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STATUTORY INSTRUMENTS

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**2002 No. 2788**

**TERMS AND CONDITIONS OF EMPLOYMENT**

**The Paternity and Adoption Leave Regulations 2002**

*Made* - - - - *11th November 2002*

*Coming into force* - - *8th December 2002*

Whereas a draft of the following Regulations was laid before Parliament in accordance with section 236(3) of the Employment Rights Act 1996<sup>(1)</sup> and approved by a resolution of each House of Parliament:

Now, therefore, the Secretary of State, in exercise of the powers conferred on her by sections 47C(2), 75A(1) to (3), (6) and (7), 75B(1), (2), (4) and (8), 75C(1) and (2), 75D(1), 80A(1), (2) and (5), 80B(1), (2) and (5), 80C(1) and (6), 80D(1), 80E and 99(1) of that Act<sup>(2)</sup>, hereby makes the following Regulations:—

**PART 1**

**GENERAL**

**Citation and commencement**

1. These Regulations may be cited as the Paternity and Adoption Leave Regulations 2002 and shall come into force on 8th December 2002.

**Interpretation**

2.—(1) In these Regulations—

“the 1996 Act” means the Employment Rights Act 1996;

“additional adoption leave” means leave under section 75B of the 1996 Act;

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(1) [1996 c. 18](#); section 236(3) was amended by paragraph 42 of Part 3 of Schedule 4 to the Employment Relations Act [1999 \(c. 26\)](#) and paragraph 49 of Schedule 7 to the Employment Act [2002 \(c. 22\)](#).

(2) Section 47C of the Employment Rights Act 1996 was inserted by paragraph 8 of Part 3 of Schedule 4 to the Employment Relations Act 1999 and amended by paragraph 26 of Schedule 7 to the Employment Act 2002; sections 75A to 75D were inserted by section 3 of the Employment Act 2002, and sections 80A to 80E by section 1 of that Act; section 99 was substituted by paragraph 16 of Part 3 of Schedule 4 to the 1999 Act and amended by paragraph 33 of Schedule 7 to the Employment Act 2002. The word “prescribed” in section 47C of the 1996 Act is defined in subsection (2) of that section; the same word in sections 75A and 75B of the 1996 Act is defined in section 75D(2), inserted by section 3 of the 2002 Act; in section 99 of the 1996 Act it is defined in subsection (2) of that section.

“additional maternity leave” means leave under section 73 of the 1996 Act;

“adopter”, in relation to a child, means a person who has been matched with the child for adoption, or, in a case where two people have been matched jointly, whichever of them has elected to be the child’s adopter for the purposes of these Regulations;

“adoption agency” has the meaning given, in relation to England and Wales, by section 1(4) of the Adoption Act 1976<sup>(3)</sup> and, in relation to Scotland, by section 1(4) of the Adoption (Scotland) Act 1978<sup>(4)</sup>;

“adoption leave” means ordinary or additional adoption leave;

“child” means a person who is, or when placed with an adopter for adoption was, under the age of 18;

“contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing;

“employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment;

“employer” means the person by whom an employee is (or, where the employment has ceased, was) employed;

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

“ordinary adoption leave” means leave under section 75A of the 1996 Act;

“parental leave” means leave under regulation 13(1) of the Maternity and Parental Leave etc. Regulations 1999<sup>(5)</sup>;

“partner”, in relation to a child’s mother or adopter, means a person (whether of a different sex or the same sex) who lives with the mother or adopter and the child in an enduring family relationship but is not a relative of the mother or adopter of a kind specified in paragraph (2);

“paternity leave” means leave under regulation 4 or regulation 8 of these Regulations;

“statutory leave” means leave provided for in Part 8 of the 1996 Act.

(2) The relatives of a child’s mother or adopter referred to in the definition of “partner” in paragraph (1) are the mother’s or adopter’s parent, grandparent, sister, brother, aunt or uncle.

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

(a) are to relationships of the full blood or half blood or, in the case of an adopted person, such of those relationships as would exist but for the adoption, and

(b) include the relationship of a child with his adoptive, or former adoptive, parents,

but do not include any other adoptive relationships.

(4) For the purposes of these Regulations—

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

(b) a person is notified of having been matched with a child on the date on which he receives notification of the agency’s decision, under regulation 11(2) of the Adoption Agencies Regulations 1983<sup>(6)</sup> or regulation 12(3) of the Adoption Agencies (Scotland) Regulations 1996<sup>(7)</sup>;

(3) 1976 c. 36; section 1(4) was amended by paragraph 5 of Schedule 4 to the Care Standards Act 2000 (c. 14).

(4) 1978 c. 28.

(5) SI 1999/3312, to which there are amendments not relevant to these Regulations.

(6) SI 1983/1964.

(7) SI 1996/3266.

- (c) a person elects to be a child's adopter, in a case where the child is matched with him and another person jointly, if he and that person agree, at the time at which they are matched, that he and not the other person will be the adopter.
- (5) A reference in any provision of these Regulations to a period of continuous employment is to a period computed in accordance with Chapter 1 of Part 14 of the 1996 Act, as if that provision were a provision of that Act.
- (6) For the purposes of these Regulations, any two employers shall be treated as associated if—
  - (a) one is a company of which the other (directly or indirectly) has control; or
  - (b) both are companies of which a third person (directly or indirectly) has control;and "associated employer" shall be construed accordingly.

## **Application**

- 3.—**(1) The provisions relating to paternity leave under regulation 4 below have effect only in relation to children—
- (a) born on or after 6th April 2003, or
  - (b) whose expected week of birth begins on or after that date.
- (2) The provisions relating to paternity leave under regulation 8 and adoption leave under regulation 15 below have effect only in relation to children—
- (a) matched with a person who is notified of having been matched on or after 6th April 2003, or
  - (b) placed for adoption on or after that date.
- (3) Regulation 28 (protection from detriment) has effect only in relation to an act or failure to act which takes place on or after 8th December 2002.
- (4) For the purposes of paragraph (3)—
- (a) where an act extends over a period, the reference to the date of the act is a reference to the last day of that period, and
  - (b) a failure to act is to be treated as done when it was decided on.
- (5) For the purposes of paragraph (4), in the absence of evidence establishing the contrary an employer shall be taken to decide on a failure to act—
- (a) when he does an act inconsistent with doing the failed act, or
  - (b) if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.
- (6) Regulation 29 (unfair dismissal) has effect only in relation to dismissals where the effective date of termination (within the meaning of section 97 of the 1996 Act) falls on or after 8th December 2002.

## **PART 2**

### **PATERNITY LEAVE**

#### **Entitlement to paternity leave: birth**

- 4.—**(1) An employee is entitled to be absent from work for the purpose of caring for a child or supporting the child's mother if he—
- (a) satisfies the conditions specified in paragraph (2), and

- (b) has complied with the notice requirements in regulation 6 and, where applicable, the evidential requirements in that regulation.
- (2) The conditions referred to in paragraph (1) are that the employee—
  - (a) has been continuously employed for a period of not less than 26 weeks ending with the week immediately preceding the 14th week before the expected week of the child's birth;
  - (b) is either—
    - (i) the father of the child or;
    - (ii) married to or the partner of the child's mother, but not the child's father;
  - (c) has, or expects to have—
    - (i) if he is the child's father, responsibility for the upbringing of the child;
    - (ii) if he is the mother's husband or partner but not the child's father, the main responsibility (apart from any responsibility of the mother) for the upbringing of the child.
- (3) An employee shall be treated as having satisfied the condition in paragraph (2)(a) on the date of the child's birth notwithstanding the fact that he has not then been continuously employed for a period of not less than 26 weeks, where—
  - (a) the date on which the child is born is earlier than the 14th week before the week in which its birth is expected, and
  - (b) the employee would have been continuously employed for such a period if his employment had continued until that 14th week.
- (4) An employee shall be treated as having satisfied the condition in paragraph (2)(b)(ii) if he would have satisfied it but for the fact that the child's mother has died.
- (5) An employee shall be treated as having satisfied the condition in paragraph (2)(c) if he would have satisfied it but for the fact that the child was stillborn after 24 weeks of pregnancy or has died.
- (6) An employee's entitlement to leave under this regulation shall not be affected by the birth, or expected birth, of more than one child as a result of the same pregnancy.

#### **Options in respect of leave under regulation 4**

- 5.—**(1) An employee may choose to take either one week's leave or two consecutive weeks' leave in respect of a child under regulation 4.
- (2) The leave may only be taken during the period which begins with the date on which the child is born and ends—
- (a) except in the case referred to in sub-paragraph (b), 56 days after that date;
  - (b) in a case where the child is born before the first day of the expected week of its birth, 56 days after that day.
- (3) Subject to paragraph (2) and, where applicable, paragraph (4), an employee may choose to begin his period of leave on—
- (a) the date on which the child is born;
  - (b) the date falling such number of days after the date on which the child is born as the employee may specify in a notice under regulation 6, or
  - (c) a predetermined date, specified in a notice under that regulation, which is later than the first day of the expected week of the child's birth.
- (4) In a case where the leave is in respect of a child whose expected week of birth begins before 6th April 2003, an employee may choose to begin a period of leave only on a predetermined date,

specified in a notice under regulation 6, which is at least 28 days after the date on which that notice is given.

#### **Notice and evidential requirements for leave under regulation 4**

**6.—(1)** An employee must give his employer notice of his intention to take leave in respect of a child under regulation 4, specifying—

- (a) the expected week of the child's birth;
- (b) the length of the period of leave that, in accordance with regulation 5(1), the employee has chosen to take, and
- (c) the date on which, in accordance with regulation 5(3) or (4), the employee has chosen that his period of leave should begin.

(2) The notice provided for in paragraph (1) must be given to the employer—

- (a) in or before the 15th week before the expected week of the child's birth, or
- (b) in a case where it was not reasonably practicable for the employee to give the notice in accordance with sub-paragraph (a), as soon as is reasonably practicable.

(3) Where the employer requests it, an employee must also give his employer a declaration, signed by the employee, to the effect that the purpose of his absence from work will be that specified in regulation 4(1) and that he satisfies the conditions of entitlement in regulation 4(2)(b) and (c).

(4) An employee who has given notice under paragraph (1) may vary the date he has chosen as the date on which his period of leave will begin, subject to paragraph (5) and provided that he gives his employer notice of the variation—

- (a) where the variation is to provide for the employee's period of leave to begin on the date on which the child is born, at least 28 days before the first day of the expected week of the child's birth;
- (b) where the variation is to provide for the employee's period of leave to begin on a date that is a specified number of days (or a different specified number of days) after the date on which the child is born, at least 28 days before the date falling that number of days after the first day of the expected week of the child's birth;
- (c) where the variation is to provide for the employee's period of leave to begin on a predetermined date (or a different predetermined date), at least 28 days before that date,

or, if it is not reasonably practicable to give the notice at least 28 days before whichever day or date is relevant, as soon as is reasonably practicable.

(5) In a case where regulation 5(4) applies, an employee may only vary the date which he has chosen as the date on which his period of leave will begin by substituting a different predetermined date.

(6) In a case where—

- (a) the employee has chosen to begin his period of leave on a particular predetermined date, and
- (b) the child is not born on or before that date,

the employee must vary his choice of date, by substituting a later predetermined date or (except in a case where regulation 5(4) applies) exercising an alternative option under regulation 5(3), and give his employer notice of the variation as soon as is reasonably practicable.

(7) An employee must give his employer a further notice, as soon as is reasonably practicable after the child's birth, of the date on which the child was born.

(8) Notice under paragraph (1), (4), (6) or (7) shall be given in writing, if the employer so requests.

**Commencement of leave under regulation 4**

7.—(1) Except in the case referred to in paragraph (2), an employee's period of paternity leave under regulation 4 begins on the date specified in his notice under regulation 6(1), or, where he has varied his choice of date under regulation 6(4) or (6), on the date specified in his notice under that provision (or the last such notice if he has varied his choice more than once).

(2) In a case where—

- (a) the employee has chosen to begin his period of leave on the date on which the child is born, and
- (b) he is at work on that date,

the employee's period of leave begins on the day after that date.

**Entitlement to paternity leave: adoption**

8.—(1) An employee is entitled to be absent from work for the purpose of caring for a child or supporting the child's adopter if he—

- (a) satisfies the conditions specified in paragraph (2), and
- (b) has complied with the notice requirements in regulation 10 and, where applicable, the evidential requirements in that regulation.

(2) The conditions referred to in paragraph (1) are that the employee—

- (a) has been continuously employed for a period of not less than 26 weeks ending with the week in which the child's adopter is notified of having been matched with the child;
- (b) is either married to or the partner of the child's adopter, and
- (c) has, or expects to have, the main responsibility (apart from the responsibility of the adopter) for the upbringing of the child.

(3) In paragraph (2)(a), "week" means the period of seven days beginning with Sunday.

(4) An employee shall be treated as having satisfied the condition in paragraph (2)(b) if he would have satisfied it but for the fact that the child's adopter died during the child's placement.

(5) An employee shall be treated as having satisfied the condition in paragraph (2)(c) if he would have satisfied it but for the fact that the child's placement with the adopter has ended.

(6) An employee's entitlement to leave under this regulation shall not be affected by the placement for adoption of more than one child as part of the same arrangement.

**Options in respect of leave under regulation 8**

9.—(1) An employee may choose to take either one week's leave or two consecutive weeks' leave in respect of a child under regulation 8.

(2) The leave may only be taken during the period of 56 days beginning with the date on which the child is placed with the adopter.

(3) Subject to paragraph (2) and, where applicable, paragraph (4), an employee may choose to begin a period of leave under regulation 8 on—

- (a) the date on which the child is placed with the adopter;
- (b) the date falling such number of days after the date on which the child is placed with the adopter as the employee may specify in a notice under regulation 10, or
- (c) a predetermined date, specified in a notice under that regulation, which is later than the date on which the child is expected to be placed with the adopter.

(4) In a case where the adopter was notified of having been matched with the child before 6th April 2003, the employee may choose to begin a period of leave only on a predetermined date, specified in a notice under regulation 10, which is at least 28 days after the date on which that notice is given.

### **Notice and evidential requirements for leave under regulation 8**

**10.—**(1) An employee must give his employer notice of his intention to take leave in respect of a child under regulation 8, specifying—

- (a) the date on which the adopter was notified of having been matched with the child;
- (b) the date on which the child is expected to be placed with the adopter;
- (c) the length of the period of leave that, in accordance with regulation 9(1), the employee has chosen to take, and
- (d) the date on which, in accordance with regulation 9(3) or (4), the employee has chosen that his period of leave should begin.

(2) The notice provided for in paragraph (1) must be given to the employer—

- (a) no more than seven days after the date on which the adopter is notified of having been matched with the child, or
- (b) in a case where it was not reasonably practicable for the employee to give notice in accordance with sub-paragraph (a), as soon as is reasonably practicable.

(3) Where the employer requests it, an employee must also give his employer a declaration, signed by the employee, to the effect that the purpose of his absence from work will be that specified in regulation 8(1) and that he satisfies the conditions of entitlement in regulation 8(2)(b) and (c).

(4) An employee who has given notice under paragraph (1) may vary the date he has chosen as the date on which his period of leave will begin, subject to paragraph (5) and provided that he gives his employer notice of the variation—

- (a) where the variation is to provide for the employee's period of leave to begin on the date on which the child is placed with the adopter, at least 28 days before the date specified in the employee's notice under paragraph (1) as the date on which the child is expected to be placed with the adopter;
- (b) where the variation is to provide for the employee's period of leave to begin on a date that is a specified number of days (or a different specified number of days) after the date on which the child is placed with the adopter, at least 28 days before the date falling that number of days after the date specified in the employee's notice under paragraph (1) as the date on which the child is expected to be placed with the adopter;
- (c) where the variation is to provide for the employee's period of leave to begin on a predetermined date, at least 28 days before that date,

or, if it is not reasonably practicable to give the notice at least 28 days before whichever date is relevant, as soon as is reasonably practicable.

(5) In a case where regulation 9(4) applies, an employee may only vary the date which he has chosen as the date on which his period of leave will begin by substituting a different predetermined date.

(6) In a case where—

- (a) the employee has chosen to begin his period of leave on a particular predetermined date, and
- (b) the child is not placed with the adopter on or before that date,

the employee must vary his choice of date, by substituting a later predetermined date or (except in a case where regulation 9(4) applies) exercising an alternative option under regulation 9(3), and give his employer notice of the variation as soon as is reasonably practicable.

(7) An employee must give his employer a further notice, as soon as is reasonably practicable after the child's placement, of the date on which the child was placed.

(8) Notice under paragraph (1), (4), (6) or (7) shall be given in writing, if the employer so requests.

### **Commencement of leave under regulation 8**

**11.**—(1) Except in the case referred to in paragraph (2), an employee's period of paternity leave under regulation 8 begins on the date specified in his notice under regulation 10(1), or, where he has varied his choice of date under regulation 10(4) or (6), on the date specified in his notice under that provision (or the last such date if he has varied his choice more than once).

(2) In a case where—

- (a) the employee has chosen to begin his period of leave on the date on which the child is placed with the adopter, and
- (b) he is at work on that date,

the employee's period of leave begins on the day after that date.

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

**12.**—(1) An employee who takes paternity leave—

- (a) is entitled, during the period of leave, to the benefit of all of the terms and conditions of employment which would have applied if he had not been absent, and
- (b) is bound, during that period, by any obligations arising under those terms and conditions, subject only to the exception in section 80C(1)(b) of the 1996 Act<sup>(8)</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 an employee by way of wages or salary are to be treated as remuneration.

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

**13.**—(1) An employee who returns to work after a period of paternity leave 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,

is entitled to return from leave to the job in which he was employed before his absence.

(2) An employee who returns to work after a period of paternity leave not falling within the description in paragraph (1)(a) or (b) above is entitled to return from leave to the job in which he was employed before his absence, or, if it is not reasonably practicable for the employer to permit him to return to that job, to another job which is both suitable for him and appropriate for him to do in the circumstances.

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<sup>(8)</sup> Section 80C was inserted by section 1 of the Employment Act 2002.

(3) The reference in paragraphs (1) and (2) to the job in which an employee was employed before his absence is a reference to the job in which he was employed—

- (a) if his return is from an isolated period of paternity leave, immediately before that period began;
- (b) if his return is from consecutive periods of statutory leave, immediately before the first such period.

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

**14.—**(1) An employee's right to return under regulation 13 is a right to return—

- (a) with his seniority, pension rights and similar rights—
  - (i) in a case where the employee is returning from consecutive periods of statutory leave which included a period of additional adoption leave or additional maternity leave, as they would have been if the period or periods of his employment prior to the additional adoption leave or (as the case may be) additional maternity leave were continuous with the period of employment following it;
  - (ii) in any other case, as they would have been if he had not been absent, and
- (b) on terms and conditions not less favourable than those which would have applied if he had not been absent.

(2) The provision in paragraph (1)(a)(i) concerning the treatment of periods of additional maternity leave or additional adoption leave is subject to the requirements of paragraphs 5 and 6 of Schedule 5 to the Social Security Act 1989<sup>(9)</sup> (equal treatment under pension schemes: maternity absence and family leave).

(3) The provisions in paragraph (1)(a)(ii) and (b) for an employee to be treated as if he had not been absent refer to his absence—

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

## **PART 3**

### **ADOPTION LEAVE**

#### **Entitlement to ordinary adoption leave**

**15.—**(1) An employee is entitled to ordinary adoption leave in respect of a child if he—

- (a) satisfies the conditions specified in paragraph (2), and
  - (b) has complied with the notice requirements in regulation 17 and, where applicable, the evidential requirements in that regulation.
- (2) The conditions referred to in paragraph (1) are that the employee—
- (a) is the child's adopter;
  - (b) has been continuously employed for a period of not less than 26 weeks ending with the week in which he was notified of having been matched with the child, and
  - (c) has notified the agency that he agrees that the child should be placed with him and on the date of placement.

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(9) 1989 c. 24.

(3) In paragraph (2)(b), “week” means the period of seven days beginning with Sunday.

(4) An employee’s entitlement to leave under this regulation shall not be affected by the placement for adoption of more than one child as part of the same arrangement.

### **Options in respect of ordinary adoption leave**

**16.—**(1) Except in the case referred to in paragraph (2), an employee may choose to begin a period of ordinary adoption leave on—

- (a) the date on which the child is placed with him for adoption, or
- (b) a predetermined date, specified in a notice under regulation 17, which is no more than 14 days before the date on which the child is expected to be placed with the employee and no later than that date.

(2) In a case where the employee was notified of having been matched with the child before 6th April 2003, the employee may choose to begin a period of leave only on a predetermined date, specified in a notice under regulation 17, which is after 6th April 2003 and at least 28 days after the date on which that notice is given.

### **Notice and evidential requirements for ordinary adoption leave**

**17.—**(1) An employee must give his employer notice of his intention to take ordinary adoption leave in respect of a child, specifying—

- (a) the date on which the child is expected to be placed with him for adoption, and
- (b) the date on which, in accordance with regulation 16(1) or (2), the employee has chosen that his period of leave should begin.

(2) The notice provided for in paragraph (1) must be given to the employer—

- (a) no more than seven days after the date on which the employee is notified of having been matched with the child for the purposes of adoption, or
- (b) in a case where it was not reasonably practicable for the employee to give notice in accordance with sub-paragraph (a), as soon as is reasonably practicable.

(3) Where the employer requests it, an employee must also provide his employer with evidence, in the form of one or more documents issued by the adoption agency that matched the employee with the child, of—

- (a) the name and address of the agency;
- (b) the name and date of birth of the child;
- (c) the date on which the employee was notified that he had been matched with the child, and
- (d) the date on which the agency expects to place the child with the employee.

(4) An employee who has given notice under paragraph (1) may vary the date he has chosen as the date on which his period of leave will begin, subject to paragraph (5) and provided that he gives his employer notice of the variation—

- (a) where the variation is to provide for the employee’s period of leave to begin on the date on which the child is placed with him for adoption, at least 28 days before the date specified in his notice under paragraph (1) as the date on which the child is expected to be placed with him;
- (b) where the variation is to provide for the employee’s period of leave to begin on a predetermined date (or a different predetermined date), at least 28 days before that date,

or, if it is not reasonably practicable to give the notice 28 days before whichever date is relevant, as soon as is reasonably practicable.

(5) In a case where regulation 16(2) applies, an employee may only vary the date which he has chosen as the date on which his period of leave will begin by substituting a different predetermined date.

(6) Notice under paragraph (1) or (4) shall be given in writing, if the employer so requests.

(7) An employer who is given notice under paragraph (1) or (4) of the date on which an employee has chosen that his period of ordinary adoption leave should begin shall notify the employee, within 28 days of his receipt of the notice, of the date on which the period of additional adoption leave to which the employee will be entitled (if he satisfies the conditions in regulation 20(1)) after his period of ordinary adoption leave ends.

(8) The notification provided for in paragraph (7) shall be given to the employee—

- (a) where the employer is given notice under paragraph (1), within 28 days of the date on which he received that notice;
- (b) where the employer is given notice under paragraph (4), within 28 days of the date on which the employee's ordinary adoption leave period began.

### **Duration and commencement of ordinary adoption leave**

**18.**—(1) Subject to regulations 22 and 24, an employee's ordinary adoption leave period is a period of 26 weeks.

(2) Except in the case referred to in paragraph (3), an employee's ordinary adoption leave period begins on the date specified in his notice under regulation 17(1), or, where he has varied his choice of date under regulation 17(4), on the date specified in his notice under that provision (or the last such date if he has varied his choice more than once).

(3) In a case where—

- (a) the employee has chosen to begin his period of leave on the date on which the child is placed with him, and
- (b) he is at work on that date,

the employee's period of leave begins on the day after that date.

### **Application of terms and conditions during ordinary adoption leave**

**19.**—(1) An employee who takes ordinary adoption leave—

- (a) is entitled, during the period of leave, to the benefit of all of the terms and conditions of employment which would have applied if he had not been absent, and
- (b) is bound, during that period, by any obligations arising under those terms and conditions, subject only to the exception in section 75A(3)(b) of the 1996 Act<sup>(10)</sup>.

(2) In paragraph (1)(a), "terms and conditions of employment" has the meaning given by section 75A(4) of the 1996 Act, and accordingly does not include terms and conditions about remuneration.

(3) For the purposes of section 75A of the 1996 Act, only sums payable to an employee by way of wages or salary are to be treated as remuneration.

### **Additional adoption leave: entitlement, duration and commencement**

**20.**—(1) An employee is entitled to additional adoption leave in respect of a child if—

- (a) the child was placed with him for adoption,

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<sup>(10)</sup> Section 75A was inserted by section 3 of the Employment Act 2002.

- (b) he took ordinary adoption leave in respect of the child, and
  - (c) his ordinary adoption leave period did not end prematurely under regulation 22(2)(a) or 24.
- (2) Subject to regulations 22 and 24, an employee's additional adoption leave period is a period of 26 weeks beginning on the day after the last day of his ordinary adoption leave period.

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

##### **21. An employee who takes additional adoption leave—**

- (a) is entitled, during the period of leave, to the benefit of his employer's implied obligation to him of trust and confidence and of any terms and conditions of his employment relating to—
  - (i) notice of the termination of the employment contract by his employer;
  - (ii) compensation in the event of redundancy, or
  - (iii) disciplinary or grievance procedures; and
- (b) is bound, during that period, by his implied obligation to his employer of good faith and of any terms and conditions of his employment relating to—
  - (i) notice of the termination of the employment contract by him,
  - (ii) the disclosure of confidential information;
  - (iii) the acceptance of gifts or other benefits, or
  - (iv) the employee's participation in any other business.

#### **Disrupted placement in the course of adoption leave**

##### **22.—(1) This regulation applies where—**

- (a) an employee has begun a period of adoption leave in respect of a child before the placement of the child with him, and the employee is subsequently notified that the placement will not be made, or
  - (b) during an employee's period of adoption leave in respect of a child placed with him—
    - (i) the child dies, or
    - (ii) the child is returned to the adoption agency under section 30(3) of the Adoption Act 1976 or section 30(3) of the Adoption (Scotland) Act 1978.
- (2) Subject to regulation 24, in a case where this regulation applies—
- (a) except in the circumstances referred to in sub-paragraphs (b) and (c), the employee's adoption leave period ends eight weeks after the end of the relevant week specified in paragraph (3);
  - (b) where the employee is taking ordinary adoption leave and the period of 26 weeks provided for in regulation 18 ends within eight weeks of the end of the relevant week—
    - (i) the employee's ordinary adoption leave period ends on the expiry of the 26-week period;
    - (ii) the employee is entitled to additional adoption leave, and
    - (iii) the employee's additional adoption leave period ends eight weeks after the end of the relevant week;
  - (c) where the employee is taking additional adoption leave and the period of 26 weeks provided for in regulation 20 ends within eight weeks of the end of the relevant week, the employee's additional adoption leave period ends on the expiry of the 26-week period.

- (3) The relevant week referred to in paragraph (2) is—
  - (a) in a case falling within paragraph (1)(a), the week during which the person with whom the child was to be placed for adoption is notified that the placement will not be made;
  - (b) in a case falling within paragraph (1)(b)(i), the week during which the child dies;
  - (c) in a case falling within paragraph (1)(b)(ii), the week during which the child is returned.
- (4) In paragraph (3), “week” means the period of seven days beginning with Sunday.

### **Redundancy during adoption leave**

**23.**—(1) This regulation applies where, during an employee’s ordinary or additional adoption leave period, it is not practicable by reason of redundancy for his employer to continue to employ him under his existing contract of employment.

(2) Where there is a suitable available vacancy, the employee is entitled to be offered (before the end of his employment under his existing contract) alternative employment with his employer or his employer’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 his 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 the employee and appropriate for him to do in the circumstances, and
  - (b) its provisions as to the capacity and place in which he is to be employed, and as to the other terms and conditions of his employment, are not substantially less favourable to him than if he had continued to be employed under the previous contract.

### **Dismissal during adoption leave**

**24.** Where an employee is dismissed after an ordinary or additional adoption 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.

### **Requirement to notify intention to return during adoption leave period**

**25.**—(1) An employee who intends to return to work earlier than the end of his additional adoption leave period must give his employer at least 28 days’ notice of the date on which he intends to return.

(2) If an employee attempts to return to work earlier than the end of his additional adoption leave period without complying with paragraph (1), his employer is entitled to postpone his return to a date such as will secure, subject to paragraph (3), that he has at least 28 days’ notice of the employee’s return.

(3) An employer is not entitled under paragraph (2) to postpone an employee’s return to work to a date after the end of the employee’s additional adoption leave period.

(4) If an employee whose return has been postponed under paragraph (2) has been notified that he is not to return to work before the date to which his return was postponed, the employer is under no contractual obligation to pay him remuneration until the date to which his return was postponed if he returns to work before that date.

(5) This regulation does not apply in a case where the employer did not notify the employee in accordance with regulation 17(7) and (8) of the date on which the employee’s additional adoption leave period would end.

(6) In a case where an employee’s adoption leave is curtailed because regulation 22 applies, the references in this regulation to the end of an employee’s additional adoption leave period are

references to the date on which that period would have ended had that regulation not applied, irrespective of whether it was the employee's ordinary adoption leave period or his additional adoption leave period that was curtailed.

### **Right to return after adoption leave**

**26.**—(1) An employee who returns to work after a period of ordinary adoption leave 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,

is entitled to return from leave to the job in which he was employed before his absence.

(2) An employee who returns to work after—

- (a) a period of additional adoption leave, whether or not preceded by another period of statutory leave, or
- (b) a period of ordinary adoption leave not falling within the description in paragraph (1)(a) or (b) above,

is entitled to return from leave to the job in which he was employed before his absence, or, if it is not reasonably practicable for the employer to permit him to return to that job, to another job which is both suitable for him and appropriate for him to do in the circumstances.

(3) The reference in paragraphs (1) and (2) to the job in which an employee was employed before his absence is a reference to the job in which he was employed—

- (a) if his return is from an isolated period of adoption leave, immediately before that period began;
- (b) if his return is from consecutive periods of statutory leave, immediately before the first such period.

(4) This regulation does not apply where regulation 23 applies.

### **Incidents of the right to return from adoption leave**

**27.**—(1) An employee's right to return under regulation 26 is to return—

- (a) with his seniority, pension rights and similar rights—
  - (i) in a case where the employee is returning from additional adoption leave, or consecutive periods of statutory leave which included a period of additional adoption leave or additional maternity leave, as they would have been if the period or periods of his employment prior to his additional adoption leave or (as the case may be) additional maternity leave were continuous with the period of employment following it;
  - (ii) in any other case, as they would have been if he had not been absent, and
- (b) on terms and conditions as to remuneration not less favourable than those which would have been applied to him if he had not been absent.

(2) The provision in paragraph (1)(a)(i) concerning the treatment of periods of additional adoption leave or additional maternity leave is subject to the requirements of paragraphs 5 and 6 of Schedule 5 to the Social Security Act 1989<sup>(11)</sup> (equal treatment under pension schemes: maternity absence and family leave).

(11) 1989 c. 24.

(3) The provisions in paragraph (1)(a)(ii) and (b) for an employee to be treated as if he had not been absent refer to his absence—

- (a) if his return is from an isolated period of ordinary adoption leave, since the beginning of that period;
- (b) if his return is from consecutive periods of statutory leave, since the beginning of the first such period.

## PART 4

### PROVISIONS APPLICABLE IN RELATION TO BOTH PATERNITY AND ADOPTION LEAVE

#### Protection from detriment

**28.**—(1) An employee is entitled under section 47C of the 1996 Act<sup>(12)</sup> not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer because—

- (a) the employee took or sought to take paternity leave or ordinary or additional adoption leave;
- (b) the employer believed that the employee was likely to take ordinary or additional adoption leave, or
- (c) the employee failed to return after a period of additional adoption leave in a case where—
  - (i) the employer did not notify him, in accordance with regulation 17(7) and (8) or otherwise, of the date on which that period ended, and he reasonably believed that the period had not ended, or
  - (ii) the employer gave him less than 28 days' notice of the date on which the period would end, and it was not reasonably practicable for him to return on that date.

(2) 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

**29.**—(1) An employee who is dismissed is entitled under section 99 of the 1996 Act 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 the employee is redundant, and regulation 23 has not been complied with.

(2) An employee who is dismissed 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 the employee 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 the employee and who have not been dismissed by the employer, and

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(12) 1996 c. 18; section 47C was inserted by paragraph 8 of Part 3 of Schedule 4 to the Employment Relations Act 1999 and amended by paragraph 26 of Schedule 7 to the Employment Act 2002.

- (c) it is shown that the reason (or, if more than one, the principal reason) for which the employee 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 the fact that—
  - (a) the employee took, or sought to take, paternity or adoption leave;
  - (b) the employer believed that the employee was likely to take ordinary or additional adoption leave, or
  - (c) the employee failed to return after a period of additional adoption leave in a case where—
    - (i) the employer did not notify him, in accordance with regulation 17(7) and (8) or otherwise, of the date on which that period would end, and he reasonably believed that the period had not ended, or
    - (ii) the employer gave him less than 28 days' notice of the date on which the period would end, and it was not reasonably practicable for him to return on that date.
- (4) Paragraph (1) does not apply in relation to an employee who took adoption leave if—
  - (a) immediately before the end of his additional adoption leave period (or, if it ends by reason of dismissal, immediately before the dismissal) the number of employees employed by his employer, added to the number employed by any associated employer of his employer, did not exceed five, and
  - (b) it is not reasonably practicable for the employer (who may be the same employer or a successor of his) to permit the employee to return to a job which is both suitable for the employee and appropriate for him to do in the circumstances or for an associated employer to offer the employee a job of that kind.
- (5) Paragraph (1) does not apply in relation to an employee if—
  - (a) it is not reasonably practicable for a reason other than redundancy for the employer (who may be the same employer or a successor of his) to permit the employee to return to a job which is both suitable for the employee and appropriate for him to do in the circumstances;
  - (b) an associated employer offers the employee a job of that kind, and
  - (c) the employee 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 (4) or (5), it is for the employer to show that the provisions in question were satisfied in relation to the complainant.

### **Contractual rights to paternity or adoption leave**

- 30.**—(1) This regulation applies where an employee is entitled to—
- (a) paternity leave,
  - (b) ordinary adoption leave, or
  - (c) additional adoption leave,
- (referred to in paragraph (2) as a “statutory right”) and also to a right which corresponds to that right and which arises under the employee’s contract of employment or otherwise.
- (2) In a case where this regulation applies—
- (a) the employee 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**

#### **31. 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 twelve 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 paternity leave or ordinary or additional adoption leave, and
- (c) remuneration is payable to the employee in respect of that week under his contract of employment, but the amount payable is less than the amount that would be payable if he 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.

11th November 2002

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

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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations relate to the new rights to paternity and adoption leave provided for in the Employment Act 2002. The relevant provisions are incorporated by that Act into the Employment Rights Act 1996 (“the 1996 Act”).

The right to take paternity leave is conferred by regulation 4 in connection with the birth of a child, and by regulation 8 in connection with the adoption of a child. In each case, the right is available to employees with 26 weeks' qualifying service, and is exercisable for the purpose of caring for the child or supporting the child's mother (in the case of a birth) or adopter (in the case of an adoption).

Regulations 5 and 9 give an employee the option of taking either one week's leave or two consecutive weeks' leave, and also options concerning the date on which the employee's period of leave will begin; however, leave may only be taken within 56 days of the child's birth or placement with the adopter. Regulations 6 and 10 require an employee to notify his employer of his intention to take leave and of his choices in respect of the options available.

Regulation 12 elaborates new section 80C of the 1996 Act, by providing that an employee is entitled during his absence on leave to the benefit of all of his terms and conditions of employment apart from the right to remuneration (excluded by section 80C(5)(b)); also that the employee is subject to all of the obligations under those terms and conditions except in so far as they are inconsistent with the right to leave (the exception appears in section 80C(1)(b)). Regulations 13 and 14 provide for an employee's right to return to work after taking leave, distinguishing the case where the leave was an isolated period of absence from the case where it followed another period of statutory leave.

New sections 75A and 75B of the 1996 Act confer rights to ordinary and additional adoption leave which are analogous to the right to ordinary and additional maternity leave conferred by sections 71 and 73 of that Act.

Regulation 15 sets out the conditions of entitlement to ordinary adoption leave. An employee must have 26 weeks' qualifying service, must have been matched with a child by an adoption agency, and must have agreed that the child should be placed with him for adoption. Only one person may take adoption leave in respect of a child at any time; accordingly, where a couple propose to adopt a child jointly, one may take adoption leave but the other may only take paternity leave. Regulation 16 enables an employee to choose when his period of leave should begin. Regulation 17 imposes notice requirements similar to those applicable in relation to paternity leave.

Ordinary adoption leave may be taken for a period of 26 weeks (regulation 18), and an employee who has completed a period of ordinary adoption leave is eligible for 26 weeks' additional adoption leave (regulation 20). During ordinary adoption leave, an employee's terms and conditions of employment continue to apply to the same extent as during paternity leave (regulation 19). During additional adoption leave only certain terms and conditions continue to apply. These are listed in regulation 21; the list is the same as that prescribed by the Maternity and Parental Leave etc. Regulations 1999 in relation to additional maternity leave.

Regulations 22–27 contain provisions applicable in relation to both ordinary and additional adoption leave. Regulation 22 deals with cases where the child is not placed with the employee or the placement ends; in such cases, the employee's entitlement to leave comes to an end after a period of eight weeks. Regulations 23 and 24 deal with cases where an employee becomes redundant or is dismissed during an adoption leave period. Regulation 25 requires an employee to notify his employer if he intends to return to work before his entitlement to both ordinary and additional

adoption leave is exhausted. Regulations 26 and 27 deal with the employee's right to return: an employee has the right to return to the same job after an isolated period of ordinary adoption leave, and the right to return to the same or a similar job after a period of additional adoption leave. Provision is made for adoption leave taken after other periods of statutory leave.

Regulations 28–31 contain provisions applicable in relation to both paternity leave and adoption leave. As in the case of employees entitled to maternity or parental leave under the 1996 Act, an employee entitled to paternity or adoption leave is protected against detriment or dismissal attributable to the fact that he took or sought to take such leave. The same protection is available where an employee fails to return after a period of additional adoption leave, if his employer has not notified him of the date on which that period would end.

A Regulatory Impact Assessment of the costs and benefits of these regulations to business has been placed in the libraries of both Houses of Parliament. Copies are available to the public from the Employment Relations Directorate, Department of Trade and Industry, 1 Victoria Street, London SW1H 0ET; the Assessment is also accessible at the Directorate's website [www.dti.gov.uk/er..](http://www.dti.gov.uk/er..)