



Employment Briefing

Construction Confederation

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New Maternity and Adoption Rights from 1st April 2007

The Government has pledged to increase maternity and adoption pay from the current entitlement of 26 weeks ultimately to one year. This is being done in two stages and with effect from the 1st April 2007 the entitlement will increase to 39 weeks. Additionally a number of other changes are being introduced from that date for parents of children who are expected to be born after the 1st April.

These are summarised below:-

- No period of qualifying service will be required to benefit from additional maternity leave ("AML").
- An employee who intends to return earlier from AML than her original return date must now give 8 weeks' notice as opposed to 28 days' notice (and if she tries to return early without giving the correct notice, the employer can postpone her return until the full 8 weeks' notice has been given, although this cannot exceed the date on which her maternity leave ends). However, if the employer did not give the employee the correct notification of when her maternity leave would end in the first place, the employee is not obliged to give eight weeks' notice of her return.
- If an employee wishes to return from maternity leave later than the originally notified to her employer, she must give the employer eight weeks' notice – which must be given before the date that she originally gave as her return date.
- The employee can benefit from up to 10 "keeping in touch days" ("KIT" days) whereby she can come into work without being deemed to have thereby terminated her maternity leave or losing any right to SMP.
- The SMP period has been extended to 39 weeks (6 weeks of 90% of salary, 33 weeks on SMP).
- The maternity pay period can start on any day, not just a Sunday (this should make organising payroll for those being paid SMP easier)
- The employer can make "reasonable contact" with the employee during maternity leave without bringing maternity leave to an end.
- The small employer's exemption in relation to the employee's right to return has been removed (previously an employer with fewer than five employees could claim that it was not reasonable practicable to enable an employee returning from AML to be given a suitable and appropriate job).

NOTE: an employee wishing to take adoption leave is still subject to the requirement of 26 weeks' continuous service as a pre-condition for taking that leave.

KIT DAYS (KEEP IN TOUCH)

The issue of whether an employee should receive payment for keeping in touch days is unclear. The regulations (unhelpfully) are silent on the point. However, the most recent DTI guidance (which is not legally binding) indicates that employees should be paid because the KIT days allow the employee to work under her contract of employment and therefore, she should be paid pursuant to that. The

guidance though, then goes on to say that the "rate of pay is a matter for agreement with the employer, and may be set out in the employment contract or as agreed on a case-by-case basis". The DTI then goes on to point out that the employer will need to keep its statutory obligations in mind, such as those relating to the minimum wage and equal pay. Clearly, the DTI seeks to encourage employers to pay for KIT days in full by referring to the statutory safety nets. But what to pay is, subject to these, a matter for employer choice.

Any SMP due should continue to be paid during KIT days (and any contractual or other payments made to the employee can include SMP, so the employer does not, at least, have to pay contractual salary plus SMP).

This all seems to involve quite a lot of second guessing for what amounts to a maximum of 10 days' work which is likely to involve re-training or updating on techniques and equipment and generally meeting colleagues prior to a return work. Employers should bear in mind that the employee cannot demand to be allowed her KIT days, nor can the employer require her to attend work for KIT days – the regulations envisage that the KIT days, if used, should be agreed between the parties with no ability for either party to compel the other to comply. The employer, in any event, may not allow the employee to use her KIT days during the two-week compulsory maternity leave period. In addition, the employer cannot subject an employee to a detriment because she wanted to use her KIT days or has refused a request on the part of the employer that she come into work on a KIT day.

The DTI guidance is just that – guidance, and does not have the force of legislation. However, in a vacuum of information, and until there are tribunal decisions on the point, it is likely to be used by many employers as a fairly solid indication of what they should be doing.

REASONABLE CONTACT

Many employers make an effort to keep in "reasonable contact" in any event with employees on maternity or adoption leave, so it seems that the regulations are only codifying what very often happens in practice – and they at least give some comfort that communication with employees is not going to have the inadvertent effect of ending maternity leave. However, employers and employees will still need to be careful that "reasonable contact" does not turn into pressure to come into work to "help out" at a busy time.

Further guidance to the new regulations can be found on the following website:-
www.dti.gov.uk/employment/workandfamilies/maternity-leave-pay/guidance/page2116.html

Further information may be obtained from the Construction Confederation Industrial Relations Department on 020 7227 4522 ■