

EMPLOYMENT ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part One: Statutory Leave and Pay

Chapter One: Paternity and adoption leave and pay

Adoption leave and Statutory Adoption Pay

Section 18-21 and 48 (see paragraph 142): Maternity Pay

40. **Section 18-21 and 48** (see paragraph 142) make changes to Statutory Maternity Pay and Maternity Allowance as announced in the 2001 Budget in the light of responses to the Green Paper “Work and Parents: Competitiveness and Choice”. There are also measures to simplify and clarify the arrangements for women and employers. There are two maternity benefits for pregnant working women. Statutory Maternity Pay (SMP) is administered and paid by employers; Maternity Allowance (MA) is paid by the Department for Work and Pensions (DWP). Both are currently paid for a maximum of 18 weeks.
- SMP is paid to employees who satisfy two basic tests. A woman must have been employed continuously by her employer for at least 26 weeks into the 15th week before the expected week of confinement (EWC); and she must earn on average at or above the Lower Earnings Limit (£75 from April 2002). There are two weekly rates. The higher rate is 90% of the employee’s average weekly earnings and is payable for the first six weeks for which SMP is payable. The lower rate is a standard rate (£75 from April 2002) which is reviewed annually and is payable for the remaining weeks of the Maternity Pay Period.
 - MA is paid to certain women who do not qualify for SMP, to the self-employed, and to recently employed women. To qualify, they must have been employed or self-employed in at least 26 of the 66 weeks (the test period) ending with the week before the EWC. There are two rates of MA. Women whose average earnings are at least equal to the LEL in force at the beginning of their test period receive standard rate MA (equal to the standard rate of SMP, £75 from April 2002). Women whose average earnings are below that LEL but at least £30 receive 90% of their average weekly earnings (subject to a £75 maximum from April 2002).
41. There are a small number of women who cannot qualify for SMP if they leave their employment after the 15th week before the EWC but before the SMP payment period can commence (from the 11th week before the EWC unless triggered by earlier childbirth). Prior to a decision of a Social Security Commissioner in 2000 it was always understood that women who left their employment after the 15th week before the EWC for whatever reason, would still receive SMP. However, the Social Security Commissioner determined that if a woman ceased to work for her employer for reasons that were not wholly or partly due to her pregnancy, she would not qualify for SMP. Secondary legislation was introduced in 2000 to restore SMP in many of these cases

but the primary powers were insufficient to restore SMP to those few women who leave work voluntarily for reasons wholly unrelated to their pregnancy. This group, who it was always expected would be entitled to SMP, are therefore currently unable to get SMP.

42. Employers can recover most of the SMP they pay out by making deductions from their contribution payments made to the Inland Revenue. Where SMP has been paid and the amount of SMP due to be recovered exceeds such contribution payments the employer may apply to the Inland Revenue for payment. Currently the rules restrict recovery to contribution payments and allow payments of any excess only to be refundable in arrears. This is less flexible for employers than the arrangements proposed for adoption and paternity pay, where recovery can be made from other payments due to the Inland Revenue and payment of the excess made in advance.
43. In summary, the sections increase the standard rate of SMP and MA, extend the payment period, safeguard an employee's entitlement to SMP at the 15th week before the EWC and enable employers to recover SMP in advance and from all payments due to the Inland Revenue. The changes to the rate of SMP and MA will apply to women in receipt of maternity pay on or after 6 April 2003. All other changes will apply to women with an expected week of childbirth beginning on or after 6 April 2003.
44. In particular, sections 18-21 and 48 (see paragraph 141):
 - Extend the payment period of MA and SMP from 18 to 26 weeks.
 - Allow for an increase in the standard rate of MA and SMP to £100 a week, or 90% of weekly earnings if this is less than £100. In the case of SMP a woman will receive 90% of her average weekly earnings for the first 6 weeks for which SMP is payable (as now).
 - Increase the minimum period of notice that must be given to employers for SMP from 21 days to 28 days.
 - Safeguard an employee's entitlement to SMP from the 15th week before the EWC on her satisfying the employment and earnings tests and giving notice where appropriate. This will be the case even if should happen that, *for whatever reason*, her employment ends after this point.
 - Allow an employer to offset his SMP payments against any payments due to be made to the Inland Revenue as may be prescribed in regulations. Regulations may also provide for employers to apply for advance funding if the amount they are due to pay in SMP will exceed the tax, national insurance and other allowable payments due to be made to the Inland Revenue.
45. [Sections 18-21](#) and [48](#) (see paragraph 141) amend sections 35, 35A, 164, 165, 166 and 167 of the 1992 Social Security Contributions and Benefits Act 1992, which contains the rules for Statutory Maternity Pay and Maternity Allowance.