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**SHARED PARENTAL LEAVE**

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## Introduction

The Shared Parental Leave (“ShPL”) provisions came into force in England, Wales and Scotland on the 1st December 2014. ShPL applies to mothers and their partners whose baby is due or who have a child placed with them for adoption on or after the 5th April 2015.

The stated aim of the provisions is to enable parents to share child care and shift the emphasis away from gender based leave. This is achieved by enabling mothers/adopters to end their maternity/adoption leave or pay early leaving a period of leave and pay which can then be shared by the mother/adopter’s partner.

A study by the TUC into the provisions of additional paternity leave (“APL”) - which enabled the father, civil partner or partner of the mother or adopter to take a maximum of 26 weeks' leave to care for a child where the mother or adopter returned to work - showed that less than 1% of fathers had taken advantage of that leave.

APL will no longer be available when shared parental leave is in force. However, the current maternity/adoption leave and pay arrangements as well as the 2 weeks ordinary paternity leave and pay arrangements remain in place alongside the shared parental leave and pay provisions.

Employers will be able to recover Statutory Shared Parental Pay (“ShPP”) from HMRC in the same way in which they can recover Statutory Maternity Pay (“SMP”), Statutory Adoption Pay (“SAP”) and Statutory Paternity Pay (“ShPP”).

Ultimately, whether the shared parental leave provisions will lead to more fathers and partners sharing maternity leave will depend on the personal financial position of families and whether employers will live up to the challenge to ensure that entitlement to shared parental leave is supported by adequate shared parental pay.

The scheme has also been criticised because of the complicated notice provisions. There are 11 sets of regulations covering the provisions:

 The Shared Parental Leave Regulations 2014.

 The Maternity and Adoption Leave (Curtailment of Statutory Rights to Leave) Regulations 2014.

 The Statutory Shared Parental Pay (General) Regulations 2014.

 The Statutory Maternity Pay and Statutory Adoption Pay (Curtailment) Regulations 2014.

 The Maternity Allowance (Curtailment) Regulations 2014.

 The Employment Rights Act (Application of Sections 75G and 75H to Adoptions from Overseas) Regulations 2014.

 The Shared Parental Leave and Paternity and Adoption Leave (Adoption from Overseas)

 Regulations 2014.

 The Statutory Shared Parental Pay (Adoption from Overseas) Regulations 2014.

 The Employment Rights Act 1996 (Application of Sections 75A, 75B, 75G, 75H, 80A and 80B to Parental Order Cases) Regulations 2014.

 The Paternity, Adoption and Shared Parental Leave (Parental Order Cases) Regulations 2014.

 The Statutory Shared Parental Pay (Parental Order Cases) Regulations 2014.

This session will give an overview of entitlement to shared parental leave and pay and set out some implications for the Union to consider the main one being in respect of existing enhanced maternity pay.

Please note that shared parental leave is not yet available in Northern Ireland although a Work and Families Bill which proposes to introduce shared parental leave is currently progressing through the legislature and completed the further consideration stage on 24 November 2014.

This session will cover:

* Who ShPL applies to;
* How much ShPL can be taken;
* When ShPL can be taken;
* Impact on terms and conditions;
* Impact on return to work;
* Keeping in touch days;
* Who qualifies for shared parental pay?
* How much is shared parental pay?
* When will shared parental pay be paid?

For ease, we focus on the position in relation to the birth of the child, although similar provisions apply in relation to adoption.

In addition to the ShPL provisions there have also been a number of amendments to the existing provisions in relation to adoption leave, statutory adoption pay, rights for those who foster children with a view to adoption and those who are parents of children born to a surrogate mother who are intending to apply for a Parental Order. A summary of these is set out in Appendix 1.

## Overview of ShPL

The provisions provide for:

* A right for partners to take up to 50 weeks of a woman’s untaken maternity/adoption leave where the mother returns to work before the end of the 52-week maternity /adoption leave period
* A requirement that the mother bring her maternity leave and/or maternity pay period to an end ( this is known as curtailment)
* ShPL to be taken as one continuous period (as happens for maternity/adoption leave) or as separate blocks of a minimum of one week (known as discontinuous leave)
* ShPL from the date of birth up to the day before the child’s first birthday
* Where the mother notifies her employer in advance that she will return early then the balance of the leave may be taken by the parents concurrently
* Each parent must meet the qualifying criteria for leave and/or pay in their own right;
* Parents to agree between them how the leave should be taken
* Each parent must comply with the various notice requirements which include notice of entitlement and intention, period of leave notice, notice to vary ShPL and for the mother notice to bring SML/SMP/SMA to an end (curtailment notice)
* An employer can refuse discontinuous periods of ShPL
* Keeping in touch days of a further 20 days on top of the existing 10 days as applies to Statutory Maternity Leave (SML) policy
* A right for parents to return to the same job or a job that is both suitable and appropriate
* A right not to be subject to a detriment or dismissal for exercising or proposing to exercise their right to ShPL and ShPP

## Who qualifies for ShPL?

The provisions on ShPL introduce the right for partners of mothers to be entitled to paid parental leave within the first year of the child’s birth subject to satisfying the eligibility conditions. Partner means father, husband or civil partner or resident partner.

The eligibility criteria requires both the mother and partner to satisfy the tests in order for either or both to qualify for ShPL. While generally both parents must be employees to benefit from the scheme if either parent is self-employed and meets the economic eligibility requirements and in the case of the mother is entitled to Statutory Maternity Pay (‘SMP’) Statutory Maternity Allowance (‘SMA’) one of the parents may benefit from ShPL.

A mother will qualify for ShPL if:

1. She is an employee and has been continuously employed with an employer for 26 weeks by the end of the qualifying week (which is the end of the 15th week before the expected week of birth (“EWB”)) (reg 35);
2. She remains in continuous employment with the same employer until the week before she takes any ShPL;
3. She has the main responsibility for the care of the child (other than that of the partner);
4. She is entitled to Statutory Maternity Leave (“SML”) in respect of the child;
5. She has ended entitlement to SML by issuing a curtailment notice for the child in accordance with the appropriate procedure or she has returned to work before the end of her SML;
6. She has given her employer a notice of entitlement and intention to take ShPL and if requested by the employer a copy of the birth certificate and name and address of the partners employer and a period of leave notice;
7. Her partner meets the qualification requirements namely:
8. Have been employed or self-employed for at least 26 of the 66 weeks immediately preceding the Expected Week of Birth (“EWB”) or the week the primary carer was notified as having been matched for adoption (this can include part weeks);
9. Still in employment until the week before any ShPL; and
10. Have earned at least £30 per week on average for 13 of those 66 weeks;
11. Have the main responsibility for the carer of the child (other than that of the mother).

As can be seen in order for the mother to qualify for ShPL the partner also has to satisfy certain eligibility requirements (as per (g) i, ii and iii above) these are known as the economic eligibility requirements.

The partner will qualify for ShPL if they have:

1. Been continuously employed with an employer for at least 26 weeks by the end of the 15th week before the expected week of birth;
2. The main responsibility for the care of the child (apart from the mother);
3. Complied with the notice requirement for ShPL;
4. Provided the required evidence;

In order for the partner to qualify the mother must:

1. Have been employed or self-employed for at least 26 weeks out of the 66 weeks immediately before the EWB/or placement of the child;
2. Have earned at least £30 per week on average for 13 of those 66 weeks
3. Still be in employment until the week before any ShPL
4. Have the main responsibility for the care of the child (other than the father/partner);
5. Be entitled to SML, SMP, MA in respect of the child;
6. Curtailed her SML or returned to work, or curtailed her Statutory Maternity Pay Period (“SMPP”) or Statutory Maternity Allowance Period (“SMAP”);

Where the mother is not entitled to either SML or SMP/SMA the partner will not qualify for ShPL. In order to qualify for SML, the mother must be employed.

Women workers who contract personally to provide work but who do not have a contract of employment including agency workers and the self-employed who do not qualify for maternity leave but who qualify for SMP or SMA do not qualify for ShPL. However, partners of agency workers or the self-employed, who are employed may be entitled to ShPL.

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| A woman qualifies for SMP if she has 26 weeks continuous service by the qualifying week and her normal earnings in the 8 week period ending with the qualifying week are at least the LEL (currently £111 per wk). A woman qualifies for SMA if she has been employed or self-employed for 26 weeks in the 66 week period ending with the EWB and has earnings not less than the MA threshold in the tax year in which the 66 week period begins which is currently £30 per week. |

## How does ShPL work?

We will look at this in more detail below but in summary:-

* The ShPL scheme works by the mother bringing their maternity leave to an end (or maternity pay period (‘MPP’) if they do not qualify for maternity leave).
* The maternity leave or SMPP is brought to an end by the mother issuing a curtailment notice or by returning to work.
* Notice of intention to take ShPL must be given 8 weeks in advance.
* The ShPL can be taken as one continuous period (as for maternity leave) or in separate blocks (discontinuous leave). An employee can only give separate notices of discontinuous leave 3 times.

The burden of proving entitlement to ShPL is firmly on the employee.

## How much ShPL can be taken?

ShPL can be taken at any time within the period which begins from the date the child is born and ends the day before the child’s first birthday.

ShPL must be taken in complete weeks and can be taken either as one continuous period or in discontinuous periods. There is a minimum period of ShPL of 1 week.

The starting point is 52 weeks. However, as the mother of a child has to take compulsory maternity leave - which is either 2 weeks after the birth or, in the case of factory workers, 4 weeks after the birth – the reality is that in most cases the maximum amount of ShPL is 50 weeks.

The amount of ShPL is reduced further by:

1. The SML already taken by the mother beginning with the first day of SML and ending with the curtailment date or the date she returns to work;
2. Where the mother is not entitled to SML but is entitled to SMP and has given a curtailment notice reducing her MPP, the number of weeks she received SMP up to the curtailment date;
3. Where she is not entitled to SML but is entitled to SMA the number of weeks of SMA payable up to the curtailment date.

The amount of ShPL which the mother is allowed to take will be reduced by any ShPL notified or taken by her partner. For the purposes of calculating the amount of ShPL part of a week of SML or SMP/SMA is to be treated as a whole week.

Although the ShPL is reduced by the number of weeks of SML (or SMP/SMA if the mother is not entitled to SML) the two weeks ordinary paternity leave (“OPL”) is not deducted from ShPL.

These provisions allow for both the mother and partner to take time off at the same time, and in the case of the partner, this can begin with the date the child is born or placed with the primary carer since no compulsory period of leave applies to the partner. In practice, it is most likely that the mother and partner who qualify will take the first two weeks as compulsory maternity leave and statutory paternity leave and pay.

Note that where a mother is not entitled to maternity leave but is entitled to SMP/SMA, SMP is not brought to an end on return to work so the mother must issue a curtailment notice to bring her ShPP to an end.

Example:

If a mother who qualifies for SML ends her statutory maternity leave and pay after 18 weeks there will be 34 weeks available for ShPL and 21 weeks available for ShPP.

## When can leave be taken?

ShPL can be taken at any time within the period which begins from the date the child is born and ends the day before the child’s first birthday.

ShPL must be taken in complete weeks and can be taken either as one continuous period or in discontinuous periods. There is a minimum period of ShPL of 1 week.

Both parents may be absent on ShPL at the same time

However, eligible mothers cannot take ShPL until they have taken compulsory maternity leave. Those women who qualify for SML will need to decide when they wish to bring their maternity leave to an end since they cannot take ShPL until the SML has come to an end or they have returned to work.

If a woman decides to take her full entitlement to maternity leave of 52 weeks then there will be no shared parental leave. Likewise, if the mother takes her full entitlement to 39 weeks SMP then there will be no ShPP.

## Bringing maternity leave to an end

## *The Curtailment Notice*

A mother, who is eligible to take ShPL or who wants her partner to take ShPL must bring her maternity leave (or her SMP or SMA if she does not qualify for SML) to an end early. This is known as a curtailment notice. A curtailment notice must be:

1. In writing:
2. State the date the mother wants either her ordinary or additional statutory maternity leave period to end ( the leave curtailment date) which must be:
	1. At least one day after the end of the compulsory maternity leave period;
	2. At least 8 weeks after the date on which the mother gave the curtailment notice to the employer; and
	3. Must be at least one week before the last day of the mother’s additional maternity leave if she is curtailing her additional maternity leave (‘AML’) or at least one week before the last day of the mother’s SMP period.

If the mother is employed by more than one employer she must give a leave curtailment notice to each employer at the same time.

Where a mother returns to work, she must comply with the notice requirements that apply to the maternity leave, i.e. 8 weeks’ notice of their planned return to work date.

## *Revoking notice to curtail SML or SMP*

A mother can revoke notice to curtail maternity leave by serving a revocation notice in writing provided this is before the leave curtailment date but only in the following cases:

1. Where the mother or partner cease to be entitled to ShPL or ShPP – notice must be given within 8 weeks of the date on which the mother gave her leave curtailment notice to her employer; and
2. The mother served her curtailment notice before the child’s birth - notice must be given within 6 weeks of the birth; or
3. The partner dies - notice must be given within a reasonable period of time.

Where curtailment of maternity leave is revoked, then the mother automatically reverts to maternity leave. Any leave taken will be deducted from the 52 week of ShPL taken at a later date. Note, that where the mother revokes curtailment of the maternity leave, both parents lose entitlement to ShPL.

The curtailment notice can be in the notice of entitlement and intention to take ShPL (see below).

## The Notice Provisions

Before ShPL can be taken by either the mother or the partner the complicated notice provisions must be complied with.

There are effectively two key notice provisions:

* a notice of entitlement and intention to take ShPL and a period of notice of ShPL to be taken.
* a period of notice to take ShPL which cannot be given without a notice of entitlement and intention to take ShPL having been given.

## Notice of entitlement and intention to take ShPL

Both the mother and partner must give notice of entitlement and intention to take ShPL. This must be not less than 8 weeks before the start of the first period of ShPL. Set out below are the notice provisions which apply to the mother and partner.

The notice must be in writing to the mother’s employer and contain the following information:

1. The mother’s name;
2. The partner’s name;
3. The start and end date of any SML taken or to be taken;
4. The total amount of ShPL available to both parents ( worked out by deducting SML taken or SMP/SMA as above);
5. The expected week of birth and date of birth;
6. How much ShPL the mother and partner intend to take each;
7. An indication as to when the mother intends to take ShPL (including the start and end dates for each period of leave);
8. A signed declaration.

The declaration must be signed by the mother and state that:

1. She satisfies or will satisfy the eligibility criteria;
2. The information she has given is accurate
3. She will immediately inform the employer if she stops caring for the child.

This must be accompanied by a declaration signed by the partner which states:

1. The partners name, address and NI number (or a declaration that they have no NI number) ;
2. That the partner satisfies the eligibility conditions required for the mother to take ShPL;
3. S/he is the father , spouse, civil partner or partner of the mother;
4. Consents to the amount of ShPL which the mother intends to take ; and
5. Consents to the partner’s employer processing the information in the partner’s declaration.

In the case of the father the notice of entitlement and intention must contain the following:

1. The mother’s name;
2. The partner’s name;
3. The start and end date of any SML taken or to be taken;[[1]](#footnote-1)
4. The total amount of ShPL available to both parents;
5. The expected week of birth and date of birth;
6. An indication of the dates the partner intends to take ShPL;
7. A signed declaration.

The declaration signed by the partner must state that:

1. They satisfy the eligibility criteria;
2. The information given is accurate;
3. They are the father, spouse, civil partner or partner; and
4. They will immediately inform their employer if they stop caring for the child or if the mother fails to curtail SML, SMP or SMA

This must be accompanied by a declaration signed by the mother which states:

1. the mother’s name address and NI number ( or a declaration that the mother has no NI number) has stopped caring for the child;
2. that the eligibility requirements are satisfied so that the partner can take ShPL;
3. consent to the amount of ShPL the partner intends to take;
4. she will immediately inform her partner if she fails to curtain SML, SMP or SMA
5. consent to the partner’s employer processing the information in the mother’s declaration

Where notice is given before the baby is born then the mother must notify the employer as soon as reasonably practicable after the birth. This must be before any ShPL is taken.

The notice which the mother/partner has to give of entitlement and intention to take ShPL is not binding and must not be treated as a notice of a period of leave unless the mother/partner has indicated that they wish it to be binding.

Where the mother/partner gives notice of entitlement and intention to take ShPL the employer may within 14 days of the date notice was given request:

* A copy of the child’s birth certificate; and
* The name and address of the mother/partners employer

The mother/partner has to respond within 14 days.

## Can the notice of entitlement and intention of ShPL be varied?

Yes. The notice of intention and entitlement can be varied by the mother/partner in writing provided it contains:

1. An indication as to when the ShPL is to be taken setting out the start and end dates for each period of leave;
2. What periods of ShPL have already been notified
3. What periods of ShPP have already been notified (for the purposes of determining the period of ShPL);
4. A declaration that both the mother and partner agree the variation.

Note there is no limit on the number of variations that can be given under these provisions. Although the entitlement and intention provisions are not intended to be binding and must not be treated as a period of leave notice they can be binding if an employee indicates this in the notice. If the employee therefore gives binding notice of leave under the entitlement and intention notice provisions it is not clear whether they could make more than three variations which is the limit which applies to the period of leave notice.

## Period of leave notice

ShPL can only be taken if written notice of the start and end dates of each period of ShPL is given in writing to the mother/partner’s employer. As stated above the mother and partner have to complete a notice of entitlement and intention but the dates of ShPL set out in that notice are not generally binding.

A period of leave notice cannot be given before a notice of entitlement and intention is given although it may be given at the same time as notice of entitlement and intention to ShPL.

The period of leave notice of ShPL must be given at least 8 weeks before the start date of the first period of shared parental leave and may:

1. Provide for more than one period of ShPL;
2. If given before the child is born
3. Contain the start date for the leave which is the day on which the child is born or is expressed as a number of days following the birth; and
4. Contain an end date, expressed as a number of days following the date of the birth.

ShPL cannot be taken before the child is born and after the day before the child’s first birthday.

## *Periods of leave*

Different provisions apply depending on whether an employee gives notice of a continuous period of ShPL or discontinuous periods of ShPL.

## *One continuous period of ShPL*

Where a continuous period of ShPL is given by the employee, the employer cannot refuse or alter that period of ShPL and the employee will be entitled to take ShPL. The notice must give the start and end date of the ShPL requested. This means that an employee can give one notice of just 6 weeks continuous leave.

However, when the employee wishes to take more than one continuous period of ShPL they can only give three separate notices in total.

## *Discontinuous periods of ShPL*

Where an employee gives one notice of ShPL to be taken in blocks of weeks i.e. discontinuous periods of ShPL then the employer may either:

1. Consent to the periods of leave requested;
2. Propose alternative dates for the periods of leave; or
3. Refuse periods of leave without proposing alternative dates.

The employer **must** do this within 2 weeks beginning with the date notice of the period of leave was given to the employer.

The effect of this provision is that if the employee gives a notice of 3 discontinuous periods of ShPL to begin and end on different dates e.g. 1st May to 31st May, 1st July to 15th July and 1st August to 10th August the employer can refuse. In that case, the employee may be better off submitting 3 separate notices of continuous periods of leave as the employer cannot refuse that.

Where the employer agrees, then the employee is entitled to take the leave on the dates agreed.

Where no agreement is reached where discontinuous leave is set out in one notice, between the employer and employee, the employee must take the discontinuous leave as one continuous period of leave. If the employee wants the continuous period to start on a different day from the first period of discontinuous leave set out in the notice they must give the employer notice within 5 days of the refusal by the employer (i.e. within 19 days of giving the notice). The new date of one continuous period of leave is to be taken must be a date after the 8 weeks from when the period of leave notice was given. If an employee does not give notice of an alternative start date within that time then one continuous period of leave must start on the start date of the first period of leave requested in the notice.

An employee may withdraw a request for discontinuous periods of shared leave up until the 15th day after the period of notice was given. This is only one day after the employer has refused leave etc. This means that parents need to decide in advance what they will do if the discontinuous period is refused. They will need to consider if one or other will take one continuous period and if so which date they would want that to begin or alternatively if they will withdraw and consider at a later date depending on their circumstances.

The provisions in relation to discontinuous periods of shared leave are a big concern. In particular, an employer does not have to give a reason to refuse an employee’s request for ShPL to be taken in blocks of weeks where this is given is one notice, nor does the employer have to offer alternative dates. A survey of employers conducted by Eversheds showed that 49% were concerned about the impact of discontinuous leave on the business and a quarter suggested that they may refuse leave.

Clearly, one of the biggest risks with the discontinuous periods of leave is that employers will simply not respond resulting in the employee being bumped into taking one continuous period of ShPL. Where an employee wishes to take a discontinuous period of leave it is suggested that they submit 3 separate notices of the periods of SPL they want to take. For example;

* For period 1st May to 31st May – notice must be given by 5th March
* For period 1st June to 15th June – notice must be given by 5th April
* For period 1st August to 10th August – notice must be given by 5th June

Note though, that the employer is limited to giving notice of 3 separate periods. In the above example, only 7 weeks ShPL has been given. The employee could lose the right to request the rest of the ShPL unless the employer agreed they could take it later.

Alternatively, if the employee has submitted one continuous period of leave then they could withdraw the notice by the end of the 15th day after they gave the notice. A withdrawal does not count towards the 3 periods of leave that can be requested.

## *Can an employee vary their period of leave notice?*

Once an employee has become entitled to a period of ShPL (because they have given a period of leave notice) they may give a written notice to vary ShPL. However, a maximum of 3 variations can be made and includes period of leave notices. It does not include where the employer proposes alternative dates.

A notice to vary may be given not less than 8 weeks before the original date and the new date. The variation notice can:

* Vary the start or end date of ShPL
* Request a continuous period to become discontinuous or vice versa;
* Vary the total amount of leave; or
* Cancel the leave.

## *Variation because of change in circumstances*

Where the notice is varied to make a discontinuous period become a continuous period the employee is automatically entitled to take the leave provided it is given 8 weeks before both the original and varied date.

If however, the employer wishes to change from one continuous period to discontinuous periods the employer has 14 days from the variation notice to agree. If they do not agree, then the employee has to take one continuous period but it is not clear if that is from the new date or the old date.

Special provisions apply where the child is born early, there is a change in circumstances, or a parent dies before the end of the ShPL period.

## Shared Parental Pay

## Who is entitled to ShPP

The mother will be entitled to ShPP if they meet the following conditions:

1. Have been employed for a continuous period of at least 26 weeks ending with the 15th week before the expected date of birth (“EWB”);
2. Have earned not less than the lower earnings limited (currently £111 per week) in the 8 week period ending with the 15th week before the EWB;
3. Have, at the date of birth main responsibility for the care of the child;
4. Have complied with the notification and evidence provisions (see below).
5. Is entitled to SMP in respect of the child.
6. The statutory maternity pay period that applies as a result of the mother’s entitlement to SMP is, and continues, to be reduced.
7. It is their intention to care for the child during each week in respect of which ShPP is paid; and
8. the mother is absent from work during each week in respect of which ShPP (excluding the KIT days) is paid;
9. if the mother is an employee their absence from work during which ShPP is paid is on ShPL in respect of the child.

The partner must also satisfy the following conditions:

* Have main responsibility for the care of the child (apart from the mother):
* Satisfy the employment and earnings condition, i.e. have been engaged in employment on an employed or self-employed basis for at least 26 weeks out of 66 weeks immediately preceding expected week of birth and had average weekly earnings of not less than the amount of the SMA (currently £30 per week) in the relevant tax year.

In the case of the partner:

1. Have been employed for a continuous period of at least 26 weeks ending with the 15th week before the expected date of birth (“EWB”);
2. Have earned not less than the lower earnings limited (currently £111 per week) in the 8 week period ending with the 15th week before the EWB;
3. Have, at the date of birth main responsibility for the care of the child (apart from the mother);
4. Have complied with the notification and evidence provisions (see below).
5. It is the partners intention to care for the child during each week in respect of which ShPP is paid;
6. The partner’ is absent from work during each week in respect of which ShPP is paid; and
7. Where the partner is an employee their absence from work during each week that ShPP is paid is on ShPL in respect of the child

The mother must also satisfy the following conditions:

* Have the main responsibility for the care of the child; and
* Meet the employment and earnings conditions (i.e. have been employed or self-employed for at least 26 weeks out of 66 weeks immediately preceding the birth/placement for adoption of the child) and the average weekly earnings are not less than SMA (currently £30 per week) in the relevant tax year;
* Became entitled to SMP/SMA; and
* The maternity pay period/maternity allowance period continues to be reduced.

Where the mother/partner are entitled to ShPP they must give notice as well as evidence to their employer who will then be liable to pay ShPP.

## Notice of ShPP

As with the notice requirements to take ShPL the notice requirements for ShPP apply to both the mother and partner as set out below:

In the case of the mother at least 8 weeks before the beginning of the first period the mother intends to claim ShPP she must give notice of the following:

1. The total number of weeks the mother is entitled to claim ShPP, irrespective of the partners intention to claim ShPP;
2. The number of weeks the mother intends to claim ShPP;
3. The number of weeks the partner intends to claim ShPP;
4. The period or periods the mother intends to claim ShPP.
5. The child’s expected week of birth;
6. The child’s date of birth;
7. The mothers name;
8. A written declaration signed by the mother.

The written declaration signed by the mother must state:

1. That the information given in the notice given by the mother and the declaration signed by the partner is correct;
2. That the mother meets or will meet, the eligibility requirements for ShPP
3. That the mother will immediately inform the person liable to pay ShPP if the mother’s maternity pay period does not and continues not to be reduced
4. Specify the date on which the mother’s maternity pay period or maternity allowance period in respect of the child began and the number of weeks by which it is, or will be, reduced.

This must be accompanied by a written declaration signed by the partner that the partner:

1. Consents to the mother’s intended claim for ShPP;
2. Has the main responsibility for the care of the child apart from the mother);
3. Meets the employment and earnings conditions (i.e. have been employed or self-employed for at least 26 weeks out of 66 weeks immediately preceding the birth) and the average weekly earnings are not less than SMA (currently £30 per week) in the relevant tax year;
4. Specify the partner's name, address and national insurance number or, if the partner has no national insurance number, stating that fact; and
5. Provide consent to the employer who is liable to pay ShPP to process the information in the written declaration.

In the case of the partner at least 8 weeks before the beginning of the first period the partner intends to claim ShPP the partner must give notice of the following:

1. The total number of weeks the partner is entitled to claim ShPP, irrespective of the mothers intention to claim ShPP;
2. The number of weeks the partner intends to claim ShPP;
3. The number of weeks the mother intends to claim ShPP;
4. The period or periods during which the partner intends to claim ShPP.
5. The child’s expected week of birth;
6. The child’s date of birth;
7. The partners name;
8. A written declaration signed by the partner

The written declaration signed by the partner must state:

1. That the information given by the partner is correct;
2. That the partner meets or will meet, the eligibility requirements for ShPP
3. That the partner will immediately inform the person liable to pay ShPP if the partner ceases to be eligible for ShPP

This must be accompanied by a written declaration signed by the mother that the mother:

1. Consents to the partners intended claim for ShPP;
2. Meets the eligibity conditions in respect of the mother which apply to the partner’s entitlement to ShPP;
3. Will immediately inform the partner if the maternity pay period or maternity allowance period does not reduce or continue to reduce
4. Specifies the mother’s name, address and national insurance number or, if the mother has no national insurance number, stating that fact;
5. Specifies the date which the maternity pay period or maternity allowance period for the child began and the number of weeks by which it reduced; and
6. Provide consent to the employer who is liable to pay ShPP to the partner to process the information in the written declaration.

The employer can within 14 days of receiving the notice of ShPP above request:

1. A copy of C's birth certificate or, if one has not been issued, a declaration signed by the

mother stating that one has not been issued; and

1. The name and address of the partner’s employer or, if P has no employer, a written

declaration signed by the mother that the partner does not have an employer.

The mother and partner must provide the information requested within 14 days of the request.

## How much is ShPP?

The weekly rate of ShPP is the smaller of £138.18 or 90% of the normal weekly earnings of the individual claiming ShPP.

The likely effect of setting ShPP at this level means that mothers who qualify for SMP at the higher rate of 6 weeks at 90% of earnings (which is higher than the flat rate of £138.18) will take SMP for the first 6 weeks of birth.

It is important to point out that only mothers who qualify for SMP and who meet the other eligibility requirements will be entitled to ShPP.

Note that mothers who only qualify for SMA will not be entitled to qualify for ShPP. However, where the mother qualifies for SMA the partner may qualify for ShPP if he is employed.

## How long is ShPP payable for?

The starting point for which ShPP is payable is 39 weeks. However, as the mother must take at least 2 weeks SMP/SMA the maximum amount of ShPP that is available to be shared is 37 weeks.

In order for entitlement to ShPP to arise, the mother must have curtailed her SMP/SMA i.e. she must intend to take less than 39 weeks. If the mother has given notice to end her SMP/SMA in advance the number of weeks of ShPP is less the number of weeks she has already claimed SMP/SMA.

If a woman returns to work before the end of the maternity pay period or the SMA period, the maternity pay period does not end but continues in the background. Therefore, in order to create entitlement for the partner she will have to curtail the maternity pay period. In that case, the number of weeks of ShPP will be 39 weeks less the number of weeks SMP/SMA taken by the mother up to the date of curtailment.

Regulation 14 provides that no ShPP is payable where the employee is in receipt of SSP.

Before the mother/partner can claim entitlement to ShPP they must comply with the notice requirement.

## Variation of the amount of ShPP

Parents will be able to change the amount of ShPP they will each take by giving at least 8 weeks’ notice in writing to the employer. The employer will not be liable to pay ShPP for at least 8 weeks before the beginning of the first period specified in that notice.

The mother may vary the number of weeks she intends to claim ShPP by notice in writing. The employer will be liable to pay ShPP to the mother for the number of weeks during which the mother and partner have exercised, or intend to exercise entitlement to ShPP. The notice must be accompanied by a declaration that the partner consents to the variation.

Similarly the partner may vary the number of weeks in respect of which he intends to claim ShPP by giving notice in writing. The employer will be liable to pay ShPP to the partner for the number of weeks during which the mother and partner have exercised or intend to exercise entitlement to ShPP. The written notice must be accompanied by a declaration that the partner consents to the variation.

## Impact on terms and conditions

An employee who takes shared parental leave (“ShPL”) is entitled to the benefit of all their terms and conditions of employment which would have applied if they had not been absent with the exception of remuneration. Remuneration means wages or salary. This means that entitlement to holidays continues to accrue during ShPL. The issue is likely to be whether holiday pay can be carried over.

In addition, entitlement to pensions continues to accrue during the period of ShPL. In terms of pension contributions, where the employee receives ShPP the employer must continue to pay contributions at the same level as if the employee was in work. This is the same as applies in relation to SMP and Statutory Paternity Pay (“SPP”).

## *Redundancy*

Where, during a period in which the employee is taking ShPL, it is not practicable, by reason of redundancy, for the employer to continue to employ the employee under the existing contract of employment then the employee is entitled to be offered alternative employment with the employer, the employer’s successors or an associated employer under a new contract of employment.

The employee is entitled to be offered suitable alternative employment before the end of their existing contract. The alternative employment must be suitable in relation to the employee and appropriate for the employee to do in the circumstances, in terms of capacity and place and other terms and conditions. It must not be substantially less favourable than those which would have applied if the employee had continued in their previous job. Where an employer fails to comply with these provisions, then any dismissal, by reason of redundancy, will be regarded as automatically unfair.

In the recent case of *Sefton Borough Council v Wainwright UKEAT/0168/14,*  an issue arose as to when an employee, on maternity leave, should be offered suitable alternative employment in a redundancy situation. In that case the EAT held in the case of maternity and the protection from redundancy provided by reg 10 of MPL Regulations applied at the point at which the post was displaced not after the selection process had been completed. Arguably the same should apply in relation to ShPL.

Similarly, in the case of *Simpson v Endsleigh Insurance Services Ltd UKEAT 0544/09,* the EAT held that what is suitable in relation to the employee and appropriate for the employee to do is a matter to be determined by the employer. In that case the employer failed to offer a woman on maternity leave who had worked in London prior to going on maternity leave a job in Cheltenham. In that case, while the job was suitable and appropriate for her to do the employer was entitled to regard the location as substantially less favourable and it did not therefore amount to a suitable alternative vacancy

## *Return to work after ShPL*

Apart from redundancy (see above) an employee has the right to return to the same job when they return from 26 weeks ShPL or ShPL together with other statutory leave i.e. maternity paternity or unpaid parental leave.

However, where the period of ShPL is the last of 2 or more consecutive periods of statutory leave which include a period of parental leave of more than 4 weeks, a period of additional maternity leave or a period of additional adoption leave,the employer can argue that it is not reasonably practicable for them to return to the job they were employed in before their absence. In that case the right to return is to another job which is both suitable and appropriate for them to do in the circumstances.

Where the employee takes ShPL on its own or taken with other statutory leave which exceeds 26 weeks, the employer can argue that it is not reasonably practicable for them to return to the job they were employed in before their absence. In that case the right to return is to another job which is both suitable and appropriate for them to do in the circumstances.

Where an employee is returning from discontinuous periods of ShPL, the right is to return to the post that the employee held immediately before the first period of ShPL. This is subject to the provisions above on returning. Seniority and pension rights accrue as if the employee had not been absent and they must return on terms and conditions no less favourable than would have applied had they not been absent.

## Protection from a detriment and dismissal

An employee is entitled not to be subject to a detriment by an employer by any act or failure to act which takes place on or after 1 December 2014 because:

* They took or sought to take or made use of the benefits of ShPL;
* The employer believed the employee was likely to take ShPL;
* The employee refused to work during ShPL (see below);

Similarly, an employee who is dismissed will be treated as automatically unfairly dismissed if:

1. The reason or principal reason for the dismissal is because the employee took, or sought to take, or made use of the benefits of ShPL,
2. The employer believed that the employee was likely to take ShPL or the employee undertook, considered undertaking or refused to undertake work (See below) during ShPL;
3. The principal reason for the dismissal was that the employee was made redundant and the employer did not comply with the requirement for suitable alternative work;
4. A redundancy situation applied equally to one or more employees in the same undertaking and who were in a similar position to the employee but who were not dismissed.

Where an employee is subject to a detriment they should lodge a grievance setting out the detriment they have been subjected to and asserting that this is because they took or sought to take or benefit from the provisions of ShPL in order to comply with the ACAS Code of Practice on Disciplinary and Grievances. They should also appeal against the outcome of the grievance if the grievance is not upheld.

In the case of an employee who is dismissed, the employee should appeal against their dismissal in accordance with the ACAS Code of Practice on Disciplinary and Grievances. The employee should assert that they have been automatically unfairly dismissed for one of the reasons set out in (a) to (d) above.

Where an employee wishes to bring a claim in an Employment Tribunal as a consequence of being subject to a detriment or unfair dismissal the tribunal claim must be lodged within 3 months less 1 day of the detriment/date of termination.

Early Conciliation now applies to all Employment Tribunal claims and, therefore, ACAS must be contacted before any Employment Tribunal claim is lodged. Early Conciliation can be useful to see if a settlement can be reached in the matter.

## Working during ShPL

The regulations make provisions similar to the 10 ‘keeping in touch days’ which apply for maternity leave (“KIT”). The provisions which apply to ShPL are in addition to the 10 maternity KIT days making it 30 in total.

Specifically, an employee may carry out work for the employer during a period of ShPL without bringing the ShPL to an end.

In particular, the employee may work for up to 20 days during the period of ShPL. Work includes work done under the contract of employment and includes training, or any other activity, for the purpose of keeping in touch. However, this does not include meetings to discuss the employee’s return to work or any other reasonable contact between the employer and employee. Reasonable contact is not defined.

There is no obligation on the employer to pay the employee for any work carried out on one of those 20 days. Similarly, there is no obligation on the employee to work during that period and they are protected from being subject to a detriment in the event that they refuse to work when asked by the employer.

Any days worked do not either bring the ShPL to an end nor do they extend the period of ShPL.

## Issues for the Union

## Pay

This is likely to be the biggest issue in relation to the implementation of ShPP. Unlike maternity pay which is payable for the first 6 weeks of the 39 week period at 90% of pay which is **higher** than the SMP rate of 138.18 per week, ShPL is paid at a flat rate for up to 39 weeks at either 90% of pay or £138.18, whichever is the **lower**. Given that ShPL is payable from the date of birth, there is a potential risk that fathers who take ShPP claim that they are subject to discrimination because they are paid the lower rate of pay. In terms of a claim for direct discrimination, this would be unlikely to succeed on the basis that the correct comparator for a man on ShPL would arguably be a woman who is on ShPL and not, a woman on maternity leave. Given that the enhanced rate for the first 6 weeks only applies to women who are in receipt of SMP a tribunal may find that the circumstances are not comparable and that, had the woman taken ShPP, she would have received the same rate as the man and, therefore, a claim for direct discrimination would not succeed.

However, it may give rise to a claim for indirect discrimination on the basis that the employer has applied a provision, criterion or practice namely, paying a lower rate of ShPP which puts men at a particular disadvantage when compared with women and puts men at an actual disadvantage because they receive a lower rate of pay. The issue then would be whether or not the employer could justify the provision of the lower rate of ShPP. There are two issues which arise in relation to justifying discrimination:

1. Women who are on maternity leave are in a special position so that men cannot compare themselves with women on maternity leave (section 13(6) EqA 2010); and
2. Men could argue that ShPL is to promote involvement of parents in child care and he is, therefore, in a comparable position.

In relation to point (1) the case law to date seems to support the argument that the higher rate of maternity pay is intended to protect the woman’s biological condition during and after pregnancy. In *Abdoulaye v Regie Nationale des USINES Renault SA C218/98*, the European Courts rejected a claim by a man for a lump sum bonus payment which was paid to a woman on maternity leave on the basis that women are in a different position to men. However, in the case of *Roca Alvarez v CSA Sturt Espana ETT SA C-104/09*, the European Court held in a case where a father could only take time off if he and the mother were employees, that the leave was no longer related to the woman’s biological condition and amounted to parental leave.

This seems to suggest that the special protection argument can be used to defend enhanced maternity pay but only for a certain period after birth. The question is for how long after the birth can an enhanced maternity pay be justified. In the case of *Betriu Montull v Instituto of Institut Nationale des Seguridad Social C-5/12*, the European Court held that a period of 16 weeks leave was intended to protect the woman’s biological condition. It can also be argued that because shared parental leave is only triggered when a woman ends her maternity leave that this supports an argument that for the period that women are on paid maternity leave this is a special position and, as such, enhanced pay can be justified for that period.

Alternatively, it can be argued that because the Pregnant Worker’s Directive 92/85 guarantees minimum maternity leave of 14 weeks, which is recognised as an inalienable right of women that enhanced maternity pay can be justified for this period.

In relation to argument (2), the success of any defence may depend on the gender demographic of the workforce.

In the case of *Shuter v Ford Motor Company Ltd Case No: 3203504/13*, Mr Shuter took additional paternity leave for 20 weeks and was paid SPP. He brought a claim of direct discrimination and the tribunal, in rejecting his claim, found that the appropriate comparator was a woman on additional paternity leave and she would not have been treated any differently. As regards the indirect discrimination claim the tribunal rejected his claim for indirect discrimination even though the employer had conceded that its maternity policy placed men at a particular disadvantage when compared with women on the basis that the employer could justify the difference in treatment because the aim of the maternity policy was to attract women to its male dominated workforce.

It is therefore likely that, a similar argument would succeed in defending the difference between maternity pay and ShPP, in those sectors, where men dominate the workforce. The issue then is whether or not an argument that women should receive a higher rate of pay as a health and safety measure would be enough to justify discrimination in sectors where the proportion of women and men is more balanced.

As a consequence, employers may rely on potential discrimination claims to introduce the following changes:

1. Remove enhanced maternity pay altogether and pay statutory rates only for both maternity leave and ShPL;
2. Reduce the amount of enhanced maternity pay to a shorter period;
3. Retain the different provisions of enhanced maternity and statutory ShPL, relying on the points above to justify discrimination.

In terms of the Union’s response, if option (1) is adopted by the employer, there is a significant risk that where the enhanced maternity pay is set out in the contract of employment or a collective agreement, which is incorporated into the contract of employment, that an employer who removes the enhanced maternity pay is acting in breach of contract. In that case the Union can use the arguments above i.e. special position of women on maternity leave to maintain the status quo.

In terms of option (2), in relation to limited enhanced maternity pay, the Union could argue that the enhanced pay should be maintained for the first 18 weeks where this is paid at an enhanced rate on the basis that this would be a reasonable period for the employer to treat as protecting the health and safety of women. In this regard, it would be helpful to record this agreement in writing should any claims be subsequently brought by other employees so that there is evidence of consideration as to what protection is required taking into account the special condition of women following birth. The Union could also consider taking into account enhanced pay for those women who breastfeed following birth as this may give rise to further health and safety considerations.

In terms of option (3), it may be that the best position is to negotiate one shared parental scheme which mirrors the enhanced maternity scheme so that both parents benefit from enhanced pay during their first periods of ShPL which encourages fathers and partners to take ShPL. In this regard, Unions can rely on the Government’s own statistics which suggests that only 4% of men will take up ShPP.

## Discontinuous periods of leave

The issue in respect of discontinuous leave is whether a blanket policy or practice of rejecting requests for discontinuous ShPL places men at a particular disadvantage because they are less likely to take one continuous period of leave. Clearly, the success of a claim for indirect discrimination will depend on the gender demographic of those who take up ShPL and evidence to show that fathers are less likely to take one continuous period of leave. Assuming evidence can be found to show that men are more likely to request discontinuous periods of leave, then the issue for the employer is whether or not they could justify such a refusal. A blanket refusal policy ground is unlikely to amount to a justification defence.

## Redundancy

As the ShPL regulations provide those who take ShPL with the same protection as women on maternity leave, namely the right to be offered a suitable alternative post in a redundancy situation, there is likely to be an issue as to who should be offered the suitable alternative vacancy first. Should it be the woman who is on maternity leave or the man on parental leave? Likewise, offering suitable alternative vacancy to a man on ShPL make give rise to a claim of discrimination by a woman on maternity leave.

Ultimately, the effect of the provisions to allow those on ShPP to be offered suitable alternative vacancies is likely to lead to a weakening of the women’s position on maternity leave with employers pooling those posts with those on maternity and ShPL. In the case of *Sefton Borough Council v Wainwright UKEAT/0168/14,* the EAT held in relation to a claim brought by a woman that she was unfairly dismissed because the employer failed to offer an alternative post during maternity leave, the EAT held that the provisions of Regulation 10 applied at the point at which the employer decided to displace a post and redeploy staff to alternative posts and not after the decision to select candidates for alternative posts had been taken. In that case, two employees, one a man and one a woman, were considered for an alternative post and when the woman was not selected she submitted a claim for unfair dismissal. In considering whether or not the employer should have offered her the alternative post, the EAT confirmed that the tribunal was entitled to find that the post which both candidates applied for was a suitable vacancy for the woman, and that the employer could have met its obligations under Regulation 10 if it had considered a different suitable available vacancy without necessarily having to offer her the post. In particular, the EAT said that it was for the employer to assess whether or not it would have been able to offer some other suitable alternative vacancy taking into account its desire to appoint the best person to the post, that it might not have been proportionate to require the employer to have offered her the particular vacancy if something else could have been offered which was suitable.

Whether a claim for unfair dismissal succeeds will then depend on the particular facts of the case in relation to what was suitable and appropriate in the circumstances. In view of the decisions in *Sefton* and *Simpson,* employers may be more likely to succeed in arguing that it was reasonable for them to determine, in the circumstances, which candidate was the most appropriate.

Ultimately, employers may use the threat of discrimination claims to review enhanced maternity leave and pay policies. In terms of employers who introduce ShPL and pay policies they may seek to introduce:

1. A requirement to meet with the employer when submitting an entitlement/intention to take ShPL and again, when submitting notice of ShPL.
2. A more onerous notice provisions than the statutory 8 weeks’ notice required;
3. Criteria for handling requests for discontinuous ShPL;
4. Criteria for determining who should be offered alternative employment where redundancy situation occurs;
5. Shared parental pay at the statutory minimum.

As a starting point, the Union should seek to secure that any ShPL and pay policy mirrors any enhanced maternity leave and pay policy.

In this regard, Agenda for Change provides that a woman who has 12 months continuous service with one or more NHS employers by the beginning of the week before the expected week of birth (“WEB”) is entitled to:

* For the first 8 weeks of absence the employee will receive full pay, less any Statutory Maternity Pay or Maternity Allowance (including any dependents’ allowances) receivable;
* for the next 18 weeks the employee will receive half of full pay, plus any Statutory Maternity Pay or Maternity Allowance (including any dependents’ allowances) receivable, providing the total receivable does not exceed full pay;
* for the next 13 weeks, the employee will receive any Statutory Maternity Pay or Maternity Allowance that they are entitled to under the statutory scheme.

The scheme is flexible in that a woman on maternity leave can vary how maternity pay is paid for example at full or half pay or a fixed amount.

Although the provisions come into effect, for those whose baby is due on or after the 5th April 2015, the date from which the first notice can be given, is the 1st December 2014. As such, Unions should be negotiating now with employers to protect the enhanced provisions already in place.

## Appendix 1 - Amendments to adoption and other family friendly rights

## Amendments to the adoption provisions

*Parents of a child born to a surrogate mother.*

New Regulations are introduced which provide rights to paternity, adoption and shared parental leave and pay for couples who apply or intend to apply for a Parental Order under s.54 of the Human Fertilisation and Embryology Act 2008. This will mean that a child born to a surrogate mother will be treated as the couple’s own child. The Regulations came into force on the 25th November and the 1st December 2014.

The right to adoption leave is extended to individuals who foster a child with a view to adoption under the Fostering for Adoption Scheme run by Local Authorities. This is due to come into force on the 5th April 2015.

New Regulations also provide for couples who are adopting a child from outside the UK to the right to shared parental leave. The Regulations are due to come into force on the 5th April 2015.

*Parental leave*

The existing right to unpaid parental leave of 18 weeks is extended to the parents of children aged between 5 and 15. Currently the provision is only available to those who have children up until the age of 5. This provision is due to come into force on the 5th April 2015.

1. In the case of notice issued by the father, when the mother does not qualify for SML the notice must also contain the period in respect of which SMP is received or is to be received by the mother where statutory maternity leave was not taken or if the mother is not entitled to SMP the period of w maternity allowance received or which is to be received by the mother is payable. [↑](#footnote-ref-1)