

Additional paternity leave and pay

Introduction

The Additional Paternity Leave Regulations 2010 (**the Regulations**) came into force in April 2010 and apply to parents of babies due or children matched for adoption on or after 3 April 2011. Additional paternity leave (**APL**) was an initiative of the last Labour Government and was first proposed in 2005. It was due to be implemented in 2009 but was delayed. The Government had intended to increase statutory maternity pay from 39 to 52 weeks at the same time but this proposal was dropped.

The Regulations apply to men and women and will cover, for example, the father of a new baby, the wife of a male adopter, the male partner of a female adopter and the civil partner of a male or female adopter. An employee will have the right to 26 weeks' APL, part or all of which may be paid. This is in addition to ordinary paternity leave, which remains. APL only applies to employees.

Ordinary paternity leave and pay – a reminder

A new father (or the partner of an adopter) can take either one week or two consecutive weeks of ordinary paternity leave (**OPL**), which must be taken within 56 days of the child's birth or placement for adoption. OPL only applies to employees. It can start on the date the child is born or adopted, a stated number of days after the birth or adoption, or on a specified date. The purpose of OPL is to enable the employee to care for the child or support the child's mother or adopter. To qualify, the employee must have at least 26 weeks' service before the 14th week before the expected week of confinement or the week the child is matched for adoption. The employee must expect to have the main responsibility for the child's upbringing (apart from the mother).

In relation to the birth of a child, the employee must be the child's father or the spouse, partner or civil partner of the child's mother. In relation to an adoption, the employee must be the spouse, partner or civil partner of the adopter.

During OPL, the usual contractual terms apply except remuneration (which is wages or salary) and continuous service continues to accrue. Benefits (such as gym membership, share schemes and use of a company car or mobile phone) apply unless they are provided for business use only. Ordinary statutory paternity pay is payable and is the lesser of 90% of normal weekly earnings and the prescribed rate (£128.73 per week from 3 April 2011 and £135.45 per week from April 2012).

At the end of OPL, the employee has the right to return to the same job on no less favourable terms.

Additional paternity leave

An employee has the right to one period of APL, of between two and 26 weeks. The window for taking APL starts 20 weeks after the child's birth or adoption and ends 12 months after it. For the employee to qualify, his or her spouse, partner or civil partner must have returned to work after maternity or adoption leave. An employee must give at least eight weeks' notice of his intention to take APL and the employer has 28 days to confirm the start and finish dates. Various documentation is required, comprising a leave notice, an employee declaration and a mother/adopter declaration (which gives the mother's name, address and National Insurance number, the date she intends to return to work and consent to the employer processing the information she has provided). HM Revenue & Customs has published appropriate forms. The employer can request a copy of the child's birth certificate and the name and address of the mother's employer. The employee has to provide this within 28 days.



An employee is protected from detriment and dismissal during OPL and APL.”

Special rules apply if there is a change of circumstances, for example if the child, mother or adopter dies.

The eligibility criteria for APL are the same as for OPL except that the child's mother must be entitled to maternity leave, statutory maternity pay or maternity allowance (or adoption leave or statutory adoption pay) and have returned to work. This means that maternity or adoption leave and entitlement to statutory maternity pay or statutory adoption pay have ended. It is unclear whether a mother will have returned to work if she then takes annual leave or parental leave. Guidance produced by ACAS and Business Link states that annual leave, sick leave or parental leave taken directly following maternity or adoption leave will not count as a return to work so the woman must actually resume working.

Employment terms continue to apply during APL, except remuneration (wages or salary) and the employee continues to accrue statutory and contractual holiday entitlement. “Keeping in touch” days apply so that the employee can carry out work or undergo training for up to 10 days and the employer and employee can be in reasonable contact, which is intended to allow for discussions about the employee's return to work.

The employee has to give at least six weeks' notice if he wants to return to work early or late. He is entitled to return to the same job unless that is not reasonably practicable, in which case he has to return to another job that is suitable and appropriate. If the employee is selected for redundancy during APL, he is entitled to be offered a suitable alternative vacancy if it exists. A failure to offer this will constitute an automatic unfair dismissal. An employee is protected from detriment and dismissal during OPL and APL; if he is dismissed because he has taken OPL or APL, this will be an automatic unfair dismissal with no service requirement.

Additional paternity pay

The mother's remaining weeks of statutory maternity or adoption pay are effectively transferred to the father: the employee will get additional statutory paternity pay (**ASPP**) if the mother/adopter has at least two weeks of her statutory maternity or adoption pay left when she returns to work. ASPP starts on a date notified by the employee, provided the child is at least 20 weeks old and the mother has returned to work. It ends on a date notified by the employee or, if earlier, the end of the mother's maternity allowance or statutory maternity pay period or the child's first birthday. ASPP is paid for up to 26 weeks.

The rate of pay is the same as SMP, which is the lesser of 90% of earnings and £128.73 per week from 3 April 2011 (£135.45 per week from April 2012).

The Government estimates that only around five to six per cent of eligible employees will take up the right to APL; however, where the mother earns more than the father it might be more attractive for the father to take APL than for the woman to take her full entitlement to maternity leave (unless she benefits from generous contractual maternity pay).

Frequently asked questions

There are a number of difficult issues that employers may have to deal with, including:

Q: If a woman gives birth to twins, will the father get double the amount of APL?

A: No. He will still get two weeks' OPL and up to 26 weeks' APL.

Q: If the mother works part-time and the father works full-time, is his APL calculated pro rata according to the hours the mother works?

A: No, the father will get up to 26 weeks' APL calculated on the basis of how many days per week he works.



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Q: If an employer gives enhanced maternity pay, does it have to give enhanced paternity pay?

A: This is one of the most difficult issues around APL. The man would probably not have a sex discrimination claim. This is because the comparator for a man on APL would be a woman on APL. Since she would not get enhanced additional paternity pay either, there will be no discrimination. The previous Government stated that there was no “requirement for employers to offer terms above statutory requirements” in January 2010 but, since then, there has been an ECJ case that has thrown some doubt on this. We will have to wait for a man to challenge this before we have a definitive answer.

Q: Who gets priority in a redundancy situation – a woman on maternity leave or a man on paternity leave?

A: They both have the same rights and it is not clear who will take priority if there is suitable alternative employment available. Best practice will be to carry out an objective evaluation and select the one who will best be able to do the job.

Q: Is an employee on APL entitled to a bonus?

A: This is unlikely because a bonus will normally be “remuneration”. However, if an employer pays women a return to work bonus after maternity leave, men may expect to receive the same.

Q: What happens to pension payments while an employee is on APL?

A: During periods of paid paternity leave, an employer's pension contributions to a money purchase scheme should be calculated as if the employee is working normally and receiving his normal salary. If the scheme rules require the employee to contribute to the scheme, his contributions can only be calculated by reference to the amount of statutory paternity pay he is actually receiving.

Q: What if the mother returns to work before the baby is 20 weeks old?

A: A woman cannot return to work until after her compulsory leave has finished (ie the two weeks after the birth) but she could return before the baby is 20 weeks old. The person taking APL cannot start it until the baby is 20 weeks old so there will be a gap, although the father could take unpaid parental leave in the interim.

Q: What if the mother decides not to go back to work?

A: The father ceases to qualify for APL and will have to withdraw his notice.

Q: What if the mother returns to work but leaves shortly afterwards?

A: If the mother leaves to join another employer, the father will still be able to take APL. If, however, the mother stops work and resumes her entitlement to statutory maternity pay or statutory adoption pay, the father will cease to qualify for APL and will have to withdraw his notice.

Q: What if an employee tries to take APL when he is not entitled to it?

A: The implications will depend on the circumstances: if it was an honest mistake then the employer is unlikely to take any action. However, if it was a deliberate attempt to take paid leave when he was clearly not entitled to it, this might constitute misconduct and disciplinary action might be appropriate.

Q: Is the mother's employer obliged to provide information to the father's employer (eg confirming that the mother has returned from maternity leave and how many weeks' SMP she has been paid)?

A: No. The mother's employer will only be able to provide this information if the mother has given her consent to this information being processed. If (despite having this consent) her employer refuses, the father's employer will have to find other ways of obtaining the information, such as by asking the father to obtain written proof from the mother (eg payslips or a letter from her employer).

Action points for employers

Employers should have done the following in order to comply with the Regulations:

- amend their paternity and redundancy policies
- decide if they will enhance the statutory scheme
- obtain the appropriate forms from HM Revenue & Customs
- decide what checks they will make with the mother's employer
- decide if they will respond to requests for information from other employers
- consider how they will deal with men taking long absences from work.

Future changes

The Regulations are an interim measure - in May 2011 the Government published its Consultation on Modern Workplaces. Key proposals included unpaid leave for fathers to attend antenatal appointments and an 18-week period of maternity leave for mothers, followed by a 34-week period of shared parental leave. The consultation has closed and the Government's response is due in early 2012.

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Updated April 2012.

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