

Draft Regulations laid before Parliament under section 236(3) of the Employment Rights Act 1996, for approval by resolution of each House of Parliament

DRAFT STATUTORY INSTRUMENTS

2002 No.

TERMS AND CONDITIONS OF EMPLOYMENT

**The Maternity and Parental Leave
(Amendment) Regulations 2002**

Made - - - - 2002
Coming into force - - 24th November 2002

Whereas a draft of the following Regulations was laid before Parliament in accordance with section 236(3) of the Employment Rights Act 1996(1) and approved by a resolution of each House of Parliament:

Now, therefore, the Secretary of State, in exercise of the powers conferred on her by sections 47C(2), 71(1) to (4), (6) and (7), 73(1), (2), (4) and (7), 74(4), 75(1), 76 and 99(1) of that Act(2), hereby makes the following Regulations:

Citation, commencement and interpretation

1.—(1) These Regulations may be cited as the Maternity and Parental Leave (Amendment) Regulations 2002 and shall come into force on 24th November 2002.

(2) In these Regulations, “the Principal Regulations” means the Maternity and Parental Leave etc. Regulations 1999(3).

Application

2.—(1) The amendments to the Principal Regulations provided for in regulations 5 to 11, 13 and 14 below (all of which concern maternity leave), and the amendment in regulation 12 in so far as it relates to the right to return from maternity leave, have effect only in relation to employees whose expected week of childbirth begins on or after 6th April 2003.

(1) 1996 c. 18; section 236(3) was amended by paragraph 42 of Part 3 of Schedule 4 to the Employment Relations Act 1999 (c. 26).
(2) Section 47C of the Employment Rights Act 1996 was inserted by paragraph 8 of Part 3 of Schedule 4 to the Employment Relations Act 1999; sections 71 to 75 of the 1996 Act were substituted by Part 1 of Schedule 4 to the 1999 Act, and section 99 of the 1996 Act was substituted by paragraph 16 of Part 3 of Schedule 4 to the 1999 Act. Sections 71(4) and (7) and 73 of the 1996 Act were amended by section 17 of the Employment Act 2002 (c. 22). The word “prescribed” in section 47C of the 1996 Act is defined in subsection (2) of that section; the same word in sections 71 and 73 of that Act is defined in section 75(2), and in section 99 it is defined in subsection (2) of that section.
(3) S.I. 1999/3312, to which there are amendments not relevant to these Regulations.

(2) The amendment to the Principal Regulations provided for in regulation 12, in so far as it relates to the right to return after parental leave, has effect only in relation to employees returning from a period of leave begun on or after 6th April 2003.

Amendments to the Principal Regulations

3. The Principal Regulations shall be amended as follows.
4. In regulation 2(1) (interpretation)—
 - (a) after the definition of “the 1996 Act” insert—

“additional adoption leave’ means leave under section 75B of the 1996 Act;”
 - (b) in the definition of “job” omit “additional”;
 - (c) after the definition of “parental responsibility” insert—

“statutory leave’ means leave provided for in Part 8 of the 1996 Act;”
5. In regulation 4 (entitlement to ordinary maternity leave)—
 - (a) in paragraph (1)(a), for “at least 21 days before the date on which she intends her ordinary maternity leave period to start”, substitute “no later than the end of the fifteenth week before her expected week of childbirth”;
 - (b) after paragraph (1) insert—

“(1A) An employee who has notified her employer under paragraph (1)(a)(iii) of the date on which she intends her ordinary maternity leave period to start may subsequently vary that date, provided that she notifies her employer of the variation at least—

 - (a) 28 days before the date varied, or
 - (b) 28 days before the new date,

whichever is the earlier, or, if that is not reasonably practicable, as soon as is reasonably practicable.”;
 - (c) in paragraph (2), for “The notification provided for in paragraph (1)(a)(iii)” substitute—

“Notification under paragraph (1)(a)(iii) or (1A)”;
 - (d) in paragraph (3)—
 - (i) before “the first day” insert “the day which follows”;
 - (ii) for “the sixth week” substitute “the fourth week”;
 - (iii) at the end of sub-paragraph (b) insert “and of the date on which her absence on that account began”;
 - (e) in paragraph (4)—
 - (i) for “with” substitute “on the day which follows”;
 - (ii) at the end of sub-paragraph (b) insert “and of the date on which the birth occurred”.
6. In regulation 5(b) (entitlement to additional maternity leave: qualifying period of employment) —
 - (a) for “the eleventh week” substitute “the fourteenth week”;
 - (b) for “a year” substitute “26 weeks”.
7. In regulation 6 (commencement of maternity leave periods)—
 - (a) in paragraph (1)(a)—
 - (i) omit “, in accordance with regulation 4(1)(a)(iii),”;
 - (ii) after “her employer” insert “, in accordance with regulation 4,”;

- (iii) after “to start,” insert “or, if by virtue of the provision for variation in that regulation she has notified more than one such date, the last date she notifies,”;
 - (b) in paragraph (1)(b)—
 - (i) before “the first day” insert “the day which follows”;
 - (ii) for “the sixth week” substitute “the fourth week”;
 - (c) in paragraph (2), for “with” substitute “on the day which follows”.
- 8.** In regulation 7 (duration of maternity leave periods)—
- (a) in paragraph (1), for “eighteen weeks” substitute “26 weeks”;
 - (b) in paragraph (4), for “29 weeks beginning with the week of childbirth” substitute “26 weeks from the day on which it commenced”;
 - (c) after paragraph (5) insert—
 - “(6) An employer who is notified under any provision of regulation 4 of the date on which, by virtue of any provision of regulation 6, an employee’s ordinary maternity leave period will commence or has commenced shall notify the employee of the date on which—
 - (a) if the employee is entitled only to ordinary maternity leave, her ordinary maternity leave period will end, or
 - (b) if the employee is entitled to both ordinary and additional maternity leave, her additional maternity leave period will end.
 - (7) The notification provided for in paragraph (6) shall be given to the employee—
 - (a) where the employer is notified under regulation 4(1)(a)(iii), (3)(b) or (4)(b), within 28 days of the date on which he received the notification;
 - (b) where the employer is notified under regulation 4(1A), within 28 days of the date on which the employee’s ordinary maternity leave period commenced.”
- 9.** For regulation 9 substitute—

“Application of terms and conditions during ordinary maternity leave

- 9.—**(1) An employee who takes ordinary maternity leave—
- (a) is entitled, during the period of leave, to the benefit of all of the terms and conditions of employment which would have applied if she had not been absent, and
 - (b) is bound, during that period, by any obligations arising under those terms and conditions, subject only to the exception in section 71(4)(b) of the 1996 Act.
- (2) In paragraph (1)(a), “terms and conditions” has the meaning given by section 71(5) of the 1996 Act, and accordingly does not include terms and conditions about remuneration.
- (3) For the purposes of section 71 of the 1996 Act, only sums payable to an employee by way of wages or salary are to be treated as remuneration.”
- 10.** In regulation 11 (requirement to notify intention to return during a maternity leave period)—
- (a) in paragraph (1)—
 - (i) after “she is entitled to” insert “both ordinary and”;
 - (ii) for “21 days” substitute “28 days”
 - (b) in paragraph (2), for “21 days” substitute “28 days”;
 - (c) after paragraph (4) insert—

“(5) This regulation does not apply in a case where the employer did not notify the employee in accordance with regulation 7(6) and (7) of the date on which the relevant maternity leave period would end.”

11. Omit regulation 12.

12. For regulation 18 substitute—

“Right to return after maternity or parental leave

18.—(1) An employee who returns to work after a period of ordinary maternity leave, or a period of parental leave of four weeks or less, which was—

- (a) an isolated period of leave, or
- (b) the last of two or more consecutive periods of statutory leave which did not include any period of additional maternity leave or additional adoption leave, or a period of parental leave of more than four weeks,

is entitled to return to the job in which she was employed before her absence.

(2) An employee who returns to work after—

- (a) a period of additional maternity leave, or a period of parental leave of more than four weeks, whether or not preceded by another period of statutory leave, or
- (b) a period of ordinary maternity leave, or a period of parental leave of four weeks or less, not falling within the description in paragraph (1)(a) or (b) above,

is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances.

(3) The reference in paragraphs (1) and (2) to the job in which an employee was employed before her absence is a reference to the job in which she was employed—

- (a) if her return is from an isolated period of statutory leave, immediately before that period began;
- (b) if her return is from consecutive periods of statutory leave, immediately before the first such period.

(4) This regulation does not apply where regulation 10 applies.

Incidents of the right to return

18A.—(1) An employee’s right to return under regulation 18(1) or (2) is a right to return—

- (a) with her seniority, pension rights and similar rights—
 - (i) in a case where the employee is returning from additional maternity leave, or consecutive periods of statutory leave which included a period of additional maternity leave or additional adoption leave, as they would have been if the period or periods of her employment prior to her additional maternity leave or (as the case may be) additional adoption leave were continuous with the period of employment following it;
 - (ii) in any other case, as they would have been if she had not been absent, and
- (b) on terms and conditions not less favourable than those which would have applied if she had not been absent.

(2) The provision in paragraph (1)(a)(i) concerning the treatment of periods of additional maternity leave or additional adoption leave is subject to the requirements of paragraphs 5 and 6 of Schedule 5 to the Social Security Act 1989⁽⁴⁾ (equal treatment under pension schemes: maternity absence and family leave).

(3) The provisions in paragraph (1)(a)(ii) and (b) for an employee to be treated as if she had not been absent refer to her absence—

- (a) if her return is from an isolated period of statutory leave, since the beginning of that period;
- (b) if her return is from consecutive periods of statutory leave, since the beginning of the first such period.”

13. In regulation 19 (protection from detriment)—

(a) after paragraph (2)(e) insert—

“(ee) failed to return after a period of ordinary or additional maternity leave in a case where—

- (i) the employer did not notify her, in accordance with regulation 7(6) and (7) or otherwise, of the date on which the period in question would end, and she reasonably believed that that period had not ended, or
- (ii) the employer gave her less than 28 days' notice of the date on which the period in question would end, and it was not reasonably practicable for her to return on that date;”;

(b) in paragraph (3), after “section 71 of the 1996 Act” insert “and regulation 9”.

14. In regulation 20(3) (reasons making dismissal unfair), after sub-paragraph (e), insert—

“(ee) the fact that she failed to return after a period of ordinary or additional maternity leave in a case where—

- (i) the employer did not notify her, in accordance with regulation 7(6) and (7) or otherwise, of the date on which the period in question would end, and she reasonably believed that that period had not ended, or
- (ii) the employer gave her less than 28 days' notice of the date on which the period in question would end, and it was not reasonably practicable for her to return on that date;”.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend provisions relating to maternity leave in the Maternity and Parental Leave etc. Regulations 1999 (S.I. 1999/3312), and also provisions in those Regulations concerning the right to return from parental leave. Some of the amendments concern provisions which implement (in part) provisions of Council Directive 92/85/EEC, relating to the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding, and provisions of the Framework Agreement on Parental Leave annexed to Council Directive 96/34/EC.

The most significant changes are the extension of ordinary maternity leave from 18 to 26 weeks, and the extension of additional maternity leave so as to end 26 weeks from the end of ordinary maternity leave rather than 29 weeks after the week of childbirth (regulation 8(a) and (b)). An employee will qualify for additional maternity leave if she has been continuously employed for at least 26 weeks at the beginning of the 14th week before the expected week of childbirth (“e.w.c.”), rather than, as previously, at least a year at the beginning of the 11th week before the e.w.c. (regulation 6).

The 1999 Regulations are amended to provide for notification of the date on which an employee intends her ordinary maternity leave period to start to be given to the employer before the end of the fifteenth week before the e.w.c., rather than 21 days before the intended start date as previously; however, there is a new provision for the employee to change the date subsequently provided that her employer is given 28 days' notice (regulation 5). Absence from work on account of pregnancy will cause an employee's ordinary maternity leave period to begin automatically if it is after the beginning of the fourth week before the e.w.c., rather than the sixth week before then as previously (regulation 7).

A new requirement is inserted for an employer notified of the commencement of an employee's maternity leave to notify the employee of the date on which it will end (regulation 8(c)). If no such notification is given by the employer, he is unable to prevent the employee from returning early (regulation 10(c)), and the employee is protected against detriment or dismissal if she fails to return on the due date (regulations 13 and 14). The requirement in regulation 12 of the 1999 Regulations for an employee entitled to additional maternity leave to notify her employer, if so requested, whether she intends to return to work at the end of a period of additional maternity leave is removed (regulation 11).

Provision is made for all of the rights and obligations in an employee's contract of employment, apart from the right to remuneration, to continue during an employee's ordinary maternity leave period (regulation 9), and for the employee to return from an isolated period of ordinary maternity leave to the job in which she was employed before her absence (regulation 12, which substitutes new regulations 18 and 18A in the 1999 Regulations). Provision to the same effect was made by section 71 of the Employment Rights Act 1996, but that section was amended by section 17 of the Employment Act 2002 so as to provide for the extent to which rights and obligations continue to apply, and the kind of job to which an employee is entitled to return, to be determined in regulations.

Besides providing for the rights of an employee returning from an isolated period of ordinary maternity leave, the new regulations 18 and 18A of the 1999 Regulations make provision in respect of employees who return following ordinary maternity leave taken after another period of statutory leave. They carry forward provisions in the original regulation 18 concerning employees returning after additional maternity leave, and extend the provisions in that regulation concerning employees returning from parental leave so as to cover cases where such leave is taken after ordinary maternity leave, paternity leave or adoption leave.

A Regulatory Impact Assessment of the costs and benefits of these Regulations to business, and a Transposition Note explaining how certain of the provisions amended give effect to the directives referred to above, have been placed in the libraries of both Houses of Parliament. Copies are available to the public from the Employment Relations Directorate, Department of Trade and Industry, 1 Victoria Street, London SW1H 0ET and are also available at the Directorate's website www.dti.gov.uk/er.