

# MATERNITY

*Revised January 2012*

## **Overview**

This line manager briefing covers the basic rights of employees who become pregnant and take maternity leave. A second briefing Line manager briefing on maternity rights that apply in specific situations is available on request and covers situations that may arise as a result of an employee's pregnancy or maternity leave, but will not be relevant to every pregnancy or period of maternity leave.

It should be noted that the rights and duties discussed in this briefing are the minimum statutory rights and duties. Individual employers may offer their employees contractual entitlements over and above the minimum statutory rights. Employees' contractual terms may therefore be the source of further rights and duties that line managers will be required to take into account.

Female employees enjoy a range of statutory rights related to pregnancy and maternity leave:

1. Paid time off work for antenatal care
2. Protection against discrimination because of pregnancy and maternity
3. Employees' health and safety rights during pregnancy
4. Maternity leave
  - ordinary maternity leave and additional maternity leave
  - compulsory maternity leave
5. Terms and conditions during maternity leave
6. Keeping-in-touch days
7. Reasonable contact
8. Return to work after maternity leave
9. The effect of maternity leave on holiday entitlement
  - public holidays during maternity leave
10. Statutory maternity pay

## **1. Paid time off work for antenatal care**

All pregnant employees are entitled to take paid time off work on medical advice to attend antenatal appointments. An employee can be asked to produce a medical certificate or appointment card, except in the case of her first request for time off.

Managers should not unreasonably refuse time off for antenatal care and cannot ask employees to work additional hours to make up for any time spent at antenatal appointments.

## 2. Protection against discrimination because of pregnancy and maternity

Employees are entitled not to be subjected to any type of unfavourable treatment because of their pregnancy; if they are ill as a result of their pregnancy; or because they have or are taking, or have proposed to take, maternity leave. Such unfavourable treatment would amount to direct discrimination because of pregnancy and maternity and will always be unlawful. Managers should therefore ensure that pregnant employees do not experience:

- exclusion from training, appraisal or other normal activities;
- demotion;
- detrimental change to job duties;
- removal of responsibility;
- denial of sick pay if absent on account of a pregnancy-related illness;
- pressure to resign or dismissal; or
- abuse or derogatory remarks.

Any dismissal because an employee is pregnant or suffers an illness as a result of her pregnancy, or because of maternity leave, will be automatically unfair as well as discriminatory. Employees may bring complaints of detriment or dismissal because of pregnancy or maternity to an employment tribunal irrespective of their length of service.

When an employee first announces that she is pregnant her manager should take care that what is said in response is appropriate, and preferably positive in content and tone. While it is understandable that an employee's pregnancy and impending absence on maternity leave may cause inconvenience for the manager, this is no excuse for making negative or critical remarks to an employee at this important time in her life.

<b>Don't say</b>	<b>Do say</b>
Oh no, not another pregnancy in my section!	Congratulations!
And just how do you think the department is going to cope with your absence?	Let's discuss the timing of your forthcoming maternity absence.
You do realise that this will scupper your chances of promotion?	<i>No substitute. This is wholly inappropriate and discriminatory.</i>
You are no use to me now - you might as well resign.	We will arrange to sit down soon to discuss your rights and responsibilities.
I suppose that you'll be taking a lot of time off sick from now on.	Are you keeping well?

### **3. Employees' health and safety rights during pregnancy**

Under health and safety legislation, if the job duties of a pregnant employee are in any way likely to cause her harm, steps must be taken to remove or reduce the risks. Specifically, consideration must be given to whether it is necessary to:

- adjust the employee's working hours if she is normally employed on night work and removal from night working has been recommended by her doctor;
- remove the employee from any job duties that might pose a risk to her health or safety;
- transfer the employee to an alternative job - which must be on terms and conditions not substantially less favourable than those of her normal job;
- if alternative work is not available or would not remove or reduce the risks to the employee, place her on paid suspension until the commencement of her maternity leave.

### **4. Maternity leave**

There are three types of maternity leave: ordinary, additional and compulsory.

#### **Ordinary maternity leave and additional maternity leave**

Irrespective of their length of service, all pregnant employees are entitled to take 26 weeks' ordinary maternity leave, followed by 26 weeks' additional maternity leave, and resume working afterwards. All pregnant employees are therefore entitled to a total period of up to 52 weeks' maternity leave.

To be eligible, an employee must give notification:

- that she is pregnant;
- of her expected week of childbirth; and
- of the date on which she intends her maternity leave to start.

If she is asked to, she must do so in writing.

She may also be asked to produce a certificate from a registered medical practitioner or a registered midwife stating the expected week of childbirth.

Notification must be provided no later than the end of the 15<sup>th</sup> week before the week that the baby is expected, unless this is not reasonably practicable, in which case the employee must provide notification as soon as it is reasonably practicable for her to do so.

The employee can choose when to start her ordinary maternity leave, subject to two restrictions:

- maternity leave cannot begin prior to the 11<sup>th</sup> week before the week that the baby is expected, unless the baby is born prematurely in which case maternity leave will begin the day after the baby is born; and

- the start of ordinary maternity leave will be triggered automatically if the employee is absent from work wholly or partly on account of a pregnancy-related reason within four weeks of the week her baby is due.

If an employee who has already provided notification of her maternity leave start date subsequently changes her mind, she may do so by giving at least 28 days' notice of the revised start date. This may be earlier or later than the date originally notified.

On receipt of an employee's notification that she intends to take maternity leave, the employer must respond in writing within the next 28 days acknowledging the employee's intentions and informing her of the date on which her additional maternity leave will end. This will be 52 weeks after the start of the employee's maternity leave.

### **Compulsory maternity leave**

A woman who has given birth must not be allowed to do any work for a period of two weeks from the date on which her baby was born. For women who work in factories, the prohibited period is four weeks.

## **5. Terms and conditions during maternity leave**

Regardless of the timing of an employee's expected week of childbirth, during ordinary and additional maternity leave all contractual benefits, except normal wages or salary, must continue. This means that ordinary basic salary and other monetary payments such as a shift allowance may be stopped, but all other contractual benefits must remain in place. For example, the employee will remain entitled to cover under any medical insurance or similar policy in place, contractual holiday and gym membership. The employee is also bound by obligations arising from the terms and conditions of her contract.

## **6. Keeping-in-touch days**

Employees on ordinary or additional - but not compulsory - maternity leave may do up to 10 days' work under their contract of employment without bringing their maternity leave period to an end or losing their entitlement to statutory maternity pay. These days are known as "keeping-in-touch days".

The days of work may be separate days or a single block, as agreed between the employee and her manager. The provision can be used in a number of ways, for example to invite an employee on maternity leave to go on a training course, to attend an important team meeting or to undergo an appraisal review.

Line managers may not, however, oblige employee to do any work during their maternity leave. Neither are employees entitled to be offered any work to do. The amount and type of work to be done is subject to the agreement of both parties, as is the amount of remuneration that the employee will be paid.

## **7. Reasonable contact**

Managers may make reasonable contact with employees who are on maternity leave, for example to discuss the employee's plans to return to work or whether she might wish to seek any changes to her working hours or pattern of work on her return.

Employees on maternity leave have the right to be consulted over a range of matters, for example any proposed redundancies or reorganisation, and to be given information about pay rises, bonuses and internal vacancies (including promotion opportunities).

## **8. Return to work after maternity leave**

An employee who decides to return to work at the end of her additional maternity leave is not required to give notice of her return date. She may simply turn up to work in the usual way on the appropriate date. If, however, she wishes to return to work early, including at the end of her ordinary maternity leave, she must give at least eight weeks' notice of the intended early return date.

There is no option for the employer to postpone an employee's return to work except in circumstances where she fails to give the necessary eight weeks' notice for an early return. Her return cannot, however, be postponed beyond what would otherwise have been the last date of her maternity leave.

An employee can change her mind more than once about her return date provided that she gives at least eight weeks' notice before whichever is earlier of the date on which she now intends to return and the date on which she had intended to return.

An employee has the right to resume working in the same job if she is returning to work at the end of ordinary maternity leave. If she is returning to work after additional maternity leave, the entitlement is slightly different. Her right is to return either to the same job or, if this is not reasonably practicable from the company's perspective, to another suitable job on terms and conditions that are not less favourable.

An employee's period of continuous service must be calculated to take into account the whole of her maternity leave. This means, for example, that if the employee is made redundant at some future time, her redundancy pay will have to be calculated using her total length of service as if she had never been absent.

## **9. The effect of maternity leave on holiday entitlement**

Since the late 1990s all workers have been entitled to a minimum of four weeks' paid leave each year. On 1 October 2007, they became entitled to an additional 0.8 week's paid annual leave, and on 1 April 2009 to a further 0.8 week's paid annual leave. This means that they are entitled to a total of 5.6 weeks' paid

annual statutory leave. Some employers may elect to grant holiday in excess of the statutory minimum, which will be referred to here as "contractual holiday".

As stated above, the employee's contract of employment remains in force during ordinary and additional maternity leave for all purposes except wages or salary. It follows that both statutory and contractual annual holiday entitlement continue to accrue in the normal way.

The basic four weeks of statutory annual holiday cannot be carried forward from one holiday year to the next - although the additional 1.6 weeks' statutory holiday can be carried forward into the following year if there is an agreement to this effect. Another limitation is that buy-out of statutory annual holiday is prohibited, except when an employee is leaving.

The manager, in consultation with the employee, should therefore review the timing of her holiday in relation to her forthcoming maternity leave. Maternity leave will usually span two holiday years and the manager should ensure that the employee is given the opportunity to use up all her holiday entitlement for the first of the two holiday years before commencing maternity leave. After her return to work during the next holiday year, the employee should be permitted to take her full 5.6 weeks of statutory annual leave in the usual way at agreed times during the year.

In the event that the employee's period of maternity leave coincides with the employer's holiday year to the extent that she is unable to take her full entitlement for the current holiday year before she goes on maternity leave, the manager should discuss the position with the employee. The legal position is not entirely clear, but in practice many employers simply allow leave that has not been taken in these circumstances to carry over into the following holiday year.

### **Public holidays during maternity leave**

Contrary to popular belief, there is no law that requires employers to grant employees paid leave on any public or bank holiday, although many do so in practice.

It follows that employees will have no automatic right to take paid leave in lieu of public holidays that occur during their maternity leave. However, the manager should check the terms of an employee's contract or any employee handbook that forms part of the contract to see whether any such entitlement exists as a result of the contract. It may also be that such a right has arisen impliedly through custom and practice, even if it is not written down in any company documentation. If there is such a contractual right, whether express or implied, the employee will have the right to be granted the appropriate number of days off in lieu of any public holidays that occur during her maternity leave.

Where some or all public holidays form part of the 5.6-week statutory annual holiday entitlement to which all employees are entitled, paid time off in lieu will have to be granted in respect of any public holidays that fall during an employee's maternity leave, otherwise the employee's rights to 5.6 weeks' paid annual holiday will be infringed.

## 10. Statutory maternity pay

An employee who is pregnant will be eligible to receive statutory maternity pay (SMP) for 39 weeks provided that:

- she has been employed for a minimum of 26 weeks as at the end of the 15<sup>th</sup> week before the week her baby is due (which is known as the qualifying week);
- she is still employed during that week, i.e. has not resigned or been dismissed before the beginning of that week; and
- her average weekly earnings are equal to or greater than the lower earnings limit for national insurance contributions.

SMP may be paid only once the employee begins her maternity leave. It can begin on any day of the week according to the date that the employee has notified as the start date of her maternity leave. If an employee chooses to return to work before the end of her maternity pay period she will forfeit any outstanding SMP that would otherwise have been due to her.

Where the employee works for up to 10 keeping-in-touch days during her maternity leave, SMP will be paid in the normal way. The manager will also need to agree with the employee in advance how much contractual payment she will receive for the work done.

SMP is payable whether or not the employee intends to return to work or actually returns to work after maternity leave.

There are two rates of SMP. The higher rate is paid for the first six weeks of an employee's maternity leave. This is 90% of the employee's average weekly earnings, based on earnings during the period of eight weeks that immediately precede the 14<sup>th</sup> week before the expected week of childbirth. The standard rate is then payable for up to 33 more weeks. This is a flat weekly rate determined by the Government from time to time, and is £128.73 from 3 April 2011 (£124.88 prior to this). However, where the standard rate is more than 90% of the employee's average weekly earnings, her entitlement will be to 90% of actual earnings, instead of the standard rate. For example, an employee whose average weekly earnings are £115 would be entitled to receive SMP at £103.50 per week throughout her maternity pay period.

SMP is treated as earnings and is therefore subject to PAYE and national insurance contributions in the normal way.