SHARED PARENTAL LEAVE – A GUIDE FOR EMPLOYERS

Introduction

Shared Parental Leave ("SPL") is a brand new employment right from April 2015 which allows working parents to share statutory leave and pay on the birth or adoption of a child.

Its introduction implements the Coalition Government's commitment to put in place a more flexible system of statutory leave and pay for working parents.

The current system of rights includes additional paternity leave ("APL") and pay which allows fathers to take up to 6 months leave to care for a child but APL has been very unpopular. There are various reasons for this. These are partly economic (few employers offer enhanced pay during APL) and partly cultural. A major drawback with the APL scheme is that it requires the mother to return to work and give up her right to further leave in order for the partner to take APL.

The new system of shared parental leave is much more flexible allowing parents to take leave in continuous or discontinuous blocks, separately or at the same time and to make up to 3 requests for leave or changes to leave.

Existing family-friendly employment rights (and related April 2015 changes)

Maternity Leave – pregnant employees are entitled to 52 weeks maternity leave and, subject to eligibility conditions, 39 weeks statutory maternity pay ("SMP"). SMP is paid at the following rates:

- First 6 weeks – at the rate of 90% of the employee's normal weekly earnings.
- Remaining 33 weeks – at the lower of (i) the statutory rate (currently £138.18 per week, increasing to £139.58 from 5 April 2015) or (ii) 90% of the employee's normal weekly earnings.

Employees on maternity leave have protected rights in relation to returning to their job after maternity leave and to receive contractual benefits (except remuneration) during maternity leave. They may agree with their employer up to 10 keeping in touch ("KIT") days during maternity leave whereby they can work or carry out work related activity (e.g. training) without the period of maternity leave coming to an end. Employees are protected during pregnancy and maternity leave from dismissal or suffering any detriment for exercising their statutory rights. In addition, expectant mothers have the right to paid time off to attend ante-natal appointments.

Adoption Leave – employees who are the primary adopter in a couple have very similar rights to employees entitled to maternity leave. Adoption leave also lasts 52 weeks with 39 weeks statutory adoption pay ("SAP"). From April 2015, there will no longer be a qualifying service requirement for adoption leave which, like maternity leave, will become a day one right. Also from April 2015, SAP will be aligned with SMP so that employees receive SAP at the rate of 90% of their normal weekly earnings for the first 6 weeks. Previously all SAP was paid at the statutory rate (or 90% of normal weekly earnings if lower).

From April 2015, a new right to time off for 5 pre-adoption appointments is being introduced for employees.

The rights for employees taking adoption leave to return to work, contractual benefits, KIT days and protection against dismissal and detriment mirror the rights for maternity leave.

Paternity Leave – employee partners of expectant mothers or primary adopters with qualifying service can take 1 or 2 weeks paternity leave within the 56 day period from birth or placement. If eligible, statutory paternity pay is paid at the statutory rate (or 90% of normal weekly earnings if lower). In addition, if the mother curtails her right to maternity leave and returns to work then the partner can take up to a further 26 weeks additional paternity leave ("APL") paid at the statutory rate. Similar rights apply regarding returning to work, contractual benefits, KIT days and protection against dismissal and detriment as applies to maternity and adoption leave.

From April 2015, with the introduction of shared parental leave, APL is being abolished. To ascertain whether the old or new regime will apply, the key point will be to clarify whether the child is due to be born or placed for adoption (i) before or (ii) on/after 5 April 2015. The new regime applies to the latter.

(Unpaid) Parental Leave – not to be confused with the new shared parental leave right is the existing right to take unpaid parental leave. This right enables birth or adoptive parents (or anyone with parental responsibility) to take up to 18 weeks unpaid leave to care for a child during the period up to the child's 5th birthday (or during the 5 years from placement in adoption cases) or 18th birthday for disabled children.

The right includes protection around return to work, contractual benefits during leave and detriment/dismissal.

From April 2015, the scheme for unpaid parental leave will be changed so that the leave can be taken up to the child's 18th birthday in all cases (not just in the case of disabled children).

Flexible Working – employees with 6 months qualifying service have the right to request flexible working (e.g. to move to part-time work or working from home). Employers can refuse requests for flexible working where they can show at least one of several business grounds for refusal listed in the Employment Rights Act 1996. In practice, employers have a good deal of discretion to resist agreeing flexible working requests although they must be careful to act consistently and not to unlawfully discriminate. Flexible working requests must be dealt with by employers within 3 months of receipt including any appeal. Previously, only employees with caring responsibilities had the right to request flexible working but this was extended to all employees (with the requisite service) from June 2014.

Shared Parental Leave and Pay – the new employment right

- **When does it apply from?**

  The new rules apply to children due to be born or placed for adoption on or after 5 April 2015. Therefore, in the case of premature births that occur before 5 April

2015, the parents will be able to take SPL and receive shared parental pay ("ShPP"), assuming the eligibility conditions are satisfied, if the child was due on or after 5 April 2015. Conversely, where the child is born on or after 5 April 2015 but was due before that date, the parents will not be able to participate in the SPL scheme but the mother will be able to take maternity leave and the father, if eligible, may take paternity leave and APL.

The new right applies to same sex couples as well as to different sex couples.

- **Amount of leave and pay that can be shared**

The new rules allow working parents to share up to 50 weeks statutory leave and 37 weeks statutory pay on the birth or adoption of a child. There is an exception to this limit in the case of a self employed mother who is entitled to maternity allowance ("MA"). In that situation the self employed mother could curtail her right to receive any MA and the employed partner, assuming s/he satisfies the eligibility conditions, could take 52 weeks SPL.

To calculate how much SPL (and ShPP) a couple can take (and receive) one must deduct any ML or AL (and SMP or SAP) that has been taken (and received) by the mother (or primary adopter). For example, in a birth case where the mother takes 26 weeks ML, the maximum SPL that will be available for the couple to share is a further 26 weeks. Assuming the mother was paid SMP for the 26 weeks ML, the couple would have 13 weeks ShPP left available to them.

- **Period when SPL can be taken**

SPL can be taken by parents within the first year following the birth or adoption of a child.

It cannot be taken until after the compulsory 2 weeks (or 4 weeks for factory workers) compulsory maternity leave period immediately following birth (or the equivalent 2 week period in adoption cases).

SPL is taken in blocks of a week. The minimum period of SPL is 1 week. A period of SPL can start on any day of the week.

SPL can be taken by parents consecutively or concurrently. However, if SPL is taken concurrently this will obviously reduce the period over which the leave is being taken. For example, a couple sharing 50 weeks SPL taking it concurrently would use up their full statutory leave entitlement after 25 weeks.

- **Eligibility for SPL**

To qualify for SPL a mother (or primary adopter) must:

- have a partner;
- be entitled to ML or AL, SMP, SAP or MA; and
- have curtailed or given notice to reduce their ML or AL (or SMP, SAP or MA if not entitled to ML or AL).

A parent intending to take SPL must:

- be an employee;
- share the primary responsibility for the relevant child with the other parent at the time of birth (or placement for adoption); and
- have properly notified their employer of their entitlement to SPL and provided the necessary declaration and evidence.

In addition, for a parent wanting to take SPL:

- they must meet the continuity of employment test (see table A); and
- their partner must satisfy the employment and earnings test (see table B).

Table A

Continuity of employment test
The individual must: 1. have worked for the same employer for at least 26 weeks at the end of the 15th week before the expected due date (or matching date); and 2. still be working for the employer at the start of each leave period

Table B

Employment and earnings test
In the 66 weeks prior to the expected due date/matching date the individual must have: 1. worked for at least 26 weeks; and 2. earned an average of at least £30 a week in any 13 of those weeks

- **Eligibility for ShPP**

ShPP is paid at the same rate as SMP and SAP and is payable for up to 37 weeks (following the mother's compulsory 2 week maternity leave period).

To be eligible for ShPP an employee must:

- satisfy the continuity of employment test (see Table A); and

- have earned more than the national insurance lower earnings limit in each of the 8 weeks prior to the 15th week before the expected due date (or matching date in adoption cases)

In addition, their partner must satisfy the employment and earnings test (see Table B).

The lower earnings limit is reviewed each year in line with inflation. It is currently £111 per week.

- **Notification – the 'SPL notice of entitlement' and 'period of leave notice'**

An employee who intends to take SPL must submit a notice of entitlement and intention to take SPL to their employer. This notice must be given at least 8 weeks before any SPL starts and must include:

- how many weeks ML/AL (or SMP, SAP or MA if the mother is not entitled to ML/AL) has been or will be taken;
- how much SPL both parents are entitled to take;
- how much SPL each parent intends to take; and
- a non-binding indication of when they expect to take SPL.

In some cases only one parent will take SPL. For example, where the mother takes 26 weeks ML and her partner then takes the remaining 26 weeks as SPL. In such a case only the partner would need to submit the notice of entitlement and intention to take SPL to their employer. However, the mother would need to curtail her ML either by submitting a notice to that effect or by returning to work. Alternatively, it is possible for the mother to be on ML whilst the father is also on SPL providing that the mother has submitted her curtailment notice.

The notice of entitlement must be accompanied by a declaration from the employee's partner stating that:

- the partner shares the main responsibility for the care of the relevant child with the employee;
- they meet the employment and earnings test; and
- they consent to the employee taking the SPL set out in the employee's notice of entitlement.

In addition to the notice of entitlement and intention to take SPL, an employee wishing to take SPL must submit a period of leave notice to their employer stating when they wish to take SPL at least 8 weeks before the SPL is due to start. This notice can be given at the same time as the notice of entitlement and intention to take SPL.

Early Births – the requirement for employees to give 8 weeks notice to take SPL is modified in the case of early births. Where a child is born early and an employee had SPL arranged to start within 8 weeks of the due date, the regulations allow the employee to change the start date and take the same period of SPL after the actual birth date without having to give the employer 8

weeks notice provided the notice is given as soon as reasonably practicable (see example 1).

Example 1:

Jenny and Arthur's baby is due on 1/5/15 and Arthur has arranged to take 4 weeks SPL from 1/6/15. The baby is born early on 1/4/15. Arthur can vary the start date and take the same period of SPL from 1/5/15 provided he submits a notice to this employer notifying the change as soon as reasonably practicable (8 weeks notice of the change is not required).

Alternatively, where a child is born more than 8 weeks early and the notice of entitlement to SPL and/or period of leave notice has not been submitted, there is no requirement for an employee to give 8 weeks notice before SPL starts provided notice is given as soon as reasonably practicable (see example 2).

Example 2:

Jenny and Arthur's baby is due on 1/5/15. They have not yet submitted a notice of entitlement to SPL or a period of leave notice. The baby is born on 1/3/15. Arthur could take SPL straightaway without having to provide 8 weeks notice to his employer provided notice is given as soon as reasonably practicable. (In practice Arthur may seek to take his 2 week period of PL before taking SPL).

- **ShPP notice of entitlement**

If either the mother or partner are to claim ShPP, the mother must give notice to end or reduce their SMP, SAP or MA.

An employee intending to claim ShPP must give a notice to their employer which must include:

- how much ShPP both parents are entitled to take;
- how much ShPP each parent intends to take;
- when they expect to take the ShPP; and
- a declaration from their partner consenting to the employee claiming the relevant amount of ShPP.

- **Taking SPL**

The flexibility of the SPL scheme allowing employees to effectively dip in and out of the workplace during the first year following a child's birth (or adoption) will be a significant challenge for employers.

But what are employees entitled to demand under the SPL rules? As described above, an eligible employee wishing to take SPL must submit details of the SPL to be taken in a period of leave notice. Significantly, the regulations place a limit

of three on the amount of period of leave notices (including notices to vary or cancel SPL) that employees can submit. Employers can accept further period of leave notices or notices to vary leave but they will want to consider if they are setting an unhelpful precedent if they do this.

The SPL regulations make an important distinction between continuous and discontinuous periods of SPL. An employee eligible for SPL is entitled to take a continuous period of SPL as of right provided they submit their period of leave notice giving the requisite 8 weeks notice to their employer. The employer cannot refuse a period of continuous leave in these circumstances.

The situation with a request for discontinuous SPL is different. A discontinuous period of SPL involves a pattern whereby the employee takes a period of SPL, returns to work and then takes a further period (or periods) of SPL. For example, an employee's request might be for 4 weeks SPL returning to work for 4 weeks followed by a further 4 week period of SPL before returning to work permanently.

Employers can refuse requests for discontinuous SPL. The regulations do not require an employer to give any reason or justification for refusing such a request.

- **Dealing with discontinuous SPL requests**

Where an employee makes a request for a discontinuous period of SPL it triggers a 14 day discussion period under the regulations. The intention is that the employer and employee should then discuss the request to see if it can be agreed or, if not, whether some alternative arrangement could be put in place. The regulations provide default provisions that will apply where a request for discontinuous SPL is either refused, not responded to by the employer or where there is no agreement between the employer and employee.

Table C below sets out the alternative outcomes that may result following a request for discontinuous leave by an employee.

Table C

Discontinuous leave requests	
request agreed:	the employer should write to the employee within 14 days of period of leave notice to confirm agreed SPL dates
modified SPL pattern agreed:	the employer and employee should confirm the details in writing within 14 days of period of leave notice

request refused:	the employer should write to the employee within 14 days of period of leave notice stating: - confirmation of refusal - (if possible) proposed alternative dates - the employee's options (withdrawal of period of leave notice /agree modified SPL pattern (if one is offered) /default provisions)
employer does not respond:	the request is deemed refused and the default provisions will apply

- **Discontinuous leave requests – the default provisions**

Under the regulations where the default provisions apply, the SPL requested by the employee must be taken in a continuous block beginning on the start date of the earliest period of SPL requested in the employee's period of leave notice.

However, this is subject to the employee modifying the default arrangement in the following ways:

- within 15 days of the period of leave notice – the employee may withdraw it. This will not then count as one of their three period of leave notices.

- within 19 days of the period of leave notice – the employee can choose a different start date for the SPL (which has now been converted to one period of continuous leave) provided that the new start date is not less than 8 weeks from the date of the period of leave notice.

- **Cancelling or varying SPL**

As described above, the Regulations allow employees to make changes to a period of SPL that they have booked. However, varying a period of SPL will generally use up one of the employee's three requests that they are entitled to under the rules.

A notice varying a period of SPL should:

- give details of the change requested; and
- be submitted at least 8 weeks before any dates varied by the notice

Under the regulations, a notice to vary SPL can do one of the following:

- amend the start and/or end date of a period of SPL;
- convert a discontinuous period of SPL into a continuous period (or vice versa); or
- cancel a period of SPL

As referred to above, an employer is not obliged to agree a request for SPL or variation to SPL where the employee has used his/her three notices so employees will need to give careful consideration before submitting their period of leave notice.

- **SPLIT days**

Like KIT days during ML, AL or APL, employees taking SPL can agree up to 20 shared parental leave in touch (SPLIT) days without the SPL being brought to an end. There is no obligation on either the employer or the employee to agree to SPLIT days. SPLIT days are in addition to the 10 KIT days available for employees taking ML or AL. Therefore, theoretically, a couple could take a total of 50 in touch days (combining KIT and SPLIT days) during the ML (or AL) and SPL periods.

It is for the employer and the employee to agree what the employee will be paid during a SPLIT day although in practice the employee would normally receive their usual contractual pay (less any ShPP payable).

- **Rights on returning to work following SPL**

As with other statutory family leave, employees are protected when they return to work from SPL. Different protection applies depending on the amount of leave that has been taken as per table D below.

Table D

Returning to work	
where combined family leave (e.g. ML, AL, PL and SPL), ignoring any period of 4 weeks or less UPL, = 26 weeks or less:	the employee is entitled to return to the same job
where: (i) combined family leave = more than 26 weeks; or (ii) more than 4 weeks UPL taken:	the employee is entitled to return to either: (i) the same job; or (ii) (if not reasonably practicable) a suitable and appropriate job on terms and conditions that are no less favourable

- **Other rights in connection with SPL**

During SPL, employees are entitled to their normal terms and conditions of employment except in relation to remuneration (i.e. wages or salary). This means therefore that an employee's holiday entitlement accrues in the normal way and they would be entitled to any of their normal contractual benefits such as gym membership, a company car or health or life insurance.

The SPL regulations provide special protection for employees where a redundancy arises during their period of SPL. In that situation, an employee on SPL is entitled to be offered any suitable alternative vacancy that exists ahead of any other employees regardless of whether or not the person on SPL is the best person for the job. This right mirrors a similar provision that applies to women affected by redundancies during ML.

As with other statutory family leave, employees taking SPL enjoy protection against suffering any detriment as a result of exercising or seeking to exercise the right to take SPL. Similarly, where employees have been dismissed because they have exercised or sought to exercise SPL rights, then the dismissal will be automatically unfair regardless of the employee's length of service with the employer.

In addition to unfair dismissal and detriment claims, employees taking SPL may also have claims for discrimination against their employer and/or their work colleagues. Below is an example taken from the ACAS guidance that accompanies the SPL regulations:

Peter works on a production line for a large firm. He knows the firm has received and authorised a couple of discontinuous SPL notifications from female employees in similar roles. However, his notification has been declined without any obvious reason. Also, his supervisor told other team members about the request and they are now referring to him in a derogatory manner as "the wife".

In the ACAS example, the employee, Peter, might have various potential claims against his employer (and against colleagues in relation to the potential harassment claim) in an employment tribunal. For example:

- **Direct sex discrimination** – if an employment tribunal decided that Peter's request for discontinuous SPL was refused because he was a man, then this would be direct sex discrimination. From the facts provided in the example, there is not necessarily enough information for a tribunal to reach that conclusion. However, in this type of situation a tribunal would be very interested to know what the employer's reason was for turning down Peter's request for discontinuous SPL where it had allowed such requests from female employees.

- **Harassment** – provided that Peter could show that the derogatory treatment from colleagues satisfied the statutory test for harassment under the Equality Act 2010.

- **Detriment** – a detriment claim might arise, for example, over both the derogatory treatment by colleagues and also in relation to the breach of confidence by Peter's supervisor where he told other team members about the SPL request (assuming that there was a breach of confidence).

- **Automatic unfair constructive dismissal** – if Peter was able to show that the treatment he received by his employer (and/or colleagues) amounted to a fundamental breach of his contract of employment, then he might be able to resign and claim automatic unfair constructive dismissal.

- **Checking eligibility for SPL**

  Whilst employers will check whether their own staff who want to take SPL (and receive ShPP) satisfy the eligibility criteria, they will have limited ability to check the eligibility of their employee's partner (assuming that person works for another employer).

  The regulations allow an employer to request, within 14 days of receiving the SPL notice of entitlement, a copy of the child's birth certificate and the name and address of the partner's employer. These provisions will be of very limited use to employers however. A birth certificate only shows that a child has been born. It does not, for example, indicate who is responsible for the care of that child.

  Furthermore, employers will need to be very careful how they use information regarding the partner's employer. For example, it would probably be unwise for an employer to contact the partner's employer to check information. Individuals' data is protected under the Data Protection Act 1998 from any processing done without their consent. For this reason it would not be wise to contact the partner's employer unless the partner has provided explicit written consent to this. Even then, employers will need to ensure that they do not treat employees inconsistently without good reason.

- **Practical steps for employers**

  Prudent employers will consider taking various steps in preparation for the new rules relating to SPL and ShPP:

  1. **Employment handbooks and staff policies** – the SPL regulations represent a significant change in the statutory family leave and pay regime and employers' policies in this area will need to be changed accordingly. Any employers who have not already undertaken this task should give the matter high priority given that employees who have premature births for children due on or after 5 April 2015 could be entitled to SPL now.

  2. **Staff training and awareness** – employers should educate their staff, especially line managers, in relation to the new rights. As set out above, employees are protected from, for example, suffering detriment in relation to their new SPL rights and it is therefore important that line managers have at least basic awareness of these rights.

  3. **Early discussion/agreement regarding SPL** – the SPL regulations are complex and there is significant scope for them being difficult to administer where you have two employees usually with different employers involved. For this reason it would be wise for employees and

employers to discuss SPL requests at an early stage in order to try and reach agreement. By doing this, employers will hopefully be able to plan more effectively for any disruption to their operations and employees will not take chances when using up their three period of leave notices.

4. **Consider your enhanced family pay policy** – some employers provide enhanced maternity pay i.e. in excess of the statutory rate of SMP. Such employers will need to give consideration as to whether they are also going to provide enhanced ShPP. If they do not, then they run the risk of employment tribunal claims e.g. for indirect discrimination. With this in mind, now may be a good time to rethink your family pay policy. It may, for example, be decided to remove enhanced maternity pay and provide only statutory rates of pay for all family leave. However, advice should be taken on whether this could cause any issues for example for employees on existing ML or where employees may be able to claim that enhanced family pay is or may be a contractual right.

If you have any queries about the issues dealt with in these notes or on any employment related legal issues, please contact David Seals at d.seals@downslaw.co.uk or 01306 502218 or your usual Downs employment law contact.

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