gives birth, is injured or assaulted
- make longer term care arrangements for the provision of care for a dependant who is ill or injured
- deal with the death of a dependant
- deal with unexpected disruption or termination of arrangements for the care of a dependant
- deal with an incident involving the employee's child which occurs unexpectedly while he/she is at school or college

Who is a dependant?

A dependant is the employee's wife, husband, child, parent or someone who lives in the same household but is not his/her employee, tenant, lodger or boarder. Additionally, a dependant is someone who reasonably relies on the employee either for assistance on an occasion when the person falls ill, or is injured or assaulted, or to make arrangements for the provision of care in the event of illness or injury.

Where the time off is due to an unexpected disruption or termination of arrangements for the care of a dependant, the definition also includes any person who reasonably relies on the employee to make arrangements for the provision of care.

As with parental leave, the entitlement is to unpaid time off, unless agreed otherwise in the contract of employment.

Penalties for non-compliance

If an employee feels that he or she has been unreasonably refused time off or has been subjected to a detriment for requesting time off under these provisions, they may complain to the Employment Tribunal. If the complaint is well founded, the tribunal may award such compensation as it considers just and equitable. If the reason or principal reason for a dismissal is connected with the fact that an employee took or sought to take time off for dependants under these provisions, it will be an automatically unfair dismissal.

Contacts

For further information or guidance on this subject, please contact the Employment Law team at employmentinfo@bllaw.co.uk or call us:

Southampton

023 8090 8090

Oxford

01865 248607

London

020 7405 2000

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 Kay Hogg on 01865 258010 or by email at kay.hogg@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.