



Who's Holding the Baby?

Shepherd and Wedderburn's Guide to Shared Parental Leave

Families now have greater flexibility when deciding who will take time off work to look after their new baby. The new system of shared parental leave enables mothers to share their maternity leave and pay with their partners. If the mother chooses to do so, each parent will then have a right to take three blocks of leave before the baby's first birthday.

The new rules came into force from 1 December 2014, and apply to babies due or placed for adoption on or after 5 April 2015.



The new rights at a glance

Shared parental leave

The new system allows qualifying parents to share between them up to 50 weeks of leave before a child's first birthday. Parents can be off work at separate times or together and can each take up to three separate blocks of leave (or more if the employer agrees).

Shared parental pay

Shared parental leave is paid for up to 37 weeks at the flat rate of statutory maternity pay ('SMP'). This is currently capped at the lower of £139.58 or 90% of pay. Unlike SMP, where the mother is entitled to receive an enhanced rate of 90% of actual pay for the first six weeks, shared parental pay will all be paid at the flat rate.

Attending appointments

Since October 2014 partners have been allowed unpaid time off to attend two ante-natal appointments (taking up to six and a half hours each time).

Protection from detriment

Since December 2014 employees have been protected against suffering a detriment if they request or take shared parental leave (or if their employer thinks they may do so).

Adoption and surrogacy

The focus of this guide is on the situation when the mother gives birth to the baby. However, the regulations also include a broadly mirrored scheme for adoption and surrogacy.



Reminder of existing family leave regimes

Maternity leave

Mothers are entitled to 52 weeks of maternity leave and 39 weeks of statutory maternity pay ('SMP').

The leave can start any time from 11 weeks before the baby is due to the date of birth. The two weeks immediately following birth (four weeks in the case of factory workers) are known as compulsory maternity leave and must be taken by the mother. There are 10 keeping in touch ('KIT') days when the mother can work during her maternity leave but otherwise once a mother returns to work her entitlement to maternity leave and pay ends and cannot be revived.

SMP is paid at 90% of actual pay for the first six weeks and a flat rate capped at the lower of £139.58 or 90% of pay for the next 33 weeks.

This will remain the default position unless the mother chooses to shorten her maternity leave.

Paternity leave

Fathers will still be entitled to two weeks' ordinary paternity leave, paid at the flat rate of SMP. This two-week

period is exclusively reserved for fathers and can be used any time from the date of birth to 56 days after the date the baby was due. It can be taken in a single block of one or two weeks.

Additional paternity leave introduced in 2013 means partners can currently take 26 weeks leave if the mother has gone back to work. Leave can be taken when the child is between 20 weeks and one year old, during which time 10 KIT days can be taken. Additional paternity leave is paid at the same flat rate as SMP until the mother's SMP entitlement would have ended. This leave has been abolished in respect of babies expected from 5 April 2015. However, it will still be in force for babies due prior to that date so the two schemes will run in tandem for a year.

Parental leave

The existing parental leave regime will remain in place. After a year's employment each parent will be entitled to 18 weeks' unpaid parental leave per child which, from 5 April 2015, can be taken between the child's birth and their 18th birthday.

Eligibility checklist for shared parental leave



1. The baby's due date must be on or after 5 April 2015

Shared parental leave and pay is connected to the baby's due date (often referred to as the expected week of childbirth or 'EWC'). It does not matter when the baby actually arrives. If the baby is due prior to 5 April 2015, then the old rules apply. If it is due on or after 5 April 2015, then the new shared parental leave rules will apply. This means that March and April 2015 might be difficult months to deal with as babies born around the same time could be covered by different rules.

2. The partner must have a specific relationship to the mother and baby

The partner can be the child's father, the mother's husband or civil partner at the time of the birth, or a partner who lives with her and the child in an 'enduring family relationship'. Where there is more than one eligible partner (for example the father and a new partner), it will be for the mother to elect the partner with whom she will share her parental leave. The leave cannot be shared with anyone else who will help to care for the child, for example, the baby's grandparent.

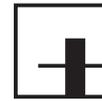
3. Maternity leave must be shortened

The mother needs to have shortened any entitlement she has to statutory maternity leave, pay and allowance by returning to work or giving notice to curtail the entitlement.

4. The mother and her partner must meet eligibility criteria

The mother and partner must comply with the shared parental leave procedures; and have responsibility for caring for the child.

The parent taking the leave must be employed the week before taking shared parental leave and have 26 weeks' continuous service with their employer 14 weeks prior to the EWC. It is not necessary for the other parent to meet this continuous service criterion. However, the partner does need to satisfy the 'Employment and Earnings Test': have worked in an employed or self-employed capacity for 26 of the 66 weeks before the EWC and earned at least £30 in 13 of these weeks.



Request procedure

There are three different steps to complete before shared parental leave can be taken. Each step can involve a separate notification being given to the employer. In practice, these three notices may be given at the same time.

• Step 1: Maternity leave shortened

First, the mother must shorten her maternity leave, and commit to sharing the untaken balance of her maternity leave and pay with her partner by doing one of the following:

- returning to work
- giving at least eight weeks' written notice to curtail her maternity leave at a specified point in the future
- if she is not entitled to maternity leave (for example she is self-employed) ending her maternity pay or allowance.

Revoking the curtailment notice

If a notice to curtail is given before the baby is born it can be revoked up to six weeks after the birth. In these circumstances the mother will be allowed to serve a second curtailment notice at a later stage. This rule was included to recognise that giving birth is a significant change of circumstances which may lead to families changing their childcare plans.

The curtailment notice can be revoked if the partner dies or either parent is not entitled to shared parental leave (for example, because they do not meet the earnings criteria, or will no longer have responsibility for caring for the child). In these circumstances there is no further right to make a second leave curtailment notice.

• Step 2: Entitlement and intention notice

Second, both parents must give their employer a notice of entitlement and intention to take shared parental leave. Step 2 is essentially just a non-binding 'heads up'. It allows employers and employees to start a conversation.

The notice needs to contain specific information including:

- the names of both parents who are accessing the shared parental leave regime
- the start date and end date of maternity leave, the balance of leave and pay which remains, and the date the baby was born (or is due)
- how much shared parental leave each partner proposes to take

- a non-binding indication of when the employee intends to take their portion of the leave
- a declaration by both parents that they meet the qualifying conditions, agree to the division of leave and pay, and agree to information being processed by the employer.

Employers are entitled to take the declarations on trust, and there is no obligation for the employers to liaise with one another in relation to the leave. However, the employers can request further evidential information from their employee, including a copy of the baby's birth certificate and the name and address of the mother's/partner's employer, which the employee must then provide. Employers may wish to include a requirement in a shared parental leave policy for all employees making an application to provide this information, or at least highlight that it must be provided on request.

Revoking or varying the entitlement and intention notice

This notice provides an indication only and is not binding. Both parents can vary the notice of entitlement and intention to take shared parental leave as many times as they like. This could include changing the proportion of leave each parent intends to take.

• Step 3: Period of leave notice

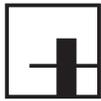
The mother and partner must each notify their employer before they actually take a block of shared parental leave. They must give their employer at least eight weeks' notice and include some specified information such as the proposed leave dates and division of pay.

Shared parental leave must be taken in blocks of at least one week. It cannot start until the baby is born and must be taken before the baby's first birthday.

Absolute right to three blocks of shared parental leave

Each partner has the right to take three blocks of shared parental leave. The language in the legislation can be a little confusing. When the terms 'continuous' and 'discontinuous' are used, they refer to each individual block requested, rather than the full leave entitlement taken by a parent over the course of the year.

- 'Continuous' is used to describe an individual block of continuous leave (for example, a month off work). Employees have the right to three such 'continuous' blocks during the year. It seems a little odd to refer to these three separate blocks as each being continuous. If a request is made from an eligible employee for a continuous block of shared parental leave then the employer must grant the request. Each eligible employee is therefore entitled to three blocks of shared



parental leave, on a start date and for a period of their choosing. The employer cannot lawfully refuse these requests. All the employee needs to do is comply with the procedure and give the correct notice.

- 'Discontinuous' is used to describe the situation where an employee asks to break down a block of leave into a discontinuous pattern of leave with periods of time off and periods back at work (for example a week-on, week-off arrangement). Employers can refuse such a request and make the employee take the leave as one of their three continuous blocks instead. The employee can then decide on the length and start date of that continuous block provided they comply with the notice requirements.

Whether a pattern of leave is 'continuous' or 'discontinuous' really depends on whether it has been requested using a separate notice for each period of leave (continuous) or one single notice requesting a number of periods of leave (discontinuous).

Revoking or varying the period of leave notice

Employees can withdraw or vary a notice to take a period of leave. A variation can be a change of start/end date, or a request to change a continuous period of leave to a discontinuous pattern. Generally, notice to vary or cancel a period of leave must be given at least eight weeks prior to both the original start date of the leave, and any varied start date. There are specific rules around whether any change will count as using up one of the employee's three notices.

Important details you need to know

The mother and partner can be off at the same time

The mother and her partner can choose to be off work at the same time provided that the total period of maternity and shared parental leave does not exceed 52 weeks. Shared parental leave can be taken by both partners at the same time. It can also be taken by a partner at the same time that the mother is on maternity leave provided that she has given notice to curtail her maternity leave in the future. It is not necessary for both parents to take shared parental leave: for example, a mother may only take maternity leave while the partner may take shared parental leave.

Employees can take more than one block of leave per child

The regulations give employees a right to more than one period of leave when a baby is born:

- A partner could take paternity leave and then shared parental leave at a later date with a return to work in the middle.
- Similarly, a mother could take an initial period of maternity leave and then shared parental leave at a later date with a return to work in the middle.
- Provided they comply with the notice requirements, employees are entitled to take three separate blocks of shared parental leave during the baby's first year. An employer cannot refuse the first three requests for continuous blocks of shared parental leave. That means that an employee could take a block of paternity or maternity leave, followed by three separate blocks of shared parental leave and the employer cannot refuse the pattern of leave. This could present operational difficulties for employers in terms of resourcing and continuity of service.

Employees have certain rights during shared parental leave

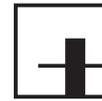
Contractual terms remain in place: Employees on shared parental leave will enjoy similar protections to women on maternity leave. They will remain entitled to all contractual terms and benefits (apart from pay) and will continue to accrue holidays.

Protection in redundancy situations: If an employee's role is made redundant while they are on shared parental leave, then that employee must be given a right of first refusal on any suitable alternative vacancy. This rule could potentially be open to abuse as employees could time shared parental leave to gain greater protection in a redundancy situation.

SPLIT days: In addition to the 10 KIT days that a mother on maternity leave has, each parent taking shared parental leave would be entitled to 20 shared parental leave in touch days ('SPLIT days'). An employer cannot require an employee to attend work during shared parental leave, nor can an employee insist on attending work during a period of shared parental leave. Employees are protected against suffering a detriment as a result of their decision to use (or not use) SPLIT days.

Employees have rights when they return to work

Employees returning from shared parental leave will have the same rights as those returning from maternity leave. If the employee has been off for less than 26 weeks in total, they will have the right to return to the same role. Where the employee has been off for over 26 weeks in total, they will have the right to return to the same role or a similar role on no less favourable terms.



Things to think about now!

How many of our employees are likely to take the leave and will we be able to cope?

The Government anticipates that the take-up will be relatively low at between 2% and 8%. However, it remains to be seen how the leave will be used as this could depend on a number of factors including the extent to which employers offer enhanced benefits. High take-up could be problematic for businesses with predominantly male workforces not as used to accommodating maternity leave absences. Women are also entitled to use the leave and they may do so as it is flexible and allows employees to return to work between periods of leave. It could be that the leave is used by employees in small blocks throughout the baby's first year similar to additional holiday entitlement.

Regardless of the number of people who take up the leave, or how leave is shared between parents, it will still be essential to ensure that businesses have clear policies in place on how shared parental leave will operate.

Should we offer enhanced shared parental pay (and what are the risks of not doing so)?

Statutory shared parental pay is paid at the same flat rate as SMP. However, if you currently offer enhanced maternity pay, as a business you will need to consider whether or not to offer enhanced shared parental pay on the same basis.

The Government has said that there should not be a risk in treating shared parental leave differently from maternity leave. However, there is European case law which could be used to support a sex discrimination claim against an employer who does not offer the same enhanced benefits during shared parental leave as it does during maternity leave. This issue is likely to remain unclear until there is a legal challenge.

Employers who are able to extend their existing enhanced entitlements to the full workforce may choose to do so to avoid the risk of discrimination claims and maintain their appeal to employees through family friendly policies. If you decide to offer enhanced pay during shared parental leave, it is far more likely that employees will use the right and take time off.

Should we reduce the levels of enhanced maternity pay we currently offer?

Mirroring enhanced maternity pay for shared parental leave may not be financially viable. In order to maintain equality across the workforce and minimise the risk of discrimination claims, you may consider reducing or removing your existing enhanced maternity pay to enable

you to give those on shared parental leave mirrored benefits.

Your legal ability to do so will depend on whether or not employees have an express or implied contractual right to the enhanced entitlements currently offered. If enhanced benefits have been provided for a number of years, it is likely to be difficult to change them without employee consent. The business may also be reluctant to dilute family friendly rights as this could cause employee relations and PR issues.

What amendments do we need to make to our policies and pension scheme?

Shared parental leave is a new entitlement in addition to maternity and paternity leave so you will need a new policy covering the procedure and rates of pay (including any enhanced benefits). This policy should include style notification forms to make it easier for everyone to comply with the legislation.

It may also be necessary to amend your existing maternity and paternity policies to ensure that your family leave rights all work together. Policies must be carefully drafted to ensure that they do not discriminate, work as intended and do not unintentionally offer double benefits. The new policies should then be communicated to employees.

Your pension scheme rules, explanatory documentation and pension policies should also be reviewed and if necessary amended to ensure that they refer to shared parental leave in addition to the existing family leave rights. At present, pension accrual/contributions will usually continue (as a minimum) during any period of paid family leave. Pension accrual/contributions should also continue for periods of paid shared parental leave.

Is there a risk of discrimination claims and how can we protect our business?

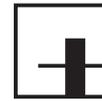
The best way to limit discrimination claims is to be prepared. Your HR team need to know how to process requests and answer questions on shared parental leave. Your managers need to understand that employees, both male and female, have a new right to request time off so that they can plan for such absences and ensure that requests are not mishandled. If a man requesting or taking shared parental leave is treated less favourably than a woman requesting or taking maternity leave or shared parental leave, then there is a real risk of sex discrimination claims. Employees who have started planning families will want to know what their entitlements will be when the baby arrives. You may wish to consider arranging training sessions for your HR team and managers, as the first requests could come in any day.



To do list

- Tell the decision makers in your business that shared parental leave is here.*
- If you currently enhance maternity pay, speak to your finance director about whether or not to offer enhanced shared parental pay on the same basis or whether or not to reduce any existing enhanced maternity benefits, and the related risks and costs.*
- Prepare and communicate a shared parental leave policy together with notification forms and manager guidance.*
- Review and, if necessary, amend existing family leave policies and pension documentation.*
- Arrange training for your HR team and managers to ensure that requests are properly and consistently managed from day one.*

Please contact us if you have any questions on the effect that Shared Parental Leave could have on your business, would like to arrange a training session or need help preparing policies.



About us

Our employment team is renowned for its impressive technical expertise, proactive approach and ability to deliver practical and commercial solutions. Working with clients, across the UK and internationally, we have a wealth of experience that extends to all areas of employment law.

We work for clients across a number of different sectors, including Finance, Energy, Real Estate, Pharma & Life Sciences, Food & Drink, Hospitality & Leisure, Education and the Public Sector.

Key contacts

If you require advice or further information on any of the matters raised in this update, please get in touch with any of our specialist Employment lawyers listed below, or your usual Shepherd and Wedderburn contact.



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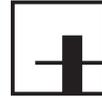
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