
STATUTORY INSTRUMENTS

2010 No. 1056

The Additional Statutory Paternity
Pay (General) Regulations 2010

PART 4

ADDITIONAL STATUTORY PATERNITY PAY: PROVISIONS APPLICABLE
TO BOTH ADDITIONAL STATUTORY PATERNITY PAY (BIRTH)
AND ADDITIONAL STATUTORY PATERNITY PAY (ADOPTION)

Return to work

19. For the purposes of these Regulations, a mother or adopter is treated as returning to work if one of the following situations applies—

- (a) in a case where a mother is entitled to maternity allowance, that allowance is not payable to her by virtue of regulations made under section 35(3)(a)(i) of the Act⁽¹⁾;
- (b) in a case where an adopter is entitled to statutory adoption pay, that payment is not payable to that person in accordance with section 171ZN(3) or (5) of the Act⁽²⁾;
- (c) in a case where a mother is entitled to statutory maternity pay, that payment is not payable to her in accordance with section 165(4) or (6) of the Act⁽³⁾.

Work during the additional statutory paternity pay period

20.—(1) In a case where additional statutory paternity pay is being paid to a person who works during the additional statutory paternity pay period for an employer who is not liable to pay that person additional statutory paternity pay and who does not fall within, as appropriate, regulation 11(1)(b) or regulation 18(1)(b), there shall be no liability to pay additional statutory paternity pay in respect of the week in which the person does that work.

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

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

(4) In a case where an employee does any work on any day, under a contract of service with an employer who is liable to pay that employee additional statutory paternity pay, for not more than ten such days during the employee's additional statutory paternity pay period, whether consecutive or not, additional statutory paternity pay shall continue to be payable to the employee by the employer.

(1) 1992 c. 4. Section 35(3)(a)(i) was amended by the Work and Families Act 2006, Schedule 1, paragraph 6.

(2) Section 171ZN(3) was inserted by section 2 of the Employment Act 2002 (c. 22) and amended by the Work and Families Act 2006, Schedule 1, paragraph 21(2) and (3).

(3) Section 165(4) was amended by the Work and Families Act 2006, Schedule 1, paragraph 7(3).

Cases where there is no liability to pay additional statutory paternity pay

21.—(1) There shall be no liability to pay additional 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) 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 additional statutory paternity 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.

Additional statutory paternity pay and contractual remuneration

22.—(1) For the purposes of section 171ZG(1) and (2) of the Act (as such provisions apply to additional statutory paternity pay), 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; and
- (c) by reason of birth or adoption of a child.

Avoidance of liability for additional statutory paternity pay

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

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

- (a) the employee shall be treated as if they had been employed for a continuous period ending with the earliest date that they could have been entitled to additional statutory paternity pay; and
- (b) their normal weekly earnings shall be calculated by reference to their normal weekly earnings for the period of eight weeks ending with the last day in respect of which they were paid under their former contract of service.

Treatment of persons as employees

24.—(1) Subject to paragraph (2), in a case where, and in so far as, a person is treated as an employed earner by virtue of the Social Security (Categorisation of Earners) Regulations 1978(4) that person shall be treated as an employee for the purposes of Part 12ZA 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, that person shall not be treated as an employee for the purposes of Part 12ZA of the Act.

(4) [S.I. 1978/1689](#).

- (2) Paragraph (1) shall have effect in relation to a person who—
 - (a) is under the age of 16; and
 - (b) would or, as the case may be, would not have been treated as an employed earner by virtue of the Social Security (Categorisation of Earners) Regulations 1978 had they been over that age,

as it has effect in relation to a person who is or, as the case may be, is not so treated.

(3) A person who is in employed earner’s employment under a contract of apprenticeship shall be treated as an employee for the purposes of Part 12ZA of the Act.

- (4) A person who is in employed earner’s employment 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
 - (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 Part 12ZA of the Act.

Continuous employment

25.—(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, that person is regarded as continuing in the employment of their employer for all or any purposes,

and returns to work for their employer after the incapacity for or absence from work, that week shall be treated for the purposes of sections 171ZEA and 171ZEB 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 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 the employer 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 their employer after the incapacity for or absence from work,” were omitted.

Continuous employment and unfair dismissal

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

- (a) of the presentation by that person of a complaint under section 111(1) of the Employment Rights Act 1996⁽⁵⁾;
- (b) of their making a claim in accordance with a dismissal procedures agreement designated by an order under section 110 of that Act⁽⁶⁾; or
- (c) of any action taken by a conciliation officer under section 18 of the Employment Tribunals Act 1996⁽⁷⁾.

(2) If, in consequence of an action of the kind specified in paragraph (1), a person is reinstated or re-engaged by their employer or by a successor or associated employer of that employer, the continuity of their employment shall be preserved for the purposes of Part 12ZA 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 their period of continuous employment.

(3) In this regulation—

“dismissal procedures agreement” and “successor” 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

27.—(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⁽⁸⁾ at their place of employment, that person’s continuity of employment shall, subject to paragraph (2), be treated, for the purposes of Part 12ZA of the Act, as continuing throughout the stoppage but, subject to paragraph (3), no such week shall count in the computation of their period of employment.

(2) Subject to paragraph (3), where during the stoppage of work a person is dismissed from their employment, that person’s continuity of employment shall not be treated in accordance with paragraph (1) as continuing beyond the commencement of the day they 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 they have a direct interest in the trade dispute in question.

Change of employer

28. A person’s employment shall, notwithstanding a change of employer, be treated, for the purposes of Part 12ZA of the Act, 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;

⁽⁵⁾ 1996 c. 18.

⁽⁶⁾ Section 110 was amended by sections 1(2)(a) and (c) and 12(1) to (3) and (5) of the Employment Rights (Dispute Resolution) Act 1998 (c. 8).

⁽⁷⁾ 1996 c. 17.

⁽⁸⁾ 1995 c. 18.

- (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 that person's employer;
- (c) on the death of their employer, the person is taken into the 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 they entered that employer's employment, an associated employer of their previous employer, and for this purpose "associated employer" shall be construed in accordance with section 231 of the Employment Rights Act 1996⁽⁹⁾; or
- (f) on the termination of the person's employment with an employer they are taken into the employment of another employer and those employers are governors of a school maintained by a local education authority.

Reinstatement after service with the armed forces etc

29. If a person who is entitled to apply to their employer under the Reserve Forces (Safeguard of Employment) Act 1985⁽¹⁰⁾ enters the employment of that employer within the six month period mentioned in section 1(4)(b) of that Act, their 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 six-month period shall be treated as continuous.

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

30.—(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 of the Act.

(2) Where two or more employers are treated as one under the provisions of paragraph (1), liability for additional statutory paternity 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 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"

31.—(1) For the purposes of section 171ZJ(6) of the Act (as such provision applies to additional statutory paternity pay) (normal weekly earnings for the purposes of Part 12ZA 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

⁽⁹⁾ 1996 c. 18.

⁽¹⁰⁾ 1985 c. 17.

- be disregarded) and regulation 27 of those Regulations (payments to directors to be disregarded) (or would have been so excluded had they not been under the age of 16);
- (b) a chargeable emolument under section 10A of the Act⁽¹¹⁾ except where, in consequence of such a chargeable emolument being excluded from earnings, a person would not be entitled to additional statutory paternity pay (or where such a payment or amount would have been so excluded and in consequence the person would not have been entitled to additional statutory paternity pay had they not been under the age of 16).
- (3) For the avoidance of doubt, “earnings” includes—
- (a) any amount retrospectively treated as earnings by regulations made by virtue of section 4B(2) of the Act⁽¹²⁾;
 - (b) 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;
 - (c) 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;
 - (d) 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⁽¹³⁾;
 - (e) any sum payable by way of statutory sick pay, including sums payable in accordance with regulations made under section 151(6) of the Act;
 - (f) any sum payable by way of statutory maternity pay;
 - (g) any sum payable by way of ordinary statutory paternity pay;
 - (h) any sum payable by way of additional statutory paternity pay; and
 - (i) any sum payable by way of statutory adoption pay.

Normal weekly earnings

32.—(1) For the purposes of Part 12ZA 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 additional 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 additional statutory paternity pay (adoption), 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;
- “day of payment” means a day on which the person was paid; and
- “normal pay day” means a day on which the terms of a person’s contract of service require that person to be paid, or the practice in that person’s employment is for that person to be paid, if any payment is due to them.

(3) Subject to paragraph (4), the relevant period for the purposes of section 171ZJ(6) (as such provision applies to additional statutory paternity pay) is the period between—

- (a) the last normal pay day to fall before the appropriate date; and

⁽¹¹⁾ Section 10A was inserted by section 53 of the Social Security Act 1998 (c. 14).

⁽¹²⁾ Section 4B was inserted by section 1(1) of the National Insurance Contributions Act 2006 (c. 10).

⁽¹³⁾ 1992 c. 52.

- (b) the last normal pay day to fall at least eight 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) that person’s normal weekly earnings shall be calculated by dividing their 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 their earnings in the relevant period by the number of days in the relevant period and multiplying the result by seven.

(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 additional statutory paternity pay

33. Payments of additional statutory paternity 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 additional statutory paternity pay is to be paid

34.—(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 theirs, 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 Revenue and Customs under section 8(1) of the Social Security Contributions (Transfer of Functions, etc) Act 1999⁽¹⁴⁾ as a result of which a person is entitled to an amount of additional statutory paternity 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 additional statutory paternity 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;

⁽¹⁴⁾ 1999 c. 2. Section 8(1) was amended by the Work and Families Act 2006 (c. 18), Schedule 1, paragraph 46(1) and (2).

- (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 their 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 Commissioners to pay additional statutory paternity pay

35.—(1) Where—

- (a) an officer of Revenue and Customs has decided that an employer is liable to make payments of additional statutory paternity pay;
- (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 additional statutory paternity pay but did not do so, and for any subsequent weeks in the additional statutory paternity pay period, the liability to make those payments shall, notwithstanding section 171ZED of the Act, be that of the Commissioners and not the employer.

(2) Liability to make payments of additional statutory paternity pay shall, notwithstanding section 171ZED of the Act, be a liability of the Commissioners and not the employer as from the week in which the employer first becomes insolvent until the end of the additional statutory paternity 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) the employer has been adjudged bankrupt or has made a composition or arrangement with its creditors;
 - (ii) the employer has died and the employer's estate falls to be administered in accordance with an order made under section 421 of the Insolvency Act 1986⁽¹⁵⁾; or
 - (iii) where an employer is a company or a limited liability partnership, a winding-up 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 it enters administration, 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—

⁽¹⁵⁾ 1986 c. 45.

- (i) an award of sequestration is made on the employer's estate or the employer executes a trust deed for its creditors or enters into a composition contract;
- (ii) the employer has died and a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889⁽¹⁶⁾ is required by that section to divide the employer's insolvent estate among the employer's creditors; or
- (iii) where the employer is a company or a limited liability partnership, a winding-up 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 it enters administration, 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 Commissioners to pay additional statutory paternity pay in cases of legal custody or imprisonment

36.—(1) Where—

- (a) there is liability to pay additional statutory paternity pay in respect of a period which is subsequent to the last week falling within paragraph (1)(c) of regulation 21, or
- (b) there is liability to pay additional statutory paternity pay during a period of detention in legal custody by virtue of the provisions of paragraph (2) of that regulation,

that liability, notwithstanding section 171ZED of the Act, shall be that of the Commissioners and not the employer.

Payments by the Commissioners

37. Where the Commissioners become liable in accordance with regulation 35 or 36 to make payments of additional statutory paternity 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 Commissioners to be appropriate in the circumstance of any particular case.

Persons unable to act

38.—(1) Where to any person—

- (a) additional statutory paternity pay is payable or it is alleged that additional statutory paternity pay is payable;
- (b) that person is unable for the time being to act; and
- (c) either—
 - (i) no deputy has been appointed by the Court of Protection with power to receive additional statutory paternity pay on their behalf, or
 - (ii) in Scotland, their estate is not being administered by a guardian acting or appointed under the Adults with Incapacity (Scotland) Act 2000⁽¹⁷⁾,

the Commissioners may, upon written application to the Commissioners 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 the person unable to act may be entitled under Part 12ZA of the

⁽¹⁶⁾ 1889 c. 39. Section 11A was inserted by the Bankruptcy (Scotland) Act 1985 (c.66), Schedule 7, paragraph 4.

⁽¹⁷⁾ 2000 asp 4.

Act and to deal on behalf of the person unable to act with any sums payable to the person unable to act.

(2) Where the Commissioners 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 their office after having given one month's notice in writing to the Commissioners of their intention to do so; and
- (c) the appointment shall terminate when the Commissioners are notified that a deputy or other person to whom paragraph (1)(c) applies has been appointed.

(3) Anything required by Part 12ZA 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 behalf of the person unable to act, and the receipt of the person so appointed shall be a good discharge to the employer or former employer of the person unable to act for any sum paid.

Service of notices by post

39. 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.