

## Shared Parental Leave and Paternity Leave

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### Introduction

1. Shared parental leave came into operation in the United Kingdom on 5 April 2015. In this paper I will invite you to compare and contrast the rights which working fathers and working mothers have to take time off work to care for their children. This exercise takes you to the heart of the choice which governments, societies, families, and individuals can make between the feminism of equality and the feminism of difference. To what extent, in the 21<sup>st</sup> century, should parents be given equal rights to care for their children, particularly now that shared parental leave gives a man a right to take a year off work to care for his newborn baby from birth? To what extent does the new regime ignore the physical realities of women's experiences of pregnancy, childbirth, and breastfeeding? Against this abstract conflict between two philosophical interpretations of feminism, how are employers and employees to manage these issues in the workplace in practice?

### Statutory Framework

2. The statutory rules governing the various kinds of leave which working mothers and fathers may take, and the pay for such leave, are extremely complicated. A consolidating statute might be considered long overdue. At present, relevant rules on maternity leave, paternity leave and shared parental leave can be found in:
  - Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960)
  - Statutory Maternity Pay (Medical Evidence) Regulations 1987 (SI 1987/235)
  - Social Security Contributions and Benefits Act 1992
  - Employment Rights Act 1996
  - Maternity and Parental Leave etc Regulations 1999 (SI 1999/3312)
  - Paternity and Adoption Leave Regulations 2002 (SI 2002/2788)
  - Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 (SI 2002/2822)
  - Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002 (SI 2002/2818)
  - Statutory Paternity Pay and Statutory Adoption Pay (Administration) Regulations 2002 (SI 2002/2820)
  - Paternity and Adoption Leave (Adoptions from Overseas) Regulations 2003 (SI 2003/921)

- Statutory Paternity Pay (Adoption) and Statutory Adoption Pay (Adoptions from Overseas) (Administration) Regulations 2003 (SI 2003/1192).
- Shared Parental Leave Regulations 2014 (SI 2014/3050)
- Statutory Shared Parental Pay (General) Regulations 2014 (SI 2014/3051)
- Maternity and Adoption Leave (Curtailed of Statutory Rights to Leave) Regulations 2014 (SI 2014/3052).
- Maternity Allowance (Curtailed) Regulations 2014 (SI 2014/3053)
- Statutory Maternity Pay and Statutory Adoption Pay (Curtailed) Regulations 2014 (SI 2014/3054).
- Statutory Shared Parental Pay (Persons Abroad and Mariners) Regulations 2014 (SI 2014/3134).
- Social Security Contributions and Benefits Act 1992 (Application of Parts 12ZA and 12ZB to Adoptions from Overseas) Regulations 2014 (SI 2014/2857)
- Employment Rights Act 1996 (Application of Sections 75G and 75H to Adoptions from Overseas) Regulations 2014 (SI 2014/3091)
- Shared Parental Leave and Paternity and Adoption Leave (Adoptions from Overseas) Regulations 2014 (SI 2014/3092)
- Statutory Shared Parental Pay (Adoptions from Overseas) Regulations 2014 (SI 2014/3093).
- Social Security Contributions and Benefits Act 1992 (Application of Parts 12ZA, 12ZB and 12ZC to Parental Order Cases) Regulations 2014 (SI 2014/2866)
- Statutory Paternity Pay and Statutory Adoption Pay (Parental Order and Prospective Adopters) Regulations 2014 (SI 2014/2934)
- Employment Rights Act 1996 (Application of Sections 75A, 75B, 75G, 75H, 80A and 80B to Parental Order Cases) Regulations 2014 (SI 2014/3095).
- Paternity, Adoption and Shared Parental Pay (Parental Order Cases) Regulations 2014 (SI 2014/3096)
- Statutory Shared Parental Pay (Parental Order Cases) Regulations 2014 (SI 2014/3097)

3. It is essential to bear in mind that, for the purposes of simpler exposition, I shall use examples involving leave taken by a married heterosexual couple of parents, who are employees, nevertheless, many workers have other family structures. Of course, unmarried parents may have parental rights, as may gay staff and civil partners.

Adopting parents may have parental rights, including when adopting older children. Parents commissioning babies through surrogacy may also have parental rights. I take this approach deliberately, however, because the legislative scheme itself adopts this paradigm, of the heterosexual married couple having their own biological child, with other parents' rights mirroring their rights. For example, in the legislation there is little attempt to create rights which would specifically be useful to, say, an employee undergoing fertility treatment, an employee travelling abroad to adopt a baby or to bring home a baby commissioned by surrogacy, or an employee who has just adopted a school-age child. Similarly, it is important be alert to the possibility that the worker in question may not be an employee; agency workers, zero hours workers, and self-employed workers have parental rights which are not identical to those of employees.

## **Practical Consequences**

4. In this legislative maze, neither managers nor individual employees can realistically be expected to grasp the legal entitlements without assistance. A sizeable and well-resourced employer should have in place a policy on shared parental leave and paternity leave, to which all managers and team members can refer, just as it probably already has a maternity policy. There have been frequent changes to the rights of working parents in recent years, and, unfortunately, many businesses need a reminder to ensure that their policies have kept pace with the legislative developments. In-house Human Resources staff may themselves require training before they can support managers in this area.
5. An additional feature is that, in this very technical area of law, some commonly-used phrases have specific legal meanings, which staff and managers may not always appreciate. For example, many people colloquially refer to "flexible working" to mean part-time working for mothers, however, under section 80F of the Employment Rights Act 1996, it is used as a legal term of art. To take just one more example, many people casually refer to "maternity leave" or "paternity leave" as time off work taken by the parent of a baby, however, with the introduction of shared parental leave, the legal meaning of these phrases has become very precise, and distinctions exist between maternity leave, paternity leave, and shared parental leave. Moreover, the periods of entitlement to statutory maternity pay, statutory paternity pay, and statutory shared parental pay are not the same as the periods of entitlements to take leave from work.

6. Failure to manage issues of parental leave lawfully, tactfully, and efficiently can lead to unhappy team members, or even stressed and medically unwell team members. In a worse form, it can lead to complaints about managers and about the employer, or to failures to return after taking leave, and resignations, which can make the whole team short-staffed and demoralised. A legal claim, probably for unfair dismissal, and for sex discrimination or pregnancy and maternity discrimination, or even equal pay, could also follow.

## **What Rights do Working Parents Have?**

7. Parents now have an array of rights at their disposal which they can use singly or in concatenation to obtain time off work.

### **Early Pregnancy**

8. Pregnant employees have a statutory right to take paid time off work in order to attend antenatal appointments, under section 55 of the Employment Rights Act 1996. This right is available to women who do and to women who do not proceed with their pregnancies to full term. Women who experience tiredness, maternity-related health problems, and miscarriage, may also have maternity-related rights to time off work, and sick pay, depending on the timing.
9. An expectant father now has a right to take unpaid time off work to accompany his wife to antenatal appointments, under section 57ZE of the Employment Rights Act 1996. He may go to up to two antenatal appointments of up to six and half hours each.
10. Where an abnormality is revealed in early pregnancy or where the mother is experiencing a serious pregnancy-related illness in early pregnancy, the father will often make a request for time off work. Similarly, a father whose partner has miscarried may request leave. He has no specific statutory right to leave in those circumstances. Some employers choose to give paid or unpaid compassionate leave, or find a way to bring him within the rules on emergency time off to care for dependants, if the mother requires his care, and some employers choose to take a generous approach to requests for last-minute holiday leave.

## **Late Pregnancy**

11. There is now no minimum length of service required for a pregnant employee to be eligible to take maternity leave. Maternity leave usually starts during late pregnancy, rather than with the event of birth. It tends to start earliest where there is maternity-related sickness. Indeed, certain maternity-related sickness absence in late pregnancy can trigger the commencement of the woman's maternity leave, even if she does not wish it to start. It should be noted that it remains a feature of maternity leave that, once started, it must be taken in one continuous block.
  
12. As described above in relation to complications during early pregnancy, an expectant father has no particular right to take leave from work in order to care for his partner who is experiencing maternity-related illness in late pregnancy.

## **Maternity Leave and Paternity Leave**

13. Each female employee who has a baby benefits from a total entitlement of 52 weeks' leave. She has a wide choice as to when her maternity leave will start. Generally speaking, women in good health in pregnancy tend to delay their leave until nearer the time of birth. It is financially advantageous to them to continue to receive normal pay for as long as possible. Delaying the start of maternity leave also means that women can keep more leave to spend at home with the new baby, rather than spending time alone at home during late pregnancy.
  
14. The pregnant employee is required to give formal notification of her intention to take maternity leave under a complicated regime. These old-fashioned rules are expressed in the language of how many weeks the notification date precedes the "expected week of confinement". Many people find it easier to think in terms of the weeks of pregnancy. Generally, the mother must tell the employer of her intention to take maternity leave no later than around 25 or 26 weeks of pregnancy. From a practical point of view, that is a good point in time, when the employee is likely to have made any necessary decisions, since most women will have had a detailed scan at 20 weeks of pregnancy, and abortion is legal up to 24 weeks of pregnancy under the Abortion Act 1967. Where a woman fails to give proper notification, this may affect her pay entitlements, however, it will not affect her right to take maternity leave.

15. A father who wishes to take paternity leave is also subject to complicated rules of notification, based on the expected week of confinement. A father is entitled to take either one week or two weeks of paternity leave and cannot take odd days. As human babies rarely arrive “on time” unless through planned caesarean sections, many fathers complain that their entitlement is rigid, or that they even missed the birth despite taking paternity leave, particularly where the birth came late. The purpose of paternity leave is caring for a child or supporting the child’s mother.
16. In order to acquire the right to maternity pay, or to take paternity leave, an employee must have worked for the employer for at least 26 weeks before an entitlement date which is around 25 or 26 weeks of pregnancy. The legislative intention behind this timescale appears to be to grant the entitlement only to employees who commenced the job before conception.
17. For men in the UK, paternity leave is optional. Paternity leave is paid at a statutory rate which is currently £139.58. Generally speaking, women who are entitled to maternity pay will receive 90% of their gross average weekly earnings for the first six weeks of leave. Many employers offer maternity pay in excess of the statutory requirements, as a goodwill gesture to mothers of young babies. Several of the large accountancy firms and law firms have publicly announced that they will offer enhanced pay to fathers who take paternity leave and / or shared parental leave, however, there is no legal obligation for businesses to do so. Men who take paternity leave are protected from detrimental treatment at work caused by their exercising the right.
18. There is a compulsory period of two weeks’ maternity leave in every case, regardless of the woman’s wishes, following her giving birth. This requirement is derived from the Pregnant Workers’ Directive and is aimed at the physical protection of the new mother. For factory workers, the compulsory period of leave is four weeks.
19. A mother is entitled to 26 weeks’ ordinary maternity leave, following which she will have an entitlement to return to work in the same job. Her statutory entitlement to maternity pay is for 39 weeks. Many employers offer enhanced contractual maternity pay for longer periods. Self-employed women may be entitled to 39 weeks of statutory maternity allowance, depending on their national insurance contributions.

20. On completion of her ordinary maternity leave, the baby is typically around five to six months old. The employee may then choose to take additional maternity leave. Additional maternity leave may last up to 26 further weeks, however, the statutory maternity pay entitlement will run out after 13 weeks of additional maternity leave, typically when the baby is around eight or nine months old. After additional maternity leave, a woman's right is to return either to the same job or, where that is not reasonably practicable, to suitable alternative employment.
21. During maternity leave, a woman permitted to work up to ten keeping in touch days without losing her status as being on maternity leave. Employers generally pay these days at work during maternity leave at the normal rate of pay, although the regulations do not require them to be paid. The reason for introducing keeping in touch days was to encourage a good working relationship to continue when a woman takes a long maternity leave, and to facilitate her return to work when her leave ends. On the one hand, they offer women the opportunity to earn two weeks' full pay, particularly valuable when her statutory or contractual entitlement to maternity pay has run out, but, on the other hand, they require a woman at home with her baby to organise her travel, childcare, and return to work early, albeit temporarily. It is unusual to come across a maternity policy in which the employer clearly sets out its expectations as to how many keeping in touch days it would wish the mother to take, or how she would spend them.
22. Under the Equality Act 2010, pregnancy and maternity are treated as protected characteristics which are distinct from sex. As soon as she becomes pregnant, an employee is protected against pregnancy or maternity discrimination. Her protection under this head continues until she ends her maternity leave and returns to work. She may, however, have an equivalent protection against discrimination after her return to work through the protected characteristic of sex. It is significant to note that a woman who wishes to undertake shared parental leave, return to work, and then go off again on shared parental leave, will not be protected from maternity discrimination subsequent to her first return from maternity leave. The act of taking shared parental leave is not a protected characteristic, and, on its face, it is a gender-neutral act.

### **Shared parental leave**

23. The coalition government told us that parental leave will revolutionise patterns of work between men and women in the UK, giving men for the first time the statutory right to stay at home and care for young children. Nevertheless, until the point at which the

mother chooses to end her maternity leave and trigger shared parental leave, the rights of working mothers and working fathers to care for their children remain very different.

24. Statutory shared parental pay, like statutory maternity pay and statutory paternity pay, is fixed at £139.58. According to statute, the statutory shared parental pay has to be the same whether it is the mother or father taking the shared parental leave. Nevertheless, pay is different for mothers during the first six weeks of maternity leave. Fathers have no statutory entitlement to that enhanced rate of pay, even if they take shared parental leave to care for a newborn baby.
25. Many large professional services businesses have announced that they have chosen to offer equality of contractual terms to men and women in regard to time off to care for children, and contractual pay for such time off, which is a commitment that goes far beyond the statutory requirements on employers. It remains to be seen whether working fathers will elect to take up these generous options, including whether they can afford to do so. Amongst highly skilled trades and occupations, the gender pay gap in the UK remains at around 26%, according to the Office for National Statistics, and in the City of London financial services sector, the pay gap is around 55%, according to the Fawcett Society. Just 0.6% of eligible fathers took up additional paternity leave under the previous regime, according to the TUC. For many couples, it will not be financially viable for the higher-earning partner, usually the man, to take equal time off work for childcare reasons.
26. In order to take shared parental leave, an employee must have been employed continuously for at least 26 weeks before around 25 weeks of pregnancy. This is consistent with the eligibility provisions for maternity pay and paternity leave. Only employees are eligible to take shared parental leave, although some zero hours and agency workers may be entitled to statutory shared parental pay, but not shared parental leave. Shared parental leave is for couples only, so single parents cannot participate under any circumstances. Self-employed mothers may share their shared parental leave and / or shared parental pay with employed fathers. Nevertheless, self-employed fathers may not share their shared parental leave or pay with employed mothers. Men with stay-at-home wives will not be able to take shared parental leave at all; it is only for men whose wives are employed on paid work. Conversely, where only one parent qualifies for shared parental leave, he or she might still be able to take shared parental leave in

blocks. For example, a schoolteacher who qualified for shared parental leave might be able to take shared parental leave in blocks, ostensibly returning to work in the school holidays, even if the other parent was ineligible for shared parental leave. It seems that schoolteacher couples are leading the way in using the shared parental leave rules in novel ways which suit their individual families – although not necessarily their educational establishments.

27. UK law operates on a paradigm in which the mother is entitled to take leave in order to give birth to and care for the young baby, but she may elect to share that leave with her husband. Up to 50 weeks' leave may be shared. This means that, following the two weeks' compulsory maternity leave which the mother must take, in theory a couple can choose any division of childcare labour between the two of them which they like. Similarly, up to 37 weeks' statutory shared parental pay may be shared. The father can take shared parental leave from two weeks after birth until 52 weeks after the birth. Another option is for the couple to be on shared parental leave simultaneously.

28. The notice requirements for shared parental leave are complicated. Whilst maternity leave must be taken in one block, shared parental leave may be split into up to three blocks. Where an employee proposes to take discontinuous leave, the employer may be able to disagree with the proposal. An employer cannot, however, veto a request to take a continuous block of shared parental leave. Each parent taking shared parental leave may have up to 20 shared parental leave keeping in touch days. It is up to the employer and employee to agree whether and when such days will be taken and at what rate of pay. For a couple intending to take full advantage of shared parental leave, the keeping in touch days during maternity leave and shared parental leave give the couple the opportunity to earn an extra ten weeks' pay, potentially at full pay, a significant sum given the low rate of statutory pay available for employees undertaking childcare. The keeping in touch days also offer an employer an opportunity to use pay to incentivise employees taking extended leave to attend the workplace regularly, or even to encourage employees to return to work on a phased basis.

29. When receiving notification of an intention to take shared parental leave, an employer is entitled to ask to see the baby's birth certificate, and to know the name and address of the other parent's employer.

## **Breastfeeding and Return to Work**

30. Both the National Health Service and the World Health Organization recommend exclusive breastfeeding for the first six months of a baby's life. It is notable that although the shared parental leave regime contemplates many mothers returning to work during that period of time, no legal protections for breastfeeding mothers who return to work have been introduced. Unsurprisingly, fathers in the UK also have no rights associated with the fact that their babies may be breastfed.
31. Breastfeeding mothers at work in the United Kingdom are protected only through the general law on health and safety at work, the right to request flexible working, the protections from sexual harassment and in the Protection from Harassment Act 1998, and an attempt to argue that less favourable treatment of breastfeeding mothers at work constitutes unjustified indirect sex discrimination.
32. In many other European countries breastfeeding working mothers have a statutory right to paid breastfeeding breaks or a shorter working day, when their baby is less than a year old (see my article "Ostentatious and Discreet Breastfeeding: the legal rules exposed" which explains the rights of birth mothers and non-birth mothers to breastfeed in public places, and associated employment rights, in England and Wales, and in Scotland, where they are different (<http://blog.rubensteinpublishing.com/ostentatious-and-discreet-breastfeeding-the-legal-rules-exposed-by-harini-iyengar/>)).

## **Parental Leave**

33. An employee of either gender who has been continuously employed for not less than a year is entitled to take parental leave for the purposes of caring for a child, under section 76 of the Employment Rights Act 1996 and the Maternity and Parental Leave etc Regulations 1999. The leave is limited to 18 weeks for each child and must be taken in blocks of a week. Parental leave is unpaid.

## **Holiday Leave**

34. In practice, many parents of both sexes use holiday time strategically to perform childcare, particularly during the school holidays. Although we now have extensive European caselaw saying that holiday may not be taken during sick leave, because of the concept that holiday time is for workers to rest, we have yet to see any caselaw

indicating that an employer must not collude with employees using holiday time for the purposes of childcare. Holiday rights are the same for men and women.

## **Time Off for Dependants**

35. Another right of which many working parents avail themselves is contained in section 57A of the Employment Rights Act 1996 – the right to take a reasonable time off to deal with family emergencies involving dependants. The situations covered by the statute involve a dependant who is ill, who is injured, who gives birth, who dies, or where a childcare arrangement is unexpectedly disrupted. This right is gender neutral.

## **Right to Request Flexible Working**

36. The final relevant right in this survey of working parents' entitlements is the right to request flexible working arrangements under section 80F of the Employment Rights Act 1996. This right is no longer limited to parents and was never linked to the employee's sex. An employee with at least 26 weeks' service may apply in writing to vary his hours, time or location of work. If agreed, the change will involve a permanent change to the contract of employment. These variations are proving increasingly popular with working fathers. The complicated procedural rules which were originally in place have now been removed and the penalty for breach is just eight weeks' pay. Requests and appeals must be decided within three months of receiving the request.
37. Employers may refuse flexible working requests because of the burden of additional costs, detrimental effect on ability to meet customer demand, inability to re-organise work among existing staff, inability to recruit additional staff, detrimental impact on quality, detrimental impact on poor performance, insufficiency of work during the periods the employees proposes to work, or planned structural changes.
38. Where working parents make use of non-specific entitlements in order to care for their children, employers have a wide discretion. Sometimes, employers find that informal arrangements are the most effective ways of assisting parents who are returning to work. For example, rather than agreeing to a permanent contractual variation, an employer may suggest a phased return to work whilst a baby settles into nursery, through the voluntary use of holiday time. The use of discretionary arrangements poses its own challenges. Employers often face difficult decisions on issues such as how to ensure fairness as between working mothers and working fathers, and working parents and

carers for the elderly or disabled, and non-carers, when devising flexible working policies, or when drawing up leave policies which cater for the popular school holiday periods.

## Conclusion

39. Superficially, the new shared parental leave scheme gives working men a golden opportunity to care for their children, equivalent to the rights which working women enjoy under that scheme. Closer inspection, however, reveals that UK law still perpetuates a paradigm in which the leave and childcare duties belong to the mother, although some mothers are now allowed to share their leave, childcare duties, and statutory pay. Meanwhile, in European law, we see a different model developing, in which women are protected through a narrow focus on pregnancy, childbirth and breastfeeding, and associated minimum maternity rights, with separate gender-neutral parental rights developing (see my article “Equal Rights for Men” in *The Lawyer* [http://www.11kbw.com/uploads/files/EqualRightsforMen\\_Harinilyengar\\_May2014.pdf](http://www.11kbw.com/uploads/files/EqualRightsforMen_Harinilyengar_May2014.pdf)).
40. The most striking aspect of shared parental leave, however, is the enthusiastic and generous way in which some private sector employers have responded by voluntarily introducing contractual parental entitlements which are identical for men and women. The economic justification put forward by those businesses is simply that it is a desperate attempt to stem the loss of highly-skilled mothers from the workforce. What remains to be seen is whether fathers will exercise their new statutory and contractual rights to take extended childcare leave, and whether best practice in the private sector will over time influence the wider labour market, and the public sector, where employees are restricted to the statutory scheme but may devise interesting arguments under European law to challenge the UK shared parental leave regime.

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