Employment and pensions

Shared rights and shared responsibilities - getting to grips with shared parental leave and pay

Heralded towards the beginning of its term as "...a great opportunity to make our workforce even more flexible, help working families and boost economic growth" the government's plans to bring in shared parental leave are now on the brink of implementation.

Provided that they meet the eligibility criteria, parents of babies expected on or after 5 April 2015, or those with children placed for adoption on or after that date, will be able to take advantage of this new right.

In addition to the right to share parental leave there are also new rights for fathers to take time off work to attend ante-natal appointments, and for adopters to attend pre-adoption appointments.

So what do these new rights entail and what will employers have to do to implement them?

**Shared parental leave**

The Children and Families Act 2014 sets out the framework for shared parental leave. The implementation of the new regime is primarily set out in a series of statutory instruments, the most important of which are the Statutory Shared Parental Pay (General) Regulations 2014 (SSPP Regulations) and the Shared Parental Leave Regulations 2014 (SPL Regulations).

The entitlement

Shared parental leave is available for up to 50 weeks and can begin at any point that the family chooses after the two week period of compulsory maternity leave. It must be taken in multiples of complete weeks, and may be taken as one continuous period or in discontinuous breaks. The length of flexible parental leave will not exceed the balance of untaken maternity leave, and the amount of statutory flexible parental pay will not exceed the balance of untaken maternity pay or maternity allowance available at the point at which the woman returns, or commits to return to work.

An employee can be absent on shared parental leave in relation to the child at the same time as another employee absent on maternity leave, adoption leave, parental leave, or paternity leave in respect of the same child.

**Ante-natal appointments**

From 1 October fathers and partners of pregnant women will be able to take unpaid time off work to attend up to two ante-natal appointments. On each occasion, the maximum amount of time off allowed is six and a half hours. The right will also extend to intended parents of children born through surrogacy.

Individuals will not be required to provide evidence of the pregnancy to qualify for time off, and there will be no statutory process for making a request for time-off to attend ante-natal appointments. However, an employer can ask an employee to provide a signed declaration of their entitlement to take time off if it wishes to do so.

**Paternity leave**

A father, the mother's partner, or a "secondary adopter" (an individual in a couple who is not designated as the "primary adopter") will continue to be entitled to up to two continuous weeks' paid paternity leave. Additional paternity leave will no longer exist when the new shared parental leave provisions come into force.

**Eligibility**

Both parents (birth, adoptive or intended parents in surrogacy agreements) will have to be eligible to take shared parental leave. They will have to have been continuously employed (or self-employed) for a period of not less than 26 weeks ending with the expected week of childbirth (EWC) or date of matching. They will
also both have to satisfy an economic test, the "employment and earnings test". In addition they will have to give notice of their entitlement to shared parental leave to their employers and also give their employer a period of leave notice. The mother must be entitled to statutory maternity pay (SMP) and have chosen to end her statutory maternity leave (SML) or returned to work.

What is the employment and earnings test?
An individual will satisfy this if they have been employed or self-employed for at least 26 weeks out of the 66 weeks preceding the EWC, or the week in which the individual was notified of being matched. In addition they will have to have average weekly earnings of not less than £30 (the Maternity Allowance Threshold).

Those balking at the concept of this economic test will be relieved to hear that an on-line tool will be available to assist with calculations.

Notices of entitlement
Not less than eight weeks before the start date for the first period of shared parental leave to be taken by each of the parents, the parent must provide his or her employer with a written notice containing various pieces of information including both parents’ names, the child's EWC and actual date of birth and how much shared parental leave each parent intends to take. The complexity of the notice requirements are perhaps the most criticised aspect of the new legislation. It will be interesting to see how they work in practice.

A notice to vary the period(s) of leave requested can be given which must contain the information prescribed by the Regulations. There is no limit on the number of occasions that such a notice may be given.

Where the leave request is for one continuous period of shared parental leave then the employee is entitled to take that leave. Where discontinuous periods of leave are requested then, in the two weeks following the date in which the notice was given, the employer may consent to the leave, propose alternative dates or refuse the leave. Where two weeks after the notice was given no agreement has been reached then the employee can withdraw the notice or take the total amount of leave requested in the notice as a continuous period of leave.

Variation of period of leave
Where an employee is entitled to a period of leave the employee may give written notice to vary that leave. An employee can give up to three notices to vary, though this limit may be waived by agreement between the employer and employee. Any notice will be disregarded for the purposes of this rule if it has been withdrawn by the employee, it is given as a result of the child being born earlier or later than the EWC, or it is given in response to a request from the employer that the employee vary a period of leave.

Change of circumstances
Where, less than eight weeks before a parent is to take a period of shared parental leave, the parent informs their employer that they have ceased to meet the conditions of entitlement for shared parental leave and it is not reasonably practicable for their employer to accommodate the change in circumstances then their employer may require them to take the period of leave.

Leave that the employer requires the employee to take must be treated as shared parental leave, must start on the date that the next period of shared parental leave was due to commence and must end no later than the end date on which that period of leave was due to end, or eight weeks after the employer is informed of the change in circumstances, whichever is the earlier.

Keeping in touch days
An employee can work up to 20 days for their employer during a period of shared parental leave without bringing the period of leave to an end. "Work" can include any training or activity undertaken for the purposes of keeping in touch with the workplace.

According to the Government's response to the consultation these days will be renamed so as to distinguish them from KIT days for use during the maternity leave period. They have not yet been renamed, and are just referred to as "work during shared parental leave" under the Regulations.

Right to return after shared parental leave
Where an employee returns to work after shared parental leave they are entitled to return to the same job provided that the period of parental leave, when added to any other period of relevant statutory leave taken by the employee in relation to the child, is 26 weeks or less.

If this is not the case then the entitlement is to return to the same job or, if this is not reasonably practicable, then to another job which is suitable for the employee and appropriate in the circumstances.

Entitlement to shared parental pay
The entitlement to statutory shared parental pay (SSPP) is 39 weeks, less the number of weeks in respect of which maternity allowance or statutory maternity pay has been payable to the mother. SSPP is not payable after the end of the period of 52 weeks following the child's birth/adoption.

Both parents will have to have been continuously employed (or self-employed) for a period of not less than 26 weeks ending with the EWC or date of matching. They will also have had normal weekly
earnings for the 8 weeks ending with the EWC/date of matching which are not lower than the lower earnings limit (currently £111). In addition the mother must be entitled to maternity pay, and her pay period must be reduced (because she has returned to work). Both parents must comply with notification and evidential requirements.

**Variation of SSPP**
The mother and father may vary the weeks, or the number of weeks, during which they intend to claim SSPP. The notice must be in writing and must be given at least 8 weeks before the beginning of the first week specified in the notice.

**Adoption leave**
This will become a "day one" right for employment adopters (i.e. the current requirement for 26 weeks' service will be removed) and statutory adoption pay will be enhanced to 90% of salary for the first six weeks for the "primary adopter" in line with statutory maternity pay.

The "primary adopter" will be entitled to time off to attend five paid pre-adoption appointments, and the "secondary adopter" will be entitled to time off to attend up to two unpaid pre-adoption appointments. The total amount of time off per appointment will be capped at six and a half hours. It is thought at the moment that this right to time off to attend pre-adoption appointments will come in in March.

**What do you need to do now?**
Bearing in mind that women who become pregnant now will be giving birth in April and hence qualifying for the new right to shared parental leave, it's essential that you start reviewing your policies now in preparation and briefing your managers on what to expect.

Another issue to consider is whether any enhanced maternity pay you offer should be extended to both parents taking shared parental leave. The government has stated that there is no requirement on employers to do this. There is, however, the potential for discrimination claims to be made by men so you should make sure that any decision not to enhance shared parental leave has a properly worked out justification.

The final point to consider is how widely the new right will be taken up? Given that the total take up for additional paternity leave was less than 1%, expectations aren't that high, but it may well be that the new flexibility offered by the system will appeal to employees and it is no longer the case that only women with child caring responsibilities work flexibly. With the extension of the right to flexible working and the introduction of shared parental leave, employers need to be prepared for an increase in the number of parents and potential parents enquiring about family friendly working practices.