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Proposals for the reform of the law relating to Family Rights

Employment Lawyers Association

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INTRODUCTION

- 1) The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation, rather it is to make observations from a legal standpoint. Accordingly it is not intention in this paper to suggest changes to the content of the law but we do seek to make it more accessible and coherent. ELA's Legislative and Policy Committee, which is made up of both barristers and solicitors meet regularly for a number of purposes including to consider and respond to proposed new legislation and on this occasion to highlight the serious need for an area of law to be redesigned and consolidated.
- 2) The Employment Law Oversight Committee of ELA set up a sub-committee under the chairmanship of Stephen Levinson of Keystone Law to consider and propose changes to the structure and design of the law relating to Family Rights. A list of the members of the sub-committee is in Appendix 2 to this response.

Executive Summary

- A A survey of our members demonstrated that Family Rights is one of the areas giving rise to the greatest practical difficulty for practitioners. Members were given the opportunity to explain their rationale for finding Family Rights so difficult to apply in practice. Reasons given included: lack of understanding of what was permissible generally under the law, the wide variety of different regulations applying to different types of family leave, the qualifying criteria for leave varying from the qualifying criteria for pay, the interaction of different rights contained in different pieces of legislation, the legislation being difficult to follow with pay and leave being addressed in different pieces of legislation, difficulty of interpretation where rights overlap, differing qualifying requirements for similar types of rights and the disparate nature of the legislation. For example many employers still do not realise that they can recover Statutory Maternity Pay from their NI contributions – small employers 103%. They think it is their responsibility to pay. This we believe leads some to dismiss pregnant women for fear of having to pay. Also the different provisions between Statutory Maternity Pay and shared parental leave are confusing. For example, a woman taking maternity leave is entitled to Statutory Maternity Pay for the whole period even if her employment terminates. If a woman receives Shared Parental Pay and is likely to be made redundant, she needs to book the rest of the Shared Parental Pay period before her employment ends otherwise she will lose it. This is because a parent must be employed up to the week in which Shared Parental Pay starts.

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B If practitioners find the family rights regime so difficult, its intended beneficiaries can stand little chance. The codification and simplification of family rights is long overdue. The approach taken to codifying and consolidating the scattered strands of discrimination law, culminating in the Equality Act 2010 (EqA), provides a useful model.

A unitary framework

C Core Family Rights are currently spread across three different Acts of Parliament and about 14 different sets of regulations. Domestic law must be compliant with, depending on the context, one or more of up to seven different European Union Directives. In some cases, domestic law is more generous than EU law.

D Given the breadth of the legislation covering this topic, we have sub-divided Family Rights into the following unitary framework, taking a ‘life stages’ approach:

- Pre-birth rights (encompassing IVF, surrogacy, pregnancy, ante-natal appointments and associated time off and health and safety rights)
- Birth rights (encompassing maternity, paternity, adoption)
- Childhood years (encompassing unpaid parental leave)
- Family life (encompassing flexible working requests, part-time working and time off for dependents)
- Enforcement

E The issues with the current law in relation to each of these is set out below. Details of where the existing law in relation to each of these is to be found is set out at Annex 1.

Findings and recommendations

F Across the field of family rights, common themes emerge

- Complexity, arising from legislative scatter and piecemeal development
- Ambiguity and uncertainty over the boundaries and content of rights
- Overlap between discrimination law and Family Rights
- Inconsistency in requirements for similar rights
- Exclusion from or greater difficulty in enjoying rights for workers, agency workers and those in zero hours contract

- Difficulty in the effectiveness of enforcement of rights because of employment tribunal fees and the little understood role of the First-tier Tribunal (Tax Chamber) in disputes over rights to statutory payments from employers

G Underlying these themes is the need for greater clarity and certainty regarding rights and obligations. ELA recommends:

- Consolidating and simplifying existing family rights legislation.

In the longer term, we envisage including all rights in a single Act setting out the framework, with a limited range of secondary legislation following our suggested 'life stages' approach.

In the shorter term, we envisage concrete steps towards consolidation by:

- Harmonising concepts and qualifying conditions, any differences to be evidence-based. Removing defunct provisions. The default position should be uniformity and simplicity.

H A Statutory Code of Guidance and Practice is warranted, given the existing uncertainties and the relationship with discrimination law.

I The purpose of such a code would be:

- Drawing together and explaining all strands of family rights, including health and related health and safety rights
- Identifying areas where certainty may not be possible, but setting out clear parameters for decision-making
- Explaining areas of overlap between discrimination and family rights law
- Explaining any differences between domestic and EU law
- Explaining any differences in common concepts and qualifying conditions

I Pre-birth rights

3) Pre-birth rights encompass IVF, surrogacy, pregnancy, ante-natal appointments and associated time off and health and safety rights.

4) The issues with the current law are set out below. Annex 1 sets out the sources for existing law.

● Legislative scatter

- An individual's rights, entitlement to leave and protection from discrimination are contained in a variety of locations, which often overlap with one another – for example:
 - cross references between Employment Rights Act 1996 (ERA) and The Management of Health and Safety at Work Regulations 1999 – in particular in relation to health and safety protection and consequential rights while pregnant;
 - between ERA and EqA – in particular related to entitlements to suitable alternative work and paid suspensions on medical / maternity grounds and enforcement; and
 - the impact of the Pregnant Workers Directive.
- Having to refer to a variety of sources is time consuming, and creates confusion – in particular for lay users.
- It is difficult to compare rights in different scenarios (for example, if an individual wished to assess their relative entitlements in the event that they were considering pregnancy, surrogacy, IVF or adoption etc).

● Piecemeal development

- Legislation and regulations have been created in a reactive way when situations (already in place) required legal rules which, to an extent, explains the lack of consistency.

● Ambiguity and uncertainty

- IVF and surrogacy
 - The fact that the law is exceedingly complex and these cases are becoming more frequent justifies a simplification/codification exercise.
 - Rights at each stage of the process (for both IVF and surrogacy) should specifically be addressed, including putting *Sahota v Home Office and Pipkin* UKEAT/0342/09 on a statutory footing. The EHRC guidance to treat requests for time off 'sympathetically', and to establish procedures for allowing time off, should be made clear and consideration given to it being replaced with unambiguous rights.
 - In relation to surrogacy, the rights of the biological mother and of the intended parents should be clarified and should be independent of each other (for

example, the position in relation to paternity leave is especially complex depending on what the birth mother wants to do about the birth certificate).

- Health and safety
 - Codification, and a step-by-step approach, for the duties in relation to pregnant women and nursing mothers in the workplace.
 - Clarification to give certainty on when the duty to undertake special risk assessments arises (Regulation 16 MHSW Regs, *Madarassy v Nomura International plc* [2007] ICR 867)
- **Overlap with discrimination law**
 - As with other family rights, the rights and remedies for breach are incorporated into various pieces of legislation – and while an act may breach a right under ERA, which may provide a specific remedy, it is likely to also give rise to claims under EqA. For example, failure to pay an employee while on suspension on maternity grounds.
 - A key inconsistency, which has serious practical implications, is in the right to return. Employers do not understand that if a woman has taken more than 26 weeks leave they cannot refuse to allow her to return to the same job – if the reason for doing so is because she has been on maternity leave; that would of course be discrimination. Most employers think that the ERA right to return and the exception (if it is not reasonably practicable for her to return to the same job), is all they have to consider. So, some believe they have complied with their obligations but are then faced with a discrimination claim.
- **Inconsistency in requirements for similar rights**
 - Complexity due to the use of different qualifying conditions for leave and pay
 - Different treatment of surrogate mothers and intended mothers
 - Surrogate mothers are entitled to statutory maternity leave but this is not the case for intended mothers.
 - There has been a debate as to whether the Pregnant Workers Directive requires the intended mothers to also be entitled to such leave but the ECJ held that they do not have the right to maternity leave
 - Should we allow intended mothers the same rights than surrogate mothers especially when considering that one of the aim of maternity leave is to allow the mother time to bond with her child?
 - Paid time off for mothers but unpaid time off for fathers to attend ante natal appointments
 - The right to paid time off for ante-natal care appointments for agency workers came in on 1 October 2014, yet similar rights for paid time off for agency workers to attend adoption appointments came in from 5 April 2015

II Birth rights

- 5) Birth rights encompass maternity, paternity and adoption.
- 6) The issues with the current law are set out below. Annex 1 sets out the sources for existing law.

- **Legislative scatter**

- It is difficult to find provisions
- leave and pay are dealt with separately – in the ERA for leave and Social Security Contributions and Benefits Act 1992 (SSCBA) for pay, as well as in secondary legislation
- extensive amendments to ERA and SSCBA were made made by the Children and Families Act 2014 (CFA)
- it requires tortuous cross referencing from Equality Act 2010 (EqA) to ERA and Maternity & Parental Leave etc Regulations 1999 (MPL) for the definition of a ‘protected period’
- there are a number of badly worded or circular definitions: e.g. the Shared Parental Leave Regulations 2014, reg 3(1), defines ‘shared parental leave’ as ‘leave under ss75E or 75G’ of ERA, yet each of these sections simply provide regulation-making powers
- there is a tension between the need for consistency (one definition only) and clarity (in one location)

- **piecemeal development**

- some of the complexity is caused by the original drafting, some of which is no longer necessary: for example now that maternity and adoption leave are ‘day one’ rights, it is questionable whether the existing complex notice provisions are necessary.

- **ambiguity and uncertainty**

- *e.g. Reg. 10 MPL (redundancy during maternity) and equivalents*

- We believe that Reg. 10 creates huge problems. Many employers do not understand that they have to look actively for suitable alternative work as opposed to just sending out summaries of vacancies. If the employee does not see a suitable job being advertised in this situation, the employer may well be in breach as the duty is to offer the job. Clarity is needed about the duty where there are associated companies.
- There is an issue for those on maternity etc. leave when their role are altered and this requires a new contract given that in a downsizing and restructuring exercise they take priority over others, but not in a redundancy exercise.

- It is uncertain how to deal with competing claims.
 - It is uncertain at what point the Reg. 10 duty arises
 - It is uncertain whether there is a continuing duty in circumstances where the employee refuses offer of a suitable vacancy, does / should the duty continue? Until when?
- E.g. *Reg. 20(4) MPL (unfair dismissal circumstance) and automatically unfair dismissal*
 - This protection applies only if dismissal ends Ordinary or Additional Maternity Leave
 - Reg. 10 MPL has no effect if dismissal comes later, during post-maternity contractual leave or redeployment
 - It is uncertain whether this is compliant with the EU Pregnant Workers Directive.
- E.g. *the effect of failure to comply with notice provisions*
 - Reg. 4(3) MPL prevents entitlement to ordinary maternity leave if the woman has not notified the employer that she is absent from work wholly or partly because of pregnancy in the four weeks before the expected week of childbirth
 - It is uncertain what counts as notification.
 - It is uncertain what relationship is between Reg. 4(3) and the standard notification under Reg. 4(1). For example:
 - Does the Reg. 4(1) MPL notice survive?
 - When does the employee's statutory maternity leave begin and end?
 - There is uncertainty about an employee's status if she has not notified her employer she is off work because of pregnancy-related illness
 - Within the MPL Regs., and
 - under the EU Pregnant Workers Directive.
 - What is the interaction with the employer's obligation under Reg. 7(6) MPL to notify the woman of the date on which her additional maternity leave shall end?
 - If an employer has not complied with Reg. 7(6) MPL in respect of the changed last day of additional maternity leave, it is unclear if the woman is free to return to work at the end of maternity leave without giving notice under Reg. 11 MPL to vary her previously notified intended date of return?
- E.g. *Shared Parental Leave Regulations 2014, Reg. 39*
 - There is uncertainty over the meaning this phrase: 'during a period in which an employee is taking shared parental leave'
 - If it is to have the same limiting effect as Reg. 20(4) MPL then it needs a narrow interpretation

- That seems unlikely: although Reg. 39 could be applicable only when the employee is not at work but on SPL leave, a broader interpretation would do justice to SPL as a shared benefit and reduce the prospect of the employer manipulating the timing. Thus possibilities include, from the 1st day of SPL booked or indicated, to the last such day (but would perhaps leave 'taking' meaningless); or as SPL is shared, no reason not to take account of the mother's notice curtailing her SML and starting the protection from the first day of SPL and ending it 52 weeks after the birth / adoption.
- There is plainly a need for a clear definition.

Note the overlap between discrimination law and Family Rights

7) *What is the status of the defence of statutory authority?*

- The EAT in *Eversheds v de Belin* said of s.13 (6) (b) EqA ('no account' to be taken of special treatment) held that the treatment must be reasonably proportionate to the aim to be achieved, so it may be easy to get the balance wrong.
- However, in *Amnesty International v Ahmed* (not referred to in *Eversheds*) the EAT had considered s41 of the Race Relations Act 1976, a predecessor to EqA Sch 22, para 1 (where R 'must' act pursuant to statutory authority ...) where a less fluid interpretation was given, it being enough that the employers could show that the act complained of was necessary on the information available to them, or on what they should reasonably have known at the time of the decision.
- These conflicting authorities require to be resolved to remove the uncertain position of the scope of the statutory defence.

8) *Another example is the overlap between sex discrimination and agency workers*

- The ERA deals with agency workers' rights where a placement is ended on maternity grounds; however the lack of anything specific about rights to return at the end of maternity leave suggests there are none.
- The MPL Regulations are silent about agency workers
- The Agency Workers Regulations 2010 are specific about the rights of agency workers and perhaps ought to enable an agency worker to return to work after maternity leave in the same role for the hirer without reserving the qualifying period. However, the Regs. do not make this explicit.
- Moreover, if an agency worker leaves to go on maternity leave and is replaced with a permanent employee, that appointment may be found to be sex discrimination, as it was in *Patefield v. Belfast City Council [2000] NICA 4*
- This demonstrates the need for the position of agency workers to be made clear.

- 9) There is also a lack of common concepts, e.g. notice requirements, aligned to evidence showing what is actually necessary. One example is the mismatch between numbers of 'keep in touch' days available: it is 10 days in MPL, yet 20 per partner, i.e. 40, for SPL.

III Rights in the childhood years

- 10) This stage covers only Unpaid Parental Leave. It overlaps with birth rights and with rights relating to family life but not limited to the needs created by children.

- 11) The issues with the current law are set out below. Annex 1 sets out the sources for existing law.

- **Legislative scatter**

- Rights to unpaid parental leave are found in the ERA (ss76-80), the Parental Leave Directive and in the Maternity and Parental Leave etc. Regulations 1999/3312.
- Later Regulations such as the Parental Leave (EU Directive) Regulations 2013 SI 2013/283 increased the total amount of parental leave that a qualifying employee is entitled to take in respect of an individual child e.g. from 13 to 18 weeks while the child is aged 18 years or younger.
- As well as considering ss210 to 212 ERA for the meaning of 'continuous employment', to understand their later rights, agency workers also have to look to the Agency Workers Regs. 2010 – the right under s80F ERA to make a flexible working request is dependent on having returned from a period of parental leave. Under Reg. 13(1)(a) MPL, the employment condition for entitlement to parental leave requires having been 'continuously employed' for not less than a year

- **Ambiguity and uncertainty**

- There is much scope for confusion with paid shared parental leave
- The case law on twins at EU level and other issues are not reflected in legislation.
- The Framework Agreement on Parental Leave refers to its scope as affecting all workers who have an employment relationship however UK legislation refers to employees only.
- The position of workers, including agency workers, needs clarifying

- **Complexity**

- No more than 4 weeks' leave can be taken in any one year. However, leave must be taken in one-week blocks, even if the need is for a shorter period.
- Employers and parents are free to agree more flexible arrangements, leading to confusion and dissatisfaction when parents compare experiences.

- **Overlap with discrimination law**

- As with other family rights, the right and remedies for breach are incorporated into the ERA but a breach could also give rise to claims under legislation such as the EqA 2010.

- **Inconsistency in requirements for similar rights**

- Maternity and adoption leave are both 'day one' rights for leave and 26 weeks for statutory pay purposes, yet for unpaid parental leave, employees must have completed one year's service with an employer to qualify.
- 21 days' notice is required to request leave, compared to 28 days for varying dates for statutory paternity pay, 8 weeks for shared parental leave, and 14 weeks for notifying intention to take maternity or paternity leave in the first place.

IV Family life rights

12) Family rights encompasses flexible working requests, part-time working and time off for dependants.

13) Issues with the current law are set out below. Annex 1 sets out the sources for existing law.

- **Legislative scatter**

- *Flexible working requests* – these are found in ss80F to 80I ERA and the Flexible Working Regulations 2014:

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- The problem is not acute in this area as it is caused by Scatter is reduced, unless the applicant is an agency worker. However, simplicity in this case, subject to the requirement to deal with applications in a 'reasonable manner' and a menu of grounds for refusal, leaves much to discretion which tends to increase uncertainty.
- Does not remove the possibility that refusing an individual request to work part-time on return from maternity leave, or in other childcare situations, may amount to indirect sex discrimination under EqA

- *Time off to care for dependants* – the right is found in just one location: s57A ERA, with s57B dealing with enforcement
- *Part-time work* – found as a free-standing set of rights in the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Made under the Part-time Workers Directive, 97/81/EC
- **Ambiguity and uncertainty**
- *Flexible working requests* –
 - Although the drafting itself is relatively open and clear, difficulties arise because the law cannot be applied in a uniform way
 - Uncertainty is created by the varying nature and circumstances of each individual request and the employer’s response
 - The abolition of a mandatory right of appeal increases uncertainty
 - Competing claims raise particular problems
 - With no specific provision made for a formal trial period, parties have to substitute use of the 3 month period for making a decision, or jointly agree to extend that period.
 - The lack of any right to review an arrangement, or to return to the former position, save through a fresh annual request, creates some uncertainty.
- *Time off to care for dependants*
 - The flexibility required to address the uncertainties of family life means that s57A ERA cannot be applied in a uniform way: it necessarily relates to each person’s individual circumstances
 - Uncertainty comes not from the drafting but from the subject matter. The practical difficulties are a product of the individual application of the right, ie what is reasonable in any particular set of circumstances.
- **Overlap with discrimination law**
- *Flexible working requests* –
 - if the employer gave no right of appeal, and with compensation limited to 8 weeks’ pay and no award for injury to feelings, employees may be expected to explore whether they also have a claim under the EqA
 - Competing requests increase uncertainty. If employers opt for discrimination-proof decision-making, that increases the risk of breaching the implied term of trust and confidence for those lacking a relevant protected characteristic.
- *Time off to care for dependants*
 - as with any right, limited compensation for breach and apparent inconsistency in accepting applications as valid, may encourage claims under the EqA

- **Inconsistency in requirements for similar rights**
- A *flexible working request* is subject to a strict statutory process of request and reply, whereas others, such as *time off for dependents* are more flexible
 - At what stage does a contractual change really require the level of formality required for an initial *flexible working* request?
- Maternity and adoption leave are 'day one' rights, yet to make a request for *flexible working* requires 26 weeks' continuous employment
 - Double that to one year if the employee is an agency worker – s80F(8)(a) ERA with reg 13(1)(a) MPL

V Enforcement of rights

- *Leave*
 - Unlike other aspects of Family Rights, many (but not all) of the provisions regarding enforcement of the rights to leave are contained in a single piece of legislation: the ERA, but this often cross refers to other legislation, making it difficult (for both employers and employees) to determine what remedy is available in the event of a breach of the particular right
- *Pay – statutory or contractual?*
 - When it comes to issues of pay during leave, the picture is different:
 - Enforcement of statutory pay is dealt with by HM Revenue & Customs, with an appeal to the First-tier Tribunal (Tax Chamber)
 - Enforcement in relation to any elements of contractual pay would be dealt with by an Employment Tribunal (or the High Court in the event that the contractual claim is in excess of £25,000.
 - Where an employer states that enhanced pay for any of the form of Family Rights is discretionary, there is no apparent mechanism for enforcement, unless the employee chooses to argue that the payment is contractual and/or is directly or indirectly discriminatory.
- *Flexible working*
 - The lack of an automatic right of appeal against *flexible working* requests may affect the employment relationship adversely. But for employment tribunal fees, it would be likely to lead to more tribunal claims which could have been avoided had the request been reconsidered formally by the employer.
- *Time limits*
 - Although the primary time limit of 3 months in which to make a claim is standard, extension of the limit is not.
 - 'Just and equitable' extensions apply in part-time working cases

- For all other family rights, an extension is possible only if it was not reasonably practicable to have claimed in time and that the claim has been presented within a reasonable time thereafter.
- *Remedy*
 - The remedies available for failure to allow a parent to exercise a right to maternity leave, paternity leave, parental leave or EDL include an award of “such compensation as the Employment Tribunal considers is just and equitable”.
 - There is no guidance regarding how this should be determined and, as such, neither employers nor employees have any certainty regarding the level of payment that could be expected in such circumstances.
 - In contrast, remedy for breach of the flexible working provisions is restricted to a cap of 8 weeks’ pay – with effect from 6 April 2015, a maximum award of £3,800
 - Formulating a claim as a breach of the EqA would, if possible on the facts and if successful, result in uncapped compensation.
 - Is monetary relief always the most appropriate remedy? Although money is the traditional measure, individuals may find it helpful to take part in conciliation or mediation exercises, receive an apology, specific relevant training for decision makers or reconsideration along the correct lines.

Annex 1 – Current Family Rights

I PRE-BIRTH RIGHTS

IVF treatment

- A protected period starts when fertilised ova are implanted (when she is regarded as pregnant).
- If the implantation fails the protected period ends after a further two weeks have elapsed (*section 18(6) EqA 2010*¹).
- Being treated less favourably because the employee is undergoing IVF treatment is likely to be sex discrimination (EqA 2010).

Surrogacy

- Surrogate mothers in the UK are entitled to statutory maternity leave
- Debate as to whether the Pregnant Workers Directive requires the intended/commissioning mother to also be entitled to such leave. *CD v ST* c-167/12 (ECJ) *Z v A Government Department and the Board of Management of a Community School* C-363/12 (ECJ) held that commissioning mothers do not have the right to maternity leave.

Pregnancy

- Paid-time off for antenatal appointments (*section 55*² and *56*³ ERA 1996)
 - Where she has made an appointment for such care on the advice of a registered medical practitioner, registered midwife or registered nurse.⁴
 - Remunerated at the appropriate hourly rate (to be calculated by reference to one week's pay and the number of hours worked in a week).⁵
 - An expectant father or the partner of a pregnant woman is entitled to take unpaid time off to accompany the woman to up to two of her ante-natal appointments for up to 6.5 hours per appointment. This is a "day one" right.⁶
 - Employees or agency workers who seek to exercise their right to accompany a pregnant woman to an anti-natal appointment are protected from detriment arising from the exercise of that right.⁷
 - An employee may complain to an employment tribunal where he or she has been unreasonably refused time off to attend an ante-natal appointment. Where this complaint is upheld the employment tribunal must make a declaration to that effect and order the employer to make a payment to the employee.⁸
- Health and safety protection while pregnant
 - Assess the workplace risks posed to new or expectant mothers or their babies
 - Alter the employee's working conditions or hours of work to avoid any significant risk (*Reg 16(2) MHSW Reg 1999*⁹)

¹ <http://www.legislation.gov.uk/ukpga/2010/15/section/18/prospective>

² <http://www.legislation.gov.uk/ukpga/1996/18/section/55>

³ <http://www.legislation.gov.uk/ukpga/1996/18/section/56>

⁴ Sections 55 and 57ZA Employment Rights Act 1996 ("ERA 1996")

⁵ Section 56 and 57ZB ERA 1996

⁶ Section 57ZE ERA 1996 (inserted by section 127 Children and Families Act 2014)

⁷ Section 47C ERA 1996

⁸ Section 57ZF ERA 1996 (inserted by section 127 Children and Families Act 2014)

⁹ <http://www.legislation.gov.uk/uksi/1999/3242/regulation/16/made>

- Offer suitable alternative work on terms that are not “substantially less favourable” (*Reg 16(3) MHSW Reg 1999¹⁰ and section 67 ERA 1996¹¹*)
- Where suitable alternative work is not available or the employee reasonably refuses it, suspend the employee on full pay (*Regulation 16(3) MHS Reg¹² and section 67 ERA 1996¹³*)

(Also articles 5 and 11 of the Pregnant Workers Directive 92/85/EEC¹⁴)

- Protection from dismissal, detriment or discrimination by reason of pregnancy
 - Automatically unfair to dismiss a woman (at any time) or to select her for redundancy when the reason (or principal reason) for it is connected to her pregnancy
 - Protection against being subject to a detriment for a reason connected to her pregnancy
 - Protection from discrimination: It is unlawful for an employer to discriminate by treating job applicant or employee unfavourably because of her pregnancy or related illness (*section 18(2) EqA 2010¹⁵*)

II BIRTH RIGHTS

Pregnancy

- Protection from dismissal, detriment or discrimination by reason of pregnancy
 - Automatically unfair to dismiss a woman (at any time) or to select her for redundancy when the reason (or principal reason) for it is connected to her statutory maternity leave
 - Protection against being subject to a detriment for a reason connected to her statutory maternity leave

Protection from discrimination: it is unlawful for an employer to discriminate by treating an employee unfavourably because she is on compulsory

- maternity leave or because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to OML or AML (*sect 18(3) and (4) EqAct 2010¹⁶*)
- Changing the start date of maternity leave:
 - give the employer at least 28 days’ notice before the date she originally intended to take that leave, or 28 days’ notice before the new date, whichever is the earlier (*reg 4(1A) MPL Reg 1999¹⁷*)
- Automatic start:
 - Premature birth (*reg6(2) MPL Reg 1999¹⁸*)
 - Absence from work for pregnancy-related reason (*reg 6(1)(b) MPL Reg¹⁹*)

Maternity

¹⁰ <http://www.legislation.gov.uk/uksi/1999/3242/regulation/16/made>

¹¹ <http://www.legislation.gov.uk/ukpga/1996/18/section/67>

¹² <http://www.legislation.gov.uk/uksi/1999/3242/regulation/16/made>

¹³ <http://www.legislation.gov.uk/ukpga/1996/18/section/67>

¹⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31992L0085>

¹⁵ <http://www.legislation.gov.uk/ukpga/2010/15/section/18/prospective>

¹⁶ <http://www.legislation.gov.uk/ukpga/2010/15/section/18/prospective>

¹⁷ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/4/made>

¹⁸ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/6/made>

¹⁹ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/6/made>

- Contract of employment continues and therefore the employee is entitled to the benefit of the terms and conditions of employment during leave except for the terms as to remuneration (*reg 71(4)(a) ERA 1996²⁰ and reg 9 MPL Reg 1999²¹*).
- Health and safety protection while breastfeeding
 - Employers are required to provide suitable facilities for breastfeeding mothers to rest and to provide adequate rest and meal breaks (*Reg 25(4) and (5) Workplace (Health, Safety and Welfare) Regulations 1992²²*).
- Up to 52 weeks' maternity leave.
- Statutory maternity pay (SMP) for up to 39 weeks. SMP paid at 90% of average earnings for the first six weeks and then a flat rate (*Section 166 SSCBA 1992²³*).
- The right to return to the same job (*Regulations 18(1) MPL Reg 1999²⁴*).
- The right to return to a suitable alternative job, on terms not less favourable (*Reg 18(2)²⁵ and 18A(1)(b) MPL Reg 1999²⁶*):
 - Where the employee has taken any period of AML, or a period of at least four weeks' parental leave on top of her OML, and there is some reason (other than redundancy) why it is not reasonably practicable for the employer to permit her to return to the same job.
- Priority for alternative employment in redundancy cases (*Reg 10 MPL Regulations 1999²⁷*).
- Bound by any express and implied obligations arising under the employee contract of employment except for the right to be absent from work (*reg 9(1)(b)MPL Reg 1999²⁸*).
- SMP payable for 39 weeks.
- Reasonable contact and KIT days
 - An employer may make "reasonable contact" from time to time during an employee's maternity leave (*reg 12A(4) MPL Reg 1999²⁹*).
 - 10 KIT days (*reg 12A(1) MPL Reg 1999³⁰*).
- Earlier return:
 - Give the employer at least 8 weeks' notice (*reg 11(1) MPL Reg 1999*).

²⁰ <http://www.legislation.gov.uk/ukpga/1996/18/section/71>

²¹ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/9/made>

²² <http://www.legislation.gov.uk/uksi/1992/3004/regulation/25/made>

²³

<http://login.westlaw.co.uk/maf/wluk/app/document?crumb-action=reset&docguid=I7FoF7310E44B11DA8D70A0E70A78ED65&sp=plcls-1&srcid=PLC>

²⁴ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/18/made>

²⁵ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/18/made>

²⁶

<http://login.westlaw.co.uk/maf/wluk/app/document?crumb-action=reset&docguid=I9E9C3B50E44B11DA8D70A0E70A78ED65&sp=plcls-1&srcid=PLC>

²⁷ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/10/made>

²⁸

<http://login.westlaw.co.uk/maf/wluk/app/document?crumb-action=reset&docguid=ID4A58410E44E11DA8D70A0E70A78ED65&sp=plcls-1&srcid=PLC>

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<http://login.westlaw.co.uk/maf/wluk/app/document?crumb-action=reset&docguid=IC993CF902DA611DBA7A5D2D2AF4DCED8&sp=plcls-1&srcid=PLC>

³⁰

<http://login.westlaw.co.uk/maf/wluk/app/document?crumb-action=reset&docguid=IC993CF902DA611DBA7A5D2D2AF4DCED8&sp=plcls-1&srcid=PLC>

Paternity

- Ordinary paternity leave:
 - Either one week or two continuous weeks' leave (*reg 5(1) PAL Reg 2002*³¹ (*birth cases*); *reg 9(1) PAL Reg 2002*³² (*adoption cases*)).
 - Taken between the date on which the child is born or placed with the adopter and 56 days after that date (*reg 5(2)(a) PAL Reg 2002*³³ (*birth cases*); *reg 9(2)(a) PAL Reg 2002*³⁴ (*adoption cases*)).
 - Written notice of intention to take OPL to the employer (*reg 6(1) PAL Reg 2002*³⁵ (*birth cases*); *reg 10(1) PAL Reg 2002*³⁶ (*adoption cases*)).
 - Employees are entitled to benefit from their usual contractual terms (*reg 12(1)(a) PAL Reg 2002*³⁷ and *section 80C(1) ERA 1996*³⁸) except those terms regarding remuneration.
 - Ordinary statutory paternity pay at the flat rate or 90% of the employee's normal weekly earnings whichever is the lowest (*Section 171ZE(1) SSCBA 1992*³⁹).
 - Usually right to return to the same job (*reg 13(1) PAL Reg 2002*⁴⁰).
- Additional paternity leave:
 - *APL is abolished for babies expected to be born on or after 5 April 2015. Instead, equivalent rights come under the Shared Parental Leave and Pay system.*

For babies expected to be born before 5 April 2015:-

- If the mother has returned to work without using her full maternity leave entitlement.
- Minimum of 2 weeks and maximum of 26 weeks (*reg 5(2) APL Reg 2010*⁴¹ (*birth cases*); *reg 15(2) Reg 2010*⁴² (*adoption cases*)).
- Can be taken at any time between the period which begins 20 weeks after the date on which the child is born or placed for adoption and ends 12 months after that date (*reg 5(1)*⁴³ (*birth cases*) and *reg 15(1) (adoption cases) APL Reg 2010*⁴⁴).
- Withdrawing a notice (*reg 6*⁴⁵ (*birth cases*) and *16*⁴⁶ (*adoption cases*) *APL Reg 2010*).
- Varying or cancelling a notice (*reg 7(1)*⁴⁷ and *17(1)*⁴⁸ *APL Reg 2010*).

³¹ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/5/made>

³² <http://www.legislation.gov.uk/uksi/2002/2788/regulation/9/made>

³³ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/5/made>

³⁴ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/9/made>

³⁵ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/6/made>

³⁶ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/10/made>

³⁷ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/12/made>

³⁸ <http://www.legislation.gov.uk/ukpga/1996/18/section/80C>

³⁹

<http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=5&crumb-action=r eplace&docguid=I94F0288267B611DFB3CAAC2E152C16C6>

⁴⁰ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/13/made>

⁴¹ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/5/made>

⁴² <http://www.legislation.gov.uk/uksi/2010/1055/regulation/15/made>

⁴³ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/5/made>

⁴⁴ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/15/made>

⁴⁵ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/6/made>

⁴⁶ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/16/made>

⁴⁷ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/7/made>

⁴⁸ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/17/made>

- Employee is entitled to the benefit of all his employment terms, except those about remuneration and bound by any obligations except those which are inconsistent with the employee caring for the child (*section 80C(1)(b) ERA 1996⁴⁹ and reg 27(1) APL Reg 2010⁵⁰*)
- 10 KIT days (*reg 26(1) APL Reg 2010⁵¹*).
- Entitlement to suitable alternative vacancy in redundancy situation (*Reg 28(3) APL Reg 2010⁵²*).
- Early return from APL, at least six weeks' notice (*reg 30(2) APL Reg 2010⁵³*).
- Right to return to the job in which he was employed as long as their period of APL lasted no longer than 26 weeks. (*Reg 31(1) APL Reg 2010⁵⁴*)
- Protection from detriment and dismissal
 - Right not to be subjected to any detriment by their employer for a prescribed reason related to paternity leave (*section 47C(1) and (2)(ca) ERA 1996⁵⁵*).
 - Automatically unfair dismissal where the reason (or principal reason) for it is a prescribed reason relating to OPL (*reg 29 PAL Reg 2002⁵⁶*) or APL (*reg 34 APL Reg 2010⁵⁷*).

Adoption

- Key rights:
 - *Additional Adoption Leave (AAL) is abolished for children placed for adoption on or after 5 April 2015. Instead, equivalent rights come under the Shared Parental Leave and Pay system.*

For children adopted before 5 April 2015:-

- Up to 52 weeks' SAL, split into 26 weeks' OAL (*reg 15(4) PAL Reg 2002⁵⁸*) and 26 weeks' AAL (*reg 20(2) PAL Reg 2002⁵⁹*). SAP for up to 39 weeks (*Part XII B SSCBA 1992⁶⁰ and Pay Regulations 2002⁶¹*) paid at a flat rate or 90% of average weekly earnings if lower (*reg 3 SPP and SAP Weekly rates) Reg 2002⁶²*).
- Right to return to the same job(or, in certain circumstances, to return to a suitable and appropriate alternative job) (*reg 26(1) PAL Reg 2002⁶³*)

⁴⁹ <http://www.legislation.gov.uk/ukpga/1996/18/section/80C>

⁵⁰ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/27/made>

⁵¹ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/26/made>

⁵² <http://www.legislation.gov.uk/uksi/2010/1055/regulation/28/made>

⁵³ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/30/made>

⁵⁴ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/31/made>

⁵⁵ <http://www.legislation.gov.uk/ukpga/1996/18/section/47C>

⁵⁶ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/29/made>

⁵⁷ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/34/made>

⁵⁸ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/15/made>

⁵⁹ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/20/made>

⁶⁰

<http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=4&crumb-action=r eplace&docguid=ID62494E0E44C11DA8D70A0E70A78ED65>

⁶¹ <http://www.legislation.gov.uk/uksi/2002/2822/contents/made>

⁶² <http://www.legislation.gov.uk/uksi/2002/2818/regulation/3/made>

⁶³ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/26/made>

- Protection from detriment (*Section 47C(1) and (2)(ba) ERA 1996⁶⁴*) or dismissal relating to adoption leave (*Section 99 ERA 1996⁶⁵*)
- Priority to be offered suitable alternative employment in redundancy situation (*reg 23(3) PAL Reg 2002⁶⁶*)
- Continuity of contract of employment: the employee is entitled to benefit from all the employment terms that would have applied had they not been absent and is bound by any obligations except for remuneration and obligations which are inconsistent with the fact that he is taking SAL (*reg 19 PAL Reg 2002⁶⁷*)
- “reasonable contact” (*reg 21A(4) PAL Reg 2002⁶⁸*) and up to 10 KIT days (*reg 21A(1) PAL Reg 2002⁶⁹*, *reg 27A Pay Reg 2002⁷⁰*)

Shared Parental Leave⁷¹

Shared parental leave and pay come into force 1 December 2014 for babies expected to be born or adopted on or after 5 April 2015)

- SPL is optional
- SPL applies in relation to children (*Reg 2(1) and (2) SPL Reg*)
 - Whose EWC begins on or after 5 April 2015
 - Who are placed for adoption on or after 5 April 2015
- First 2 weeks are compulsory maternity leave paid at 90% of the mother’s normal weekly earnings
- 50 weeks SPL to be taken during the 12 months following the birth of the child (*reg 7(1) SPL Reg*) and 37 weeks Shared Parental Pay available to eligible parents
- Allows period of discontinuous leave (*reg 14 SPL reg*)
- Allows both parents to be off at the same time (*reg 7(5) SPL reg*)
- Mother must return to work or curtail her maternity leave – curtailment notice give at least eight weeks before the date on which the mother wishes her leave to end
- Both parents must also give notice to the employer of their intention to take SPL (*reg 8 and 9 SPL reg*)
- Both parents must give their employer notice setting up their intended period of leave no less than 8 weeks before the requested start date (*reg 12, 13 and 14 SPL reg*)
- Terms of contract of employment continue to apply (except for remuneration) (*Reg 38 SPL reg*)

⁶⁴ <http://www.legislation.gov.uk/ukpga/1996/18/section/47C>

⁶⁵ <http://www.legislation.gov.uk/ukpga/1996/18/section/99>

⁶⁶ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/23/made>

⁶⁷ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/19/made>

⁶⁸

<http://login.westlaw.co.uk/maf/wluk/app/document?crumb-action=reset&docguid=ICF1BD3902DA611DBA7A5D2D2AF4DCED8&sp=plcls-1&srcid=PLC>

⁶⁹

<http://login.westlaw.co.uk/maf/wluk/app/document?crumb-action=reset&docguid=ICF1BD3902DA611DBA7A5D2D2AF4DCED8&sp=plcls-1&srcid=PLC>

⁷⁰

<http://login.westlaw.co.uk/maf/wluk/app/document?crumb-action=reset&docguid=I5E1E38403E3111DB8197FCCB110BD188&sp=plcls-1&srcid=PLC>

⁷¹ <http://www.legislation.gov.uk/uksi/2014/9780111118856>

- Reasonable contact and up to 20 days during SPL (*Reg 37 SPL Reg*)
- Entitled to suitable alternative in case of redundancy (*reg 39 SPL Reg*)
- Same rules apply for adoption

III CHILDHOOD YEARS

Parental Leave

- Eligibility (*reg 13 MPL Reg 1999⁷²*)
 - available to employees only
 - with at least one year continuity of employment
 - which have, or expect to have, responsibility for a child
- Each parent is entitled to take 18 week's parental leave for each child (*reg 14(1) MPL Reg 1999⁷³*)
- Leave is unpaid
- Until the child's fifth birthday or fifth anniversary of the date of the placement (adoption) or until the child's 18th birthday (disabled child) (*reg 15 MPL Reg 1999⁷⁴*)
- No more than 4 weeks' leave can be taken in any one year and leave must be taken in one-week blocks (*Paragraph 8 Schedule 2 MPL Reg⁷⁵*).
- The employee remains entitled to benefit from: (*reg 17(b) MPL Reg 1999⁷⁶*)
 - The employer's implied obligation of trust and confidence
 - Any contractual terms and conditions relating to
 - notice periods;
 - compensation for redundancy; and
 - disciplinary and grievance procedures
- The employee remains bound by: (*reg 17(b) MPL Reg 1999⁷⁷*)
 - The implied obligation of good faith towards the employer
 - Any contractual terms and conditions relating to:
 - notice periods;
 - disclosure of confidential information;
 - acceptance of gift or benefits and;
 - the employee's freedom to participate in another business
- Returning to work
 - Employee are entitled to return to the same job following (*reg 18(1) MPL Reg 1999⁷⁸*)
 - parental leave for an isolated period of four weeks or less

⁷² <http://www.legislation.gov.uk/uksi/1999/3312/regulation/13/made>

⁷³ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/14/made>

⁷⁴ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/15/made>

⁷⁵ <http://www.legislation.gov.uk/uksi/1999/3312/schedule/2/paragraph/8/made>

⁷⁶ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/17/made>

⁷⁷ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/17/made>

⁷⁸ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/18/made>

- parental leave for a period of four weeks or less which was the last of two or more consecutive periods of statutory leave which did not include any period of AML or additional adoption leave
- In cases not falling in the above: right to return to the same job or suitable alternative if not reasonable practicable for the employer (*reg 18(2) MPL Reg 1999*⁷⁹)

IV FAMILY DEPENDENTS

Flexible working requests (*sections 80F to 80I ERA 1996*⁸⁰ (as amended) and *Flexible Working Regulations 2014 (SI 2014/1398)*⁸¹)

- employees with at least 26 week's continuous employment (Reg 3 Flexible Working Reg 2014⁸²)
- Request must be made in writing; be dated; state that it is an application made under the statutory procedure; specify the change that the employee is seeking and when; explain what effect, if any, the employee thinks the change would have on the employer and how any such effect could be dealt with; state whether the employee has previously made an application to the employer and, if so, when (*Section 80F(2) ERA 1996*⁸³, and *reg 4 Flexible Working Reg*⁸⁴)
- Only one request can be made in any 12-month period (*Section 80F(4) ERA 1996*⁸⁵)
- Agency workers are excluded (*Section 80F(8) ERA 1996*⁸⁶)
- Kind of change (*Section 80F(1) ERA 1996*⁸⁷)
 - Change to working hours
 - Change to the times of work
 - Change to the place of work
- The employer must deal with the application in a reasonable manner.
- The employer can only refuse a request for one (or more) of the eight reasons set out in the legislation (*Section 80G(1) ERA 1996*⁸⁸).

Part-time working

- PTW Reg does not provide a right for a worker to change their hours of work.
- However, refusal to grant a woman's request to change her hours in order to meet childcare commitment may amount to indirect sex discrimination (*Eq Act 2010*⁸⁹).
- No obligation for the employer to agree a request for PT work but may be liable if he cannot objectively justifies the refusal.

Time-off for dependants

- Applies to employees only, regardless of their length of service.

⁷⁹ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/18/made>

⁸⁰ <http://www.legislation.gov.uk/ukpga/1996/18/section/80F>

⁸¹ <http://www.legislation.gov.uk/uksi/2014/1398/contents/made>

⁸² <http://www.legislation.gov.uk/uksi/2014/1398/regulation/3/made>

⁸³ <http://www.legislation.gov.uk/ukpga/1996/18/section/80F>

⁸⁴ <http://www.legislation.gov.uk/uksi/2014/1398/regulation/4/made>

⁸⁵ <http://www.legislation.gov.uk/ukpga/1996/18/section/80F>

⁸⁶ <http://www.legislation.gov.uk/ukpga/1996/18/section/80F>

⁸⁷ <http://www.legislation.gov.uk/ukpga/1996/18/section/80F>

⁸⁸ <http://www.legislation.gov.uk/ukpga/1996/18/section/80G>

⁸⁹ <http://www.legislation.gov.uk/ukpga/2010/15/contents>

- Right to take a “reasonable” amount of unpaid time off work to take “necessary” action to deal with particular situations affecting their dependants (*Section 57A⁹⁰ ERA 1996*):
 - To provide assistance if a dependant falls ill, gives birth, is injured or assaulted (*Section 57A(1)(a) ERA 1996*)
 - To make care arrangements for the provision of care for a dependant who is ill or injured (*Section 57A(1)(b) ERA 1996*)
 - In consequence of the death of a dependant (*Section 57A(1)(c) ERA 1996*)
 - To deal with the unexpected disruption, termination or breakdown of arrangements for the care of a dependant (*Section 57A(1)(d) ERA 1996*)
 - To deal with an unexpected incident which involves the employee’s child during school (or another educational establishment’s) hours (*Section 57A(1)(e) ERA 1996*)
- A “dependant” is defined as a spouse, civil partner, child or parent (but not grandparent) of the employee, or a person who lives in the same household as the employee (excluding tenants, lodgers, boarders and employees) (*Section 57A(3) ERA 1996*).
- Employee need to tell their employer: (*Section 57A(2) ERA 1996*)
 - As soon as reasonably practicable, the reason for their absence; and
 - How long they expect to be away from work

V ENFORCEMENT

Tribunal jurisdiction

- Suspension of pregnant woman (Health and Safety)
 - Claim for just and equitable compensation if an employer fails to offer a pregnant woman suitable alternative work before suspending her (*Section 70(4) ERA 1996⁹¹*)
 - If an employer fails to pay a pregnant employee while she is suspended, the employee can bring a claim (*Section 70(1) ERA 1996*)
 - Failing to carry out the risk assessment or refuses to recruit a pregnant woman who cannot perform her contract because of H&S reasons may constitute unlawful discrimination (*Eq Act 2010*)
- Regarding the right not to suffer detriment (*Section 48 ERA 1996⁹²*)
- Regarding the rights for ante natal care (*Section 57 ERA 1996⁹³*)
- Regarding the rights for ante natal care for agency workers (*Section 57ZC ERA 1996⁹⁴*)
- Regarding time-off for dependants (*Section 57B ERA 1996⁹⁵*)
- Regarding parental leave (*Section 80 ERA 1996⁹⁶*)
- Regarding flexible-working (*Section 80H ERA 1996⁹⁷*)
- Regarding Unfair Dismissal (*Section 111 ERA 1996⁹⁸*)

⁹⁰ <http://www.legislation.gov.uk/ukpga/1996/18/section/57A>

⁹¹ <http://www.legislation.gov.uk/ukpga/1996/18/section/70>

⁹² <http://www.legislation.gov.uk/ukpga/1996/18/section/48>

⁹³ <http://www.legislation.gov.uk/ukpga/1996/18/section/57>

⁹⁴ <http://www.legislation.gov.uk/ukpga/1996/18/section/57ZC>

⁹⁵ <http://www.legislation.gov.uk/ukpga/1996/18/section/57B>

⁹⁶ <http://www.legislation.gov.uk/ukpga/1996/18/section/80>

⁹⁷ <http://www.legislation.gov.uk/ukpga/1996/18/section/80H>

⁹⁸ <http://www.legislation.gov.uk/ukpga/1996/18/section/111>

- Regarding Indirect Sex Discrimination (*Section 120 EqA 2010*⁹⁹)
- Deduction from wages (*Section 13 ERA 1996*¹⁰⁰)

County court jurisdiction (e.g. H&S at work)

- Local authorities are enforcing authorities regarding H&S at work (*reg 3 The Health and Safety (Enforcing Authority) Regulations 1998*¹⁰¹)
- County Court deal with issues regarding Local authority enforcement action

KEY CONCEPTS AND QUALIFYING CONDITIONS

The protected period (*section 18(6) EqA 2010; previously section 3A SDA 1975*)¹⁰²

Begins when a woman becomes pregnant and ends:

- If she has the right to OML and AML, at the end of the AML period or (if earlier) when she returns to work after the pregnancy.
- If she does not have that right, at the end of the period of two weeks beginning with the end of the pregnancy.

Expected week of childbirth (*reg 2 MPL Reg*).¹⁰³

This is the week, measured from Sunday to Saturday, in which childbirth is expected to occur

Maternity Leave

- Compulsory maternity leave: all employees must take a minimum of two week's maternity leave starting with the day on which childbirth occurs (*section 72(1) ERA 1996*¹⁰⁴ and *regulation 8 MPL Reg 1999*¹⁰⁵). Extended to four weeks for factory workers (*section 205 Public Health Act 1936*¹⁰⁶).
- Ordinary maternity leave: period of 26 weeks' leave available to all employees, regardless of length of service, who give birth and comply with the notification conditions (*regulation 4 MPL Reg 1999*¹⁰⁷). Not available to self-employed or workers (*regulation 2 MPL Reg 1999*¹⁰⁸).
- Additional maternity leave: a further 26 weeks' leave, since 1 April 2007, all employees who qualify for OML automatically also qualify for AML (*regulation 4 MPL Reg 1999*¹⁰⁹ as amended by *reg 2 and 5 MPL Amendment Reg*).
- Statutory maternity pay for employees: (*section 164 SSCBA*¹¹⁰ and *reg 22 SMP Reg 1986*¹¹¹)

⁹⁹ <http://www.legislation.gov.uk/ukpga/2010/15/section/120>

¹⁰⁰ <http://www.legislation.gov.uk/ukpga/1996/18/section/13>

¹⁰¹ <http://www.legislation.gov.uk/uksi/1998/494/regulation/3/made>

¹⁰² <http://www.legislation.gov.uk/ukpga/2010/15/section/18/prospective>

¹⁰³ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/2/made>

¹⁰⁴ <http://www.legislation.gov.uk/ukpga/1996/18/section/72>

¹⁰⁵ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/8/made>

¹⁰⁶ <http://www.legislation.gov.uk/ukpga/Geo5and1Edw8/26/49/section/205>

¹⁰⁷ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/4/made>

¹⁰⁸ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/2/made>

¹⁰⁹ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/4/made>

¹¹⁰

<http://login.westlaw.co.uk/maf/wluk/app/document?crumb-action=reset&docguid=I2271D810E44A11DA8D70A0E70A78ED65&sp=plcls-1&srcid=PLC>

¹¹¹ <http://www.legislation.gov.uk/uksi/1986/1960/regulation/22/made>

- With 26 weeks' continuous employment up to and including the 15th week before the EWC (*Reg 11 SMPay Reg1986*¹¹²)
- Average earnings of at least the lower earnings limit for NI during the eight-week period ending with the 15th week before EWC (*Reg 20(2) and (4) SMP Regulations 1986*¹¹³)
- Still pregnant 11 weeks before the start of the EWC
- Gives the employer at least 28 days' notice of the date she intends SMP to start
- Supplies a certificate from a midwife or doctor, confirming the date of EWC.
- Has ceased work
- Notification to employer: (*Regulations 4(1) MPL Reg 1999*¹¹⁴)
 - Not later than the end of the 15th week before the EWC (or if not reasonably practicable, as soon as is reasonably practicable) of:
 - The fact that she is pregnant
 - The EWC
 - The date when she intends her OML to start

Paternity Leave

- Ordinary paternity leave available to eligible employees, not workers or self-employed.
 - Sufficient service
 - In birth cases: continuously employed for a period of not less than 26 weeks ending with the week immediately before the 14th week before the child's expected week of childbirth (*reg 4(2)(a) PAL Reg 2002*¹¹⁵)
 - In adoption cases: continuously employed for a period of not less than 26 weeks ending with the week in which the child's adopted is notified that they have been matched with a child (*reg 8(2)(a) PAL Reg 2002*¹¹⁶).
 - One of the specified relationship
 - In birth cases: the employee must either be the child's father or have one of the following relationships with the child's mother: spouse, civil partner, partner (*Reg 4(2)(b) PAL Reg2002*¹¹⁷).

¹¹² <http://www.legislation.gov.uk/uksi/1986/1960/regulation/11/made>

¹¹³ <http://www.legislation.gov.uk/uksi/1986/1960/regulation/20/made>

¹¹⁴ <http://www.legislation.gov.uk/uksi/1999/3312/regulation/4/made>

¹¹⁵ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/4/made>

¹¹⁶ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/8/made>

¹¹⁷ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/4/made>

- In adoption cases: the employee must have one of the following relationships with the child’s adopter: spouse, civil partner, partner (Reg 8(2)(b) PAL Reg 2002¹¹⁸).
- Partner is “a person (whether of a different sex or the same sex) who lives with the mother/adopter and the child in an enduring family relationship, but is not a relative of the mother/adopter” (Reg 2(1) PAL Reg 2002¹¹⁹)
- Responsibility for the child’s upbringing
 - In birth cases: the employee must have the required degree of responsibility for the child’s upbringing, which depends on their relationship with the child:
 - If the employee is the child’s biological father, he must have, or expect to have, responsibility for the child’s upbringing (Reg 4(2)(c)(i) PAL Reg 2002¹²⁰).
 - If the employee is not the child’s biological father but is married to, the civil partner of or the partner of the child’s mother, the employee must have or expect to have the main responsibility (other than that of the child’s mother) for the child’s upbringing (Reg 4(2)(c)(ii) PAL Reg 2002¹²¹)
 - In adoption cases: the employee must have, or expect to have, the main responsibility (apart from the responsibility of the adopter) for the child’s upbringing (reg 8(2)(c) PAL Reg 2002¹²²).
- Additional paternity leave (reg 4¹²³ and 6¹²⁴ (birth cases); reg 14¹²⁵ and 16¹²⁶ (adoption cases) APL Reg 2010) (abolished and replaced by the Shared Parental Leave and Pay system for babies expected to be born on or after 5 April 2015)
 - Sufficient continuous employment

¹¹⁸ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/8/made>

¹¹⁹ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/2/made>

¹²⁰ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/4/made>

¹²¹ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/4/made>

¹²² <http://www.legislation.gov.uk/uksi/2002/2788/regulation/8/made>

¹²³ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/4/made>

¹²⁴ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/6/made>

¹²⁵ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/14/made>

¹²⁶ <http://www.legislation.gov.uk/uksi/2010/1055/regulation/16/made>

- Required relationship with the child and its mother or adopter
- Satisfy notice and evidential requirements
- The mother must have returned to work

Adoption leave

- Ordinary adoption leave: a period of 26 weeks available to an employee who
 - Is the adopter of a child
 - Has completed 26 week's qualifying employment ending with the week in which they are notified of having been matched for adoption with the child
 - Has notified the adoption agency of their agreement that the child should be placed with them; and
 - Complies with the statutory notification and evidential requirements

(Reg 15(1) and (2) PAL Reg 2002¹²⁷)

Regardless of how many children are adopted as part of the same arrangement (*Reg 15(4) PAL Reg 2002¹²⁸*)

- Additional adoption leave is abolished for children placed for adoption on or after 5 April 2015. For previous placements, it was available after the last day of the employee's OAL (*Reg 20(2) PAL Reg 2002¹²⁹*) if:
 - The child was placed with the employee for adoption
 - The employee took OAL in respect of the child
 - The employee's OAL did not end prematurely because the placement of the child was disrupted or because the employee was dismissed

(Reg 20(1) PAL Reg 2002¹³⁰)

¹²⁷ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/15/made>

¹²⁸ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/15/made>

¹²⁹ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/20/made>

¹³⁰ <http://www.legislation.gov.uk/uksi/2002/2788/regulation/20/made>

APPENDIX 2

Members of the Sub-Committee

Chair: Stephen Levinson, Keystone Law
Rachel Crasnow QC, Cloisters
Ed Kemp, Littleton Chambers
Anthony Korn, No 5 Chambers
Camilla Palmer QC
Jemma O'Reilly, Wragge Lawrence Graham & Co LLP
Sally Robertson, Cloisters
Anne Sammon, Simmons & Simmons LLP
Tarun Tawakley, Lewis Silkin LLP