

SECTION 8

MATERNITY LEAVE AND PAY

Key Legal Points

- All female employees are entitled to take up to **52 weeks' maternity leave** regardless of length of service.
- All pregnant employees are entitled to **paid time off for antenatal care**. If the employer requests, the employee must show her employer a certificate from a doctor and an appointment card unless it is the first appointment.
- Expectant fathers and partners are entitled to take unpaid time off work to accompany a pregnant woman to **2 antenatal appointments** (up to 6.5 hours for each but the employer can choose to give more) if they are: the baby's father; or the expectant mother's spouse or civil partner; or in a long-term relationship with the expectant mother; or the intended parent (for surrogacy arrangements).
- The **first 26 weeks** of maternity leave are called **Ordinary Maternity Leave (OML)**. Employees may also take an **additional 26 weeks** maternity leave called **Additional Maternity Leave (AML)**, regardless of their length of service.
- An eligible mother can end her maternity leave early, and with her partner or the child's father, opt for **Shared Parental Leave** (see Section 11).
- The earliest day that **leave can begin** is the 11th week before the **Expected Week of Confinement (EWC)** i.e. the week the baby is due. The latest day that leave can begin is on the day after the birth.
- Leave is compulsory for the two weeks immediately following the birth or four weeks if the woman works in a factory.
- For eligible employees, **Statutory Maternity Pay (SMP)** is paid for **39 weeks**. The employer pays SMP but can reclaim all or most of it from the government. For the **first six weeks** employees are entitled to SMP at the rate of **90%** of their average weekly earnings. For the next **33 weeks** employees are entitled to **the standard, flat weekly rate** as set by government or **90% of their average weekly earnings, whichever is the lesser**.
- If an employee suffers a miscarriage or still birth after the 24th week of pregnancy, she is still entitled to statutory maternity leave and statutory maternity pay if she meets the eligibility criteria below.
- **Health and safety regulations** require employers to take account of the special position of new and expectant mothers and mothers who are breastfeeding and to conduct a risk assessment. This should take account of any risks where the worker may be exposed to any process, working conditions, or physical, chemical or biological agents which might adversely affect the health and safety of the worker or their baby. Risks should primarily be avoided by adopting prevention and control measures.

Notification

Employees must inform their employer as soon as possible that they are pregnant. This is important as there may be health and safety considerations.

Before the end of the 15th week before the Expected Week of Confinement (EWC), or as soon as reasonably practical afterwards, the employee must notify the employer:

- that she is pregnant;
- the EWC; and
- the date on which she would like to start maternity leave.

The employee must provide a certificate from a doctor or midwife (usually a MAT B1 form) confirming their EWC.

The employee can give notice for her Statutory Maternity Pay at the same time.

Statutory Maternity Pay - Qualifying Conditions

Employees must meet certain qualifying conditions to receive statutory maternity pay (SMP). They must:

- Have been **continuously employed with the employer for at least 26 weeks by the beginning of the 15th week** before the EWC;
- Have average weekly earnings at or above the lower earnings limit for National Insurance Contributions (NICs);
- Provide the employer with a doctor's or midwife's certificate (MAT B1 form) stating the EWC;
- Give at least 28 days' notice (or if that is not possible, as much notice as they can) of their intention to take maternity pay; this notice can be given at the same time as notice is given for maternity leave; and
- Still be pregnant 11 weeks before the start of the EWC or have already given birth.

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Terms and conditions of employment during maternity leave

- During OML and AML, an employee is entitled to **continue to benefit from all the terms and conditions** of employment which would have applied to her had she been at work. **The exception is wages or salary or other benefits with a transferable cash value** such as a car allowance or luncheon vouchers, though statutory maternity pay must be paid if the employee is eligible.
- The employee continues to accrue both full statutory **annual leave** (i.e. 5.6 weeks or pro rata equivalent) and any additional contractual leave throughout the 52 weeks.
- **Benefits** such as share schemes, private healthcare, use of company car and phone (unless these are provided for business use only) do continue during OML and AML. Whether childcare vouchers constitute “benefits/ remuneration” is under consideration by the courts so you should seek further advice on this issue.
- Contributions to an **Occupational Pension Scheme** should continue as if the employee is working normally. During any period that your employee is on additional maternity leave (AML) but not receiving any maternity pay e.g. during the last 13 weeks of AML, it is not obligatory to make any employer pension contributions unless the contract of employment provides otherwise.

If the pension scheme rules require employee contributions to continue during maternity leave, her contributions should be based on the amount of statutory and/or enhanced maternity pay she is receiving.

Employee contributions will therefore stop during any period of unpaid maternity leave - e.g. during the last 13 weeks of AML - but the scheme rules may allow her to still make voluntary contributions.

- Any **pay increase** an employee receives or would have received had she not been on maternity leave must be taken into account in the calculation of her maternity-related pay.

The position in relation to the payment of bonuses to employees during maternity leave is extremely complicated and inconsistent. Individual advice should be sought on a case by case basis. Whether a bonus will be payable to an employee on maternity leave will depend upon the nature of the bonus, contractual obligations and the custom and practice of the employer.

- Ordinary and Additional Maternity Leave counts towards an employee’s period of **continuous employment** for the purposes of entitlement to other statutory employment rights, e.g. the right to a **redundancy payment**.
- It also counts towards assessing **seniority and personal length-of-service payments**, such as pay increments, under the contract of employment.

Communication before and during maternity leave

After receiving notification of when the employee wishes her maternity leave to start the employer must in turn notify her (within 28 days of her notification) of the date on which the leave will end.

It is helpful for both parties to confirm the employee’s maternity plans in writing – see Appendix 8A.

An employee can change her start date by giving 28 days’ notice of her new start date.

The employee should provide the employer with a MATB1 form which she will receive from her midwife or doctor. This will confirm the employee is pregnant and advise the expected due date. If the employee does not qualify for SMP, return the MATB1 form to her and in addition complete the form SMP1 from the Social Security Agency.

Maternity leave shall start on the earliest of:

- the employee’s intended start date;
- the day after any day on which the employee is absent for a pregnancy-related reason during the four weeks before the EWC; and
- the day after the employee gives birth.

If the employee is absent for a pregnancy-related reason during the four weeks before EWC, she must let the employer know as soon as possible in writing. Periods of pregnancy-related sickness absence from the start of the employee’s pregnancy until the end of her maternity leave will be recorded separately from other sickness records and will be disregarded in any future employment-related decisions.

During the maternity leave period an employer can make reasonable contact with an employee and she may make contact with her employer. In addition, an employee can **choose to come** to work as a way of **keeping in touch (KIT)** with workplace developments for 10 days or less of her leave. An employee is **entitled to be paid for KIT days** and it should be noted that an employee cannot be required to take KIT days nor is an employer obliged to offer them. KIT days may not be used in the first two weeks after giving birth or during the first four weeks if the employee works in a factory.

Remember that you must keep an employee informed of promotion opportunities and other information relating to their job that they would normally be made aware of if they were working e.g. redundancy situations.

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Returning to work following maternity leave

Employees have a **right to return to the same job** on the same terms and conditions of employment as if they had not been absent after Ordinary Maternity Leave unless a redundancy situation has arisen, in which case they are entitled to be offered a suitable alternative vacancy.

If the employee takes **Additional Maternity Leave she is still entitled to return to her old job** on the same terms and conditions of employment as if she had not been absent **unless this is not reasonably practicable**, but she must still be offered a job that is suitable for her and the terms and conditions must be no less favourable.

If an employee wishes to return to work early, she must give notice to the employer at least eight weeks before her new return date. The employer has the discretion to accept less or no notice. When exercising discretion, caution should be taken to avoid claims of unfair treatment or discrimination.

If the employee attempts to return to work earlier than planned without giving notice, the employer can postpone her return by up to eight weeks. However, her return may not be postponed to a date later than the end of her 52 week SML period.

If an employee terminates her contract before the end of the statutory maternity pay (SMP) period, the employer must continue to pay her SMP for the full 39 week SMP pay period, provided she has not started work for an employer who did not employ her in the 15th week before her EWC.

Employees who don't return are not required to pay back any SMP they have received. Employees should give notice of resignation in accordance with their contract. The amount of maternity leave left to run when notice is given must therefore be at least equal to the statutory/contractual notice required.

On her return to work an employee should receive any pay increases which would have been paid to her had she not been on maternity leave.

Protection from detrimental treatment and dismissal

Pregnant employees and those on maternity leave are protected under sex discrimination legislation which outlaws unfair treatment, including dismissal, on grounds of their sex, pregnancy or maternity leave. Examples of detrimental treatment include denial of promotion or selection for redundancy based on reasons solely related to the employee's pregnancy or subsequent maternity leave. An employee dismissed for a reason related to pregnancy or childbirth may make a claim of automatically unfair dismissal regardless of length of service.

If a redundancy situation arises, an employee on maternity leave must be offered a suitable vacancy if one is available, in preference to any affected employee who is not on maternity leave.

Related rights

Be aware that working parents have the right to request **parental leave, shared parental leave, time off for dependants and flexible working** (see sections 7, 11 and 12). Any request for flexible working from a returning employee should be seriously considered. Any such requests should be made as early as possible. Refusal to offer such an option without an objective business reason may amount to indirect sex discrimination.

For further details see www.nibusinessinfo.co.uk

APPENDIX 8A

Model letter for employers to acknowledge notification of maternity leave.

This letter can be used when only the statutory levels of leave and pay are provided and as such could be amended if additional leave/pay are offered (Employer should respond within 28 days of receipt of employee's notification.)

Date:

Dear [name of employee],

Congratulations and thank you for telling me about your pregnancy and the date that your baby is due. I am writing to you about your maternity leave and pay.

As we have discussed, you are eligible for 52 weeks' maternity leave (26 weeks' Ordinary Maternity Leave plus 26 weeks' Additional Maternity Leave). Given your chosen start date of [insert date], your maternity leave will end on [insert date].

If you want to change the date your leave starts you must, if at all possible, tell me at least 28 days before your proposed new start date or 28 days before (your original start date), whichever is sooner.

If you decide to return to work before [insert date leave ends], you must give me at least eight weeks' notice.

As we discussed, you are eligible for **39 weeks' Statutory Maternity Pay / not eligible for Statutory Maternity Pay.** *[delete as appropriate].*

Your maternity pay will be £[insert amount] from [insert date] to [insert date] and £[insert amount] from [insert date] to [insert date].

OR

The form SMP1 (enclosed) explains why you do not qualify for Statutory Maternity Pay. You may however be entitled to Maternity Allowance. If you take this form to the Jobcentre Plus or Social Security Office at [insert local details], they will be able to tell you more.

As your employer I want to make sure that your health and safety as a pregnant mother are protected while you are working, and that you are not exposed to risk. I have already carried out an assessment to identify hazards in our workplace that could be a risk to any new, expectant, or breastfeeding mothers. Now you have told me you are pregnant I will arrange for a specific risk assessment of your job and we will discuss what actions to take if any problems are identified. If you have any further concerns, following this assessment and specifically in relation to your pregnancy, please let me know immediately.

During your maternity leave we are both able to make reasonable contact with each other to help with staying in touch. We are also able to agree that you can do up to ten days' work during your maternity leave without it affecting either your maternity leave or your SMP. Before you begin your maternity leave we should discuss how we will keep in touch during your time off.

If you decide not to return to work you must still give me proper notice. Your decision will not affect your entitlement to SMP.

If you have any questions about any aspect of your maternity entitlement, please do not hesitate to get in touch with me. I wish you well.

Yours sincerely,