

Shared parental leave: Top 5 issues to consider

The introduction of shared parental leave is intended to provide a framework to support modern working families and allow them to balance childcare responsibilities. Three sets of draft regulations covering shared parental leave and pay have just been laid before Parliament and are due to come into force in December 2014. Two more sets of draft regulations are awaited (expected to cover the ‘curtailment’ of statutory maternity pay and maternity allowance) and new ACAS guidance on shared parental leave will be published shortly.

Employers therefore need to start preparing now. Maternity and paternity policies should be reviewed and, for clarity, a shared parental leave policy should be drafted and implemented to reflect the new entitlement. Key issues to consider when drafting the policy are outlined below.

1. Core entitlement

- Shared parental leave (SPL) is intended to apply in relation to babies whose expected week of childbirth (EWC) begins on or after 5 April 2015. Similar arrangements will apply in the case of adoption, in relation to children placed for adoption on or after 5 April 2015.
- A SPL policy will need to outline the key elements of the new entitlement to SPL i.e. eligible parents will be able to share up to 50 weeks’ untaken leave (which can be taken at any time after the two week compulsory maternity leave period). All leave must be taken within 52 weeks of the birth of the child. Employees can also potentially share 37 weeks unclaimed pay under the new scheme.
- SPL should be taken in complete weeks (the minimum period which can be taken is one week). It can be taken as one continuous period or in discontinuous periods.
- Additional paternity leave and additional statutory paternity pay will be abolished, which employers will need to reflect in their family friendly policies.

2. Eligibility

- There are a number of qualification requirements, for the employee and the employee’s partner, which should be outlined in the SPL policy.
- For example, the employee must:
 - satisfy the “continuity of employment” test (i.e. have been continuously employed by the employer for 26 weeks ending with the week preceding the 14th week before the EWC and remain in continuous employment with that employer until the week before any period of SPL taken by the employee).
 - have the main responsibility for the care of the child.
 - have provided notice of their entitlement to SPL, evidence (where requested by the employer) and the required period of leave notice.
- In order for the employee to be entitled to SPL, the employee’s partner must:
 - have the main responsibility for the care of the child (apart from the responsibility of the employee).
 - satisfy the “employment and earnings” test (i.e. have been employed or self employed for 26 of the 66 weeks immediately preceding the EWC and have average weekly earnings of at least £30 in the tax year before the tax year containing the EWC).
- If the employee is the mother, she must be entitled to statutory maternity leave and have ended that entitlement by having ‘curtailed’ that leave or, where this is not done, have returned to work before the

end of her statutory maternity leave. If the employee is the father or partner, the mother must be entitled to statutory maternity leave and have curtailed that leave or, if she is not entitled to statutory maternity leave but is entitled to statutory maternity pay or maternity allowance, have curtailed that pay or allowance.

3. Notice requirements

- The notice requirements under the draft regulations are particularly complex but will need to be reflected in the shared parental leave policy.
- For example, employees must give their employer notice of their entitlement and intention to take SPL (which should include specified information and declarations) at least eight weeks prior to the start date of their first period of SPL and a period of leave notice. Evidence may also be requested by the employer. Notice can be given to vary the notice of entitlement and intention to take SPL and the period of SPL.
- If employees request a continuous period of leave, they will be entitled to take that period of leave. If they request a discontinuous period, in the two weeks following the date the notice was given, the employer can consent, propose alternative dates or refuse the periods of leave. If no agreement is reached within the two weeks, the employee is entitled to take the leave requested as a continuous period of leave. An employee may withdraw a notice requesting discontinuous periods of SPL on or before the 15th day after the notice was given, unless the employer and employee have agreed to periods of leave.
- Employers do not have to accept any more than three notifications to take SPL on specific dates or changes to dates already agreed. This cap may be waived by agreement between the employer and employee.

- Notice requirements and conditions also apply in relation to curtailing statutory maternity leave and in connection with qualifying for shared parental pay.

4. Terms and conditions

- During SPL, employees will be entitled to the terms and conditions of employment (other than remuneration) which would have applied if they had not been absent.
- Certain protections also apply which might be familiar to employers given their application to other family friendly rights, for example, the right to return after SPL, redundancy during SPL and protection from detriment and unfair dismissal.
- Each eligible parent will be entitled to 20 ‘shared parental leave in touch’ (SPLIT) days which enable an employee to carry out work for the employer during SPL without bringing it to an end. These will be additional to the 10 KIT days available during maternity and adoption leave.

5. Enhanced pay

- Many employers offer enhanced maternity pay. In such cases, employers may need to consider whether to offer enhanced pay for SPL, given the potential risk of discrimination claims, although this point is unclear at the moment. This requires careful consideration when drafting the shared parental leave policy.

If you require assistance with drafting your shared parental leave policy, please contact us.

Nicholas Robertson

Partner, London

E: nrobertson@mayerbrown.com

T: +44 20 3130 3919