

To paternity and beyond...

Achieving a work-life balance has become a priority in recent times. However, for many families struggling to meet the competing demands of home and work commitments, it seems an impossible goal. Acknowledging its role in supporting families, the Government has sought to provide parents with more options about how to balance family and work. The past few years have therefore seen family friendly legislation develop in order to offer increased choice and flexibility to parents and carers.

Most recently, the Work and Families Act 2006, which received Royal Assent last year, builds on and extends existing family friendly rights. The qualifying period of service required for additional maternity leave was removed, 'keeping in touch' days and reasonable contact were introduced, and the statutory maternity pay period was extended from 26 weeks to 39 weeks, with a view to extending it further to 52 weeks. These changes affect employees whose expected week of childbirth is on or after 1 April 2007 and are also mirrored in adoption leave and pay provisions, where relevant. The Act also introduced an extension of the right to flexible working to employees who care for adults, which came into force on 6 April 2007.

Perhaps the most controversial development to arise from the Act is the proposal for a new right to additional paternity leave and additional paternity pay. The proposals follow in the footsteps of a number of other European countries, most notably Denmark, which provides a transferred maternity leave system to allow fathers to take an extended period of leave, and Norway and Sweden, which offer designated 'daddy days' or a father quota to encourage mothers and fathers to share their leave entitlement. However, despite the Government's new proposals, recent DTI figures estimate that initial take up of the additional paternity leave and pay scheme will only be between 4 per cent and 8 per cent of eligible fathers. With this in mind, this article analyses the effect of the new proposals and looks at what the future holds for both employers and parents in light of this new entitlement, which may well promise more than it achieves.

Existing entitlement

The Employment Act 2002 ("the 2002 Act") was responsible for originally introducing the statutory right to paternity leave and pay. The relevant provisions are contained in regulations (derived from the 2002 Act) which came into force on 6 April 2003 and apply to employees whose children are expected to be born on or after this date (or, where adoption applies, children who are placed on or after this date).

To be eligible for the existing right to paternity leave, an employee must:

- have 26 weeks' continuous service with the same employer by the end of the 15th week before the expected week of childbirth (or, where adoption applies, have 26

weeks' continuous service ending with the week in which notification of the match occurs); and

- be either the biological father of the child or be married to, the partner or civil partner of the child's mother; or if the child is adopted, the father must be married to, the partner or civil partner of the child's adopter; and
- have, or expect to have, responsibility for the upbringing of the child.

Although the term 'father' is used in this article, and the Government consultation papers outlined below, it encompasses circumstances anticipated by all the groups above.

An employee who qualifies for the existing right to take paternity leave will be entitled to take either one whole week or two consecutive weeks' leave, within 56 days after the baby is born. Subject to qualifying conditions, an employee is currently entitled to two weeks' statutory paternity pay. The rate is the same as the prescribed rate for statutory maternity pay; currently £112.75 or 90% of normal weekly earnings, whichever is the lower.

Recognising the growing body of evidence which indicates that fathers want greater involvement in caring for their child, the Government has outlined its plans to extend fathers' rights in a series of consultation papers spanning the last two years.

Transferable maternity leave

After outlining a package of family-family measures in 2004, the DTI published the "Work and Families: Choice and Flexibility" consultation paper in February 2005, setting out the Government's proposals to increase the choice for families in balancing work and caring responsibilities. The consultation paper addressed a number of issues, most significantly, for the purposes of this article, a system of transferable maternity leave and pay, which would give mothers the right to transfer a proportion of their (unused) maternity leave and pay to fathers.

The DTI published its response to the consultation paper in October 2005. It concluded that it would be more appropriate to provide fathers with a period of additional paternity leave, rather than the suggested system of transferred maternity leave (due to the administrative confusion such a transfer may cause). The DTI also clarified that, as the aim of the scheme would be to enable the mother or father to be off work to care for their child in the first year, an employed father's entitlement to additional paternity leave and pay would be dependent on the mother returning to work. Furthermore, a father would be entitled to a maximum of 26 weeks' leave, some of which could be paid if the mother was entitled to statutory maternity pay or maternity allowance.

The new scheme in practice

Fast forward to March 2006, when the DTI issued a further consultation paper which focused on the proposal for additional paternity leave and pay, outlining how it would work in practice. It emphasised the Government's intention to keep the additional paternity leave and pay scheme as straightforward as possible. Moreover, it was confirmed that the new provisions would come into force at the same time that paid maternity and adoption leave was due to be extended to 12 months. (This was due to be 'by the end of this Parliament' – but see further below as to the most recent indication). Central to the proposals was the aim of encouraging mothers and fathers to have an equal division of paid leave and caring responsibilities during the first year of the child's life, and to keep additional paternity leave and pay consistent with existing maternity, paternity and adoption provisions.

The key proposals which arose from this consultation, and the Government's response, were as follows:

- Entitlement - the new provisions will mirror the existing paternity leave and pay provisions (which are referred to in the consultation papers as 'ordinary' paternity leave and 'ordinary' paternity pay). Additional paternity leave and pay will therefore be available to an employee who, in the case of the birth of the child, is the father of the child, the spouse, partner or civil partner of the child's mother and is responsible for the upbringing of the child. If the child is adopted, the employee must be the member of a jointly adopting couple who has chosen not to take adoption leave or statutory adoption pay, or be the spouse, partner or civil partner of the adopter.
- Continuous service - to qualify for the new scheme, the father will need to have qualified for ordinary paternity leave and have continued in employment with the same employer up to the intended date of taking additional paternity leave and pay. This option was considered to be the simplest to administer, and the least disruptive to employers.
- Calculation of pay - additional paternity pay will be calculated in the same way as ordinary paternity pay and based on the employee's average weekly earnings in the eight weeks up to and including the 14th week before the expected week of childbirth. For adoption, the period will be linked to the week of notification of matching for adoption. Additional paternity pay will be paid at the same rate as ordinary paternity pay (outlined above).
- Mother must return to work - for a father to be able to take additional paternity leave and receive additional paternity pay, the mother must have returned to work, which she will be deemed to have done if she has ended her maternity or adoption leave and has stopped receiving maternity or adoption pay.

- Starting leave and pay - the earliest that additional paternity leave and pay can be started will be 20 weeks from the date of childbirth or placement for adoption (although it may begin earlier if the mother dies during, or shortly after, childbirth).
- Minimum period - the minimum period of additional paternity leave that can be taken is two weeks, and it must be taken in one continuous block.
- Keeping in touch - a father taking additional paternity leave will be entitled to 10 'keep in touch' days, to be taken under the same terms and conditions as a mother on maternity leave.
- Terms and conditions - to encourage fathers to take additional paternity leave and pay, they will be entitled to the benefit of the terms and conditions equivalent to a mother on ordinary maternity leave (i.e. normal terms and conditions of employment continuing to apply, except for terms relating to remuneration) and will be entitled to the same right of return as a mother returning after ordinary maternity leave (i.e. to return to the same job on the same terms and conditions as before the leave began).

The response to the proposed new scheme has been mixed, particularly as it has often been viewed in the context of the other changes introduced by the Work and Families Act 2006. For example, the Federation of Small Businesses described the additional administration as “a nightmare” and commented on the risk of abuse of the system when trying to determine eligibility. Whilst the CBI initially expressed support for the new scheme, it also expressed its concerns about how it would work in practice. Fathers Direct, a registered charity promoting support for the child-father relationship, has welcomed the new scheme, but has called for more generous payment of paternity leave entitlement.

'Light touch' administration

The DTI issued a further consultation paper in May 2007, outlining the proposed administration of additional paternity leave and pay. Inviting views on the practicalities of the administration of the scheme, the DTI has confirmed that the earliest date that additional paternity leave and pay will be implemented will be for babies due on or after 5 April 2009 (although it is emphasised that this is not a firm date for introduction).

The consultation, which promises to limit the administration of the procedure to a “light touch”, has sought views on the following key issues:

- Self-certification – the preferred approach is for eligibility for additional paternity leave and pay to be established by self-certification by the father and mother, under which they will both certify key facts to the father’s employer (rather than self-certification of eligibility by parents with confirmation of entitlement from the mother’s employer, or compliance checks by HMRC). The DTI notes that this

approach would avoid the need for the father's employer to carry out checks with third parties and remove the risk of communications breaking down, although it accepts the risk of fraud remains.

- **Claim form** – the consultation paper asks whether the existing certification form provided by HMRC for claiming ordinary paternity leave and pay could be amended to apply also to additional paternity leave and pay, or whether an entirely new form should be developed, specifically for the new scheme.
- **Checklist** - the DTI proposes the use of a checklist to enable a father's employer to demonstrate that it has carried out the required assessments for eligibility. The draft checklist developed by HMRC is set out in the consultation paper and it is proposed that completion of the checklist (or a substitute) will be a mandatory requirement.
- **Notification** – it is proposed that there should be a notice period for an employer to confirm an employee's entitlement to additional paternity leave and pay.

Responses to this consultation are requested by 3 August 2007.

Testing times ahead?

Whilst systems similar to the proposed additional paternity leave and pay scheme may have been tried and tested across mainland Europe, it is difficult to say whether the new scheme will have a significant impact in the UK.

According to current DTI figures, in theory, around 239,000 fathers could be eligible for additional paternity leave and pay. However, as noted above, the estimated figures for the initial take up are substantially lower, at between 10,000 to 19,000 fathers. A predicted low take up is perhaps unsurprising, particularly given the statutory level of additional paternity pay.

It may be that despite the Government's efforts to achieve choice and flexibility, the new scheme may not be a realistic option for working parents. Some commentators consider that the right to flexible working may provide better long-term solutions; others believe that the existing entitlement to two weeks' paternity leave is sufficient for most fathers.

Irrespective of take up, however, employers are still facing the introduction of a new right which could unduly restrict or hinder their businesses, with an increase in day-to-day administration (however 'light touch' this may be) and the prospect of losing employees for a significant period of time. Every new right introduced into the workplace also requires understanding, training and management. It is therefore hoped that the response to the latest consultation will provide the clarification and certainty that both employers and employees

need to understand the true impact and worth of the new additional paternity leave and pay scheme.

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