

EMPLOYMENT (NORTHERN IRELAND) ORDER 2002

S.I. 2002 No. 2836 (N.I. 2)

EXPLANATORY MEMORANDUM

COMMENTARY ON ARTICLES

Article 1: Title and commencement

Article 1 cites the title of the Order. This is the title by which the Order will be known.

Article 1 gives the Department power to bring the provisions of the Order into operation by commencement orders.

Article 2: Interpretation

Article 2 provides for the interpretation of the Order and defines the terms used in the Order.

Article 3: Adoption leave

Article 3 makes provision for a new statutory right to ordinary adoption leave and additional adoption leave for an adoptive parent around the time of placement of a child for adoption. Regulations will determine the entitlement to and details of the leave. It is intended that adoption leave will be available whether the child is being adopted within the UK or from abroad. For practical reasons, there will be slight differences to some elements of the provisions for domestic adoptions and adoptions from abroad. It is intended that ordinary adoption leave will be for a period of up to 26 weeks and additional adoption leave will be for a further period of up to 26 weeks, giving a total of up to one year's leave.

The legislation is framed in a similar way to provisions in the Employment Rights (NI) Order 1996 (ERO) in relation to maternity leave, and the Articles will be inserted into the ERO.

Regulations will be made making adoption leave available:

- to an adoptive parent who is matched with a child by an approved adoption agency;
- to employees who give their employer a matching certificate from an approved adoption agency to support their entitlement to leave;
- to both married couples and individuals who adopt; and
- for placements of children up to the age of 18.

In cases where a married couple adopts a child, it is planned that only one spouse will be entitled to take the leave. The other spouse will be entitled to two weeks' paternity leave if the qualifying requirements in respect of such leave are met.

Regulations will provide that adoption leave will apply only where the child is newly placed with an adoptive parent - it will not apply to step-family adoptions or adoptions by a child's existing foster carers.

Regulations will also provide that adoption leave will only be available to an employee who has completed a period of qualifying service. It is intended that the requirement will be continuous service with the same employer for at least 26 weeks by the week in which an approved match with the child is made (a match occurs when an approved adoption agency matches an adopter with a child).

An employee will have the right to return to a job following a period of adoption leave. It is intended that regulations will allow for:

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- the right to return to the same job following an absence on ordinary adoption leave in most cases; and
- protection for employees from detriment and unfair dismissal in connection with adoption leave.

Article 4: Paternity leave

Article 4 establishes provision for the introduction of a new statutory right to two weeks' paternity leave. Regulations will provide for this to be taken in a single block of two weeks or, if regulations so provide, a period of one week or two non-consecutive periods of a week. The intention is to make paternity leave available to fathers following the birth of a child or the placement of a child for adoption. The requirement for paternity leave will be set out in the regulations.

Article 4 is similar in construction to the provisions in the ERO in relation to parental leave, and it will be inserted into the ERO.

Regulations will be made making paternity leave available:

- for the purpose of caring for a newborn child or supporting the mother;
- for the purpose of caring for a child newly placed for adoption or supporting the adoptive parent; and
- to an employee who has a relationship (to be specified in regulations) with the newborn child, or the child newly placed for adoption, and has a relationship (to be specified in regulations) with the mother or adoptive parent. It is intended that paternity leave will be available to an employee who expects to be parenting the newborn child or the child placed for adoption. It is planned that employees who are entitled to paternity leave will have an obligation to give their employer a self-certificate of entitlement to leave.

As it is intended that adoption leave will only be available to one spouse in cases where a married couple adopts a child, paternity leave will be available to the other spouse. For practical reasons there will be slight differences in how paternity leave operates between those adopting within NI and GB and those adopting abroad. Provision for adoptions outside the UK will be made in regulations.

Paternity leave will be available only to an employee who has completed a period of qualifying service. It is intended that the requirement will be continuous service with the same employer for at least 26 weeks by the fifteenth week before the child is expected to be born, or in the case of adoption by the week in which an approved match with the child is made.

An employee will have the right to return to a job following a period of paternity leave. It is intended that regulations will allow for:

- the right to return to the same job following an absence of one week or two weeks' paternity leave in most cases; and
- protection for employees from detriment and unfair dismissal in connection with paternity leave.

Article 5: Statutory paternity pay

Article 5 establishes a new statutory right to SPP for fathers following the birth of a child or the placement of a child for adoption. It provides for SPP to be paid for a period of two weeks or, if regulations permit, a period of one week or two non-consecutive periods of one week. Regulations will provide for the father to choose to be paid for a single period of one week or two weeks. SPP will generally be payable for paternity leave taken within 56 days of the date on which the child is born or placed for adoption.

The rate of SPP will be set in regulations. In 2003 it will be the lesser of £100 per week or 90% of the employee's average weekly earnings.

SPP will be available to an employee who has met the service qualification (continuous service with the same employer for at least 26 weeks by the fifteenth week before the child is expected to be born or by the week in which an approved match is made with the child), has a relationship (to be specified in regulations) with the child and the mother or adoptive parent, has given appropriate notification and whose average weekly earnings are equal to or above the Lower Earnings Limit (LEL) applying to National Insurance Contributions (NICs) (£75 per week from April 2002). For practical reasons there will be slight differences in how paternity pay operates between those adopting within the UK and those adopting outside the UK. Provision for adoptions outside the UK will be made in regulations.

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SPP will be administered by employers in the same way as SMP. Employers will be able to recover a percentage of the amount of SPP they pay out, (limited in most cases to 92%). Small employers who are entitled to Small Employers' Relief (in 2002/3, those with NICs due in a year of £40,000 or less) will be able to claim 100% and an added payment (in 2002/3 of 4.5% for SMP) to compensate for employers' share of NICs payable in respect of SPP. *Article 8* provides for a power to make regulations to enable employers to ask for funding, if necessary in advance, from the Inland Revenue where the amount of SPP they have to pay their employees exceeds the tax and NICs that they are due to pay to the Inland Revenue. In certain circumstances where an employer fails to pay SPP, the Inland Revenue will become responsible for the payment. Liability will also fall on the Inland Revenue from the first week in which an employer becomes insolvent. The framework for SPP is similar to that already in place for SMP and Working Families' Tax Credit. The distribution of rights and obligations as between primary and secondary legislation follows the model of the Social Security Contributions and Benefits (NI) Act 1992 and Tax Credits Act 1999. As under those Acts, administrative and enforcement powers are conferred on the Inland Revenue.

Article 6: Statutory adoption pay

Article 6 establishes a new statutory right to SAP for adoptive parents around the placement of a child for adoption. SAP will be available to an adoptive parent of a child newly placed for adoption - it will not apply to step-family adoptions or adoption by a child's existing foster carers - whether the child is being adopted within the UK or from abroad. For practical reasons, there are slight differences to some elements of the provisions for domestic and adoptions abroad. Regulations will set out how SAP will apply to adoptions abroad.

Article 6 states that SAP will be available for a period of up to 26 weeks. The rate of SAP will be set in regulations. In 2003 it will be the lesser of £100 per week or 90% of the employee's average weekly earnings.

SAP will be available to an employee who has met the service qualification (continuous service with the same employer for at least 26 weeks by the week in which an approved match with the child is made), has an approved match with a child, has given appropriate notification, and whose average weekly earnings are equal to or above the lower earnings limit applying to NICs (LEL is currently £75 a week).

SAP will be administered by employers in the same way as SMP. Employers will be able to recover a percentage of the amount of SAP they pay out, (limited in most cases to 92%), with small employers who are entitled to Small Employers' Relief (in 2002/3, those with NICs due in a year of £40,000 or less) able to claim 100% and an added payment (in 2002/3 of 4.5% for SMP) to compensate for employers' share of NICs payable in respect of SAP. *Article 8* provides for a power to make regulations to enable employers to ask for funding, if necessary in advance, from the Inland Revenue where the amount of SAP they have to pay their employees exceeds the tax and NICs that they are due to pay to the Inland Revenue. In certain circumstances, where an employer fails to pay SAP, the Inland Revenue will become responsible for the payment. Liability will also fall on the Inland Revenue from the first week in which an employer becomes insolvent.

Article 7: Financial arrangements

Article 7 makes provision for payment by way of sums payable by employers in respect of statutory sick pay, statutory maternity pay, statutory paternity pay and statutory adoption pay to be set off against sums payable to the Inland Revenue.

Article 8: Funding of employers' liabilities

Article 8 is an enabling Article allowing the Department to make regulations, which provide for the Board of the Inland Revenue ("the Board") to fund payment by employers of statutory paternity pay and statutory adoption pay.

Article 9: Regulations about payment

Article 9 is an enabling Article allowing the Department to make regulations setting out how employers should keep records and produce various documents for inspection by officers of the Board.

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Article 10: Decisions and appeals

Article 10 provides for officers of the Board to be responsible for matters listed therein, and for mechanisms for decisions and appeals.

Article 11: Power to require information

Article 11 is an enabling Article allowing the Department to make Regulations for the purposes of an officer of the Board of the Inland Revenue requiring persons to produce various documents relating to statutory paternity pay and statutory adoption pay.

Article 12: Penalties: failure to comply

Article 12 sets out penalties that apply in cases of failure to provide documentary material on request. Further details are contained in Schedule 1 to the Order.

Article 13: Penalties: fraud, etc.

Article 13 establishes that where a person fraudulently or negligently makes an incorrect statement regarding entitlement to statutory paternity pay or statutory adoption pay, a penalty may be applied. Further details are contained in Schedule 1 to the Order.

Article 14: Rights during and after maternity leave

Article 14 amends the Employment Rights (NI) Order 1996 in relation to maternity leave and provides for the Department to make Regulations setting out rights applying on persons returning to work in certain circumstances.

Article 15: Flexible working

Article 15 gives parents the right to apply for flexible working. It lays out:

- the eligibility criteria which must be met in order for an employee to apply for a flexible working pattern;
- a clearly defined framework for a procedure to be followed by employees and employers when making and considering requests for flexible working;
- the employer's duties in relation to an application under the new provisions;
- the right for an employee to take their case to an industrial tribunal; and
- what happens if a tribunal finds that an application has not been dealt with correctly.

The new provisions will be inserted into the Employment Rights (NI) Order 1996.

Article 16: Regulations

Article 16 states that Regulations under this Order may contain such incidental supplementary, consequential or transitional provisions as the Department considers appropriate.

Article 17: Amendments and revocations

Article 17 (Paragraph 1) brings *Schedule 2*, which makes consequential amendments to the Social Security Contributions and Benefits (NI) Act 1992, the Social Security Administration (NI) Act 1992, the Industrial Relations (NI) Order 1992; the Employment Rights (NI) Order 1996; the Industrial Tribunals (NI) Order 1996; and the Employment Relations (NI) Order 1999 into effect.

Article 17 (Paragraph 2) states that the substitution of "Inland Revenue" for "Department" in Schedule 1 Paragraph 32 of the Social Security Contributions (Transfer of Functions, etc) (NI) Order 1999 is revoked.