
STATUTORY INSTRUMENTS

2002 No. 2822

TERMS AND CONDITIONS OF EMPLOYMENT

The Statutory Paternity Pay and Statutory
Adoption Pay (General) Regulations 2002

Made - - - - *13th November 2002*
Laid before Parliament *15th November 2002*
Coming into force - - *8th December 2002*

The Secretary of State, in exercise of the powers conferred on her by sections 171ZA(2)(a), 171ZB(2)(a), 171ZC(3)(a), (c), (d), (f) and (g), 171ZD(2) and (3), 171ZE(2)(a), (b)(i), (3), (7) and (8), 171ZG(3), 171ZJ(1), (3), (4), (7) and (8), 171ZL(8)(b) to (d), (f) and (g), 171ZM(2) and (3), 171ZN(2), (5) and (6), 171ZP(6), 171ZS(1), (3), (4), (7) and (8), and 175(4) of the Social Security Contributions and Benefits Act 1992⁽¹⁾ and section 5(1)(g), (i) and (p) of the Social Security Administration Act 1992⁽²⁾ and with the concurrence of the Commissioners of Inland Revenue in so far as such concurrence is required, by this instrument, which contains only provision made by virtue of sections 2, 4 and 53 of and paragraphs 8 and 11 of Schedule 7 to the Employment Act 2002 and is made before the end of the period of 6 months from the coming into force of those enactments⁽³⁾, hereby makes the following Regulations—

PART 1

Introduction

Citation and commencement

1. These Regulations may be cited as the Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002 and shall come into force on 8th December 2002.

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- (1) 1992 c. 4. Sections 171ZA to 171ZJ were inserted by section 2 of the Employment Act 2002 (c. 22), and sections 171ZL to 171ZT by section 4 of that Act. Sections 171ZJ(1) and 171ZS(1) are cited because of the meaning ascribed to the word “prescribed”.
- (2) 1992 c. 5. Section 5(5), concerning the applicability of section 5(1)(g), (i) and (p) was amended by paragraph 11 of Schedule 7 to the Employment Act 2002.
- (3) See section 173(5)(b) of the Social Security Administration Act 1992.

Interpretation

2.—(1) In these Regulations—

“the Act” means the Social Security Contributions and Benefits Act 1992;

“adopter”, in relation to a child, means a person who has been matched with the child for adoption;

“adoption agency” has the meaning given, in relation to England and Wales, by section 1(4) of the Adoption Act 1976(4) and in relation to Scotland, by section 1(4) of the Adoption (Scotland) Act 1978(5);

“the Board” means the Commissioners of Inland Revenue;

“the Contributions Regulations” means the Social Security (Contributions) Regulations 2001(6);

“expected week”, in relation to the birth of a child, means the week, beginning with midnight between Saturday and Sunday, in which it is expected that the child will be born;

“statutory paternity pay (adoption)” means statutory paternity pay payable in accordance with the provisions of Part 12ZA of the Act where the conditions specified in section 171ZB(2) of the Act are satisfied;

“statutory paternity pay (birth)” means statutory paternity pay payable in accordance with the provisions of Part 12ZA of the Act where the conditions specified in section 171ZA(2) of the Act are satisfied.

(2) For the purposes of these Regulations—

(a) a person is matched with a child for adoption when an adoption agency decides that that person would be a suitable adoptive parent for the child, either individually or jointly with another person, and

(b) a person is notified of having been matched with a child on the date on which he receives notification of the agency’s decision, under regulation 11(2) of the Adoption Agencies Regulations 1983(7) or regulation 12(3) of the Adoption Agencies (Scotland) Regulations 1996(8).

Application

3.—(1) Subject to the provisions of Part 12ZA of the Act (statutory paternity pay) and of these Regulations, there is entitlement to—

(a) statutory paternity pay (birth) in respect of children—

(i) born on or after 6th April 2003; or

(ii) whose expected week of birth begins on or after that date;

(b) statutory paternity pay (adoption) in respect of children—

(i) matched with a person who is notified of having been matched on or after 6th April 2003; or

(ii) placed for adoption on or after that date.

(2) Subject to the provisions of Part 12ZB of the Act (statutory adoption pay) and of these Regulations, there is entitlement to statutory adoption pay in respect of children—

(4) 1976 c. 36; section 1(4) was amended by paragraph 5 of Schedule 4 to the Care Standards Act 2000 (c. 36).

(5) 1978 c. 28.

(6) S.I.2001/1004.

(7) S.I. 1983/1964.

(8) S.I. 1996/3266.

- (a) matched with a person who is notified of having been matched on or after 6th April 2003;
or
- (b) placed for adoption on or after that date.

PART 2

Statutory paternity pay (birth)

Conditions of entitlement to statutory paternity pay (birth): relationship with newborn child and child's mother

4. The conditions prescribed under section 171ZA(2)(a) of the Act are those prescribed in regulation 4(2)(b) and (c) of the Paternity and Adoption Leave Regulations 2002(9).

Modification of entitlement conditions: early birth

5. Where a person does not meet the conditions specified in section 171ZA(2)(b) to (d) of the Act because the child's birth occurred earlier than the 14th week before the expected week of the birth, it shall have effect as if, for the conditions there set out, there were substituted the conditions that—

- (a) the person would, but for the date on which the birth occurred, have been in employed earner's employment with an employer for a continuous period of at least 26 weeks ending with the week immediately preceding the 14th week before the expected week of the child's birth;
- (b) his normal weekly earnings for the period of 8 weeks ending with the week immediately preceding the week in which the child is born are not less than the lower earnings limit in force under section 5(1)(a) of the Act immediately before the commencement of the week in which the child is born.

Period of payment of statutory paternity pay (birth)

6.—(1) Subject to paragraph (2) and regulation 8, a person entitled to statutory paternity pay (birth) may choose the statutory paternity pay period to begin on—

- (a) the date on which the child is born or, where he is at work on that day, the following day;
- (b) the date falling such number of days after the date on which the child is born as the person may specify;
- (c) a predetermined date, specified by the person, which is later than the first day of the expected week of the child's birth.

(2) In a case where statutory paternity pay (birth) is payable in respect of a child whose expected week of birth begins before 6th April 2003, the statutory paternity pay period shall begin on a predetermined date, specified by the person entitled to such pay in a notice under section 171ZC(1) of the Act, which is at least 28 days after the date on which that notice was given, unless the person liable to pay statutory paternity pay (birth) agrees to the period beginning earlier.

(3) A person may choose for statutory paternity pay (birth) to be paid in respect of a period of a week.

(4) A choice made in accordance with paragraph (1) or (2) is not irrevocable, but where a person subsequently makes a different choice in relation to the beginning of the statutory pay period, section 171ZC(1) of the Act shall apply to it.

(9) S.I. 2002/2788.

Additional notice requirements for statutory paternity pay (birth)

7.—(1) Where the choice made by a person in accordance with paragraph (1) of regulation 6 and notified in accordance with section 171ZC(1) of the Act is that mentioned in sub-paragraph (a) or (b) of that paragraph, the person shall give further notice to the person liable to pay him statutory paternity pay, as soon as is reasonably practicable after the child's birth, of the date the child was born;

(2) Where the choice made by a person in accordance with paragraph (1) of regulation 6 and notified in accordance with section 171ZC(1) of the Act is that specified in sub-paragraph (c) of that paragraph, and the date of the child's birth is later than the date so specified, the person shall, if he wishes to claim statutory paternity pay (birth), give notice to the person liable to pay it, as soon as is reasonably practicable, that the period in respect of which statutory paternity pay is to be paid shall begin on a date different from that originally chosen by him.

(3) That date may be any date chosen in accordance with paragraph (1) of regulation 6.

Qualifying period for statutory paternity pay (birth)

8. The qualifying period for the purposes of section 171ZE(2) of the Act (period within which the statutory paternity pay period must occur) is a period which begins on the date of the child's birth and ends—

- (a) except in the case referred to in paragraph (b), 56 days after that date;
- (b) in a case where the child is born before the first day of the expected week of its birth, 56 days after that day.

Evidence of entitlement to statutory paternity pay (birth)

9.—(1) A person shall provide evidence of his entitlement to statutory paternity pay (birth) by providing in writing to the person who will be liable to pay him statutory paternity pay (birth)—

- (a) the information specified in paragraph (2);
- (b) a declaration that he meets the conditions prescribed under section 171ZA(2)(a) of the Act and that it is not the case that statutory paternity pay (birth) is not payable to him by virtue of the provisions of section 171ZE(4) of the Act.

(2) The information referred to in paragraph (1)(a) is as follows—

- (a) the name of the person claiming statutory paternity pay (birth);
- (b) the expected week of the child's birth and, where the birth has already occurred, the date of birth;
- (c) the date from which it is expected that the liability to pay statutory paternity pay (birth) will begin;
- (d) whether the period chosen in respect of which statutory paternity pay (birth) is to be payable is a week.

(3) The information and declaration referred to in paragraph (1) shall be provided at least 28 days before the date mentioned in sub-paragraph (c) of paragraph (2) or, if that is not reasonably practicable, as soon as is reasonably practicable thereafter.

(4) Where the person who will be liable to pay statutory paternity pay (birth) so requests, the person entitled to it shall inform him of the date of the child's birth within 28 days, or as soon as is reasonably practicable thereafter.

Entitlement to statutory paternity pay (birth) where there is more than one employer

10. Statutory paternity pay (birth) shall be payable to a person in respect of a statutory pay week during any part of which he works only for an employer—

- (a) who is not liable to pay him statutory paternity pay (birth); and
- (b) for whom he has worked in the week immediately preceding the 14th week before the expected week of the child's birth.

PART 3

Statutory paternity pay (adoption)

Conditions of entitlement to statutory paternity pay (adoption): relationship with child and with person with whom the child is placed for adoption

11.—(1) The conditions prescribed under section 171ZB(2)(a) of the Act are that a person—

- (a) is married to or the partner of a child's adopter (or in a case where there are two adopters, married to or the partner of the other adopter), and
- (b) has, or expects to have, the main responsibility (apart from the responsibility of the child's adopter, or in a case where there two adopters, together with the other adopter) for the upbringing of the child.

(2) For the purposes of paragraph (1), "partner" means a person (whether of a different sex or the same sex) who lives with the adopter and the child in an enduring family relationship but is not a relative of the adopter of a kind specified in paragraph (3).

(3) References to relationships in paragraph (2)—

- (a) are to relationships of the full blood or half blood, or, in the case of an adopted person, such of those relationships as would exist but for the adoption, and
- (b) include the relationship of a child with his adoptive, or former adoptive parents but do not include any other adoptive relationships.

Period of payment of statutory paternity pay (adoption)

12.—(1) Subject to paragraph (2) and regulation 14, a person entitled to statutory paternity pay (adoption) may choose the statutory paternity pay period to begin on—

- (a) the date on which the child is placed with the adopter or, where the person is at work on that day, the following day;
- (b) the date falling such number of days after the date on which the child is placed with the adopter as the person may specify;
- (c) a predetermined date, specified by the person, which is later than the date on which the child is expected to be placed with the adopter.

(2) In a case where statutory paternity pay (adoption) is payable in respect of a child matched with an adopter who is notified of having been matched before 6th April 2003, the statutory paternity pay period shall begin on a predetermined date, specified by the person entitled to such pay in a notice under section 171ZC(1) of the Act, which is at least 28 days after the date on which that notice was given, unless the person liable to pay statutory paternity pay (birth) agrees to the period beginning earlier.

(3) A person may choose for statutory paternity pay (adoption) to be paid in respect of a period of a week.

(4) A choice made in accordance with paragraph (1) is not irrevocable, but where a person subsequently makes a different choice in relation to the beginning of the statutory paternity pay period, section 171ZC(1) of the Act shall apply to it.

Additional notice requirements for statutory paternity pay (adoption)

13.—(1) Where the choice made by a person in accordance with paragraph (1) of regulation 12 and notified in accordance with section 171ZC(1) of the Act is that mentioned in sub-paragraph (a) or (b) of that paragraph, the person shall give further notice to the person liable to pay him statutory paternity pay as soon as is reasonably practicable of the date on which the placement occurred.

(2) Where the choice made by a person in accordance with paragraph (1) of regulation 12 and notified in accordance with section 171ZC(1) of the Act is that mentioned in sub-paragraph (c) of that paragraph, or a date is specified under paragraph (2) of that regulation, and the child is placed for adoption later than the date so specified, the person shall, if he wishes to claim statutory paternity pay (adoption), give notice to the person liable to pay it, as soon as is reasonably practicable, that the period in respect of which statutory paternity pay is to be paid shall begin on a date different from that originally chosen by him.

(3) That date may be any date chosen in accordance with paragraph (1) of regulation 12.

Qualifying period for statutory paternity pay (adoption)

14. The qualifying period for the purposes of section 171ZE(2) of the Act (period within which the statutory pay period must occur) is a period of 56 days beginning with the date of the child's placement for adoption.

Evidence of entitlement for statutory paternity pay (adoption)

15.—(1) A person shall provide evidence of his entitlement to statutory paternity pay (adoption) by providing in writing to the person who will be liable to pay him statutory paternity pay (adoption)

- (a) the information specified in paragraph (2);
 - (b) a declaration that he meets the conditions prescribed under section 171ZB(2)(a) of the Act and that it is not the case that statutory paternity pay (adoption) is not payable to him by virtue of the provisions of section 171ZE(4) of the Act;
 - (c) a declaration that he has elected to receive statutory paternity pay (adoption), and not statutory adoption pay under Part 12ZB of the Act.
- (2) The information referred to in paragraph (1) is as follows—
- (a) the name of the person claiming statutory paternity pay (adoption);
 - (b) the date on which the child is expected to be placed for adoption or, where the child has already been placed for adoption, the date of placement of the child;
 - (c) the date from which it is expected that the liability to pay statutory paternity pay (adoption) will begin;
 - (d) whether the period chosen in respect of which statutory paternity pay (adoption) is to be payable is a week;
 - (e) the date the adopter was notified he had been matched with the child for the purposes of adoption.

(3) The information and declarations referred to in paragraph (1) shall be provided to the person liable to pay statutory paternity pay at least 28 days before the date mentioned in sub-paragraph (c) of paragraph (2) or, if that is not reasonably practicable, as soon as is reasonably practicable thereafter.

(4) Where the person who will be liable to pay statutory paternity pay (adoption) so requests, the person entitled to it shall inform him of the date of the child's placement within 28 days, or as soon as is reasonably practicable thereafter.

Entitlement to statutory paternity pay (adoption) where there is more than one employer

16. Statutory paternity pay (adoption) shall be payable to a person in respect of a statutory pay week during any part of which he works only for an employer—

- (a) who is not liable to pay him statutory paternity pay (adoption); and
- (b) for whom he has worked in the week in which the adopter is notified of being matched with the child.

PART 4

Statutory paternity pay: provisions applicable to both statutory paternity pay (birth) and statutory paternity pay (adoption)

Work during a statutory paternity pay period

17.—(1) Where, in a case where statutory paternity pay is being paid to a person who works during the statutory paternity pay period for an employer who is not liable to pay him statutory paternity pay and who does not fall within paragraph (b) of regulation 10 or, as the case may be, paragraph (b) of regulation 16, there shall be no liability to pay statutory paternity pay in respect of any remaining part of the statutory paternity pay period.

(2) In a case falling within paragraph (1), the person shall notify the person liable to pay statutory paternity pay within 7 days of the first day during which he works during the statutory pay period.

(3) The notification mentioned in paragraph (2) shall be in writing, if the person who has been liable to pay statutory paternity pay so requests.

Cases where there is no liability to pay statutory paternity pay

18. There shall be no liability to pay statutory paternity pay in respect of any week—

- (a) during any part of which the person entitled to it is entitled to statutory sick pay under Part 11 of the Act;
- (b) following that in which the person claiming it has died; or
- (c) during any part of which the person entitled to it is detained in legal custody or sentenced to a term of imprisonment (except where the sentence is suspended), or which is a subsequent week within the same statutory paternity pay period.

Statutory paternity pay and contractual remuneration

19. For the purposes of section 171ZG(1) and (2) of the Act, the payments which are to be treated as contractual remuneration are sums payable under a contract of service—

- (a) by way of remuneration;
- (b) for incapacity for work due to sickness or injury;
- (c) by reason of the birth or adoption of a child.

Avoidance of liability for statutory paternity pay

20.—(1) A former employer shall be liable to make payments of statutory paternity pay to a former employee in any case where the employee had been employed for a continuous period of at least 8 weeks and his contract of service was brought to an end by the former employer solely, or mainly, for the purpose of avoiding liability for statutory paternity pay.

(2) In a case falling within paragraph (1)—

- (a) the employee shall be treated as if he had been employed for a continuous period ending with the child's birth or, as the case may be, the placement of the child for adoption;
- (b) his normal weekly earnings shall be calculated by reference to his normal weekly earnings for the period of 8 weeks ending with the last day in respect of which he was paid under his former contract of service.

PART 5

Statutory adoption pay

Adoption pay period

21.—(1) Subject to paragraph (2), a person entitled to statutory adoption pay may choose the adoption pay period to begin—

- (a) on the date on which the child is placed with him for adoption or, where he is at work on that day, on the following day;
- (b) subject to paragraph (2), on a predetermined date, specified by him, which is no more than 14 days before the date on which the child is expected to be placed with him and no later than that date.

(2) In a case where statutory adoption pay is payable in respect of a child matched with an adopter who is notified of having been matched before 6th April 2003, the statutory adoption pay period shall begin on a predetermined date which is—

- (a) on or after 6th April 2003, and
- (b) no more than 14 days before the date on which the child is expected to be placed with the adopter.

(3) Subject to paragraph (4), where the choice made is that mentioned in sub-paragraph (b) of paragraph (1) or in a case where paragraph (2) applies, the adoption pay period shall, unless the employer agrees to the adoption pay period beginning earlier, begin no earlier than 28 days after notice under section 171ZL(6) of the Act has been given.

(4) Where the beginning of the adoption pay period determined in accordance with paragraph (3) is later than the date of placement, it shall be the date of placement.

(5) Subject to regulation 22, the duration of any adoption pay period shall be a continuous period of 26 weeks.

(6) A choice made under paragraph (1), or a date specified under paragraph (2), is not irrevocable, but where a person subsequently makes a different choice, section 171ZL(6) of the Act shall apply to it.

Adoption pay period in cases where adoption is disrupted

22.—(1) Where—

- (a) after a child has been placed for adoption—

- (i) the child dies;
 - (ii) the child is returned to the adoption agency under section 30(3) of the Adoption Act 1976 or section 30(3) of the Adoption (Scotland) Act 1978, or
- (b) the adoption pay period has begun prior to the date the child has been placed for adoption, but the placement does not take place,
- the adoption pay period shall terminate in accordance with the provisions of paragraph (2).
- (2) The adoption pay period shall, in a case falling within paragraph (1), terminate 8 weeks after the end of the week specified in paragraph (3).
- (3) The week referred to in paragraph (2) is—
- (a) in a case falling within paragraph (1)(a)(i), the week during which the child dies;
 - (b) in a case falling within paragraph (1)(a)(ii), the week during which the child is returned;
 - (c) in a case falling within paragraph (1)(b), the week during which the person with whom the child was to be placed for adoption is notified that the placement will not be made.
- (4) For the purposes of paragraph (3), “week” means a period of seven days beginning with Sunday.

Additional notice requirements for statutory adoption pay

23.—(1) Where a person gives notice under section 171ZL(6) of the Act he shall at the same time give notice of the date on which the child is expected to be placed for adoption.

(2) Where the choice made in accordance with paragraph (1) of regulation 21 and notified in accordance with section 171ZL(6) of the Act is that mentioned in sub-paragraph (a) of that paragraph, the person shall give further notice to the person liable to pay him statutory adoption pay as soon as is reasonably practicable of the date the child is placed for adoption.

Evidence of entitlement to statutory adoption pay

24.—(1) A person shall provide evidence of his entitlement to statutory adoption pay by providing to the person who will be liable to pay it—

- (a) the information specified in paragraph (2), in the form of one or more documents provided to him by an adoption agency, containing that information;
- (b) a declaration that he has elected to receive statutory adoption pay, and not statutory paternity pay (adoption) under Part 12ZA of the Act.

(2) The information referred to in paragraph (1) is—

- (a) the name and address of the adoption agency and of the person claiming payment of statutory adoption pay;
- (b) the date on which the child is expected to be placed for adoption or, where the child has already been placed for adoption, the date of placement; and
- (c) the date on which the person claiming payment of statutory adoption pay was informed by the adoption agency that the child would be placed for adoption with him.

(3) The information and declaration referred to in paragraph (1) shall be provided to the person liable to pay statutory adoption pay at least 28 days before the date chosen as the beginning of the adoption pay period in accordance with paragraph (1) of regulation 21, or, if that is not reasonably practicable, as soon as is reasonably practicable thereafter.

Entitlement to statutory adoption pay where there is more than one employer

25. Statutory adoption pay shall be payable to a person in respect of a week during any part of which he works only for an employer—

- (a) who is not liable to pay him statutory adoption pay; and
- (b) for whom he has worked in the week in which he is notified of being matched with the child.

Work during an adoption pay period

26.—(1) Where, in a case where statutory adoption pay is being paid to a person who works during the adoption pay period for an employer who is not liable to pay him statutory adoption pay and who does not fall within paragraph (b) of regulation 25, there shall be no liability to pay statutory adoption pay in respect of any remaining part of the adoption pay period.

(2) In a case falling within paragraph (1), the person shall notify the person liable to pay statutory adoption pay within 7 days of the first day during which he works during the adoption pay period.

(3) The notification contained in paragraph (2) shall be in writing if the person who has been liable to pay statutory adoption pay so requests.

Cases where there is no liability to pay statutory adoption pay

27.—(1) There shall be no liability to pay statutory adoption pay in respect of any week—

- (a) during any part of which the person entitled to it is entitled to statutory sick pay under Part 11 of the Act;
- (b) following that in which the person claiming it has died; or
- (c) subject to paragraph (2), during any part of which the person entitled to it is detained in legal custody or sentenced to a term of imprisonment (except where the sentence is suspended).

(2) There shall be liability to pay statutory adoption pay in respect of any week during any part of which the person entitled to it is detained in legal custody where that person—

- (a) is released subsequently without charge;
- (b) is subsequently found not guilty of any offence and is released; or
- (c) is convicted of an offence but does not receive a custodial sentence.

Statutory adoption pay and contractual remuneration

28. For the purposes of section 171ZP(4) and (5) of the Act, the payments which are to be treated as contractual remuneration are sums payable under a contract of service—

- (a) by way of remuneration;
- (b) for incapacity for work due to sickness or injury;
- (c) by reason of the adoption of a child.

Termination of employment before start of adoption pay period

29.—(1) Where the employment of a person who satisfies the conditions of entitlement to statutory adoption pay terminates for whatever reason (including dismissal) before the adoption pay period chosen in accordance with regulation 21 has begun, the period shall begin 14 days before the expected date of placement or, where the termination occurs on, or within 14 days before, the expected date of placement, on the day immediately following the last day of his employment.

(2) In a case falling within paragraph (1), the notice requirements set out in section 171ZL(6) of the Act and these Regulations shall not apply.

Avoidance of liability for statutory adoption pay

30.—(1) A former employer shall be liable to make payments of statutory adoption pay to a former employee in any case where the employee had been employed for a continuous period of at least 8 weeks and his contract of service was brought to an end by the former employer solely, or mainly, for the purpose of avoiding liability for statutory adoption pay.

(2) In a case falling within paragraph (1)—

- (a) the employee shall be treated as if he had been employed for a continuous period ending with the week in which he was notified of having been matched with the child for adoption; and
- (b) his normal weekly earnings shall be calculated by reference to his normal weekly earnings for the period of 8 weeks ending with the last day in respect of which he was paid under his former contract of service.

PART 6

Statutory paternity pay and statutory adoption pay: provisions applicable to both statutory paternity pay and statutory adoption pay

Introductory

31.—(1) Subject to paragraph (2), the provisions of regulations 32 to 47 below apply to statutory paternity pay payable under Part 12ZA of the Act and to statutory adoption pay payable under 12ZB of the Act.

(2) The provisions of regulation 44 only apply to statutory adoption pay.

Treatment of persons as employees

32.—(1) In a case where, and in so far as, a person over the age of 16 is treated as an employed earner by virtue of the Social Security (Categorisation of Earners) Regulations 1978(10) he shall be treated as an employee for the purposes of Parts 12ZA and 12ZB of the Act, and in a case where, and in so far as, such a person is treated otherwise than as an employed earner by virtue of those regulations, he shall not be treated as an employee for the purposes of Parts 12ZA and 12ZB of the Act.

(2) A person who is in employed earner's employment within the meaning of the Act under a contract of apprenticeship shall be treated as an employee for the purposes of Parts 12ZA and 12ZB of the Act.

(3) A person who is in employed earner's employment within the meaning of the Act but whose employer—

- (a) does not fulfil the conditions prescribed in regulation 145(1) of the Contributions Regulations in so far as that provision relates to residence or presence in Great Britain; or
- (b) is a person who, by reason of any international treaty to which the United Kingdom is a party or of any international convention binding the United Kingdom—
 - (i) is exempt from the provisions of the Act; or

(10) S.I. 1978/1689, amended by S.I. 1980/1713, 1984/350, 1990/1894, 1994/726, 1998/1728.

(ii) is a person against whom the provisions of the Act are not enforceable,
shall not be treated as an employee for the purposes of Parts 12ZA and 12ZB of the Act.

Continuous employment

33.—(1) Subject to the following provisions of this regulation, where in any week a person is, for the whole or part of the week—

- (a) incapable of work in consequence of sickness or injury;
- (b) absent from work on account of a temporary cessation of work;
- (c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for all or any purposes,

and returns to work for his employer after the incapacity for or absence from work, that week shall be treated for the purposes of sections 171ZA, 171ZB and 171ZL of the Act as part of a continuous period of employment with that employer, notwithstanding that no contract of service exists with that employer in respect of that week.

(2) Incapacity for work which lasts for more than 26 consecutive weeks shall not count for the purposes of paragraph (1)(a).

(3) Where a person—

- (a) is an employee in an employed earner’s employment in which the custom is for the employer—
 - (i) to offer work for a fixed period of not more than 26 consecutive weeks;
 - (ii) to offer work for such period on two or more occasions in a year for periods which do not overlap; and
 - (iii) to offer the work available to those persons who had worked for him during the last or a recent such period, but
- (b) is absent from work because of incapacity arising from some specific disease or bodily or mental disablement,

then in that case paragraph (1) shall apply as if the words “and returns to work for his employer after the incapacity for or absence from work,” were omitted and paragraph (4) shall not apply.

(4) Where a person is employed under a contract of service for part only of the relevant week within the meaning of subsection (3) of section 171ZL of the Act (entitlement to statutory adoption pay), the whole of that week shall count in computing a period of continuous employment for the purposes of that section.

Continuous employment and unfair dismissal

34.—(1) This regulation applies to a person in relation to whose dismissal an action is commenced which consists—

- (a) of the presentation by him of a complaint under section 111(1) of the Employment Rights Act 1996⁽¹¹⁾;
- (b) of his making a claim in accordance with a dismissals procedure agreement designated by an order under section 110 of that Act; or
- (c) of any action taken by a conciliation officer under section 18 of the Employment Tribunals Act 1996⁽¹²⁾.

(11) 1996 c. 18.

(12) 1996 c. 17.

(2) If, in consequence of an action of the kind specified in paragraph (1), a person is reinstated or re-engaged by his employer or by a successor or associated employer of that employer, the continuity of his employment shall be preserved for the purposes of Part 12ZA or, as the case may be, Part 12ZB of the Act, and any week which falls within the interval beginning with the effective date of termination and ending with the date of reinstatement or re-engagement, as the case may be, shall count in the computation of his period of continuous employment.

(3) In this regulation—

“successor” and “dismissal procedures agreement” have the same meanings as in section 235 of the Employment Rights Act 1996; and

“associated employer” shall be construed in accordance with section 231 of the Employment Rights Act 1996.

Continuous employment and stoppages of work

35.—(1) Where, for any week or part of a week a person does not work because there is a stoppage of work due to a trade dispute within the meaning of section 35(1) of the Jobseekers Act 1995⁽¹³⁾ at his place of employment, the continuity of his employment shall, subject to paragraph (2), be treated as continuing throughout the stoppage but, subject to paragraph (3), no such week shall count in the computation of his period of employment.

(2) Subject to paragraph (3), where during the stoppage of work a person is dismissed from his employment, the continuity of his employment shall not be treated in accordance with paragraph (1) as continuing beyond the commencement of the day he stopped work.

(3) The provisions of paragraph (1), to the extent that they provide that a week in which the stoppage of work occurred shall not count in the computation of a period of employment, and paragraph (2) shall not apply to a person who proves that at no time did he have a direct interest in the trade dispute in question.

Change of employer

36. A person’s employment shall, notwithstanding a change of employer, be treated as continuous employment with the second employer where—

- (a) the employer’s trade or business or an undertaking (whether or not it is an undertaking established by or under an Act of Parliament) is transferred from one person to another;
- (b) by or under an Act of Parliament, whether public or local and whenever passed, a contract of employment between any body corporate and the person is modified and some other body corporate is substituted as his employer;
- (c) on the death of his employer, the person is taken into employment of the personal representatives or trustees of the deceased;
- (d) the person is employed by partners, personal representatives or trustees and there is a change in the partners, or, as the case may be, personal representatives or trustees;
- (e) the person is taken into the employment of an employer who is, at the time he entered his employment, an associated employer of his previous employer, and for this purpose “associated employer” shall be construed in accordance with section 231 of the Employment Rights Act 1996;
- (f) on the termination of his employment with an employer he is taken into the employment of another employer and those employers are governors of a school maintained by a local education authority and that authority.

(13) 1995 c. 18.

Reinstatement after service with the armed forces etc.

37. If a person who is entitled to apply to his employer under the Reserve Forces (Safeguard of Employment) Act 1985(14) enters the employment of that employer within the 6-month period mentioned in section 1(4)(b) of that Act, his previous period of employment with that employer (or if there was more than one such period, the last of those periods) and the period of employment beginning in that 6-month period shall be treated as continuous.

Treatment of two or more employers or two or more contracts of service as one

38.—(1) In a case where the earnings paid to a person in respect of two or more employments are aggregated and treated as a single payment of earnings under regulation 15(1) of the Contributions Regulations, the employers of that person in respect of those employments shall be treated as one for the purposes of Part 12ZA or, as the case may be, Part 12ZB of the Act.

(2) Where two or more employers are treated as one under the provisions of paragraph (1), liability for statutory paternity pay or, as the case may be, statutory adoption pay, shall be apportioned between them in such proportions as they may agree or, in default of agreement, in the proportions which the person's earnings from each employment bear to the amount of the aggregated earnings.

(3) Where two or more contracts of service exist concurrently between one employer and one employee, they shall be treated as one for the purposes of Part 12ZA or, as the case may be, Part 12ZB of the Act, except where, by virtue of regulation 14 of the Contributions Regulations, the earnings from those contracts of service are not aggregated for the purposes of earnings-related contributions.

Meaning of “earnings”

39.—(1) For the purposes of section 171ZJ(6) (normal weekly earnings for the purposes of Part 12ZA of the Act) and of section 171ZS(6) of the Act (normal weekly earnings for the purposes of Part 12ZB of the Act), the expression “earnings” shall be construed in accordance with the following provisions of this regulation.

(2) The expression “earnings” refers to gross earnings and includes any remuneration or profit derived from a person's employment except any payment or amount which is—

- (a) excluded from the computation of a person's earnings under regulation 25 of and Schedule 3 to, and regulation 123 of, the Contributions Regulations (payments to be disregarded) and regulation 27 of those Regulations (payments to directors to be disregarded);
 - (b) a chargeable emolument under section 10A of the Act, except where, in consequence of such a chargeable emolument being excluded from earnings, a person would not be entitled to statutory paternity pay or, as the case may be, statutory adoption pay.
- (3) For the avoidance of doubt, “earnings” includes—
- (a) any sum payable in respect of arrears of pay in pursuance of an order for reinstatement or re-engagement under the Employment Rights Act 1996;
 - (b) any sum payable by way of pay in pursuance of an order made under the Employment Rights Act 1996 for the continuation of a contract of employment;
 - (c) any sum payable by way of remuneration in pursuance of a protective award under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992(15);
 - (d) any sum payable by way of statutory sick pay, including sums payable in accordance with regulations made under section 151(6) of the Act;

(14) 1985 c. 17.

(15) 1992 c. 52.

- (e) any sum payable by way of statutory maternity pay;
- (f) any sum payable by way of statutory paternity pay;
- (g) any sum payable by way of statutory adoption pay.

Normal weekly earnings

40.—(1) For the purposes of Part 12ZA and Part 12ZB of the Act, a person’s normal weekly earnings shall be calculated in accordance with the following provisions of this regulation.

(2) In this regulation—

“the appropriate date” means—

- (a) in relation to statutory paternity pay (birth), the first day of the 14th week before the expected week of the child’s birth or the first day in the week in which the child is born, whichever is the earlier;
- (b) in relation to statutory paternity pay (adoption) and statutory adoption pay, the first day of the week after the week in which the adopter is notified of being matched with the child for the purposes of adoption;

“normal pay day” means a day on which the terms of a person’s contract of service require him to be paid, or the practice in his employment is for him to be paid, if any payment is due to him; and

“day of payment” means a day on which the person was paid.

(3) Subject to paragraph (4), the relevant period for the purposes of section 171ZJ(6) and 171ZS(6) is the period between—

- (a) the last normal pay day to fall before the appropriate date; and
- (b) the last normal pay day to fall at least 8 weeks earlier than the normal pay day mentioned in sub-paragraph (a),

including the normal pay day mentioned in sub-paragraph (a) but excluding that first mentioned in sub-paragraph (b).

(4) In a case where a person has no identifiable normal pay day, paragraph (3) shall have effect as if the words “day of payment” were substituted for the words “normal pay day” in each place where they occur.

(5) In a case where a person has normal pay days at intervals of or approximating to one or more calendar months (including intervals of or approximating to a year) his normal weekly earnings shall be calculated by dividing his earnings in the relevant period by the number of calendar months in that period (or, if it is not a whole number, the nearest whole number), multiplying the result by 12 and dividing by 52.

(6) In a case to which paragraph (5) does not apply and the relevant period is not an exact number of weeks, the person’s normal weekly earnings shall be calculated by dividing his earnings in the relevant period by the number of days in the relevant period and multiplying the result by 7.

(7) In any case where a person receives a back-dated pay increase which includes a sum in respect of a relevant period, normal weekly earnings shall be calculated as if such a sum was paid in that relevant period even though received after that period.

Payment of statutory paternity pay and statutory adoption pay

41. Payments of statutory paternity pay and statutory adoption pay may be made in a like manner to payments of remuneration but shall not include payment in kind or by way of the provision of board or lodgings or of services or other facilities.

Time when statutory paternity pay and statutory adoption pay are to be paid

42.—(1) In this regulation, “pay day” means a day on which it has been agreed, or it is the normal practice between an employer or former employer and a person who is or was an employee of his, that payments by way of remuneration are to be made, or, where there is no such agreement or normal practice, the last day of a calendar month.

(2) In any case where—

- (a) a decision has been made by an officer of the Board under section 8(1) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999⁽¹⁶⁾ as a result of which a person is entitled to an amount of statutory paternity pay or statutory adoption pay; and
- (b) the time for bringing an appeal against the decision has expired and either—
 - (i) no such appeal has been brought; or
 - (ii) such an appeal has been brought and has been finally disposed of,

that amount of statutory paternity pay or statutory adoption pay shall be paid within the time specified in paragraph (3).

(3) Subject to paragraphs (4) and (5), the employer or former employer shall pay the amount not later than the first pay day after—

- (a) where an appeal has been brought, the day on which the employer or former employer receives notification that it has been finally disposed of;
- (b) where leave to appeal has been refused and there remains no further opportunity to apply for leave, the day on which the employer or former employer receives notification of the refusal; and
- (c) in any other case, the day on which the time for bringing an appeal expires.

(4) Subject to paragraph (5), where it is impracticable, in view of the employer’s or former employer’s methods of accounting for and paying remuneration, for the requirement of payment referred to in paragraph (3) to be met by the pay day referred to in that paragraph, it shall be met not later than the next following pay day.

(5) Where the employer or former employer would not have remunerated the employee for his work in the week in question as early as the pay day specified in paragraph (3) or (if it applies) paragraph (4), the requirement of payment shall be met on the first day on which the employee would have been remunerated for his work in that week.

Liability of the Board to pay statutory paternity pay or statutory adoption pay

43.—(1) Where—

- (a) an officer of the Board has decided that an employer is liable to make payments of statutory paternity pay or, as the case may be, statutory adoption pay to a person;
- (b) the time for appealing against the decision has expired; and
- (c) no appeal against the decision has been lodged or leave to appeal against the decision is required and has been refused,

then for any week in respect of which the employer was liable to make payments of statutory paternity pay or, as the case may be, statutory adoption pay but did not do so, and for any subsequent weeks in the paternity pay period or, as the case may be, adoption pay period, the liability to make those payments shall, notwithstanding sections 171ZD and 171ZM of the Act, be that of the Board and not the employer.

(16) 1999 c. 2.

(2) Liability to make payments of statutory paternity pay or, as the case may be, statutory adoption pay shall, notwithstanding sections 171ZD and 171ZM of the Act, be a liability of the Board and not the employer as from the week in which the employer first becomes insolvent until the end of the paternity pay or adoption pay period.

(3) For the purposes of paragraph (2) an employer shall be taken to be insolvent if, and only if—

(a) in England and Wales—

- (i) he has been adjudged bankrupt or has made a composition or arrangement with his creditors;
- (ii) he has died and his estate falls to be administered in accordance with an order made under section 421 of the Insolvency Act 1986⁽¹⁷⁾; or
- (iii) where an employer is a company or a limited liability partnership, a winding-up order or an administration order is made or a resolution for a voluntary winding-up is passed (or, in the case of a limited liability partnership, a determination for a voluntary winding-up has been made) with respect to it, or a receiver or a manager of its undertaking is duly appointed, or possession is taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company or limited liability partnership comprised in or subject to the charge, or a voluntary arrangement proposed for the purposes of Part 1 of the Insolvency Act 1986 is approved under that Part of that Act;

(b) in Scotland—

- (i) an award of sequestration is made on his estate or he executes a trust deed for his creditors or enters into a composition contract;
- (ii) he has died and a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889⁽¹⁸⁾ is required by that section to divide his insolvent estate among his creditors; or
- (iii) where the employer is a company or a limited liability partnership, a winding-up order or an administration order is made or a resolution for voluntary winding-up is passed (or, in the case of a limited liability partnership, a determination for a voluntary winding-up is made) with respect to it, or a receiver of its undertaking is duly appointed, or a voluntary arrangement proposed for the purposes of Part 1 of the Insolvency Act 1986 is approved under that Part.

Liability of the Board to pay statutory adoption pay in cases of legal custody or imprisonment

44. Where—

- (a) there is liability to pay statutory adoption pay in respect of a period which is subsequent to the last week falling within paragraph (1)(c) of regulation 27, or
- (b) there is liability to pay statutory adoption pay during a period of detention in legal custody by virtue of the provisions of paragraph (2) of that regulation,

that liability shall, notwithstanding section 171ZM of the Act, be that of the Board and not the employer.

⁽¹⁷⁾ 1986 c. 45.

⁽¹⁸⁾ 1889 c. 39. Section 11A was inserted by the Bankruptcy (Scotland) Act 1985 (c. 66), Schedule 7, paragraph 4.

Payments by the Board

45. Where the Board become liable in accordance with regulation 43 or 44 to make payments of statutory paternity pay or, as the case may be, statutory adoption pay to a person, the first payment shall be made as soon as reasonably practicable after they become so liable, and payments thereafter shall be made at weekly intervals, by means of an instrument of payment or by such other means as appears to the Board to be appropriate in the circumstance of any particular case.

Persons unable to act

46.—(1) Where in the case of any person—

- (a) statutory paternity pay or, as the case may be, statutory adoption pay is payable to him or he is alleged to be entitled to it;
- (b) he is unable for the time being to act; and
- (c) either—
 - (i) no receiver has been appointed by the Court of Protection with power to receive statutory paternity pay or, as the case may be, statutory adoption pay on his behalf, or
 - (ii) in Scotland, his estate is not being administered by any tutor, curator or other guardian acting or appointed in terms of law,

the Board may, upon written application to them by a person who, if a natural person, is over the age of 18, appoint that person to exercise, on behalf of the person unable to act, any right to which he may be entitled under Part 12ZA or, as the case may be, Part 12ZB of the Act and to deal on his behalf with any sums payable to him.

(2) Where the Board have made an appointment under paragraph (1)—

- (a) they may at any time in their absolute discretion revoke it;
- (b) the person appointed may resign his office after having given one month's notice in writing to the Board of his intention to do so; and
- (c) the appointment shall terminate when the Board are notified that a receiver or other person to whom paragraph (1)(c) applies has been appointed.

(3) Anything required by Part 12ZA or 12ZB of the Act to be done by or to any person who is unable to act may be done by or to the person appointed under this regulation to act on his behalf, and the receipt of the person so appointed shall be a good discharge to the person's employer or former employer for any sum paid.

Service of notices by post

47. A notice given in accordance with the provisions of these Regulations in writing contained in an envelope which is properly addressed and sent by prepaid post shall be treated as having been given on the day on which it is posted.

Signed by authority of the Secretary of State for Trade and Industry

11th November 2002

Alan Johnson,
Minister of State for Employment Relations,
Industry and the Regions,
Department of Trade and Industry

The Commissioners of Inland Revenue hereby concur

13th November 2002

Nick Montagu,
Ann Chant,
Two of the Commissioners of Inland Revenue

EXPLANATORY NOTE

(This note is not part of the Regulations)

This instrument contains only regulations made by virtue of sections 2, 4 and 53 of, and paragraphs 8 and 11 of Schedule 7 to, the Employment Act 2002, which come into force on 8th December 2002. The instrument is made before the end of the period of 6 months beginning with the coming into force of those provisions. The regulations in it are therefore exempted by section 173(5)(b) of the Social Security Administration Act 1992 from the requirement under section 172 of that Act to refer the proposals to make the regulations to the Social Security Advisory Committee and they are made without reference to the Committee.

These Regulations, made under provisions inserted into the Social Security Contributions and Benefits Act 1992 (“the 1992 Act”) by the Employment Act 2002, make provision relating to statutory paternity pay and statutory adoption pay.

Part 1 of the Regulations is introductory.

Part 2 of the Regulations relates to statutory paternity pay payable in connection with a birth:

- regulation 4 sets out the entitlement conditions as regards the relationship with the newborn child and the child’s mother;

- regulation 5 provides for a modification of the entitlement conditions in the case of early birth;

- regulation 6 specifies the period of payment;

- regulation 7 sets out additional notice requirements;

- regulation 8 specifies the period within which the statutory paternity pay period must occur (“the qualifying period”);

- regulation 9 sets out the evidence of entitlement that is required;

- regulation 10 provides for exceptional circumstances in which statutory paternity pay is payable to a person even though he is working for another employer.

Part 3 of the Regulations relates to statutory paternity pay payable in connection with an adoption. Regulations 11 to 16 contain provisions corresponding to those of regulations 4 to 10 relating to statutory paternity pay payable in connection with a birth.

Part 4 of the Regulations contains provisions relating to both types of statutory paternity pay:

- regulation 17 provides for the termination of statutory paternity pay where a person has commenced work;

- regulation 18 provides for there to be no liability for payment of statutory paternity pay where there is entitlement to statutory sick pay, where the person claiming it has died, or where he has been detained in legal custody or imprisoned;

- regulation 19 specifies the payments to be treated as contractual remuneration for the purposes of section 171ZG of the 1992 Act, which prevents both statutory paternity pay and contractual remuneration being payable in respect of the same period;

- regulation 20 provides for liability to make payments of statutory paternity pay in cases where an employee’s contract of service is brought to an end solely or mainly for the purpose of avoiding liability for statutory paternity pay.

Part 5 of the Regulations relates to statutory adoption pay:

- regulation 21 specifies the period of payment;

regulation 22 specifies how the adoption pay period is to be terminated where the adoption is disrupted;

regulation 23 sets out additional notice requirements;

regulation 24 sets out the evidence of entitlement that is required;

regulation 25 has a provision corresponding to those in regulations 10 and 16 for statutory paternity pay;

regulation 26 has a provision corresponding to that of regulation 17 for statutory paternity pay;

regulation 27 provides for there to be no liability to pay statutory adoption pay where there is entitlement to statutory sick pay, where the person claiming it has died, or, with some exceptions, during a period when the person entitled to statutory adoption pay is detained in legal custody or imprisoned;

regulation 28 has a provision corresponding to that of regulation 19 for statutory paternity pay;

regulation 29 provides for an earlier start to the adoption pay period where the employment terminates before the chosen adoption pay period has begun;

regulation 30 has a provision corresponding to that of regulation 20 for statutory paternity pay.

Part 6 of the Regulations contains, apart from one provision relating only to statutory adoption pay, provisions relating to both statutory paternity pay and statutory adoption pay:

regulation 31 introduces Part 6;

regulation 32 makes provision for persons who are, and are not, to be treated as employees in connection with statutory paternity pay and statutory adoption pay;

regulations 33 to 37 make provision as to what is to be treated as continuous employment;

regulation 38 provides for cases where two or more employers or two or more contracts of service are to be treated as one;

regulation 39 defines earnings, and regulation 40 sets out how normal weekly earnings are to be calculated;

regulations 41 and 42 set out how payment of statutory paternity pay and statutory adoption pay is to be made, and the time of payment;

regulation 43 provides for the Commissioners of Inland Revenue (“the Board”) to pay statutory paternity pay or statutory adoption pay where the employer fails to make payment, or becomes insolvent;

regulation 44 provides for the Board to pay statutory adoption pay where there is liability to pay it in cases involving detention in legal custody or imprisonment;

regulation 45 sets out how the Board is to make payments, and the time of payment;

regulation 46 provides for the Board to appoint a person to act on behalf of a person unable to act who is or may be entitled to statutory paternity pay or statutory adoption pay;

regulation 47 provides for a notice properly sent by post to be treated as having been given on the day on which it is posted.