

EMPLOYMENT ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part One: Statutory Leave and Pay

Chapter One: Paternity and adoption leave and pay

7. In the 2001 General Election manifesto the Government made a commitment to “help parents devote more time to their children early in life”. The Government launched a review of maternity and parental rights in the early summer of 2000. The terms of reference of the review were to “consider the steps needed to make sure that parents have choices to help them balance the needs of their work and their children so that they may contribute fully to the competitiveness and productivity of the modern economy”. The review led to the publication of the Green Paper ‘Work and Parents: Competitiveness and Choice’ in December 2000. The consultation process initiated by the Green Paper closed in early March 2001. Following on from an announcement made by the Prime Minister in the light of the results of the Green Paper consultation, it was announced in the Chancellor’s Budget Statement on 7 March 2001 that extensions to maternity and parental rights would be provided. These included the introduction of a new right to two weeks’ paid paternity leave, and 26 weeks’ paid adoption leave. All the measures were to be implemented from 2003. Subsequently, the Government published three framework documents¹ taking forward the options for simplification of maternity leave, paternity leave and adoption leave. After the close of the consultation exercise that followed, the Government response to the consultation² was published.
8. **Sections 1-16** make provision for new rights for paternity and adoption leave and pay. These include:
 - Paternity leave following the birth of a child or the placement of a child for adoption. This will be for a period of up to two weeks.
 - Adoption leave around the placement of a child for adoption. This will be for a period of up to one year.
 - Statutory Paternity Pay for a period of up to two weeks.
 - Statutory Adoption Pay for a period of up to 26 weeks.

1 *Work and Parents: Competitiveness and Choice, a framework for simplification* - published May 2001 (available at <http://www.dti.gov.uk/er/review.htm>)

Work and Parents: Competitiveness and Choice, a framework for paternity leave - published May 2001 (available at <http://www.dti.gov.uk/er/review.htm>)

Work and Parents: Competitiveness and Choice, a framework for adoption leave - published May 2001 (available at <http://www.dti.gov.uk/er/review.htm>)

2 *Work and Parents: Competitiveness and Choice, Government response on simplification of maternity leave, paternity leave and adoption leave* - published November 2001 (available at <http://www.dti.gov.uk/er/review.htm>)

Paternity leave and Statutory Paternity Pay

9. Since 1999 fathers have been entitled to unpaid parental leave but they have not until now had a statutory right to paid leave to care for a child. Paid paternity leave in some form is offered by many employers - either on an ad hoc basis (as in many small firms) or as a formalised policy for all staff.
10. After the consultation process ended in 2001, the Government announced it was introducing a right to two weeks' paid paternity leave from 2003. The new right to paternity leave is in addition to the right to 13 parental leave weeks' (18 weeks' for parents of disabled children) provided for in regulations made under the Employment Rights Act 1996. Statutory Paternity Pay will be financed by the state, with employers able to recover most or all of the amount of Statutory Paternity Pay they pay out.

Section 1: Paternity leave

11. This section makes provision for the introduction of a new statutory right to two weeks' paternity leave. Regulations will provide for this to be taken in a single block of either one week or two weeks at the choice of the father. The intention is to make paternity leave available to fathers following the birth of a child or the placement of a child for adoption.
12. The provisions set out in the section are similar in construction to the provisions in the Employment Rights Act 1996 (ERA) in relation to parental leave, and this section inserts them into the ERA.
13. Regulations will be made making paternity leave available to an employee:
 - who has a relationship (to be specified in regulations) with a newborn child, or a child newly placed for adoption, and has a relationship (to be specified in regulations) with the mother or adoptive parent. It is intended that paternity leave will be available to an employee who expects to be parenting the newborn child or the child placed for adoption;
 - who gives appropriate notification;
 - who gives his employer a self-certificate to support his entitlement to leave, if requested to do so by his employer.
14. As it is intended that adoption leave will only be available to one spouse in cases where a married couple adopts a child, paternity leave will be available to the other spouse. For practical reasons there will be slight differences in how paternity leave operates as between those adopting within the UK and those adopting overseas. Provisions for overseas adoptions will be made in regulations.
15. Paternity leave will be available to an employee who has completed a period of qualifying service. It is intended that the requirement will be continuous service with the same employer for at least 26 weeks by the fifteenth week before the child is expected to be born, or by the week in which an approved match with the child is made. (A match occurs when an approved adoption agency matches an adopter with a child.)
16. An employee will have the right to return to a job following a period of paternity leave. It is intended that regulations will provide for:
 - the right to return to the same job following absence of one week's or two weeks' paternity leave in most cases, and
 - protection for employees from detriment and unfair dismissal in connection with paternity leave.

Section 2: Statutory Paternity Pay

17. This section incorporates provisions into the Social Security Contributions and Benefits Act 1992 conferring a new statutory right to Statutory Paternity Pay for fathers following the birth of a child or the placement of a child for adoption. Statutory Paternity Pay is to be paid for a period of two weeks, or if regulations so provide, a period of a week or two periods of a week. Regulations will provide for the father to choose to be paid for a single period of one week or two weeks. Statutory Paternity Pay will generally be payable for paternity leave taken within 56 days of the date on which the child is born or placed for adoption.
18. The rate of Statutory Paternity Pay will be set in regulations. From April 2003 it will be the lesser of £100 per week or 90% of the employee's average weekly earnings.
19. Statutory Paternity Pay will be available to an employee who has met the service qualification (continuous service with the same employer for at least 26 weeks by the fifteenth week before the child is expected to be born or by the week in which an approved match is made with the child; and continuous service from that week up to the child's date of birth or placement), has a relationship (to be specified in regulations) with the child and the mother or adoptive parent, gives appropriate notification, and whose average weekly earnings are equal to or above the Lower Earnings Limit applying to National Insurance Contributions (NICs) (£75 per week from April 2002). For practical reasons there will be slight differences in how paternity leave operates between those adopting within the UK and those adopting overseas. Provisions for overseas adoptions will be made in regulations. It is planned that employees who are entitled to Statutory Paternity Pay will have an obligation to give their employer a self-certificate to support their entitlement to pay (the same self-certificate as for paternity leave).
20. Statutory Paternity Pay will be administered by employers in the same way as Statutory Maternity Pay. Employers will be able to recover a percentage of the amount of Statutory Paternity Pay they pay out (limited in most cases to 92%), with small employers who are entitled to Small Employers' Relief (in 2002/3, those with NICs due in a year of £40,000 or less) able to claim 100% and an added payment (in 2002/3 of 4.5% for Statutory Maternity Pay) to compensate for employers' share of National Insurance Contributions payable in respect of Statutory Paternity Pay. Section 7 of the Act provides for a power to make regulations to enable employers to ask for funding, if necessary in advance, from the Inland Revenue where the amount of Statutory Paternity Pay they have to pay their employees exceeds the amount of tax and NICs or Student Loan deductions that they are due to pay to the Inland Revenue. In certain circumstances where an employer fails to pay Statutory Paternity Pay, the Inland Revenue will become responsible for the payment. Liability will also fall on the Inland Revenue from the first week in which an employer becomes insolvent.
21. The framework for Statutory Paternity Pay is similar to that already in place for Statutory Maternity Pay and Working Families' Tax Credit . The distribution of rights and obligations as between primary and secondary legislation follows the model of the Social Security Contributions and Benefits Act 1992 and Tax Credits Act 1999. As under those Acts, administrative and enforcement powers are conferred on the Inland Revenue. Sections 13 - 15 also provide for the exchange of information about Statutory Paternity Pay between the Inland Revenue, the DTI and other relevant departments.
22. To ensure compliance the sections provide for:
 - Employers to keep appropriate records and to make periodic returns to the Inland Revenue
 - Employers to produce those records for inspection by the Inland Revenue
 - Employers to provide information about entitlement to their employees

- The Inland Revenue to be able to obtain information from both employers and applicants for Statutory Paternity Pay
- The Inland Revenue to impose penalties where there is refusal or repeated failure to comply
- The Inland Revenue to make decisions on entitlement in the event of dispute
- Appeals against decisions made and penalties awarded to be heard by the Independent Tax Commissioners.

Adoption leave and Statutory Adoption Pay

23. Since 1999 adoptive parents have been entitled to unpaid parental leave but they have not until now had a statutory right to paid leave to care for a child. It is best practice for at least one adoptive parent to spend time at home with the child in the months following placement. Support to adoptive parents is currently offered by about a third of employers. After the consultation process ended in 2001, the Government announced it was introducing a right to 26 weeks' paid adoption leave from 2003.
24. **Section 3** inserts provisions into the Employment Rights Act 1996 for an adoptive parent to take adoption leave around the placement of a child for adoption. Paid adoption leave will provide time for the adoptive child and parent to adjust to their new relationships. It is hoped that enabling adoptive parents to spend more time with their child will help reduce the number of disrupted placements. The right to return to a job after adoption leave is also intended to benefit those parents who would prefer to return to the labour market but might otherwise have difficulty doing so. Together, the sections on adoption leave and Statutory Adoption Pay aim to fulfil these objectives. The new right to adoption leave is in addition to the right to 13 weeks' parental leave (18 weeks for parents of disabled children) provided for in regulations made under the Employment Rights Act 1996. The new right to Statutory Adoption Pay will be financed by the state, with employers able to recover a percentage of the amount of Statutory Adoption Pay they pay out.

Section 3: Adoption leave

25. This section contains provision for a new statutory right to ordinary adoption leave and additional adoption leave for an adoptive parent around the time of placement of a child for adoption. Regulations will determine the entitlement to, and details of, the leave. It is intended that adoption leave will be available whether the child is being adopted within the UK or from overseas. For practical reasons, there will be slight differences to some elements of the provisions for domestic and overseas adoptions. It is intended that ordinary adoption leave will be for a period of up to 26 weeks and additional adoption leave will be for a further period of up to 26 weeks, giving a total of up to one year's leave.
26. The new provisions are framed in a similar way to provisions in the Employment Rights Act 1996 (ERA) in relation to maternity leave, and section 3 inserts them into the ERA.
27. Regulations will be made making adoption leave available:
- To an adoptive parent who is matched with a child by an approved adoption agency,
 - To employees who give their employer documentary evidence from an approved adoption agency to support their entitlement to leave, if requested to do so by their employer,
 - To both married couples and individuals who adopt,
 - For placements of children up to the age of 18.

28. In cases where a married couple adopts a child, it is planned that only one spouse will be entitled to take the leave. The other spouse will be entitled to two weeks' paternity leave if they meet the qualifying requirements in respect of such leave.
29. Regulations will provide that adoption leave will apply only where the child is newly placed with an adoptive parent - it will not apply to step-family adoptions or adoptions by a child's existing foster carers where there is no placement.
30. Regulations will also provide that adoption leave will be available to an employee who has completed a period of qualifying service. It is intended that the requirement will be continuous service with the same employer for at least 26 weeks by the week in which an approved match with the child is made (a match occurs when an approved adoption agency matches an adopter with a child).
31. An employee will have the right to return to a job following a period of adoption leave. It is intended that regulations will allow for:
 - the right to return to the same job following absence on ordinary adoption leave in most cases,
 - the right to return to the same job, or if that is not reasonably practicable, an appropriate, alternative job, following absence on additional adoption leave, and
 - protection for employees from detriment and unfair dismissal in connection with adoption leave.

Section 4: Statutory Adoption Pay

32. This section contains provisions establishing a new statutory right to Statutory Adoption Pay for adoptive parents around the placement of a child for adoption. Statutory Adoption Pay will be available to an adoptive parent of a child newly placed for adoption - it will not apply to step-family adoptions or adoptions by a child's existing foster carers where there is no new placement - whether the child is being adopted within the UK or from overseas. For practical reasons, there are slight differences to some elements of the provisions for domestic and overseas adoptions. Regulations will set out how Statutory Adoption Pay will apply to overseas adoptions.
33. New section 171ZN, inserted into the Social Security Contributions and Benefits Act 1992 by section 4, provides that Statutory Adoption Pay will be available for a period of up to 26 weeks. The rate of Statutory Adoption Pay will be set in regulations. From April 2003 it will be the lesser of £100 per week or 90% of the employee's average weekly earnings.
34. Statutory Adoption Pay will be available to an employee who has met the service qualification (continuous service with the same employer for at least 26 weeks by the week in which an approved match with the child is made), has an approved match with a child, gives appropriate notification, and whose average weekly earnings are equal to or above the lower earnings limit applying to National Insurance Contributions (£75 a week from April 2002). It is planned that employees who are entitled to Statutory Adoption Pay will have an obligation to give their employer documentary evidence from an approved adoption agency to support their entitlement to pay (the same documentary evidence as for adoption leave).
35. Statutory Adoption Pay will be administered by employers in the same way as Statutory Maternity Pay. Employers will be able to recover a percentage of the amount of Statutory Adoption Pay they pay out (limited in most cases to 92%), with small employers who are entitled to Small Employers' Relief (in 2002/3, those with NICs due in a year of £40,000 or less) able to claim 100% and an added payment (in 2002/3 of 4.5% for Statutory Maternity Pay) to compensate for employers' share of National Insurance Contributions payable in respect of Statutory Adoption Pay. Section 7 of the Act provides for a power to make regulations to enable employers to ask

for funding, if necessary in advance, from the Inland Revenue where the amount of Statutory Adoption Pay they have to pay their employees exceeds the amount of tax and NICs or Student Loan deductions that they are due to pay to the Inland Revenue. In certain circumstances, where an employer fails to pay Statutory Adoption Pay, the Inland Revenue will become responsible for the payment. Liability will also fall on the Inland Revenue from the first week in which an employer becomes insolvent.

36. The framework for Statutory Adoption Pay is similar to that already in place for Statutory Maternity Pay and Working Families' Tax Credit. The distribution of rights and obligations between primary and secondary legislation is similar to that provided for in the Social Security Contributions and Benefits Act 1992 and Tax Credits Act 1999. As under those Acts, administrative and enforcement powers are to be conferred on the Inland Revenue. Sections 13 - 15 provide for the exchange of information about Statutory Adoption Pay between the Inland Revenue, the DTI and other relevant departments.
37. To ensure compliance the sections provide for:
- Employers to keep appropriate records and to make periodic returns to the Inland Revenue
 - Employers to produce those records for inspection by the Inland Revenue
 - Employers to provide information about entitlement to their employees
 - The Inland Revenue to be able to obtain information from both employers and applicants for Statutory Adoption Pay
 - The Inland Revenue to impose penalties where there is refusal or repeated failure to comply
 - The Inland Revenue to make decisions on entitlement in the event of dispute
 - Appeals against decisions made and penalties awarded to be heard by the independent Tax Commissioners

Section 17: Maternity Leave

38. In May 2001, the Secretary of State for Trade and Industry announced that ordinary maternity leave would be increased to 26 weeks, followed by 26 weeks additional maternity leave, giving most mothers up to one year's maternity leave in total. These changes will be made in regulations.
39. This section amends Section 71(4) of the Employment Rights Act 1996 to enable the regulations to address the implications of the extension to maternity leave when a woman is returning to work.

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

40. **Section 18-21 and 48** (see paragraph 142) make changes to Statutory Maternity Pay and Maternity Allowance as announced in the 2001 Budget in the light of responses to the Green Paper "Work and Parents: Competitiveness and Choice". There are also measures to simplify and clarify the arrangements for women and employers. There are two maternity benefits for pregnant working women. Statutory Maternity Pay (SMP) is administered and paid by employers; Maternity Allowance (MA) is paid by the Department for Work and Pensions (DWP). Both are currently paid for a maximum of 18 weeks.
- SMP is paid to employees who satisfy two basic tests. A woman must have been employed continuously by her employer for at least 26 weeks into the 15th week before the expected week of confinement (EWC); and she must earn on average at or above the Lower Earnings Limit (£75 from April 2002). There are two weekly

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(c.22) which received Royal Assent on 8 July 2002*

rates. The higher rate is 90% of the employee's average weekly earnings and is payable for the first six weeks for which SMP is payable. The lower rate is a standard rate (£75 from April 2002) which is reviewed annually and is payable for the remaining weeks of the Maternity Pay Period.

- MA is paid to certain women who do not qualify for SMP, to the self-employed, and to recently employed women. To qualify, they must have been employed or self-employed in at least 26 of the 66 weeks (the test period) ending with the week before the EWC. There are two rates of MA. Women whose average earnings are at least equal to the LEL in force at the beginning of their test period receive standard rate MA (equal to the standard rate of SMP, £75 from April 2002). Women whose average earnings are below that LEL but at least £30 receive 90% of their average weekly earnings (subject to a £75 maximum from April 2002).
41. There are a small number of women who cannot qualify for SMP if they leave their employment after the 15th week before the EWC but before the SMP payment period can commence (from the 11th week before the EWC unless triggered by earlier childbirth). Prior to a decision of a Social Security Commissioner in 2000 it was always understood that women who left their employment after the 15th week before the EWC for whatever reason, would still receive SMP. However, the Social Security Commissioner determined that if a woman ceased to work for her employer for reasons that were not wholly or partly due to her pregnancy, she would not qualify for SMP. Secondary legislation was introduced in 2000 to restore SMP in many of these cases but the primary powers were insufficient to restore SMP to those few women who leave work voluntarily for reasons wholly unrelated to their pregnancy. This group, who it was always expected would be entitled to SMP, are therefore currently unable to get SMP.
42. Employers can recover most of the SMP they pay out by making deductions from their contribution payments made to the Inland Revenue. Where SMP has been paid and the amount of SMP due to be recovered exceeds such contribution payments the employer may apply to the Inland Revenue for payment. Currently the rules restrict recovery to contribution payments and allow payments of any excess only to be refundable in arrears. This is less flexible for employers than the arrangements proposed for adoption and paternity pay, where recovery can be made from other payments due to the Inland Revenue and payment of the excess made in advance.
43. In summary, the sections increase the standard rate of SMP and MA, extend the payment period, safeguard an employee's entitlement to SMP at the 15th week before the EWC and enable employers to recover SMP in advance and from all payments due to the Inland Revenue. The changes to the rate of SMP and MA will apply to women in receipt of maternity pay on or after 6 April 2003. All other changes will apply to women with an expected week of childbirth beginning on or after 6 April 2003.
44. In particular, sections 18-21 and 48 (see paragraph 141):
- Extend the payment period of MA and SMP from 18 to 26 weeks.
 - Allow for an increase in the standard rate of MA and SMP to £100 a week, or 90% of weekly earnings if this is less than £100. In the case of SMP a woman will receive 90% of her average weekly earnings for the first 6 weeks for which SMP is payable (as now).
 - Increase the minimum period of notice that must be given to employers for SMP from 21 days to 28 days.
 - Safeguard an employee's entitlement to SMP from the 15th week before the EWC on her satisfying the employment and earnings tests and giving notice where appropriate. This will be the case even if should happen that, *for whatever reason*, her employment ends after this point.

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- Allow an employer to offset his SMP payments against any payments due to be made to the Inland Revenue as may be prescribed in regulations. Regulations may also provide for employers to apply for advance funding if the amount they are due to pay in SMP will exceed the tax, national insurance and other allowable payments due to be made to the Inland Revenue.

45. [Sections 18-21](#) and [48](#) (see paragraph 141) amend sections 35, 35A, 164, 165, 166 and 167 of the 1992 Social Security Contributions and Benefits Act 1992, which contains the rules for Statutory Maternity Pay and Maternity Allowance.

Section 18: Maternity Pay Period

46. This section amends section 165(1) of the Social Security Contributions and Benefits Act 1992 by extending the period of SMP from 18 to 26 weeks.
47. Section 35(2) of the Social Security Contributions and Benefits Act 1992 links the MA period directly to section 165 and hence to the SMP period. Consequently, the period of MA is also extended.

Section 19: Rate of Statutory Maternity Pay

48. This section inserts a new section 166 of the Social Security Contributions and Benefits Act 1992, which sets out the rate of SMP.
49. The inserted section 166(1) provides that, as before, a woman shall be paid at the earnings-related rate (90% of her average weekly earnings) for the first 6 weeks for which it is payable. But this rate is no longer underpinned by the flat rate. For the remaining 20 weeks, the woman will receive a prescribed standard rate (£100 a week) unless this exceeds her earnings-related rate, in which case, she will receive the earnings-related rate for the entire pay period.

Example:

- Woman **A** earns an average of £200 a week. She therefore receives SMP at £180 for the first 6 weeks, then £100 for the remaining 20 weeks.
- Woman **B** earns an average of £90 a week. She therefore receives SMP at £81 for the whole 26 week period because the earnings-related rate is less than the flat rate.

50. The inserted subsection 166(2) states that (as now) the earnings-related rate is calculated on the basis of average earnings during the 8 weeks immediately preceding the 14th week before the EWC.
51. The inserted subsection 166(3) ensures that (as now) the weekly standard rate must not be less than the weekly rate of Statutory Sick Pay.

Section 20: Entitlement to Statutory Maternity Pay

52. This section amends section 164 of the Social Security Contributions and Benefits Act 1992. Section 164 deals with a woman's entitlement to SMP and employers' liability to pay it. In particular:
- Paragraph (a) amends section 164(2)(a) of the Act. The amendment does not affect the requirement for a woman to have been employed by her employer for a continuous period of 26 weeks into the 15th week before her expected week of confinement. She must also have ceased to work for him but the requirement that she ceases work "wholly or partly because of pregnancy or confinement" is omitted. This restores the original intention which is to safeguard a woman's entitlement to SMP should her employment end for whatever reason after the beginning of the 15th week.

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- Paragraph (b) replaces section 164(4) which sets out the notice a woman is required to give her employer of the start of her maternity pay period. Instead of requiring a woman to give notice of her absence from work because of her pregnancy, she is required to give her employer notice of the date she expects his liability to pay her SMP to start. In addition the minimum notice period is increased from 21 days to 28 days to harmonise with similar changes to maternity leave.
- Paragraphs (c) and (d) provide a power, as now, to modify the entitlement and notice provisions in certain cases; for example early birth.

Section 21: Funding of employers' liabilities: Statutory Maternity Pay

53. Subsection (1) of this section inserts a new section 167 in the Social Security Contributions and Benefits Act 1992, which provides for employers to recover most or all of the Statutory Maternity Pay they have paid out.
54. The inserted section 167, as now, provides for regulations to be made so that employers can recover 92% of the amount paid out by way of Statutory Maternity Pay and for small employers to recover all of the SMP paid out plus an additional amount in compensation for the employers' share of national insurance contributions paid on SMP. As now, the meaning of "small employer" will be defined in regulations by reference to the amount of contribution payments made by an employer.
55. However, subsection (5) of the inserted section 167 provides for regulations to be made so that employers can recover SMP from tax and other payments due to the Inland Revenue and not just from contributions payments as now. In addition regulations will provide for employers to apply for advance payments of SMP if necessary where the amount they have to pay out in SMP exceeds allowable payments due to the Inland Revenue. Regulations (under subsection (5)(c)) will also provide for the Inland Revenue to recover any overpayments generated by such advance payments. This provision aligns SMP recovery with similar provisions being introduced for Statutory Paternity Pay and Statutory Adoption Pay.
56. Subsection (2) makes corresponding provision for Northern Ireland.