

Shared Parental Leave

What the Law says



Wright, Johnston & Mackenzie LLP
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ClientCentric Service



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Introduction

In this Briefing Paper we summarise the law on Shared Parental Leave and how it works for the majority of employers.

If you have any queries about Shared Parental Leave and its application in your organisation, please contact a member of the WJM Employment Team. We will be pleased to assist you.

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The Act

The Children and Families Act 2014 (CFA 2014) inserts new provisions into the Employment Rights Act 1996 to introduce a new entitlement for employees who are parents, to take shared parental leave (SPL) in the first year of their child's life or in the first year after their child's placement for adoption. This new scheme for SPL is available in respect of children whose expected week of childbirth (EWC) begins on or after 5 April 2015 or who are placed for adoption on or after that date.

Eligibility

Parents will not be obliged to take SPL once the new scheme comes into force.

The default position on the birth of a child will be that the 52 weeks of maternity leave (39 weeks paid) will remain in place for the mother, as will compulsory maternity leave, which applies from the day of the child's birth.

The default position on the adoption of a child will be that the primary adopter will be entitled to 52 weeks of adoption leave (39 weeks paid). Changes will be made to adoption leave and pay to make them similar to the maternity leave and pay regime.

However, if they choose to do so, the SPL Regulations set out the scheme under which parents can take SPL:

- In relation to births, a mother who is entitled to statutory maternity leave, statutory maternity pay, or maternity allowance, may curtail her entitlement so that she and the child's other parent may share the balance of the leave, pay, or allowance period as SPL
- In relation to adoptions, a "primary adopter" who is entitled to statutory adoption leave or statutory adoption pay, may curtail their entitlement so that they and the child's other adoptive parent may share the balance of the leave or pay period as SPL

Criteria

- Both parents must be economically active
- Where one parent seeks leave from employment, the "*continuity of employment*" test must be satisfied. An employee will satisfy the continuity of employment test if they have been continuously employed with an employer for a period of not less than 26 weeks ending with the "relevant week", which is the 15th week before the EWC (meaning that they must have been employed for 40 weeks before the EWC)
- The person seeking SPL must also remain in continuous employment with that employer until the week before any period of SPL they take and must earn on average at least £30 a week based on any 13 of those weeks
- In order to qualify, the person seeking SPL must have the main responsibility for the care of child at the date of the child's birth

SPL in Action

- The new scheme will make up to 50 weeks of SPL and 37 weeks of Shared Paternity Pay available for eligible parents to take or share
- A mother or primary adopter will be able to end their maternity or adoption leave, or commit to ending it at a future date, and share the untaken leave with the other parent as SPL
- SPL can either be taken consecutively or concurrently, as long as the total time taken does not exceed what is jointly available to the couple

Procedure

- For parents to participate in the SPL scheme, the mother or primary adopter must either return to work or curtail their maternity or adoption leave
- A curtailment notice must be given in writing at least eight weeks before the date on which the mother or primary adopter wishes their leave or pay entitlement to end
- A curtailment notice cannot be given before the end of the compulsory maternity leave period or two weeks after the start of the adoption leave or pay period
- The mother or primary adopter must serve either a notice of entitlement and intention to take SPL, or a declaration that their partner has served such a notice at the same time as serving a curtailment notice. This is a non-binding indication of how and when a parent intends to take periods of SPL, including the start and end dates for each period of leave. Other information required includes names of the mother and the father/mother's partner, the total amount of SPL available, the EWC and the child's date of birth and how much SPL the mother and father each intend to take. For an example "opt in" notice for an employee to give their employer, see attached form
- An employee finalises their requested period(s) of SPL by, at least eight weeks before the first start date, giving their employer a period of leave notice. Neither parent can take SPL unless the other has signed a declaration giving their consent to the division of leave as set out in the notice of entitlement and intention to take SPL.
- It is possible to vary the notice of entitlement, provided that both parties declare their agreement to the variation

Continuous/Discontinuous

- A notice that requests one continuous period of SPL must be accepted
- Where a notice requests discontinuous periods, the employer has two weeks to accept the request, propose alternatives or refuse it
- Where the employer refuses the periods requested, the employee may choose to take the total amount of leave requested as a continuous period or withdraw their original notice
- An employee may serve up to three notices

The SPL Period

The amount of SPL that is available to each parent will be how much they decide to share between them once the total amount of maternity leave or the total amount of the maternity pay or allowance period is taken into account.

Factors to consider:

- Is the mother of the child taking statutory maternity leave
- Is the mother of the child entitled to statutory maternity pay
- Is the mother entitled to maternity allowance

The number of weeks is then further reduced by the amount of leave that has been claimed by the other parent, or which the other parent is required to take.

Similarly, adoptive parents will need to calculate the amount of leave they can share by starting with 52 weeks and deducting the amount of statutory adoption leave or the amount of the statutory adoption pay period that the primary adopter has taken (or will take) before they either return to work or curtail their entitlement.

Concurrent Periods of Leave

Under the SPL Regulations, a variety of scenarios are possible:-

- **SPL and SPL** - both parents on SPL at the same time (one of the stated aims of the legislation)
- **SPL and parental leave** - either parent can take a period of unpaid parental leave while the other parent is on SPL (a potentially useful way for the parents to extend their right to leave beyond the 52 weeks allowed by the SPL scheme)
- **SPL and OPL** – where the mother curtails her maternity leave to take SPL, and her partner's two weeks' ordinary paternity leave has not yet been taken, that can still be taken even though the mother is on SPL (although P cannot take OPL more than 56 days after birth and moreover P loses his right to any untaken OPL as soon as he takes a period of SPL)
- **SPL and maternity leave** – the child's father / mother's partner can take SPL while the mother is still on maternity leave

Terms and conditions during SPL

During a period of SPL, an employee is:

- With the exception of any terms as to remuneration (sums payable to the employee by way of wages or salary), entitled to the benefit of all their terms and conditions of employment as if they had not been absent
- Bound by any obligations (express or implied) arising under their terms and conditions, except for those which are inconsistent with their right to be absent from work

Therefore, with the exception of pay, all the employee's other benefits (such as the accrual of contractual annual leave, health club membership, permanent health insurance or use of a company car) will continue

Redundancy during SPL

Where an employee is taking SPL, and "it is not practicable by reason of redundancy" for them to remain employed under their existing contract, where there is a suitable alternative vacancy with the employer, the employer's successor, or an associated employer:

- The employee is entitled to be offered that suitable alternative before the end of their existing contract
- The employee's employment under a new contract of employment must take effect immediately on their previous contract coming to an end

To be a suitable alternative vacancy both of the following criteria must be met:

- The work must be of a kind which is both suitable in relation to the employee and appropriate for them to do in the circumstances
- The provisions about the capacity and place in which the employee is to be employed, and the other terms and conditions of the employment, must not be substantially less favourable than if the employee had continued to be employed under their previous contract

Failure to offer suitable alternative employment when such is available will constitute automatically unfair dismissal.

When no suitable alternative employment is available the employee may be dismissed by reason of redundancy provided a fair procedure is followed.

These provisions give employees on SPL priority over other employees who are at risk of redundancy in the same way as is currently provided to employees maternity, additional paternity or adoption leave.

Returning to work after SPL

- An employee's rights on return to work after taking SPL will depend on how much SPL they have taken
- While the employee's primary right is to return to the job in which they were employed before their absence, in certain circumstances that right becomes a right to return to another job which is both suitable for them and appropriate for them to do in the circumstances
- Where an employee returns to work after a period of SPL which, when added to any other period of relevant statutory leave they have taken in relation to the same child, is 26 weeks or less, the employee is entitled to return to the job in which they were employed before their absence
- When the period of SPL was the last of two or more consecutive periods of relevant statutory leave which included a period of parental leave of more than four weeks, a period of additional maternity leave, or a period of additional adoption leave, the position is different. In those cases, if it is not reasonably practicable for the employer to permit the employee to return to the job in which they were employed before their absence, the employee will be entitled to return to another job which is both suitable for them and appropriate for them to do in the circumstances

“Opt in” Form

Section A: Basic information		
<p>Guidance notes. Shared parental leave may be shared between a child's mother and either the child's father or the person who, at the date of the child's birth, is her partner. Both parties must expect to share the main responsibility for the child's upbringing.</p> <p>"Partner" means the mother's spouse, civil partner, or other person living with her in an enduring family relationship, but who is not her sibling, parent, child, grandparent, grandchild, aunt, uncle, niece or nephew.</p>		
<u>A1</u>	Employee's name	-
<u>A2</u>	I am the child's mother*/child's father*/mother's partner* (*delete as appropriate)	-
<u>A3</u>	Child's expected week of birth	-
<u>A4</u>	Child's actual date of birth (if known)	-
<u>A5</u>	Child's place of birth (if known)	-
<u>A6</u>	Child's name (if known)	-

-

Section B: Maternity leave, statutory maternity pay or maternity allowance

Guidance notes. If you are the mother, please give your maternity leave (ML) and statutory maternity pay (SMP) dates below. If you are still on ML you must also submit a maternity leave curtailment notice to bring your ML to an end.

If you are the child's father or the mother's partner, please give the mother's ML dates. If she is not entitled to statutory ML (for example, because she is an agency worker, self-employed or unemployed), give the dates she started and ended (or will end) her statutory maternity pay (SMP) or maternity allowance (MA) period as applicable. She must give her employer notice to curtail her ML and/or SMP period, or give notice to the Department for Work and Pensions to curtail her MA period as appropriate.

Maternity pay can only be curtailed after a whole number of weeks. For example, if the maternity pay period started on a Wednesday, it can only be curtailed on a Tuesday. These figures are needed in order to calculate your entitlement to shared parental leave and pay.

<u>B1</u>	I am taking or will take maternity leave* My partner is taking or will take maternity leave* My partner is not entitled to statutory maternity leave but is receiving or will receive statutory maternity pay or maternity allowance*	<input type="checkbox"/> - <input type="checkbox"/> - <input type="checkbox"/> - <u>(*tick one only)</u>
<u>B2</u>	Maternity leave start date	-
<u>B3</u>	Maternity leave end date	-
<u>B4</u>	Total maternity leave (weeks)	-
<u>B5</u>	Statutory maternity pay or maternity allowance start date	-
<u>B6</u>	Statutory maternity pay or maternity allowance end date	-
<u>B7</u>	Total period of statutory maternity pay or maternity allowance (weeks)	-

Section C: Shared parental leave

Guidance notes. The total shared parental leave (SPL) available is 52 weeks minus the mother's ML period. If she is not entitled to ML, it is 52 weeks minus the SMP or MA period (see section B). SPL must be taken in whole numbers of weeks. If you need help working this out please speak to HR.

You first period of shared parental leave cannot start until at least eight weeks after you submit this opt-in notice and a period of leave notice.

<u>C1</u>	Total SPL available (whole weeks).	-
<u>C2</u>	Number of whole weeks' SPL intended to be taken by you.	-
<u>C3</u>	Number of whole weeks' SPL intended to be taken by the person you will share SPL with.	-
<u>C4</u>	Indication of dates you would like to take shared parental leave.	-
<u>C5</u>	The dates in C4 will be treated as a non-binding until you give a period of leave notice. If you want to treat this notice as a period of leave notice to take SPL on the dates given in C4 tick here.

Section D: Statutory shared parental pay

Guidance notes. The total statutory shared parental pay (ShPP) available is 39 weeks minus the number of weeks SMP or MA paid (or to be paid) to the mother (see section B).

<u>D1</u>	Total ShPP available (whole weeks).	-
<u>D2</u>	Number of whole weeks' ShPP intended to be taken by child's mother.	-
<u>D3</u>	Number of whole weeks' ShPP intended to be taken by child's father/mother's partner.	-
<u>D4</u>	Indication of dates you would like to claim ShPP.	-
<u>D5</u>	The dates in D4 will be treated as a non-binding until a notice to take ShPP is given. If you want to treat this notice as a notice to claim ShPP on the dates given in D4 tick here.

Section E: Employee's declaration

Guidance notes. "Child" means the child referred to in Section A.

"Partner" means spouse, civil partner, or other person living with you in an enduring family relationship, but not a sibling, parent, child, grandparent, grandchild, aunt, uncle, niece or nephew.

I am the child's mother and I am entitled to statutory ML. I have submitted a curtailment of maternity leave notice (or will submit it before the person I am sharing SPL with takes SPL and at least eight weeks before the first date on which I intend to take SPL).*

or

I am the child's father or the child's mother's partner.*

(*delete one as applicable.)

I had at least 26 weeks' continuous employment at the end of the 15th week before the expected week of childbirth (EWC) and have remained continuously employed since then.

My normal weekly earnings in the eight-week period ending with the 15th week before the EWC were not less than the lower earnings limit (£111 for 2014-15). *(delete if not applicable)*

I expect to share the main responsibility for the care of the child with the person who has completed the declaration in Section F.

I intend to care for the child during each week that I am on shared parental leave and receiving ShPP.

I will immediately inform Human Resources if I cease to care for the child, or to otherwise satisfy the conditions for entitlement to shared parental leave or ShPP.

The information I have given in this notice is accurate.

Signed

Date

Section F: Declaration by person taking shared parental leave with employee

Guidance notes. "The employee" and "the child" are the employee and child referred to in Section A.

If the employee is the child's mother, you must be the child's father or the mother's partner.
If the employee is not the child's mother, you must be the child's mother.

"Partner" means spouse, civil partner, or other person living with you in an enduring family relationship, but not a sibling, parent, child, grandparent, grandchild, aunt, uncle, niece or nephew.

<u>Name</u>	-
<u>Address</u>	-
<u>National Insurance number</u>	-
<u>You employer's name and address (if employed) or your business address if self-employed.</u>	-

I am the mother of the child and I am (or was) entitled to ML, SMP or MA. I have curtailed my ML, SMP or MA, or will have done so by the time your employee starts parental leave.*
or

I am the child's father.*

or

I am the partner of the child's mother.*

(*delete as applicable)

I expect to share the main responsibility for the care of the child with the employee.

I have worked in an employed or self-employed capacity in at least 26 of the 66 weeks immediately before the EWC.

My average weekly earnings are at least £30, taking the 13 highest-earning weeks in the 66 weeks immediately before the EWC.

I consent to the employee taking shared parental leave and claiming ShPP as set out in this notice and will immediately inform them if I cease to satisfy any of the conditions in this declaration.

I consent to the information in this declaration being used for the purposes of administering shared parental leave and pay.

- Signed

Date

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