

## What maternity rights are employees entitled to?

All **Employees** who can satisfy the relevant qualifying conditions enjoy the following statutory rights:

- Paid time off to receive ante-natal care;
- 26 weeks ordinary maternity leave (for women whose babies are born before 1st April 2007 rising to 52 weeks for women whose expected week of childbirth begins on or after 1st April 2007);
- Protection from dismissal by reason of pregnancy or childbirth;
- Right to return to work after maternity leave;
- Offer of alternative work before being suspended on maternity grounds;
- Remuneration on suspension on maternity grounds;
- Statutory maternity pay

In addition, those employees whose babies are born before 1st April 2007 who have completed 26 weeks' continuous service 15 weeks before the week the baby is due (WBD) will also be entitled to take additional maternity leave of 26 weeks (unpaid although for women whose babies are born after 1st April 2007 only 13 weeks of this will be unpaid), i.e. one year off in total.

## What is the basic right to ordinary maternity leave?

Every employee (irrespective of length of service) has a right of up to 26 weeks' "ordinary" maternity leave ("OML") during which time she is entitled to receive the benefit of her terms and conditions of employment, with the exception of remuneration. This means that you would not have to pay the employee her salary, as this is replaced by statutory (or your company's scheme) maternity pay, but will have to maintain the employee's benefits in kind e.g. the use of a company car. For example, an employee's contractual holiday entitlement will accrue during the 26 week period, but any bonuses or commission payments are probably remuneration and as such not normally payable. However, you should always draft your bonus/commission schemes very carefully as the recent case of **Hoyland v Asda** shows.

The earliest point at which an employee may commence her ordinary maternity leave is at the beginning of the 11th week before the week the baby is due.

*Note: re: Temporary workers - It is important to note that the right to maternity leave only applies to individuals employed under a contract of services, i.e. a contract of employment. Temporary workers engaged under a contract for services will not generally be entitled to take maternity leave because they do not fall within the definition of "employee". Nevertheless, they can choose not to work during this period and may be eligible for SMP*

### What is the “sickness trigger” rule?

This is where the employee’s maternity leave is automatically started if she is absent from work for a pregnancy related illness in the four weeks before the start of the week the baby is due. So if an employee has opted to work beyond this date and then falls ill due to a pregnancy related illness, her maternity leave will be triggered automatically at this point.

### What is compulsory maternity leave?

An employee cannot return to work within the period of two weeks of giving birth. If you allow an employee to return to work during that period you could be prosecuted and fined.

### What is additional maternity leave?

Women whose expected week of childbirth begins on or after 1st April 2007 will be automatically entitled to additional maternity leave provided they qualify for ordinary maternity leave. For a woman who gives birth before 1st April she will only be entitled to an “additional” period of leave of 26 weeks if she has been continuously employed for 26 weeks at the point 15 weeks before the week the baby is due. Therefore employees are entitled to a total of one year’s leave irrespective of when they choose to start it or when the baby is born. As with the ordinary maternity leave, the contract of employment continues in existence during the additional period of leave but the only terms which apply and which can be enforced will be the implied obligations of trust and confidence and good faith.

Currently additional maternity leave is **unpaid** (unless the employee has other contractual entitlements to pay during this period i.e. from your company scheme or the woman’s expected week of childbirth begins on or after 1st April 2007 when she will be entitled to a further 13 weeks paid leave) and will begin immediately after the period of ordinary maternity leave (which is generally paid). The maximum amount of leave an employee could take is therefore one year (i.e. 26 weeks’ ordinary maternity leave followed by 26 weeks’ additional maternity leave). However the period of paid maternity leave will increase in 2007

All employees who satisfy the qualifying conditions for SMP qualify for additional maternity leave.

### How should an employee notify me of when she wants to commence maternity leave?

An employee must tell her employer of her intention to take maternity leave by the **15th week before the week her baby is due** (unless this is not reasonably practicable). She will need to state:

- That she is pregnant;
- The week her baby is expected to be born; and
- When she would like her maternity leave to start.

If the employee changes her mind about when she plans to start her leave as long as she gives her employer **28 days' notice** of any change.

You will also have **28 days** in which to reply in writing to an employee's notification explaining the date she is expected to return to work assuming that she takes her full entitlement.

### **When can an employee return to work?**

An employee is not obliged to take her entire 26 weeks' ordinary maternity leave and may return to work at an earlier date providing she gives you 28 days' notice (this rises to 8 weeks for those whose expected week of childbirth begins on or after 1st April 2007) of her return date and does not return within 2 weeks of giving birth.

The employee may also inform you that she does not intend to take the full additional leave period and may return to work at an earlier date, but again it must not be earlier than two weeks after giving birth. Again the employee must give 28 days' notice (or 8 weeks notice) to you of her intention to return to work earlier than the end of the maternity leave period.

### **Does my employee have the right to return to work at my company?**

#### **After ordinary maternity leave:**

An employee returning to work after ordinary maternity leave is entitled to return to the same job, at the same place and on the same terms and conditions as if she had not been absent. If for reasons of redundancy the employee is unable to return to her old job, then her employer must offer a suitable alternative position and the terms and conditions relating to the new position must not be substantially less favorable than her previous position. If the employee rejects the offer, her employer is entitled to terminate her employment by reason of redundancy and even if she meets the eligibility requirements for redundancy, she may lose her right to a redundancy payment.

An employee on ordinary maternity leave does not have to give notice of her return. It is presumed that she will return after the expiry of 26 weeks' leave. But if she decides to return early she must give at least 28 days notice (or 8 weeks notice: see above). If an employee on ordinary maternity leave wishes to return to work early but does not give the full 28 days, or any, notice, you may delay the employee's return to work by up to 28 days.

#### **After additional maternity leave:**

After additional maternity leave an employee is still entitled to return to work to the same job, on the same terms and conditions as if she had not been absent.

However, if there is some reason why it is not reasonably practicable for her to return to that same job, you should offer her a similar job on terms and conditions that are no less favorable than she had in her original job. If the offer is not suitable the employee could bring an unfair dismissal claim. **NB:** This right varies if you are a company employing 5 employees or less.

Additional maternity leave ends 26 weeks after the end of ordinary maternity leave, so there is some certainty about when your employee will be returning from leave, i.e. 1 year from the date they start their leave, unless you receive notice from them that they wish to return earlier.

You are not able to write to an employee before the end of her ordinary leave and ask whether she intends to return at the end of her additional leave. It is simply to be assumed that the employee will return at the end of the additional maternity leave period. However for women whose expected week of childbirth begins on or after 1st April 2007 they will be able to work for up to 10 “keeping in touch” days during their leave.

You cannot postpone an employee’s return to work after additional maternity leave.

### **What is the small business exemption?**

Small businesses employing 5 or fewer members of staff do not have to take employees back either in their old job or offer an alternative job if it is not reasonably practicable to do so. This will not necessarily stop an employee from bringing a complaint to the Employment Tribunal against you. In such a case it will be a matter for you to prove that it was not reasonably practicable to take the employee back after her maternity absence.

### **What do I do if my employee requests to return to work part time?**

Employers often receive a request from an employee to return to work on a part time basis following maternity leave. You should consider carefully before making a decision since refusal of such a request without good reason may constitute indirect sex discrimination. Unlimited compensation can be awarded for sex discrimination. In addition, employees who are parents of children under 6 or disabled children now have a legal right to request flexible working. You are now under a duty to seriously consider their requests in accordance with a set down procedure.

### **How do I deal with temporary replacements?**

Replacement temporary workers can be dismissed for a fair reason when a woman returns to work provided they were informed at the outset of their engagement that this would be the case and you act reasonably over the dismissal. However, any temporary workers who are engaged on contracts of employment will be subject to the Fixed Term Employees Regulations.

## What is unfair dismissal for reasons related to pregnancy?

If you dismiss a pregnant woman, you must ensure that it is not for a reason connected with her pregnancy otherwise the Employment Tribunal may deem the dismissal to be automatically unfair. This means that even if you followed a fair procedure, if the reason established for the dismissal is due to her pregnancy, it will be an unfair dismissal.

A pregnancy-related dismissal includes one relating to miscarriages and pregnancy-related illnesses before and after birth. An employee who believes that they have been dismissed for a reason connected with their pregnancy can bring a complaint to the Employment Tribunal for unfair dismissal within 3 months of termination of their contract without requiring a minimum length of service. You would then have to prove that the dismissal was not related to the employee's pregnancy but for some other reason, for example, redundancy or for a health and safety reason.

The circumstances in which a dismissal would be deemed to be automatically unfair are as follows:

- She is dismissed because she is pregnant or for any other reason connected with her pregnancy;
- She is dismissed within the maternity leave period because she has given birth or for any other reason connected with having given birth;
- She took maternity leave or took advantage of the benefits of maternity leave;
- She was suspended from work on maternity grounds;
- She was dismissed by reason of redundancy in the maternity leave period and an available suitable vacancy was not offered to the employee;
- She was unable to resume work on grounds of illness or injury and was dismissed within 4 weeks of the end of the maternity leave period whilst still incapable of work.

An employee also has the additional right not to be subjected to detrimental treatment on grounds of pregnancy, childbirth or maternity and can seek redress through an Employment Tribunal.

## Can I suspend an employee from work for health and safety reasons related to maternity?

You are entitled to suspend an employee on maternity grounds if the suspension is necessary in order to comply with a statutory requirement or in compliance with any recommendation contained in a relevant provision of a *Health and Safety at Work Act 1974* code of practice. For example suspension would be permitted where:

- The employee is engaged in work which could pose a risk to a new or expectant mother or her baby and it is not reasonable to alter her working conditions or hours of work or where altering her hours would not avoid such risk; or

- a new or expectant mother is working at night and she provides a medical certificate stating that it is necessary for her health and safety that she should not work such hours.

Before being suspended on maternity grounds the employee should be offered suitable alternative work that is available. This means work which is suitable and appropriate for her to do having regard to the circumstances and on the same terms and conditions as her previous job. Failure to make such an offer of work to an employee may result in the employee bringing a complaint against you through the Employment Tribunal.

If you decide to suspend an employee from work on maternity grounds, the employee is still entitled to remuneration which is to be calculated on one week's pay for each week of suspension.