



EMPLOYMENT
LAWYERS
ASSOCIATION

P.O. BOX 353
UXBRIDGE UB10 0UN
TELEPHONE/FAX 01895 256972
E-MAIL ela@elaweb.org.uk
WEBSITE www.elaweb.org.uk

BIS Shared Parental Leave and Pay - administration consultation

Response from the Employment Lawyers Association

17 May 2013

Employment Lawyers Association

Response to Shared Parental Leave and Pay - administration consultation

Introduction

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/Defendants in the Courts and Employment Tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee ("the L&P Committee") and the working party set up to respond to this particular consultation are made up of both Barristers and Solicitors, working in private practice and in-house, who act for both Claimants and Respondents. The L&P Committee meets regularly for a number of purposes including to consider and respond to proposed new legislation.

Summary

Overall ELA welcomes the "light touch" approach to regulation contained in the proposals for the administration of shared parental leave. The importance of flexibility is something which we highlight in our response, for instance in the period of time a woman has from birth to revoke her notice to end maternity leave and opt into the shared parental system where she has given notice prior to the birth. We agree with the proposals to extend the KIT day entitlement to 10 KIT days per parent for shared parental leave, and are in favour of the current system of flexibility surrounding KIT days so that any arrangements are agreed between employer and employee rather than being prescribed by statute should be retained.

It is our view that the form for shared parental leave (Form ShPL1) should come with guidance notes and be consolidated with the notice of intention to end maternity leave, the notice of intention to access the shared parental leave system, and the first request for leave. We have provided an example of our proposed consolidated form in the appendix to our response. In addition our response highlights concerns about the administrative difficulties, including the management of payroll matters, which multiple leave requests will cause for employers. As a way round this we have suggested that parents could be required to submit plans of how they intend to take the leave at the outset. This could be changed later at the employee's request, such a request to be considered in a reasonable manner by the employer (as in the case of flexible working requests).

In our view the notification period of 2 weeks over employees' leave plans is not appropriate. This is not a viable period of time for two employers to negotiate and agree a leave period and, in our opinion, it would be helpful to have a more flexible consultation period. We believe that the cut-off point for parents taking shared parental leave should be 52 weeks' from birth, rather than from the start of maternity leave, as this is consonant with the purposes of the legislation which is to allow both parents to share childcare arrangements in the first year of infancy.

We believe that the right to return to the same job should be maintained for employees returning from the first continuous block of leave of 26 weeks' or less. However, although this retains flexibility for an employee without being unnecessarily burdensome for the employer, it will favour employees entitled to paternity leave over those entitled to maternity leave. As a result we have suggested that the period of paternity leave should be included in the 26-week total from which the employee is entitled to return to the same job where shared parental leave is taken within 20 weeks of the birth.

We found the questions asked in this consultation to be very narrow in focus. There are a number of issues which do not seem to have been considered, the introduction of which will improve, and provide welcome clarity over, the mechanics of the shared parental leave system. These include the need for data protection consent when personal data is being transferred between employers and processed for the purposes of dealing with a shared parental leave request, and the need for employers to engage in a constructive and open dialogue when considering requests (perhaps encouraged by the issuing of some government guidance on the matter). In our view if enhanced maternity benefits are offered by an employer then they should be extended to parents taking shared parental leave to avoid the potential for discrimination claims and on purely practical grounds (to encourage the take up of shared parental leave).

Finally, though we noted at the beginning of this summary that we welcomed the flexible approach which has been adopted to shared parental leave, we believe that there is a danger in having too much flexibility. The impact of the new scheme may be diminished if employers faced with too many different requests opt for the default position whereby an employee will have to take all the leave requested in one block. A series of short period of leave could be problematic and have a detrimental effect on business, for example needing to find temporary cover for absent employees on a regular basis, and so we have suggested that a practical solution could be a minimum 4 week period for taking shared parental leave.

Question 1: Do you have any evidence on any administrative difficulties that the different notice period for paternity leave and pay currently cause employers? Please explain your response.

Anecdotally, a number of the lawyers involved in preparing this response to the consultation reported that some clients were confused about the operation of the different notice periods for paternity leave and pay. We understand that this can result in difficulties or errors in the administration of paternity leave and pay.

Question 2: Do you agree with the proposal to align the notice period for paternity leave and pay at the end of the 15th week before the expected week of child birth (or within 7 days of being matched with a child for adopters)? Please explain your response.

On the basis of the response to question 1 above, we agree with this proposal. It makes practical sense for both notice periods to be the same.

Question 3: Do you think that a woman should have 4 or 6 weeks from birth to revoke her notice to end maternity leave and opt into the shared parental system where the notice has been given prior to birth? Please explain your response.

It is our view that the following factors are relevant when considering this issue:

- On the face of it, a shorter period of notice would be advantageous to both employers as it reduces the period of uncertainty. Any change of mind by the woman will necessitate additional planning by either or both employers.

- A woman may find that following the birth of her child (particularly if it is her first child) she feels differently about her intentions regarding maternity leave/shared parental leave. This is accepted in the administration consultation document. Four weeks following the birth of the child, particularly if there have been any complications at, prior to or following the birth (or in the event of an early birth) may not be long enough for the woman to properly consider her wishes and/or those of her partner. If the woman does not give notice in time (more likely in the case of a shorter period to revoke her notice) she and her partner may find that they are tied into an arrangement that no longer reflects their wishes. Dissatisfied staff are likely to be less motivated and less effective. A longer period to revoke notice may make this less likely. A longer period of notice may therefore be more beneficial to both employers even though the period of uncertainty is slightly longer.
- When giving notice to end maternity leave and opt into the shared parental leave system, it is proposed that a woman and her partner will be required to give at least 8 weeks' notice and, following the negotiation period, each employer will have 6 weeks' notice of the exact pattern of leave that each employee is taking. In the circumstances outlined in the question, a period of 6 weeks' notice from the birth of the child would be more in keeping with these notice obligations.

If the child is born with a disability, the wishes of the woman and her partner in relation to shared parental leave may change following the birth of the child but it may take some time for them to be clear about their wishes in such a situation. They may need time to adjust to the situation and a longer period to revoke notice would be advantageous. An employer in such a situation should be mindful of the risks of a claim for associative discrimination.

The Government may wish to consider a more flexible approach whereby the woman has 4 (or 6) weeks from birth or the EWC, whichever is later, to revoke her notice to end maternity leave and opt into the shared parental system.

Question 4: Do you agree that this level of information is sufficient from an employee? If not, please explain why and what information you would like to be required.

Incorporate guidance notes

ELA considers that any form for Shared Parental Leave should contain some guidance notes about filling in the form in the same manner as that contained in the current form for Additional Statutory Paternity Leave and Pay.

Consolidation of forms

The consultation paper currently envisages multiple forms being submitted where a couple wants to take advantage of shared parental leave. A mother / the primary adopter would have to submit

- notice to end maternity or adoption leave, and
- notice of intention to take shared parental leave

together, and

- she/he or their partner potentially may wish to submit their first request for shared parental leave at the same time or at a later date.

We suggest the government considers having one consolidated form (which can still be called ShPL1) with different sections to it for those wanting to access the shared parental leave system which also contains the form for making the first request for leave. We attach a suggestion of how such a form might look at Appendix 1. We have not made provision in this consolidated form for requests to change a pattern of requested shared parental leave or for requests to transfer entitlement as between partners (envisaged in paragraph 77 of the consultation document).

In our view, most couples are likely to make their request for shared leave given the required notice to end maternity / adoption leave and to start a period of shared parental leave is 8 weeks for both unless either:

- an employee has given longer than 8 weeks' notice to end maternity / adoption leave; or
- both partners are envisaging working following the end of maternity / adoption leave before the first period of shared parental leave is taken.

Having wording relating to a request to take shared parental leave included in the form encourages the employee to fill it in early without imposing a requirement to do so. The earlier an employee articulates their intentions the easier it is for their employer to administer the system. An early submission of a request will also be to the benefit of the employee and their partner, particularly where there may be objections from the employer to the patterns of leave which the employee is requesting.

Terminology

We consider references to maternity leave should include references to adoption leave.

We consider references to maternity pay should be to statutory maternity / adoption pay given the current frequent practice by employers of paying enhanced pay.

If notice to access the shared parental leave system is submitted at the same time as notice to end maternity / adoption leave, maternity leave will not have ended at the time the form is submitted. We have therefore altered the possible tenses used in this section of the form.

Data protection consent

Personal data about how much maternity / adoption / shared parental leave and pay has been taken or received by one partner needs to be disclosed to the employer of the other partner seeking to take shared parental leave / receive shared parental pay.

The employer of the partner requesting leave / pay will therefore be a data controller of personal data of an individual they do not employ. A data controller can process personal data without consent

- Where the processing is necessary for the performance of any contract to which the data subject is party. This will not be applicable.
- Where the processing is necessary for compliance with any other legal obligation to which the data controller is subject. Is it sufficient for a data controller / employer to claim that personal data about their employee's partner is being processed so that the employer can

comply with its legal obligations to administer its employee's request to shared parental leave?

- Where the processing is necessary for the purposes of the legitimate interests of the data controller (except where it is unwarranted by reason of prejudicing the rights of the data subject). It is not clear that the processing of information in administering the shared parental leave system would fall into this exception.

We note that the Declaration of the Mother of a child contained in the current form for Additional Statutory Paternity Pay and Leave does contain express consent to the processing of that information. For consistency and to highlight to an employee how their personal data will be used in practice, we recommend the inclusion of wording consenting to the processing of the information by the employer of that person's partner.

Question 5: We are proposing to allow parents to notify their employer of their leave intentions as they require them. Do you agree? Please explain your response.

For ease of reference our response to this question uses the terms 'mother' and 'father', although the same provisions will apply to primary and secondary adopters and same sex couples.

ShPL1

From paragraphs 66 to 69 of consultation document, it appears that a mother on maternity leave can give 8 weeks' notice of the intention to end maternity leave, as is currently the case. However, this notice can be accompanied with a new notice (shared parental leave form "ShPL1"), which means the mother commits to ending her maternity leave at a date in the future and allows both parents to opt into the shared parental leave regime. Both parents must submit the ShPL1 to their respective employers 8 weeks before the shared parental leave begins. The draft ShPL1 set out at annex D of the consultation document requires the parents to set out the maximum shared parental leave they are each entitled to take.

Paragraph 77 of the consultation document states that the parents can submit an updated form if they want to transfer leave between them and it is proposed that there will not be a limit on the number of times parents can transfer leave and pay between them, as long as they give 8 weeks' notice.

The proposed ShPL1 will only tell the employer the maximum shared parental leave each parent intends to take by dividing up the remaining leave between them. The ShPL1 form does not tell the employer how the parents intend to take this leave or the dates of such leave. Our suggested amended ShPL1 takes this into account.

Leave requests

According to paragraph 85 of the consultation document, a parent will need to give their employer 8 weeks' notice to request shared parental leave. Leave can be taken in single blocks of one week so parents can take the leave consecutively or in separate blocks over a period of time. The employer and employee then have 2 weeks to agree the leave request and 6 weeks to implement it i.e. cover arrangements and handover of work. There are no limits on how many leave requests can be submitted, as long as the employee gives 8 weeks' notice of each block of leave. If the employer and employee cannot reach agreement, the default position is the leave requested is taken in one continuous block. But what if the employee has only requested a continuous block of leave each time? The employer will have no option but to agree, because not agreeing will mean the block of

leave will be taken in a continuous block, as requested by the employee in any event. Given that employees can submit numerous leave requests they are in a better position if they submit a request for each continuous block of leave, as it cannot be refused. This will result in multiple requests and approval processes for the employer to deal with, which will increase the administrative burden for employers.

The fact the default position is one block if the leave request cannot be agreed, will lead to an increase in employees submitting new requests, particularly where there is no limit on the number of leave requests. If an employee's leave request is not agreed and it defaults to one continuous block, which doesn't suit the needs of the employee, for example, childcare or the leave requested by the other parent, he/she will submit another leave request until a suitable leave pattern can be agreed (ensuring 8 weeks' notice for each request).

The fact that multiple leave requests can be submitted will be an administrative difficulty for employers. In addition, it will be more difficult for employers to arrange for cover where there are multiple requests as and when leave is needed. For example, seeking temps or agency workers to cover workload for short blocks of leave without knowing if further leave requests will be submitted and whether these leave requests will be consecutive. Certain sectors have minimum staffing requirements that must be met at all times i.e. care sector so they require certainty over when and how long an employee is going to be absent.

Form of requests

The consultation does not state whether there will be a prescribed form for a notice to take leave. As a minimum, the notice should be in writing (to avoid dispute about the content of the request or when it was submitted) and set out the start and end date of each block of leave requested and whether it will be paid. It may also be helpful to give an indication of the leave pattern requested by the other parent, as this may encourage employers not to decline a request where it will impact upon the other parent's leave request and potentially cause both parents to submit new notices, which will cause further administration and time delay for both employers. We have therefore taken this into account in drafting amended ShPL1 at Appendix 1.

Impact on payroll and SMEs

The numerous leave requests and transfer of leave and pay will also make it difficult for payroll to process employees on shared parental leave as payroll will not know in advance how long the employee intends to be off work or when their paid leave will start or stop. The information will have to be manually updated every time a new leave request is submitted or the ShPL1 form is amended. In addition, employers must check the leave requested does not exceed the maximum set out in ShPL1. This will become increasingly difficult if parents submit an updated ShPL1 form to transfer leave between them, particularly when there is no limit on the amount of times parents can transfer leave and pay between them. The administration and payroll difficulties will be exacerbated for smaller businesses which generally do not have the resources to process frequent notices.

Notifying leave intentions up front

It would help employers if parents were required to submit plans of how they intend to take the leave up front, even if these plans can later be changed (in order to recognise the flexibility of shared parental leave and the fact parents' plans may change). The provisional plans could be changed on request by an employee, which must be considered in a reasonable manner by employers, as in the case of flexible working requests. If parents give an indication of leave requests up front this may assist businesses to buy into shared parental leave, which will contribute to its successful take up.

The ShPL1 could be used for parents to give an indication of their leave plans when they opt into shared parental leave. If the ShPL1 is then given to both parents employers, it may assist both employers on agreeing the leave to ensure it meets the parents' needs. We have taken this into account in amended ShPL1 at Appendix 1.

Fathers requesting leave

Whilst we agree with paragraph 83, of the consultation paper that employees may request all leave so they don't lose it, the fact leave can be requested numerous times encourages employees to submit lots of small requests rather than requesting all leave up front. In addition, we think it is unlikely that parents will take leave if they don't want it, so there could be a mechanism to give 8 weeks' notice to end shared parental leave in the same way there is for mothers to end maternity leave early. From an employer perspective, it is easier to cease arrangements they have in place to cover work than to arrange cover for an employee on shared parental leave.

The point in paragraph 84 of the consultation paper about fathers taking less shared parental leave if they have to notify up front because they want to see how the mother recovers, may not always be the case because the notice to end maternity leave and enter into shared parental leave is separate. Therefore, if a mother wants longer leave she will simply defer submitting the ShPL1 (or not submit it at all). This is particularly as mothers are more protected on maternity leave than shared parental leave because of the 6 weeks' enhanced SMP and employers may choose to enhance maternity pay but not shared parental leave.

Question 6: To allow employers to know their employees' definite leave plans at least 6 weeks before any leave starts, we propose setting the negotiation period at 2 weeks. Do you agree that a 2 week negotiation period is appropriate? Please explain your response.

No, we do not agree that it is appropriate.

The current Government proposal is that employees will be required to give their employer a minimum of 8 weeks' notice before taking a period of leave when requesting new blocks of leave or varying leave that has already been requested. Employers and employees are to have a two week period in which to negotiate and agree the leave to ensure that both employers have over 6 weeks' notice of the exact pattern of leave that the employees will be taking.

A two week period for potentially two employers to negotiate and agree a leave period (which will impact on their general staffing levels and cover) with their respective employees seems fairly ambitious. General decision-making timelines within most employers can be longer even without the need to co-ordinate this with a second unconnected employer.

The employer of one parent/adopter may agree the request and plan accordingly, whilst the employer of the second parent/adopter refuses the request or requires more time to consider this or negotiate the detail than the allotted two weeks. On that basis, as the leave request cannot be granted within the two week period, the leave request must be withdrawn for both employees as appropriate (even in the case of the employee where this has already been approved). A new leave request must then be issued which would then start off a new 8 week notice and 2 week consultation period, which will be disruptive particularly for the employer who already agreed the original leave period.

On that basis a more flexible consultation period rather than a fixed 2 week period may be helpful to allow for agreement of the leave where possible rather than employees having to withdraw their request and commence a new process.

Question 7: Do you think that the cut-off point for parents taking shared parental leave should be: (a) 52 weeks from the start of maternity leave, or (b) 52 weeks from birth?

We consider that it would be better for the period of shared parental leave to run from the date of birth as this would be consistent with the purpose of the legislation, which is to allow both parents to share childcare arrangements in the first year of infancy.

The main reasons for taking early maternity leave are likely to be pregnancy-related sickness, potential birth complications, or in the later weeks nearer to the expected due date, because of the mother's increasing physical discomfort in the workplace and the desire not to go into labour while in the workplace. While it may be that, in certain circumstances, it is necessary or desirable for the father of the child to take time off to care for the child's mother prior to birth, a woman in a high-risk pregnancy situation is likely to be under close ante-natal care in any event, and there is currently no provision for such leave.

It may be desirable for discretionary time off to be granted by the employer in these circumstances and for this practice to be encouraged by government guidelines (such as those issued by BIS). However, we are not specifically aware of demand for leave to be granted for these purposes, and we think it unlikely that many fathers will wish to take parental leave prior to the birth of the child. In the majority of cases, there would be no need for shared parental leave to start prior to the birth of the child. As such, in order for shared leave to be useful to both parents, it should begin from the date of the birth.

Question 8: Is 10 KIT days per parent for shared parental leave the right number? Please explain your response.

Yes. It makes sense for both parents to have the same entitlement. In our experience it is rare that women on maternity leave use their full 10 KIT day entitlement. However, it is a useful entitlement to have as there will obviously be times when it is helpful for them to attend the office, e.g. for team meetings, training days etc.

It is a good idea to retain the current system of flexibility so that any arrangements are agreed between employer and employee rather than being prescribed by statute.

Question 9: Which "right to return to the same job" option would you prefer be applied to shared parental leave; a) or b)? Please explain your response.

Option a)

Practical Considerations

Option a) entitles employees to take leave flexibly without being unnecessarily burdensome for employers.

Option a) closely mirrors the current rights for employees to return to the same job following a period of family-related leave. This means that employees and employers are already familiar with how their rights and obligations would look like under the shared parental leave system, making the transitional period easier for all.

Option a) is simpler administratively because employers would only have to track and record one block of leave. In contrast, option b) would require employers to implement new procedures for recording periods of absence to be able to monitor their workforce.

Employers often provide cover for periods of family-related leave by using temporary, fixed-term employees or contractors. By using a contingent workforce, employers are able to guarantee that the employee who is on leave is able to return to carry out the exact same role they performed prior to going on leave. If an employee is given the right to return to the same job after their first period of leave (as is the case with option a)), then this may encourage workers to take one longer period of leave. Employers are likely to find it easier to arrange cover for these patterns of leave.

In contrast, option b) may encourage employees to take sporadic, shorter periods of leave because there would be a guaranteed right to return to the same job at the end of each. This would require employers to find temporary cover more frequently for employees who are absent for several shorter periods of time over 52-weeks. This is potentially harmful to businesses because temporary staff engaged over short periods of time are unlikely to gain the requisite expertise to cover the absence effectively. It also makes planning cover for an employee who is absent on shared parental leave difficult.

Technical Issues

The disadvantage of option a) is that it favours employees entitled to paternity leave over those entitled to maternity leave.

By way of example, an employee would be entitled take 2-weeks (paternity) leave and then return to the same job. The employee would then be entitled to take a further period of 26-weeks (shared parental) leave after just one week of being back at work. The employer would have to guarantee the right for the employee to return to the same job twice and after what is a longer total period of absence (i.e. 28-weeks).

Our suggestion is to include the period of paternity leave in the 26-week total from which the employee is entitled to return to the same job where shared parental leave is taken within 20-weeks of the birth (or adoption).

This 20-week period has been chosen because this is the period after which the mother's partner is entitled to take up to 26-weeks out of work to care for the child under the current right of additional paternity leave. This will protect employers in the situation where the employee returns to work for a very short period of time between paternity and shared parental leave.

There is also a need for consistency with other legislation granting rights to return to work from a period of family-related leave. This will avoid ambiguity and lead to greater transparency and ease of understanding.

Question 10: In cases of fostering to adopt where the child is matched and placed with the prospective adoptive parents on the same day, how can we provide realistic notification for employers of the need to take adoption leave and pay? Please explain your response.

The rules and timescale for notification for employers of the need to take "fostering to adopt" leave and pay is to be the same as for adoption leave currently, ie once the employee is notified of being matched with a child he/she has seven days in which to notify the Employer of his/her intention to

take adoption leave and the date he/she intends it to start and 28 days' notice of the date when the employee would like the adoption leave to start for statutory adoption pay, however:

- If it is not possible to comply with the 28 days' notice requirement then notification of the date the adoption leave is to start should be given to the employer at the earliest possible date; and
- Adoption leave starts automatically from the day the placement starts.

In addition, in order to give employers notice of the potential need for adoption leave at potentially very short notice employees should be required to disclose to their employer at the point they make contact with the relevant agency to formally apply to adopt, that they are an approved foster parent/approved adopter (and or are applying to become an approved foster parent/approved adopter) and are actively trying to adopt a child.

Question 11: Do you have any other comments that might aid the consultation process as a whole?

Communication between employers

The Government's proposed notification procedure does not require any communication between the parents' respective employers. The "light touch" approach to regulation is generally welcomed and should reduce the burden on employers and employees. But it could be helpful for the respective employers to communicate with each other where the employees consent to this. As currently proposed, the notification procedure could be unnecessarily timely, costly and difficult, as explained more fully in our answer to question 4 above.

Suppose, for example:

- a mother and father agree between them how they would like to divide their shared parental leave entitlement and the pattern they would ideally like to take;
- each submits a notification form to their own employer and enters into negotiations for the proposed 2 week period;
- the mother's employer agrees her proposed leave pattern, the parents begin to make childcare arrangements and the mother's employer arranges cover based on the agreed dates of leave,
- but the father's employer refuses to agree the father's proposed pattern of leave.

The parents realise that their plans are no longer viable and the mother must then go back to her employer to submit a request to change her agreed pattern of leave. There is inevitably a risk that this kind of scenario could happen several times over for the same couple making the proposed shared parental leave regime unworkable. A quick conversation between the respective employers may be helpful in some circumstances.

Employers may need to speak to the other employer to verify an employee's entitlement to shared parental leave and pay. While the vast majority of employees will provide information honestly, the complexities of the system mean that mistakes may easily be made; there will inevitably be a small number of people who do try to abuse the system and claim more than their entitlement.

On balance, we agree that a system of self-certification is the least burdensome on employers. Employers should not be required to engage with one another. Further, there may be data protection issues should one parent's employer process the personal data of the other parent.

We have two suggested solutions:

- The notification procedure could allow for communication between the parents' respective employers where the parents have consented to this. The notification form could include the parents' respective employer details and a tick box to confirm that each parent consents to his employer contacting his partner's employer for the purposes of facilitating the shared parental leave request. In our view, making a provision for communication between employers might facilitate agreement of leave patterns. Further, the knowledge that their respective employers may communicate with one another would be a powerful deterrent to those who might otherwise abuse the system.
- Alternatively, government guidance could encourage employees to engage with their employers in a constructive and open dialogue to help to achieve a mutually beneficial solution, so it could be mentioned in government guidance.

Fit with enhanced maternity benefits

Some employers, in particular large employers, offer some form of enhanced maternity benefits to employees who take maternity leave, providing enhanced pay or extending the maternity pay period.

Many employers who offer enhanced maternity benefits do not offer equivalent enhanced benefits to employees who take paternity leave. Some have expressed uncertainty as to whether this is something they are legally required to offer.

In our experience, lack of enhanced paternity benefits is a key reason for the low take-up of additional paternity leave, particularly where the father is the higher earner. When additional paternity leave was first introduced, the Government's view (as set out at paragraph 2.42 of its Response to the Consultation Choice and Flexibility: Additional Paternity Leave and Pay) was that there was no legal obligation for an employer who offered enhanced contractual maternity pay to offer equivalent enhanced paternity pay, as the correct comparator for a man on paternity leave was not a woman on maternity leave but a woman on paternity leave¹, and the law permitted special protections for pregnant women.

However, claims from fathers on additional paternity leave may now have greater force following an ECJ ruling that a Spanish law permitting time off for bottle or breast feeding a baby under nine months was unlawful where all mothers were entitled but father were only entitled if the child's mother was also an employee. Although the law was originally introduced to promote breastfeeding, it had since been amended to include bottlefeeding. As such, the differential treatment of men and women in this regard could no longer be justified as a means of protecting new mothers or of reducing any inequality suffered by women in the workplace, and in fact was liable to perpetuate traditional gender roles by keeping the father's caring role subsidiary to that of the mother. The ECJ viewed the leave as time purely devoted to the child which reconciles family life and work, and not as a measure intended to ensure the protection of the biological condition of the woman following pregnancy or the protection of the special relationship between a mother and her child. As such,

¹ e.g. as the civil partner of a mother who had taken maternity leave, or as the secondary adopter whose partner had taken adoption leave

there was no justification for distinguishing between men and women (*Roca Alvarez v Sesa Start España ETT SA* [2011] 1 CMLR 28)

The argument would be that as maternity leave post-20 weeks of birth can be transferred to the father as additional paternity leave, the purpose of the leave is not to protect the special relationship between mother and child. The two types of leave should be viewed as comparable.

If so, an employer should provide the same rights and benefits to employees on additional paternity leave. This is given further support by the EAT ruling on the scope of "special treatment" in *De Belin v Eversheds Legal Services* UKEAT/0352/10. The EAT upheld a tribunal's decision that inflating the score of an employee on maternity leave in a redundancy selection process was sex discrimination against her male colleague. Special treatment is only lawful in so far as it constitutes a proportionate means of achieving the legitimate aim of compensating a mother for the disadvantages occasioned by her maternity leave. Even if enhanced pay for the period 20 weeks post-birth can be viewed as compensating for maternity disadvantages, it may well not be justifiable to treat fathers on additional paternity leave differently.

Employers who only provide enhanced maternity pay for a period of maternity leave ending no later than 20 weeks post-birth should be in a stronger position to reject claims to enhanced paternity pay. Although there is still the risk that a father taking additional paternity leave may argue that his first week of additional paternity leave should be compared with a woman's first week of maternity leave and accordingly seek the enhanced pay.

Since shared parental leave is accessed by both parents on the basis of the mother relinquishing her remaining maternity leave entitlement, it would appear that such leave is not required to protect the biological condition of the mother.

As such, it is our view that enhanced maternity benefits would have to be offered equally to parents taking shared parental leave.

Further, if employers do not offer equivalent enhanced benefits to those on shared parental leave, this may well have a negative effect on take-up of shared parental leave, with the result that shared parenting is not facilitated as intended. If employees are given entitlement depending on whether they take their leave as maternity or shared parental leave, they will feel that this is unfair. It could also potentially lead to claims of breach of trust and confidence. Government guidance could encourage employers to ensure that employers extend enhanced maternity benefits to those who choose to opt-in to the shared parental leave system, in the same way that the balance of statutory maternity pay is transferred. Clarification on this issue would be very helpful.

There is, of course, some risk that employers who currently offer enhanced maternity benefits will cut these back if they find themselves obliged to offer equivalent benefits to those who take shared parental leave, due to the increased costs that would be incurred in offering such benefits more widely.

Difficulty for employers in dealing with small blocks of leave

Flexibility is one of the core principles underpinning the introduction of shared parental leave. Certainly more flexibility and choice for parents in relation to how they divide their leave between them is welcomed. Making parental leave and pay available to both mothers and fathers may encourage parents to share childcare responsibilities more equally. However, if there is too much flexibility, the impact of the new shared parental leave regime may be diminished. Many employers

will simply opt for the default position whereby the employee is obliged to take all the leave requested in one block.

The Government's plan to allow employees to submit requests for leave as and when they require it has the potential to impose significant administrative burdens on businesses, particularly where shorter periods of leave are concerned (as discussed in more detail in response to question 5 above).

Even with advance notice, it is likely to be difficult for employers - and in particular small employers - to accommodate numerous short periods of leave without a detrimental effect on the business. Finding temporary cover for short periods of leave requires a degree of administration which would represent a particular burden in small businesses without a dedicated HR function. The cost of such cover may also present difficulties. Attempts to avoid the costs of engaging temporary cover by asking other staff to absorb the duties of the absent employee risks causing friction in the workplace where these staff are required to take on additional work for no additional consideration.

We question whether allowing periods of leave as short as one week is really necessary to achieve the desired flexibility for families. In some cases, taking very short blocks of leave may suit both the employer and the employee. But, in many cases, this is likely to be disruptive and challenging for business. Should there be a minimum 4 week period for taking shared parental leave?

Question 12: Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcome.

We found the questions in the consultation to be very narrow. There are a number of general issues which need to be dealt with, namely data protection consent (question 4); the scope for communications between employers for the purposes of facilitating the mechanics of the process surrounding requests for shared parental leave (question 11); and clarification on whether enhanced maternity benefits should be extended to both parents taking parental leave (question 11).

Chair of working party:

Emma Burrows, Trowers & Hamlins LLP

Members of working party:

Bettina Bender, CM Murray LLP

Jemima Coleman, Herbert Smith Freehills LLP

Lily Collyer, Baker & McKenzie LLP

Maya Cronly-Dillon, Hogan Lovells International LLP

Amanda Hudson, Excello Law

Rebecca Johns, Fasken Martineau LLP

Oliver Jones, Allen & Overy LLP

Joanna Lada-Walicki, Barlow Robbins LLP

Rebecca McAlees, Lewis Silkin LLP

Raj Nadarajan, Slater & Gordon (UK) LLP

Claire Walls, Berwin Leighton Paisner LLP

Appendix 1

ANNEX D: (DRAFT) SHARED PARENTAL LEAVE FORM (SHPL1)

Section A

Notice to end Maternity / Adoption Leave

To be filled in by the mother / primary adopter of a child

I am writing to confirm that I intend to end my maternity leave, on

_____ [Date]

Signed _____ Dated: _____

Please print name _____

Section B

Notice of intention to access the shared parental leave system

To be filled in by both partners wishing to access shared parental leave

Date maternity / adoption leave started:

Date statutory maternity / adoption pay started:

Date maternity / adoption leave will end / has ended:

Date statutory maternity / adoption pay will end / has ended:

Balance of leave remaining (total):

Balance of pay remaining (total):

Partner 1 Maximum shared parental leave entitlement (individual):

Maximum statutory shared parental pay entitlement (individual):

Partner 2 Maximum shared parental leave entitlement (individual):

Maximum statutory shared parental pay entitlement (individual):

Declaration

I declare I have met the qualifying conditions for shared parental leave / shared parental pay [*delete as appropriate*] and I agree to this division of leave and pay. I agree that personal data I have provided in this form can be processed by the employer of my partner for the purpose of handling any request by them to exercise their right to shared parental leave.

Signed partner 1

Print name

Date:_____

Signed partner 2

Print name

Date:_____

Section C

[First] request to take a period of shared parental leave and/or pay (ShPL)

To be submitted 8 weeks before a requested start date and to be agreed between the employee and their employer

Name of employee making request for shared parental leave:

Proposed date shared parental leave will start:

Proposed date shared parental leave will end:

Proposed date shared parental pay entitlement will start:

Proposed date shared parental pay entitlement will end:

Signed

Print name

Date:_____