

Client Alert

Latham & Watkins
Employment Practice

New Maternity Leave and Flexible Working Provisions in the UK

New legislation under the umbrella of the *Work and Families Act 2006* has now been introduced in relation to maternity leave and flexible working. The *Work and Families Act 2006* is designed to establish a balanced package of rights and responsibilities for employers and employees.

New Maternity and Adoption Leave Provisions

Women whose expected week of childbirth (EWC) is on or after 1 April 2007 are subject to new rules regarding their maternity leave. The provisions have been brought in by the *Maternity and Parental Leave (Amendment) Regulations 2006*.

There are seven key developments which employers should be aware of:

- Extension of the Statutory Maternity Pay (SMP), Maternity Allowance (MA) and Statutory Adoption Pay (SAP) period from 26 to 39 weeks.
- Extension of eligibility for Additional Maternity Leave (AML) – all pregnant employees who are eligible for Ordinary Maternity Leave (OML) are now automatically eligible for AML (i.e., 52 weeks in total).
- Increase in the period of notice that employees on maternity leave are required to give employers to return early from OML or AML – from 28 days to eight weeks.

- Entitlement for employers to make "reasonable contact" with employees who are on maternity leave.
- Introduction of "Keeping in Touch" (KIT) days. Where both parties agree, employees on maternity leave can attend work for 10 days for training or other activities without losing their SMP allowance.
- SMP period to start on any weekday to tally with commencement of OML.
- Removal of the small employer's exemption – employers with five or less employees will no longer be exempt from a finding of automatic unfair dismissal where they do not allow an employee returning from AML or additional adoption leave to return to the same or a similar job.

Practical Considerations

KIT days have to be agreed upon by the employer and employee. If any employee agrees, considers or refuses to attend a KIT day they will be protected from detriment or dismissal on those grounds.

The regulations do not expand on what "reasonable contact" will amount to in practice (i.e., whether it only amounts to communication from the employer to the employee or vice-versa). The Department of Trade and Industry (DTI) has issued some limited guidance on their Web site but

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employers could consider agreeing on the boundaries of “reasonable contact” before the employee leaves for maternity or adoption leave.

New Flexible Working Provisions for Carers

From 6 April 2007, the right to request flexible working arrangements will extend to employees who are carers of sick or disabled adults. Previously only employees with childcare responsibilities had the right to request flexible working to meet their childcare obligations.

As with the pre-existing right, the new right is a right to *request* flexible working arrangements rather than a *right* to flexible working arrangements. Employers have a duty to consider any requests seriously but are not obliged to grant requests. The same procedures will apply to employers for responding to requests, giving a business reason for refusing requests and informing the employee of their right to appeal.

Under the new rules, employees will be eligible to make a request provided that they:

- Have at least 26 weeks continuous service at the request date;
- Expect to be caring for an adult who:
 - is a relative of the employee;
 - is the spouse, civil partner or partner of the employee; or
 - lives at the same address of the employee.
- Make an application in writing for flexible working arrangements which will enable them to care for the relevant adult; and
- Have not already made a similar request in the preceding 12 month period.

Practical Considerations

Whilst the legislation is fairly clear in its definition of the type of adult that employees can be carers for (relative, spouse, etc.) there is no definition for “carer” or the level of care required in order to show the person is in need of care. The DTI has issued an illustrative list of the types of care that might be envisaged in their guidance which is available at www.dti.gov.uk.

Coming Soon: New Paternity Leave Provisions

Under the *Work and Families Act 2006*, the government is currently consulting with regard to new paternity leave regulations. It is anticipated that the regulations will give employed fathers a new right to up to 26 weeks Additional Paternity Leave some of which could be paid, if the mother returns to work. This will be introduced alongside the extension of maternity pay to 12 months. The DTI has indicated that the legislation will be enacted before the end of the current parliamentary session.

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