

EMPLOYMENT RELATIONS ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Leave for family reasons

Section 7 and Part I of Schedule 4: Maternity and parental leave

155. *Section 7* gives effect to Part I of Schedule 4, which provides for basic rights and regulation-making powers relating to maternity and parental leave, replacing the existing maternity provisions in Part VIII of the 1996 Act. References to new sections and subsections in what follows are to the new sections, subsections and chapters inserted in the 1996 Act by Part I of Schedule 4 and references to sections etc. or to original provisions are to the sections or provisions of that Act before the new provisions come into force.
156. The new provisions provide a package of maternity and parental leave rights, which extends the existing maternity leave rights for women and introduces a new right to parental leave for men and women. Employees will be protected from detriment or dismissal for exercising these rights, which will be mainly enforceable through the employment tribunals.
157. Part I of Schedule 4 sets out the basis for the maternity leave scheme which replaces the maternity provisions contained in Part VIII of the 1996 Act. The Act aims to simplify the scheme by providing a basic framework in primary legislation with details in a single set of regulations. Some of the provisions are or will be replaced (either in the new sections inserted in the 1996 Act or in regulations made under the new powers which the Act inserts in that Act) in amended form to remove some of the complexities, while others are re-enacted without any substantive difference.
158. The new provisions were developed in informal consultation with organisations which have a particular interest in this area and then published for public consultation in *Fairness at Work*. These notes set out some of the details of what the Government currently intends to include in the regulations to be made under powers in these new provisions. However, some of these details could change as a result of the further consultation the Government is conducting.
159. The new Chapter I of the new Part VIII of the 1996 Act sets out the amended rights to maternity leave. It provides for three periods of leave:
- ordinary maternity leave of not less than 18 weeks (which replaces current rights for all pregnant employees to 14 weeks leave);
 - at least two weeks compulsory maternity leave; and
 - additional maternity leave (which replaces the current right to return to work within 29 weeks of the baby's birth for women who qualify).

In each case, the legislation provides the basic right or duty together with powers for the Secretary of State to make regulations setting out detailed provisions.

New section 71: Ordinary maternity leave

160. New section 71 re-enacts the general right (in the original section 71 of the 1996 Act) of all pregnant employees, regardless of their length of service with an employer, to a period of maternity leave. It also replaces provisions in sections 72 to 76 with powers which will enable similar provisions to be made in regulations. The new provisions, like those they replace, will implement requirements of the Pregnant Workers Directive (Council Directive [92/85/EEC](#)).
161. To distinguish it from other maternity leave periods provided for, the period of leave provided for in this new section is called the “ordinary maternity leave” period. As under the original provisions of the 1996 Act, during ordinary maternity leave the employee will be able to continue to receive the normal contractual and related benefits (including seniority and pension rights) due to her when she is working, other than her remuneration (new subsections (4) and (5)). She will also continue to be bound by contractual obligations such as confidentiality conditions (new subsection (4)(b)).
162. The Secretary of State is given powers to make regulations:
- under *new subsection (1)*, read with new section 75(2), prescribing conditions for qualifying for this right. As for the original right to 14 weeks’ leave under the 1996 Act, it is intended that the right will apply to all employees regardless of length of service;
 - under *new subsections (2) and (3)(a)*, for the length of ordinary maternity leave, which must be not less than 18 weeks. The new entitlement will be to 18 weeks’ leave, increased from the entitlement of 14 weeks under the previous provisions, in line with the 18-week period for Statutory Maternity Pay (which is dealt with in social security legislation);
 - under *new subsection (3)(b)*, which may allow employees to choose (as under the original provisions) when they want to start maternity leave, subject to restrictions the regulations may set. Parameters similar to those having effect under the original provisions are likely to be set: women can choose to start maternity leave any time from the eleventh week before the expected week of the birth; and maternity leave starts automatically if a woman is absent from work with pregnancy related illness in the six weeks prior to the birth, and at the latest when the baby is born; and
 - under *new subsection (6)*, specifying what counts as remuneration. It is intended that the regulations should provide that remuneration is the monetary element of a woman’s salary or wages.

New section 72: Compulsory maternity leave

163. This new section and the regulations for which it provides replace the [Maternity \(Compulsory Leave\) Regulations 1994 \(SI 1994/2479\)](#), which implement the health and safety requirement in the Pregnant Workers Directive for there to be a minimum period of two weeks around the birth during which a woman must not work. The new provisions are intended to have similar effect to those they replace.
164. The new section gives the Secretary of State powers to prescribe in regulations subject to affirmative resolution procedure the duration (subject to a minimum period of two weeks) and timing (subject to its falling within the ordinary maternity leave period) of the compulsory maternity leave period. It is intended that the period prescribed will be, as now, the two weeks following the baby’s birth.
165. The provisions put the onus on the employer not to allow a woman to work during the compulsory leave period and provide that any employer who contravenes this requirement will be guilty of a criminal offence and liable to a fine not exceeding level 2 on the standard scale for fines for summary offences (currently £500).

166. Under the original 1996 Act provisions, giving women a basic right to maternity leave of 14 weeks, it would be possible for a woman starting her maternity leave eleven weeks before her baby is due to run out of leave if the baby was born late. In such a situation the current compulsory maternity leave rule ensures that her maternity leave continues for two weeks following the birth. With the increase in maternity leave entitlement from 14 weeks to 18 weeks, it is more difficult to envisage such a situation occurring, but nevertheless, if it did, the regulations would provide that the ordinary maternity leave period lasted until the end of the compulsory leave period.

New section 73: Additional maternity leave

167. This new section and the regulations under it will replace sections 79-84 of the 1996 Act (which provide for an extended period of maternity absence for those with two years' service). The new section confers a right to a period of additional maternity leave, as distinct from ordinary maternity leave, for which employees who satisfy certain conditions will qualify. While the provisions this replaces are silent on whether there is a contract of employment during maternity absence, this provision makes it clear that the contract continues by conferring a right to leave rather than a right to return and, under new *subsection (4)*, by providing that terms and conditions of employment (other than those relating to remuneration, as for ordinary maternity leave) continue to apply to any extent set out in the regulations. The Government's current intention is that the conditions of employment which are always appropriate during an employment relationship, whether or not the individual is actually working, should continue to apply – such as conditions of confidentiality and mutual trust and confidence. Under new *subsection (7)* the Government intends to ensure that employees' rights relating to seniority etc. will be suspended during the leave and not lost (subject to the provisions of the Social Security Act 1989 which provide for pension rights to continue during any paid maternity leave). Under the provisions in Chapter I of Part XIV of the 1996 Act, the period of leave will count as continuous service for the purposes of determining eligibility for rights under that Act. However, the intention is that in general employers will be free to decide whether or not other terms and conditions will continue during the period of leave.
168. New subsections (4)(c) and (7) provide for regulations to determine the kind of job to which a woman is entitled to return and the rights she will have and the terms and conditions to which she will be subject when she returns. The intention is to include the flexibility provided under the original 1996 Act provisions for employers to offer suitable alternative work where it is not reasonably practicable to take the woman back in her old job.
- Section 235 of the 1996 Act defines *job*, in relation to an employee, as the nature of the work which he is employed to do in accordance with his contract and the capacity and place in which he is so employed
169. As well as the terms which are to apply during this leave, the new section 73 gives the Secretary of State powers to prescribe in regulations:
- under new *subsection (1)*, taken with new *section 75(2)*, who qualifies for this additional right. It is intended that employees with one year's service with their employer will qualify for additional maternity leave, in contrast to the two years' service required for the previous right to maternity absence; and
 - under new *subsections (2) and (3)*, the duration and timing of additional maternity leave. The additional maternity leave period is intended to be the period which follows on immediately after the end of the 18 weeks ordinary maternity leave period and which ends twenty-nine weeks after the birth of the baby. Effectively, this period mirrors the maternity absence period in the previous provisions. As under those provisions, women entitled to additional maternity leave will be able to take a total of about 40 weeks' maternity leave, but more women will benefit from this entitlement because of the shorter qualifying period.

New section 74: Redundancy and dismissal

170. Under this new section the Secretary of State may make provision in regulations about the treatment of an employee at any stage during maternity leave when a redundancy situation occurs. It is intended that the regulations will have the same effect as the provisions in the original sections 77 and 81 of the 1996 Act, under which women on maternity leave or returning to work must be offered alternative employment where the employer has a suitable available vacancy, thus ensuring that protection of women who are on maternity leave when there is a redundancy situation is not reduced. The general reference to dismissal other than redundancy is needed so that the right to return to work can be disapplied where the woman is dismissed during maternity leave (which will be automatically unfair if this is for reasons relating to pregnancy or maternity - see new section 99 inserted by paragraph 18 of Part III of the Schedule - but could be fair, for example, if it related to conduct occurring prior to maternity leave).
171. New section 74(4) provides power for the regulations to replicate provisions in the original section 96(2) of the 1996 Act, which in effect provide that employers with five or fewer employees do not have to take a woman back after the longer period of maternity absence if it is not reasonably practicable for them to offer her either her old job or a suitable alternative.

New section 75: Sections 71 to 73: supplemental

172. This new section further prescribes the scope of the powers conferred in the previous new sections for the Secretary of State to make regulations in respect of ordinary maternity leave, compulsory maternity leave and additional maternity leave. *Subsection (1)* provides that the regulations may:
- (paragraph (a)): set out notice and evidential requirements and procedures to be followed. It is intended that an employee will be required to notify the employer of her pregnancy and the week the child is expected to be born, and if requested produce medical confirmation. Under the previous provisions, there are a number of different notification procedures required before maternity leave, after the birth (if required by the employer) and before return to work. This power is intended to be used to rationalise and standardise notice requirements where possible;
 - (paragraphs (b) and (c)): set out what happens if the notice requirements or procedures are not followed, or if either the employee or (if any notification requirements were placed on the employer) the employer fail to do what they have notified they will do. Under the original provisions a woman can lose her right to return to work if she fails to meet any of the procedural requirements, even where the employer is clear about the woman's intentions, or if she cannot return to work on a date she has notified, for example because of sickness. Some respondents to *Fairness at Work* argued that losing one's right to return to work was a disproportionate penalty for a technical infringement of the procedures. This provision would allow smaller penalties to be stipulated, for example the start or finishing date for maternity leave could be postponed until the required notice was served. Again, further consultation will inform how this power is to be used;
 - (paragraph (d)): set out what happens where the woman has a contractual as well as statutory right to maternity leave. This would enable reintroduction of the provisions in the original sections 78 and 85 of the 1996 Act, which allow the woman to choose whichever of her contractual or statutory rights is better in a particular respect;
 - (paragraph (e)): make consequential changes to the provisions which set out how to calculate 'a week's pay' under the 1996 Act for the purposes of redundancy payments and compensation for unfair dismissal. This will enable the regulations to ensure that redundancy payments and compensation are based on an employees' normal pay rather than any pay she received while on maternity leave;

*These notes refer to the Employment Relations Act 1999
(c.26) which received Royal Assent on 27 July 1999*

- (paragraph (f)): make consequential amendments; and
- (paragraph (g)): make different provision for different cases or circumstances; this is a normal provision allowing some flexibility, and may be used, for example, to cover the situation where a late birth necessitates the extension of maternity leave (see under new section 72 above).

Part VIII, Chapter II: Parental Leave

173. Part I of Schedule 4 sets out the basis for the parental leave scheme which will be inserted into the 1996 Act as a new Chapter II of Part VIII, following on from the maternity leave provisions. The new rights to parental leave implement requirements of the Parental Leave Directive (Council Directive [96/34/EC](#)), which was applied to the UK by Council Directive [97/75/EC](#).

New section 76: Entitlement to parental leave

174. This new section provides that the Secretary of State must make regulations entitling a parent to a minimum of three months' leave in order to care for a child, providing qualifying conditions as set out in the regulations are satisfied. The new section gives the Secretary of State powers to prescribe in regulations:
- (*subsection (1)(a)*): the qualifying period of employment: it is intended that the regulations will provide for a one year qualifying period for the right to parental leave, the maximum period allowed under the Directive;
 - (*subsection (1)(b)*): who qualifies in terms of whether they have or will have responsibility for a child;
 - (*subsection (2)(a)*): the extent of an employee's entitlement to parental leave in respect of a child. This will enable the regulations to specify the length of leave, which under subsection (3) must not be less than three months, the minimum period required by the Parental Leave Directive;
 - (*subsections (2)(b) and (4)*): when parental leave may be taken. This will enable the regulations to set the maximum age of a child in respect of whom parental leave may be taken (which could be below 8 years, the upper limit specified in the Parental Leave Directive). The regulations will also be able to make appropriate provisions for adoptive parents, who may adopt older children or need leave before formal adoption takes place; and
 - (*subsection (5)*): further details, including circumstances in which employers may postpone leave and flexibility to specify time limits and minimum and maximum periods of absence. Factors which might count towards a decision by the employer to postpone the taking of leave by an employee could include a peak business period or a peak absence period, the level of the employee's skill and responsibility, or the difficulty in finding a short term replacement or covering the absence by other means. The regulations could include limits on the number of times or length of time for which leave could be postponed; some of the key options for consideration on timing are whether parental leave should be required to be taken as a single block, or in blocks of minimum or maximum length, or at specified times (e.g. with a proportion to be taken within the child's first year).

New section 77: Rights during and after parental leave

175. As for additional maternity leave (see under new section 73 above), the employment contract will continue in existence during parental leave and the terms and conditions of employment, other than those relating to remuneration, continue to apply to any extent set out in the regulations. Also, as for additional maternity leave, the Government's current intention is that, while employees will not lose seniority while on parental leave

and both they and their employer will continue to be bound by duties of confidentiality and trust etc., employers should be free in general to decide what, if any, other terms and conditions will apply during parental leave.

New section 78: Special cases

176. This section enables the regulations to make special provision:
- (*subsections (1) and (2)*): about redundancy and dismissal. This will enable the regulations to specify, for example, what happens if the job disappears because of redundancy or the employee is dismissed for reasons not connected with parental leave;
 - (*subsections (3) and (4)*): providing for the option of part-time working over a longer period, perhaps limited to particular circumstances;
 - (*subsection (5)*): providing for transfer of parental leave in specified circumstances. The Parental Leave Directive says that, in principle, leave should not be transferable from one parent to another. Regulations could however allow for this if there were appropriate exceptional circumstances; and
 - (*subsection (7)*): providing for collective or workforce agreements to have effect in place of specified provisions in the regulations. In order to ensure that there is no doubt about which employees have what rights, and that they will be able to enforce their rights, this applies only where the agreements are incorporated into the individual's contract of employment. These provisions will be enforceable through the employment tribunals.

New section 79: Supplemental

177. This new section makes supplementary provision as to the scope of the Secretary of State's regulation-making powers. Further consultation will inform how these additional provisions will be used, but some possibilities are set out below. They enable the Secretary of State:
- (*subsections (1)(a), (b) and (c)*): to set out procedures to be followed, notices and evidence required, and records to be kept by employers and employees in relation to a period of parental leave. For example, the regulations could specify that employees must:
 - give notice of a specified length,
 - give written notice, and
 - provide evidence of entitlement,and that employers must:
 - respond within a specified time, and
 - give reasons for postponement or refusal;
 - (*subsections (1)(d) and (e)*): to specify the consequences of failure to comply with these provisions;
 - (*subsection (1)(f)*): as for maternity leave, to enable employees to choose to exercise contractual rights, where these are better;
 - (*subsection (1)(g)*): to make consequential amendments; and
 - (*subsection (1)(h)*): to make different provision for different cases or circumstances (additional flexibility, as under the maternity leave provisions - see new section 75(1)(g)). This would enable different provision to be made, for example, in relation to adopted children.

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178. *New subsection (2)* is a technical measure enabling (as for maternity leave under new section 75(1)(e)) provisions in the 1996 Act concerned with the calculation of a week's pay to be modified to ensure, for example, that employees' entitlement to redundancy pay is not reduced because they were on parental leave on the calculation date for that payment.
179. *New subsection (3)* provides additional powers to ensure the regulations can make any other provision which may be necessary or expedient to implement the EC Parental Leave Directive or to deal with the UK's obligations under the Directive. This power ensures that a single set of regulations can be made covering all provisions on parental leave.

New section 80: Complaint to employment tribunal

180. This new section provides for employees to complain to an employment tribunal that their employer has unreasonably postponed their leave or obstructed their taking it (for example, by disputing that they qualify for the right). The remedies - a declaration and compensation - are in line with existing remedies in the 1996 Act (for example, under section 51, in relation to time off for public duties), and the new right to time off for dependants (new section 57B, see below).