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A Client Alert from Paul Hastings

Friendlier Family Legislation for the UK

By Chris Bracebridge and Caroline Dunne

AT A GLANCE

A further tranche of 'family friendly' legislation came into force in the UK on 1 October 2006.

Employees whose expected week of childbirth begins on or after 1 April 2007 will be entitled to 52 weeks' maternity leave, during 39 weeks of which statutory maternity pay would be payable. During maternity leave employers now have a statutory right to contact an employee, to advise her of changes at work or simply to stay in touch. Employees will have the right to work for up to ten days during maternity leave – and be paid – without losing statutory maternity pay. Employees must now give eight weeks' notice if they wish to return from maternity leave early.

Employers should ensure that all policies and procedures have been updated and appropriate training provided to staff dealing with maternity issues.

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1. Work and Families Act 2006

The Work and Families Act 2006 (the "Act") has introduced refinements and improvements to current maternity legislation as the Government fulfils 'family friendly' policy objectives. The changes also clarify certain areas of long-standing confusion.

The main provisions of the Act deal with maternity and adoption leave and pay, paternity leave and pay, and flexible working. Regulations will flesh out the new provisions. To date, regulations have only been implemented in respect of maternity and adoption leave and pay, by the *Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2006* (the "Regulations").

As adoption leave and pay entitlements generally mirror maternity leave and pay entitlements, throughout this Alert: ordinary maternity leave ("OML") and additional maternity leave ("AML") apply to ordinary adoption leave and additional adoption leave; and, statutory maternity pay ("SMP") applies to statutory adoption pay, unless otherwise stated.

2. Maternity and Adoption Leave: The Old Rules

In relation to employees whose expected week of childbirth ("EWC") begins on or before 31 March 2007:

Qualifying Service for AML

An employee is entitled to a 26-week period of OML without regard to length of service. An employee is entitled to an additional 26 weeks of AML if she has been in continuous employment for 26 weeks at the beginning of the 14th week before the EWC.

Returning Early

If an employee wishes to return early from maternity leave, she must provide her employer with not less than 28 days' prior notice.

3. Maternity and Adoption Leave: The New Provisions

These apply to employees whose *EWC begins* on or after 1 April 2007. The key date is when the EWC begins rather than the actual date the baby is born. If the EWC begins on or after 1 April 2007 but the baby is actually born before 1 April 2007, the new provisions will still apply. Conversely, if the EWC begins before 1 April 2007, but the baby is born after that date, the old rules will apply.

Qualifying Service for AML

The 26-week qualifying period has been removed so that all pregnant employees, irrespective of length of service, will be entitled to both OML and AML. (NB: employees will still need to serve the qualifying period for additional adoption leave).

Returning Early

An employee now has to give eight weeks', rather than 28 days', advance notice of an early return from maternity leave. An employer may delay an employee's return (although not past the maximum 52-week maternity leave period) if she attempts to return without providing the required eight weeks' notice.

Reasonable Contact

There is a new express statutory right for employers to have 'reasonable' contact with employees on maternity leave.

Keeping in Touch ("KIT") Days

In addition, where employer and employee agree, the employee may work for up to ten days during maternity leave, without losing the right to SMP (or to Maternity Allowance ("MA"), in respect of days worked during the MA, rather than SMP, period).

4. Maternity and Adoption Pay: The Old Rules

In relation to employees whose EWC begins on or before 31 March 2007:

SMP

SMP entitlement is six weeks' pay at 90% of average weekly earnings during a set reference period, followed by 20 weeks' 'basic rate' SMP (currently £108.85 per week). The reference period for the purposes of average weekly earnings is the period of eight weeks immediately preceding the 14th week before the EWC.

SMP Start Date

Although an employee can commence OML on any day of the week, the SMP and MA periods must start on the Sunday after the employee stops working.

5. Maternity and Adoption Pay: The New Provisions

These apply to employees whose *EWC begins* on or after 1 April 2007 (see 3. above regarding the effect of the *actual* date of birth).

SMP

SMP is increased to 39 weeks in total. Payment for the first six weeks remains the same, with the following period of 'basic rate' payment increased from 20 weeks to 33. MA is also increased to 39 weeks.

SMP Start Date

In order to align leave and pay entitlements, the SMP and MA periods can now start on any day of the week, concurrent with OML.

6. Practical Consequences

Qualifying Service for AML

The removal of the qualifying period for AML may have a significant impact, particularly in recruitment. It may not be easy for some managers, who have spent a considerable amount of time and money recruiting an individual, to find that the new recruit will soon be absent for up to a year. In such a situation, an employer must be careful not to treat the employee any less favourably because she is pregnant or it may face a sex discrimination claim, compensation for which is uncapped. A particular reason for caution is that such claims can be easier to bring than other discrimination claims, as pregnancy is treated as a special case under UK and European Union law.

Returning Early

The ability of an employee to return to work early from maternity leave, with only 28 days' notice, has traditionally caused employers some administrative and legal difficulties, particularly where another individual has been engaged as maternity cover on a fixed-term contract for the expected duration of the maternity leave period. The new increased length of notice, combined with the right to delay an employee's return to ensure that eight weeks' notice is served, allows employers more time to plan and manage an early return to work.

Reasonable Contact

The express provision allowing 'reasonable contact' clarifies an area where previously there had been uncertainty for employers. An employer is now legally entitled to communicate with an employee in respect of, for example, changes in the workplace, returning to work and salary increases. This should benefit both parties. Such communication should allow employers to act fairly and result in a feeling of continued inclusion for the employee. It will also mean there can be a better and more timely discussion about return to work arrangements. Flexible working requests by a returning employee can now potentially be dealt with earlier.

'Reasonable contact' has yet to be defined by the Department of Trade and Industry ("DTI"). What is 'reasonable' is likely to vary depending on individual circumstances. With this in mind, an employer might attempt to agree the nature and frequency of contact it will have with the employee during maternity leave, before the employee commences the leave. For example, an employer might agree that it will send a regular email updating the employee about work issues, call her at home or visit a set number of times or simply agree to make a phone call as and when an issue relevant to the employee arises. Any agreement with the employee should be recorded in writing for the employer's protection. As a basic precaution, an employer should have in place a policy that makes it clear that, if exceptional events occur, home visits and calls may be necessary.

Keeping in Touch Days

These ten days can be used by the employee to undertake her usual work, or for more discrete matters such as training or client events. KIT days are in

addition to any 'reasonable contact' the employer is allowed with the employee during maternity leave. They can be taken at any time other than the first two weeks following the birth of the baby (the mandatory maternity leave period).

It is important for employers to agree to the parameters of KIT days with an employee – for example, when the days will take place and exactly what work will be done. Employers should also consider potential logistical difficulties such as the need for appropriate desk space, access to IT systems and the provision of a private room and other facilities for the purposes of breastfeeding or expressing milk.

There is an expectation from the Government that employees will be paid for KIT days, but no guidance on pay has yet been issued. This should, in any event, be agreed with the employee, and her average daily rate would seem to be a sensible starting point.

Employees are protected from suffering any detriment or dismissal by accepting or refusing to work KIT days.

Pay

The increased statutory maternity pay period is likely to result in more women taking some or all of their AML entitlement (which was previously unpaid on a statutory basis). The Government estimates that the change will benefit approximately 400,000 mothers per year.

7. What Employers Should Be Doing Now

Employers must ensure that the Regulations are adhered to and no less favourable treatment is afforded to pregnant women (or to employees who are adopting). Employers should make sure that the new entitlements are fully incorporated into both policies and practice. Employers must at the very minimum ensure that:

- handbooks and relevant policies are reviewed and updated;
- training is provided to all employees dealing with maternity leave, compensation and benefits; and
- managers are fully apprised of the changes in respect of 'reasonable contact' during maternity leave and KIT days.

It may also be helpful to develop some 'best practice' procedures to ensure consistency of treatment and protect the employer, such as:

- agree with the employee and record the form and frequency of 'reasonable contact' the employer will ideally have with the employee during maternity leave (subject to unforeseen events);
- set out the proposed parameters of KIT days, including what employees can do on those days and how they will be paid;
- emphasise to managers involved in recruitment the need for objectivity in interviewing and assessing job applicants; and
- ensure that any employees absent on maternity leave are consulted, where relevant, in relation to redundancies, TUPE transfers and other collective employee consultation.

8. Looking Ahead

In general, employers' responses to the Government's consultation about the Act were positive. The changes brought in by the Regulations are therefore unlikely to be a surprise or unwelcome to the majority to employers.

The next developments in 'family friendly' legislation will include amendments to Flexible Working legislation (coming into force on 6 April 2007) and new rights of Additional Paternity Leave and Pay (in relation to which draft regulations should be put out for consultation by the DTI later this year). Further ahead, the Government intends to harmonise leave and pay provisions, increasing the total maternity pay period to 52 weeks by 2009-10.

In light of the Government's policy aim of supporting the balance between work and family, UK employers can expect that employment legislation will continue to get friendlier for their employees in the years to come.

For more information please contact any of Paul Hastings' London employment and labour lawyers:

Christopher Walter
+44-0-207-710-2031
christopherwalter@paulhastings.com

Caroline Dunne
+44-0-207-710-2071
carolinedunne@paulhastings.com

Chris Bracebridge
+44-0-207-710-2051
chrisbracebridge@paulhastings.com

Anna Sanford
+44-0-207-710-2056
annasanford@paulhastings.com
