

## STATUTORY INSTRUMENTS

# 2002 No. 2822

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

### 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.

#### Modifications etc. (not altering text)

**C1** Regs. 31-39 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

#### 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<sup>M1</sup> 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

(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.

**Status:** Point in time view as at 30/05/2003.

**Changes to legislation:** There are outstanding changes not yet made by the legislation.gov.uk editorial team to The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details)

**Modifications etc. (not altering text)**

**C1** Regs. 31-39 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

**Marginal Citations**

**M1** [S.I. 1978/1689](#), amended by [S.I. 1980/1713](#), [1984/350](#), [1990/1894](#), [1994/726](#), [1998/1728](#).

**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.

**Modifications etc. (not altering text)**

**C1** Regs. 31-39 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

## 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 <sup>M2</sup>;
- (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 <sup>M3</sup>.

(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.

### Modifications etc. (not altering text)

- C1 Regs. 31-39 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

### Marginal Citations

- M2 1996 c. 18.  
M3 1996 c. 17.

## 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 <sup>M4</sup> 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.

**Status:** Point in time view as at 30/05/2003.

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**Modifications etc. (not altering text)**

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**Marginal Citations**

- M4** 1995 c. 18.

**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.

**Modifications etc. (not altering text)**

- C1** Regs. 31-39 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

**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<sup>M5</sup> 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.

**Modifications etc. (not altering text)**

- C1** Regs. 31-39 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

#### Marginal Citations

M5 1985 c. 17.

#### 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.

#### Modifications etc. (not altering text)

**C1** Regs. 31-39 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

#### 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 <sup>M6</sup>;
- (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;

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- (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.

**Modifications etc. (not altering text)**

**C1** Regs. 31-39 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

**Marginal Citations**

**M6** 1992 c. 52.

**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.

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(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.

**Modifications etc. (not altering text)**

- C2** Reg. 40 applied (with modifications) (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, 3

**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.

**Modifications etc. (not altering text)**

- C3** Regs. 41-47 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

**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 <sup>M7</sup> 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.

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(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.

**Modifications etc. (not altering text)**

**C3** Regs. 41-47 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

**Marginal Citations**

**M7** 1999 c. 2.

**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.

(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<sup>M8</sup>; 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;



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- (ii) he has died and a judicial factor appointed under section 11A of the Judicial Factors (Scotland) Act 1889<sup>M9</sup> 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.

**Modifications etc. (not altering text)**

**C3** Regs. 41-47 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

**Marginal Citations**

**M8** 1986 c. 45.

**M9** 1889 c. 39. Section 11A was inserted by the [Bankruptcy \(Scotland\) Act 1985 \(c. 66\)](#), Schedule 7, paragraph 4.

**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.

**Modifications etc. (not altering text)**

**C3** Regs. 41-47 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

**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.

**Modifications etc. (not altering text)**

**C3** Regs. 41-47 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

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## 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.

### Modifications etc. (not altering text)

C3 Regs. 41-47 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

## 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.

### Modifications etc. (not altering text)

C3 Regs. 41-47 applied (30.5.2003) by [The Statutory Paternity Pay \(Adoption\) and Statutory Adoption Pay \(Adoptions from Overseas\) \(No. 2\) Regulation 2003 \(S.I. 2003/1194\)](#), regs. 1, **3(1)–(3)**

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