

OLD SQUARE  
CHAMBERS



# **Some Common Questions on Shared Parental Leave**

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# Shared Parental leave: resources

- ACAS guidance, templates
- BIS technical guidance
- <http://www.yesslaw.org.uk/sharedleave/>

# What hasn't changed?

- No reduction in maternity leave rights: birth mother can take OML plus AML up to 52 weeks
- No reduction in adoption leave rights (in fact, improved: day 1 right, pay harmonised with SMP)
- Ordinary Paternity Leave of one or two weeks
- Unpaid parental leave remains (though now available for all children up to 18)

# What is different about Shared Parental Leave?

- “Opt in” to system IF eligible
- Flexible way of sharing statutory leave and pay
- Simultaneous, ‘chunks’ of leave, (almost) any time in first year
- APL abolished, OPL remains but only can be taken if no SPL taken

# Shared Parental Leave: overview

- “Leave” Regs (SI 2014/3050), “Pay” Regs (SI 2014/3051) and “Curtailement” Regs (SI 2014/3052)
- 52 weeks: minus either amount of maternity leave taken, or weeks of maternity pay/maternity allowance used
- during first year following birth / adoption
- Keeping in touch days (“SPLiT”)

# Shared Parental leave: overview

- Shared between two parents – defined
- Both individuals must satisfy criteria in order to opt in
- Eligibility tests for leave and pay different
- employment protections (right to return to same/other suitable role, redundancy, non-detriment) apply as with other forms of statutory leave

# Eligibility: for person taking leave

- Must have at date of birth/placement for adoption main responsibility for child (apart from other partner)
- 26 weeks' employment prior to 15<sup>th</sup> week before birth/notification of adoption match – not day 1 right
- Complied with formalities (including two-stage notice – see leave Regs)
- Needs partner to meet a different eligibility test



## Eligibility: for partner of person taking leave

- at date of birth/placement, main responsibility for child, (apart from other partner)
- worked on an employed or self-employed basis in 26 of the last 66 weeks
- meets earnings threshold test (must have earned at least £30 per week on average for 13 of those weeks)
- if this other person is mother/main adopter then must have curtailed rights to maternity or adoption leave/pay

# Common Questions: eligibility for leave

- *I'm an employed Dad, and I want to be a hands-on carer for my new baby. My wife has been a stay-at-home Mum for two years. Can I take shared parental leave?*
- *I'm a single working mum. I would really value the flexibility of the new shared parental leave system. Can I opt in?*

# Common Questions: eligibility for leave

- *I'm an employee thinking of adopting a child. My partner is a self-employed barrister doing legal aid funded work. Do we qualify?*
- *I'm an agency worker. Can I take shared parental leave?*

# What about pay?

- No extra statutory pay available. Up to 39 weeks at £139.58/week or 90% of average earnings if less
- To qualify for pay both individuals must satisfy different criteria
  - for M to qualify she must meet same test as for SMP
  - and her partner must meet employment and earnings test
  - and for P to qualify, vice versa

## Common Questions: pay

- *I'm an agency worker. Do I qualify for shared parental leave pay?*
- *I'm an employee but working one day a week – my employer has told me I will only qualify for Maternity Allowance. Do I qualify for shared parental leave pay?*

## Common Questions: pay

- *Lucy lost her job while pregnant. She had been working for 4 years earning £13,000 as a care assistant. She will get Maternity Allowance (MA), but not SMP. She lost her job when she was 20 weeks' pregnant. Her partner Barclay has 11 years service as a bus driver earning £350 a week.*
- *Barclay has entitlement to SPL and ShPP if Lucy curtails her MA, but Lucy does not.*

# Should employers enhance SPL pay?

- Low take up of SPL – financial considerations paramount
  - Legal risks? Discrimination complaints by men?
  - Employee relations, public perception
  - Financial considerations – extension to grandparents?
  - Concern: levelling down of maternity pay

# Who is enhancing SPL pay?

- Number of large private sector employers: PWC, Deloitte, Shell, Linklaters
- Civil service committed to pay SPL at maternity leave rate
- NHS Employers – “decision for individual trusts”
- Query approach to enhancing adoption leave and pay



# Employer arguments: direct discrimination

- S13 Equality Act 2010 on direct discrimination
- S13(6) special treatment for women in connection with pregnancy or childbirth permitted
- S23 requires no material difference in circumstances
- Male employee on SPL treated same as a female partner also on SPL. Regs and pay are “gender neutral”

# Male employee arguments

- ECJ case of *Roca Alvarez* – breastfeeding leave – for first 9 months of leave, one hour per day
- Could be given to fathers if mother employed but not if mother self-employed
- So father's right to leave parasitic on mother's right
- Law perpetuated traditional gender distribution of tasks

# Employee arguments

- Must come a point where leave no longer connected with maternity and rather is about care of child
- When is that – 2/4 weeks? 20 weeks? 1 year?
- *De Bellin* redundancy scoring test – EAT held special treatment subject to test of proportionality
- Is enhancing maternity pay but not SPL proportionate?

# Employer arguments: indirect discrimination

- S19 Equality Act
- PCP? Paying enhanced pay for leave from work to look after a baby only to employees who have given birth?
- Query direct discrimination claim masquerading as indirect claim
- Key battle ground would be justification

# Proportionality points

- Protecting woman's biological condition and special relationship, including breastfeeding
- Unpredictable nature of pregnancy and birth
- Protection of pressure to return to work?
- Encouraging more women to enter/remain in workplace?
- Duration, unusual pay structures (bonuses?)

# Thank you

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