

# Maternity leave and pay



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The law recognises employees on maternity leave as being particularly vulnerable and gives them special protection. As a result, employers need to be careful to make sure they comply with their legal obligations in this area. This Inbrief summarises the rights that employees on maternity leave enjoy and looks at some common problem areas.

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### Understanding the jargon

Unfortunately, the terminology in this area makes it quite complicated to understand. Some useful terms are:

**OML (ordinary maternity leave):** the first 26 weeks of maternity leave.

**AML (additional maternity leave):** the last 26 weeks of maternity leave.

**EWC (expected week of childbirth):** the week (measured from Sunday to Saturday) in which the employee is expected to give birth. Many of the employee's rights are calculated by reference to this date, even if the child is in fact born earlier or later.

**MAT B1:** the certificate (provided by a doctor or midwife) confirming that the employee is pregnant and the EWC.

**Qualifying week:** the 15th week before the EWC. This is used in calculating eligibility for statutory maternity pay.

**SMP (statutory maternity pay):** paid by the employer to the employee during the first 39 weeks of maternity leave. Most of the money paid over can be recovered from Her Majesty's Revenue & Customs (HMRC).

**Maternity Allowance:** social security benefit paid to employees who do not qualify for SMP.

**KIT days (keeping in touch days):** during maternity leave, an employee may attend work for up to ten "keeping in touch" days without being deemed to bring her maternity leave to an end.

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### The basic right

All pregnant employees are entitled to take up to 52 weeks' maternity leave, regardless of their length of service. It is compulsory to take two weeks'

maternity leave from the date of childbirth (or, in the case of some factory workers, four weeks' leave). This is for health and safety reasons and an employer will be guilty of a criminal offence if it allows an employee to work during this period.

The first 26 weeks of maternity leave is referred to as "ordinary maternity leave" (OML) and the remainder is known as "additional maternity leave" (AML). As explained below, there are some differences in the rights enjoyed by employees during these periods of leave.

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### Starting and returning from maternity leave

#### Starting leave

An employee can choose when to start her maternity leave at any time from the 11th week before the EWC onwards. She should give her employer notice of the intended start date no later than the 15th week before the EWC. If she changes her mind, she must give her employer no less than 28 days' notice.

The maternity leave period will start automatically in two situations:

- ▶ If the employee gives birth prematurely before her maternity leave has started, the maternity leave period will start the day after the birth.
- ▶ If the employee is absent from work due to pregnancy-related sickness at any time after the 4th week before the EWC, her maternity leave will start automatically on the day after her first day of absence.

It is good practice to encourage employees to discuss their plans for start and return dates at an early stage and



encourage them to keep the employer updated if their plans change.

Employers should bear in mind that employees returning from maternity leave may wish to request that a flexible working arrangement be put in place for them, particularly if they will have childcare responsibilities.

### **Giving notice of return**

Unless the employee tells her employer that she wants to return at a different time, the expected date of her return will be at the end of AML. There is no need for her to provide any further notice.

If the employee wants to return earlier than planned, she must give the employer eight weeks' notice (although the employer can allow her to return on shorter notice). The purpose of this is to give the employer enough time to make the necessary arrangements for her return, particularly if someone has been employed temporarily to provide maternity cover.

Similarly, if the employee has previously indicated that she wants to return to work before the end of AML, but decides to return later, she must notify her employer at least eight weeks before her original return date.

### **Deciding not to return**

If the employee decides not to return from maternity leave, she must give the employer notice in accordance with her contract. Her eligibility for SMP will not be affected.

### **Rights on return**

An employee who returns to work on or before the last day of OML has the right to return to the same job and on the same terms and conditions as if she had not been away from work.

An employee who returns after AML or who has taken at least four weeks' parental leave on top of her OML is entitled to return to the same job unless it is no longer reasonably practicable for the employer to employ her in that role (for example, if there has been a reorganisation of the business). In those circumstances, the employee is entitled to return to a different job which is suitable for her and appropriate in the circumstances. The terms and conditions must be no less favourable than those she enjoyed in her previous role.

Employees who have taken maternity leave also have special rights in redundancy situations: see "Dismissal and redundancy" below.

### **KIT days and contact during leave**

An employer may make "reasonable contact" with an employee during maternity leave. Typically, this is used to discuss the plans for the employee's return, as well as to keep the employee updated about developments at work during her maternity leave. It is best practice to agree in advance with the employee what level of contact they would like, to try to strike the right balance between keeping the employee "in the loop" and allowing them to benefit from the leave period.

It is particularly important to ensure that employees on maternity leave are kept informed about any major developments or opportunities - for example, opportunities for promotion. Failure to do so could result in a claim for sex discrimination. It is also important to keep them informed about any major changes which are taking place (e.g. changes to contractual terms, restructurings, TUPE transfers) and include them in any consultation.

KIT days are different, in that they give the employee the opportunity to carry out work (and be paid for doing so) for up to ten days during maternity leave. The employer and employee must agree what work will be carried out and what rate of pay the employee will receive. KIT days are a useful way of enabling employees to receive training or attend conferences during maternity leave, but any type of work can be carried out so long as both parties agree. An employee cannot be forced to attend work for a KIT day.

### **Sharing leave**

Shared parental leave (SPL) is a way for parents to share statutory leave and pay on the birth of a child. Parents are not obliged to take SPL and mothers can still take the full 52 weeks of maternity leave (with 39 weeks paid). The SPL regime allows mothers to choose to bring their maternity leave to an end early and opt-in to a period of SPL. See our [Inbrief on shared parental leave](#) for more details.

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### **Rights during maternity leave**

During maternity leave, the contract of employment remains in force and the employee is entitled to benefit from all the terms of the contract except those relating to remuneration (i.e. wages/salary). This means that the employee will continue to be entitled to accrue annual leave and enjoy contractual benefits like health insurance or a company car. Similarly, the employee continues to be bound by the terms of the contract (except the obligation to attend work).

### **Pensions**

The employer must continue to make pension contributions while the employee is on OML or paid AML



(whether she is receiving SMP or enhanced company maternity pay). These contributions must be at the employee's normal rate of pay and cannot be reduced to reflect the reduced pay she is receiving. The employee, on the other hand, may make contributions at a pro-rata rate, reflecting her reduced pay.

During the unpaid period of AML (the last 13 weeks if the employee is receiving SMP only), the employer is not obliged to make pension contributions unless this is required by the employee's contract.

### Bonuses

This is a tricky area. If a bonus constitutes "remuneration", the employer will not be obliged to pay it to the employee. However, if it is a contractual benefit, the employer will have to pay it to the employee despite her being on maternity leave. Broadly speaking, if a bonus is based on personal performance, it will be "remuneration", whereas if it is a general staff-wide bonus (such as a Christmas bonus) it should be treated as a contractual benefit.

This can be particularly complex where the employee starts maternity leave part-way through a bonus year. Employers often adopt pro-rating arrangements in relation to performance bonuses. However, in calculating the pro-rated amount, the employee should be treated as having worked for the compulsory maternity leave period. The law on maternity leave and bonuses is particularly complicated, so it is worth seeking specialist advice on this issue.

### Redundancy and dismissal

If an employee is dismissed or selected for redundancy on the grounds of

pregnancy or having taken maternity leave, the dismissal will be automatically unfair. It will also amount to sex discrimination, for which the employee could claim uncapped compensation.

Employees on maternity leave enjoy special protection in redundancy situations. If an employee's job becomes redundant during her maternity leave, she has a right to be offered a suitable alternative role if one is available, on terms which are no less favourable than her existing contractual terms. This includes any suitable role with an "associated employer" (i.e. a holding company, subsidiary or group company).

This means that if a suitable role is available, the employee on maternity leave must be given priority over other employees who are at risk of redundancy, regardless of whether she would have been selected for the role on merit alone. If the employer does not offer the employee the suitable role, she will have a claim for automatic unfair dismissal. As a result, when employers are looking to make redundancies and it appears that the role of an employee on maternity leave will be affected, they have to analyse very carefully whether there are any suitable alternative roles which should be offered to that employee. Failure to do so could lead to a costly claim.

This special protection is about to be extended. From 6 April 2024, it will apply from when the employee notifies the employer of the pregnancy. For maternity leave ending on or after 6 April 2024, the protection will end 18 months from the date of birth if notified to employer before the end of maternity leave (or 18 months from the EWC if not notified). Similar extended rights will apply to other types of family leave,

including adoption leave and SPL. Any employers planning restructuring in 2024 will need to ensure they have properly thought through the implications of the new protections.

### Unlawful discrimination

It is unlawful discrimination to treat a woman unfavourably because of pregnancy or because of maternity leave. For example, by refusing to promote a woman while she is pregnant or demoting her when she returns to work after maternity leave.

It is also direct sex discrimination to treat a woman less favourably at work because she is breastfeeding.

### Detriment

It is unlawful to subject an employee to any detriment for a reason connected to her pregnancy or maternity leave (for example, demoting her when she returns to work). In practice, an employee who was subjected to any such detriment would also have a claim for sex discrimination.

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### Protection under discrimination law

As well as the specific statutory rights outlined above, women who take maternity leave are protected by the law on sex discrimination and equal pay. The law on this is complex and continues to develop, but common problem areas include:

- ▶ *Pay rises*: an employee on maternity leave should receive the benefit of any pay rise she would otherwise have received. This may not affect SMP but is likely to affect the calculation of enhanced company maternity pay (if applicable).

- ▶ *Service-related benefits*: time spent on maternity leave should generally be counted for the purposes of any service-related benefits.

## Statutory maternity pay

### Eligibility

An employee will be eligible to receive SMP if she satisfies the following conditions:

- ▶ She has been continuously employed for at least 26 weeks at the end of the qualifying week (see above).
- ▶ Her normal weekly earnings are not less than the lower earnings limit for National Insurance purposes.
- ▶ She is still pregnant 11 weeks before the start of the EWC.
- ▶ She has supplied a MAT B1 to her employer and given at least 28 days' notice of the date on which she wants her SMP to start.
- ▶ She has ceased work.

### Effect of resignation or dismissal

Even if the employee is dismissed or resigns before her maternity leave starts, she will still be eligible to receive SMP for 39 weeks so long as she qualified for it prior to her employment ending. So long as her employment ends after the qualifying week, her eligibility will not be affected (although she will probably no longer be eligible for any enhanced company maternity pay). There are also special provisions for employees who give birth prematurely or who are dismissed because the employer is trying to avoid paying SMP.

### How much SMP is paid?

There are two rates:

- ▶ For the first six weeks of maternity leave, the employee is entitled to receive 90% of her normal weekly earnings.
- ▶ For the remaining 33 weeks of paid leave, she will receive a prescribed statutory rate or 90% of her normal weekly earnings, whichever is lower.

The prescribed statutory rate is set by the government each tax year. ([see here for the current rate](#)).

### When does SMP start?

Unless the employee gives notice to the employer that she wants her SMP to commence on a different date, it will start on the 11th week before the EWC (assuming she has ceased work by that point).

If the employee:

- ▶ gives birth earlier than expected
- ▶ leaves her employment after the 11th week before the EWC; or
- ▶ is absent for a pregnancy-related reason on any date on or after the start of the 4th week before the EWC her SMP will automatically start.

### When does SMP stop?

SMP stops when the employee returns to work (although KIT days are an exception to this rule). It also stops automatically if the employee starts a new job, dies or is sent to prison.

### Recovering SMP

Most employers are entitled to recover 92% of SMP from HMRC. Small employers with a Class 1 National Insurance contribution liability below a prescribed limit can recover 100% of SMP plus an additional sum to compensate for the National Insurance contributions made in respect of SMP.

### Future developments

A new right to neonatal care leave and pay is due to come into effect in April 2025. This will provide parents with a right of up to 12 weeks' leave and statutory pay when their baby requires at least seven days of medical or palliative care which starts within the first 28 days after birth. Detailed regulations setting out how this will work in practice have not yet been published.

**For more information on this subject please contact:**



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