



## Paternity Leave In The Spotlight

April 2010

**Employers are facing new improved paternity leave and paternity pay provisions being brought in by the government. Although the new regulations governing these provisions are due to come into force on 6<sup>th</sup> April of this year it will be another year before they will actually take effect. However we expect that both employers and employees will be interested to know now what additional paternity benefits will be available to employees next year.**

The key development is that under the new regulations mothers of babies due on or after 3 April 2011 will be able to transfer up to six months of their maternity leave to the baby's father when they return to work. The definition of father covers partners and civil partners of mothers and adoptive mothers.

The new regulations introduce the concept of 'Ordinary' and 'Additional Paternity Leave' ('APL'). Ordinary Paternity Leave ('OPL') will be the name for the two weeks leave taken around the time of the birth/adoption. APL will be available to an employee if :-

- (i) his partner qualifies for statutory maternity pay (SMP), statutory adoption pay or maternity allowance;**
- (ii) he is the child's father, is married to, or is the partner of, the child's mother;**
- (iii) he expects to have parental responsibility for the child and he is taking the leave to care for the child;**
- (iv) he has been continuously employed by the same employer for 26 weeks ending with the expected week of childbirth (EWC) and remains in the same employment until he commences APL;**
- (v) his earnings are on average at least equal to the lower statutory earnings limit during the eight weeks prior to the EWC.**

Under the new provisions fathers will be able to take up to 26 weeks of APL. It must be taken in one block of time, cannot start earlier than 20 weeks after the birth and must end before the baby's first birthday.

APL cannot start unless the mother has returned to work, although there can be a gap between her returning to work and the father starting his APL.

If the APL is taken during the mother's 39 week statutory maternity pay (SMP) period then it can be paid and this would be at the same rate as SMP.

Some of our clients have expressed concerns about how the scheme will work in practice, the risk of employees abusing it and the cost of it. Under the scheme parents will have to 'self certify' and provide details of their eligibility to their employer. The father's employer will not be *required* under the scheme to check with the mother's employer that she is entitled to SMP or that she has returned to work, although they may wish to try to ascertain this.

We anticipate that the self certification component of the scheme may lead to concerns about the potential for fraudulent claims by employees and that employers may wish to carry out further checks by requesting information from the employee about the mother's employer, particularly if they suspect that a claim may not be genuine. It is worth noting that under the regulations the employer will have no power to force an employee to provide this information or to take action if they fail to provide it nor will there be any obligation on the mother's employer to provide any information about the mother.

The plan is that HMRC will carry out checks on a sample of employers to ensure that the proper process has been complied with. If there is evidence of fraudulent claims by the employer then the employer will be liable for penalties. However if the employer has made payment in good faith but the employee has given false information the employee will be liable to penalty.

by HMRC. Details of the penalties are expected to be set out in the government guidance issued later this year.

In order to address concerns about the administration costs of the scheme for employers there will be no obligation for the father's employer to require further evidence beyond the self certification of leave provided by the parents. However, as mentioned earlier, an employer may wish to seek further evidence. Also once the payment has been calculated for ordinary paternity leave this will not need to be recalculated for additional paternity leave. Despite this, there will undoubtedly be additional administration requirements on employers as a result of the new scheme.

Another potential problem that may arise in relation to the new regulations is possible contravention of the data protection law when the mother's employer provides information on her to a father's employer and when the father's employer processes sensitive personal data about the mother. The government has indicated that guidance on data protection issues will be provided later. One proposal made is that the form used to apply for APL should include an agreement by the mother to the processing of her sensitive personal data and to the provision of that data by her employer.

It will be interesting to see what guidance the government gives later this year on the new regulations and if and how this addresses employer's concerns.

It will also be very interesting to see how many employees take advantage of the new rights. Whether an employee takes it up might well depend on how generous their employer's scheme is, how generous their partner's scheme is and how much they/their partner gets paid. It may be that the take up will be greater by employees who can benefit from public sector schemes which are typically more generous than those in the private sector.

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At this stage our advice is that employers should familiarise themselves with the proposals as employees may start making requests under the new regulations and that there should be a clear policy and procedure which sets out clearly the requirements on employees in place ready to deal with the enhanced paternity leave and pay scheme.

If this raises any particular issues for your organisation please speak to a member of the Mace & Jones Employment & HR team in Liverpool: 0151 236 8989 or Manchester: 0161 214 0500.

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