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DRAFT STATUTORY INSTRUMENTS

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**2010 No.**

**The Additional Paternity Leave Regulations 2010**

**PART 4**

**PROVISIONS APPLICABLE TO BOTH TYPES  
OF ADDITIONAL PATERNITY LEAVE**

**Disrupted placement or death of a child in the course of additional paternity leave**

**24.**—(1) This regulation applies where, during an employee (“P’s”) leave notice period or additional paternity leave period in respect of a child (“C”)—

- (a) C dies, or
- (b) where C has been placed for adoption, C is returned to the adoption agency under sections 32, 33 or 34(3) of the Adoption and Children Act 2002(1) or section 25(6) of the Adoption and Children (Scotland) Act 2007(2).

(2) Subject to regulation 29 (dismissal during additional leave period), in a case where this regulation applies—

- (a) where the end date of P’s leave occurs less than eight weeks after the relevant week, P’s additional paternity leave period ends on the end date,
- (b) where the end date of P’s leave occurs eight or more weeks after the relevant week, P’s additional paternity leave period ends eight weeks after the end of the relevant week.

(3) For the purposes of paragraph (2)—

- (a) the relevant week means the period of seven days beginning with Sunday, during which—
  - (i) in a case falling within paragraph (1)(a), C dies,
  - (ii) in a case falling within paragraph (1)(b), C is returned to the adoption agency.
- (b) the end date of P’s leave is—
  - (i) the end date notified by P in accordance with regulation 6(1), 12(1), 16(1) or 22(1),
  - (ii) where P has varied the end date, that most recently varied in accordance with regulation 7(1), 13(1), 13(2), 17(1), 23(1), or 23(2),
  - (iii) where E required P to take leave, or remain on leave, the end date determined by E in accordance with regulation 6(5), 6(7), 7(2), 12(7), 12(9), 13(3), 16(5), 16(7), 17(2), 22(7), 22(9) and 23(3) and notified to P in accordance with regulation 8(2), 8(2) as modified by regulation 10, 18(2) or 18(2) as modified by regulation 20 as applicable, or
  - (iv) where applicable, regulation 30.

(4) In paragraph (1), P’s leave notice period is the period starting on the day P notifies E in accordance with regulation 6(1), 12(1), 16(1) or 22(1) of P’s intention to take additional paternity leave and ending on the day before the day that leave begins.

### **Return to work**

**25.** For the purposes of these Regulations, a mother (“M”) or adopter (“A”) is treated as returning to work if one of the following situations applies—

- (a) in a case where M or A is entitled to maternity leave or to adoption leave in respect of a child (“C”), the leave period has ended;
- (b) in a case where M or A is entitled, in respect of C, to payment of:
  - (i) maternity allowance, that payment is not payable by virtue of regulations made under section 35(3)(a)(i) of the Social Security Contributions and Benefits Act 1992(3);
  - (ii) to statutory maternity pay, that payment is not payable in accordance with section 165(4) or (6) of the Social Security Contributions and Benefits Act 1992(4); or
  - (iii) statutory adoption pay, that payment is not payable in accordance with section 171ZN(3) or (5) of the Social Security Contributions and Benefits Act 1992 Act(5);
- (c) in a case where both (a) and (b) apply, the conditions in both (a) and (b) are satisfied.

### **Work during an additional paternity leave period**

**26.—**(1) P may carry out up to ten days’ work for P’s employer (“E”) during P’s additional paternity leave period without bringing the additional paternity leave period to an end.

(2) For the purposes of this regulation, any work carried out on any day shall constitute a day’s work.

(3) Subject to paragraph (4), for the purposes of this regulation, work means any work done under the contract of employment and may include training or any activity undertaken for the purposes of keeping in touch with the workplace.

(4) Reasonable contact from time to time between P and E which either party is entitled to make during an additional paternity leave period (for example to discuss P’s return to work) shall not bring that period to an end.

(5) This regulation does not confer any right on E to require that any work be carried out during the additional paternity leave period, nor any right on P to work during the additional paternity leave period.

(6) Any days’ work carried out under this regulation shall not have the effect of extending the total duration of the additional paternity leave period.

### **Application of terms and conditions during additional paternity leave**

**27.—**(1) During the period of additional paternity leave, P—

- (a) is entitled to the benefit of all of the terms and conditions of employment which would have applied if P had not been absent, and

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

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

(5) Section 171ZN 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).

(b) is bound by any obligations arising under those terms and conditions, subject only to the exception in section 80C(1)(b) of the 1996 Act<sup>(6)</sup>.

(2) In paragraph (1)(a), “terms and conditions of employment” has the meaning given by section 80C(5) of the 1996 Act, and accordingly does not include terms and conditions about remuneration.

(3) For the purposes of section 80C of the 1996 Act, only sums payable to P by way of wages or salary are to be treated as remuneration.

(4) In the case of accrual of rights under an employment-related benefit scheme within the meaning given by paragraph 7 of Schedule 5 to the Social Security Act 1989<sup>(7)</sup>, nothing in paragraph (1)(a) shall be taken to impose a requirement which exceeds the requirements of paragraph 5A of that Schedule.

### **Redundancy during additional paternity leave**

**28.**—(1) This regulation applies where, during P’s additional paternity leave period, it is not practicable by reason of redundancy for E to continue to employ P under P’s existing contract of employment.

(2) Where there is a suitable alternative vacancy, P is entitled to be offered (before the end of P’s employment under P’s existing contract) alternative employment with E or E’s successor, or an associated employer, under a new contract of employment which complies with paragraph (3) and takes effect immediately on the ending of P’s employment under the previous contract.

(3) The new contract of employment must be such that—

- (a) the work to be done under it is of a kind which is both suitable in relation to P and appropriate for P to do in the circumstances, and
- (b) its provisions as to the capacity and place in which P is to be employed, and as to the other terms and conditions of P’s employment, are not substantially less favourable to P than if P had continued to be employed under the previous contract.

### **Dismissal during additional paternity leave**

**29.** Where P is dismissed after P’s additional paternity leave period has begun but before the time when (apart from this regulation) that period would end, the period ends at the time of the dismissal.

### **Early return from additional paternity leave period**

**30.**—(1) Subject to regulations 13(1) and 23(1) (variation or cancellation of leave in the event of death of the mother or adopter), where, after P’s additional leave period has begun, P intends to return to work earlier than the end of P’s additional paternity leave period, P must give E at least six weeks’ notice of the date on which P intends to return.

(2) If P attempts to return to work earlier than the end of P’s additional paternity leave period without complying with paragraph (1), E is entitled to postpone P’s return to a date such as will secure, subject to paragraph (5), that E has six weeks’ notice of P’s return.

(3) Where P complies with P’s obligations in paragraph (1), or where E has postponed P’s return in the circumstances described in paragraph (2), if P then decides to return to work—

- (a) earlier than the original return date, P must give E not less than six weeks’ notice of the date on which P now intends to return;

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<sup>(6)</sup> Section 80C was inserted by section 1 of the Employment Act 2002 (c.22) and subsequently amended by the Work and Families Act 2006 (c.18), section 5.

<sup>(7)</sup> 1989 c.24. This has been prospectively amended by the Pension Schemes Act 1993 (c. 48), section 190, Schedule 7, paragraph 2, from a day to be appointed.

(b) later than the original return date, P must give E not less than six weeks' notice ending with the original return date.

(4) In paragraph (3) the "original return date" means the date which P notified E as the date of P's return to work under paragraph (1) or the date to which P's return was postponed by E under paragraph (2).

(5) In a case where P's return to work has been postponed under paragraph (2) and P—

(a) has been notified that P is not to return to work before the date to which P's return was postponed, and

(b) returns to work before that date,

E is under no contractual obligation to pay P's remuneration until the date to which P's was postponed.

(6) This regulation does not apply in a case where E fails to notify P of the date on which P's additional paternity leave period ends, in accordance with regulation 8, regulation 8 as modified by regulation 10, regulation 18 or regulation 18 as modified by regulation 20 (confirmation of period of leave), as applicable.

### **Right to return after additional paternity leave**

**31.—**(1) In a case where P returns to work after a period of additional paternity leave, lasting no longer than 26 weeks, which was—

(a) an isolated period of leave, or

(b) the last of two or more consecutive periods of statutory leave, which did not include any period of additional maternity leave or additional adoption leave or a period of parental leave of more than four weeks,

P is entitled to return from leave to the job in which P was employed before P's absence.

(2) In a case where P returns to work after a period of additional paternity leave not falling within the description in paragraph (1)(a) or (b) above, P is entitled to return from leave to the job in which P was employed before P's absence, or, if it is not reasonably practicable for E to permit P to return to that job, to another job which is both suitable for P and appropriate for P to do in the circumstances.

(3) The reference in paragraphs (1) and (2) to the job in which P was employed before P's absence is a reference to the job in which P was employed—

(a) if P's return is from an isolated period of additional paternity leave, immediately before that period began,

(b) if P's return is from consecutive periods of statutory leave, immediately before the first such period.

(4) This regulation does not apply where regulation 28 applies.

### **Incidents of the right to return after additional paternity leave**

**32.—**(1) P's right to return under regulation 31 is a right to return—

(a) with P's seniority, pension rights and similar rights as they would have been if P had not been absent, and

(b) on terms and conditions not less favourable than those which would have applied if P had not been absent.

(2) In the case of accrual of rights under an employment-related benefit scheme within the meaning given by paragraph 7 of Schedule 5 to the Social Security Act 1989, nothing in paragraph (1)

(a) shall be taken to impose a requirement which exceeds the requirements of paragraphs 5 to 6 of that Schedule.

(3) The provisions in paragraph (1)(a) for P to be treated as if P had not been absent refer to P's absence—

- (a) if P's return is from an isolated period of additional paternity leave, since the beginning of that period,
- (b) if P's return is from consecutive periods of statutory leave, since the beginning of the first such period.

### **Protection from detriment**

**33.**—(1) P is entitled under section 47C of the 1996 Act not to be subjected to any detriment by any act, or any deliberate failure to act, by E because—

- (a) P took, sought to take or made use of the benefits of additional paternity leave;
- (b) E believed that P was likely to take additional paternity leave;
- (c) P failed to return after a period of additional paternity leave in a case where—
  - (i) E did not notify P, in accordance with regulations 8, 8 as modified by regulation 10, 18, 18 as modified by regulation 20, or otherwise, of the date on which that period ended, and P reasonably believed that the period had not ended, or
  - (ii) E gave P less than 28 days' notice of the date on which the period would end, and it was not reasonably practicable for P to return on that date;
- (d) P undertook, considered undertaking or refused to undertake work in accordance with regulation 26.

(2) For the purposes of paragraph (1)(a), P makes use of the benefits of additional paternity leave if, during P's additional paternity leave period, P benefits from any of the terms and conditions of P's employment preserved by section 80C of the 1996 Act and regulation 27 during that period.

(3) Paragraph (1) does not apply where the detriment in question amounts to dismissal within the meaning of Part 10 of the 1996 Act.

### **Unfair dismissal**

**34.**—(1) In a case where P is dismissed, P is entitled under section 99 of the 1996 Act<sup>(8)</sup> to be regarded for the purpose of Part 10 of that Act as unfairly dismissed if—

- (a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3), or
- (b) the reason or principal reason for the dismissal is that P is redundant and regulation 28 has not been complied with.

(2) In a case where P is dismissed, P shall also be regarded for the purposes of Part 10 of the 1996 Act as unfairly dismissed if—

- (a) the reason (or, if more than one, the principal reason) for the dismissal is that P was redundant,
- (b) it is shown that the circumstances constituting the redundancy applied equally to one or more employees in the same undertaking who had positions similar to that held by P and who have not been dismissed by E, and

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<sup>(8)</sup> Section 99 was substituted by the Employment Relations Act 1999, Schedule 4, Part 3, paragraphs 5 and 16, and amended by the Employment Act 2002, Schedule 7, paragraphs 24 and 33 and by the Work and Families Act 2006, Schedule 1, paragraph 41.

- (c) it is shown that the reason (or if more than one, the principal reason) for which P was selected for dismissal was a reason of a kind specified in paragraph (3).
- (3) The kinds of reason referred to in paragraph (1) and (2) are reasons connected with any of the following facts—
- (a) that P took, sought to take or made use of the benefits of, additional paternity leave;
  - (b) that E believed that P was likely to take additional paternity leave;
  - (c) that P failed to return after a period of additional paternity leave in a case where—
    - (i) E did not notify P, in accordance with regulations 8, 8 as modified by regulation 10, 18, 18 as modified by regulation 20, or otherwise, of the date on which that period ended, and P reasonably believed that the period had not ended, or
    - (ii) that E gave P less than 28 days' notice of the date on which the period would end, and it was not reasonably practicable for P to return on that date; or
  - (d) that P undertook, considered undertaking or refused to undertake work in accordance with regulation 26.
- (4) For the purposes of paragraph (3)(a), P makes use of the benefits of additional paternity leave if, during P's additional paternity leave period, P benefits from any of the terms and conditions of P's employment preserved by section 80C of the 1996 Act and regulation 27 during that period.
- (5) Paragraph (1) does not apply in relation to P if—
- (a) it is not reasonably practicable for a reason other than redundancy for E (who may be E or a successor of E) to permit P to return to a job which is both suitable for P and appropriate for P to do in the circumstances,
  - (b) an associated employer offers P a job of that kind, and
  - (c) P accepts or unreasonably refuses that offer.
- (6) Where, on a complaint of unfair dismissal, any question arises as to whether the operation of paragraph (1) is excluded by the provisions of paragraph (5), it is for E to show that the provision in question was satisfied in relation to the complainant.

### **Contractual rights to additional paternity leave**

**35.**—(1) This regulation applies where P is entitled to additional paternity leave (referred to in paragraph (2) as a “statutory right”) and also to a right which corresponds to that right and which arises under P's contract of employment or otherwise.

- (2) In a case where this regulation applies—
- (a) P may not exercise the statutory right and the corresponding right separately but may, in taking the leave for which the two rights provide, take advantage of whichever right is, in any particular respect, the more favourable, and
  - (b) the provisions of the 1996 Act and of these Regulations relating to the statutory right apply, subject to any modifications necessary to give effect to any more favourable contractual terms, to the exercise of the composite right described in sub-paragraph (a) as they apply to the exercise of the statutory right.

### **Calculation of a week's pay**

- 36.** Where—
- (a) under Chapter 2 of Part 14 of the 1996 Act, the amount of a week's pay of an employee falls to be calculated by reference to the average rate of remuneration, or the average amount

of remuneration, payable to the employee in respect of a period of 12 weeks ending on a particular date (referred to as “the calculation date”),

- (b) during a week in that period, the employee was absent from work on additional paternity leave, and
- (c) remuneration is payable to the employee in respect of that week under the employee’s contract of employment, but the amount payable is less than the amount that would be payable if the employee were working,

that week shall be disregarded for the purpose of the calculation and account shall be taken of remuneration in earlier weeks so as to bring up to twelve the number of weeks of which account is taken.