

RAINEY COLLINS LAWYERS

Employers' Guide to Maternity Leave

The provisions of the Parental Leave and Employment Protection Act are extremely complicated and involve **three kinds of unpaid leave – maternity, paternity and extended.**

There are also provisions for **paid leave** for workers and the self-employed.

We set out below our guide to implementing the Act.

SUMMARY

Employers are generally obliged to hold open a job for an employee for 52 weeks.

Employees are required to give notice three months prior to taking leave.

Employers have to respond within 21 days on whether a job can be kept open.

Employees have to give 21 days notice at the end of the leave period that they will or will not return to work. If they wish to return to work early then they must give 21 days notice of this as well.

1. MATERNITY LEAVE

1.1 Entitlement

To be entitled to take maternity leave the mother of the child or adoptive mother of a child under five must have worked for an average 10 hours or more over the last 12 or 6 months with the same employer. Work out the average over a 6 and 12 months. If they qualify under either, then they are entitled to leave.

Hours must average 10 per week, plus there must have been at least 1 hour worked per week or 40 per month. Time on leave is to be deducted before making this calculation.

1.2 One Period Only

Maternity leave must be taken in one continuous period and is for a maximum of 14 weeks.

1.3 Start Date

Maternity leave can start up to 6 weeks prior to the expected date of delivery or the date of taking over care of the child for an adoption, or any other date by agreement. If maternity leave begins on the specified date or a date appointed by the employer then the mother can take at least 8 weeks of the maternity leave period after the date of delivery.

Maternity leave can also start on a date specified in a certificate from a medical practitioner or mid-wife if they consider that the leave period should start earlier.

1.4 **Ability to Continue Working**

If an employee is unable to perform her tasks or it is unsafe to do so the employer can specify an earlier maternity leave date. This will extend the period of leave as the employee is still entitled to take 8 weeks after delivery. As an alternative the employee may be transferred to other tasks which are suitable for her condition (even without her agreement).

1.5 **Special Leave**

A pregnant employee can also take up to 10 days special leave without pay during her pregnancy for pregnancy related reasons. This is not an extension of maternity leave, but is to cover things such as doctor's visits, hospital stays, sickness, threatened miscarriages, etc.

2. **PARTNER'S PATERNITY LEAVE**

2.1 An employee who is the spouse or partner, and intends to assume care of the child, can take paternity leave if they have worked for the employer for an average of 10 hours per week over the last 6 months or last 12 months. Work out the average over 6 or 12 months. If they qualify under either, then they are entitled to the leave. Paternity leave is 1 week if the average is taken over 6 months or 2 weeks if the average is taken over 12 months. The same applies to an adoptive parent of a child under five.

2.2 **Transfer of Leave**

An employee may transfer their entitlement to leave to their spouse or partner if the spouse or partner would qualify for leave but the total leave taken is not to exceed 14 weeks. For example, a spouse may take 2 weeks of Paternity Leave and then 12 weeks of leave transferred from their pregnant partner. This transfer of leave can occur whether or not the spouse works for the same employer.

2.3 **Start Date**

Paternity leave commences on the date of confinement or adoption, or at any time nominated by the employee up to 21 days before the due date, or after delivery or adoption, or any other date by agreement. Examples:

- (a) Date of expected delivery 1 April. The partner can choose to go on leave on 1 April or up to 21 days before then.
- (b) The partner can also go on leave on any date up to 21 days after the actual date of delivery.

- (c) The partner can go on leave on the day the baby is discharged from hospital if the baby spends more than 21 days in the hospital before it is sent home.
- (d) The partner can also go on leave on the date of confinement at any time before the expected date if the baby comes early.
- (e) On any other date agreed with their employer.

The ability to start the leave before the expected delivery creates an anomaly. The partner is only entitled to leave if they are going to assume care of the child, but in some cases they may use up all of their leave before the child is born.

3. EXTENDED LEAVE

3.1 Entitlement

Pregnant employees or their spouse or partner are entitled to extended leave if they have worked for at least an average of 10 hours per week for 12 months for that employer. Similar rights apply for adoptive parents.

3.2 One Period Each

Extended leave is for one period up to 52 weeks and can be shared between the employee and their spouse/partner.

Maternity leave taken always reduces the extended leave available. The period of maternity leave is deducted from the 52 weeks for extended leave. Paternity leave does not reduce the extended leave except in some cases. The leave of the two parents can be at the same time or one after the other, but can only total 52 weeks. So if taken at the same time is up to 26 weeks each.

4. NOTICE

4.1 Employee's Notice

Employees must give notice of their intention to take leave and that notice must:

- State the date they wish to commence leave.
- Be given at least 3 months before the expected date of delivery.
- Be given at least 21 days before they want to start their leave.
- Be accompanied by a medical certificate as to pregnancy and the due date.

- If by a spouse/partner a written assurance from the woman that the spouse/partner is her spouse/partner and that they will assume care of the child.
- If the employee is also seeking extended leave they must also state:
 - Whether their spouse or partner intends to take any leave.
 - The spouse's name and name and address of the spouse's employer.
 - The start and end dates for proposed leave by her and her spouse or partner.
 - An assurance that all leave taken by both will not exceed 52 weeks.

In relation to adoptions the employee has to give a notice advising of the impending adoption supported by a social worker's certificate or Court Order.

4.2 **Lack of Information**

If the employee gives a notice but without all of the required information the employer has to give a notice requiring the missing information. The employee has 14 days to provide the information.

4.3 **Employer's Reply**

Once the employer has all of the necessary information they must give a notice in reply. This has to be given within 21 days of receiving all the necessary information, and must state whether or not the employee is entitled to parental leave and if not then why not. Whether or not a job can be kept open will depend on the particular circumstances (see section 5 for more details).

4.4 **Unable to Keep the Job Open**

If the job cannot be kept open the notice must inform the employee of their right to challenge that position and that they will be given a preference for any similar position for 26 weeks after the parental leave period ends. They must also be advised of other rights and obligations which are set out in the prescribed form.

4.5 **Early Start to Leave**

If an employee wishes to start their leave early then they must give 21 days notice.

4.6 **Employer's Notice**

Within 21 days of parental leave starting the employer has to give a notice stating:

- The date on which the leave will end.

- The day for return to work (which will be the next working day after the leave ends) or if the job is not being kept open, the period of 26 weeks for preferential treatment. This will be 26 weeks after the extended leave ends.
- That employees have an obligation to give 21 days notice of whether they will return to work at the end of the leave period or earlier.
- That specifies the employee's rights under section 45 which relate to an early return to work in certain circumstances and extension of parental leave if the employer consents (within certain limits).

5. KEEPING THE POSITION OPEN

- 5.1 There is a presumption that a position can be kept open if the leave is for less than 4 weeks, except in a redundancy situation.
- 5.2 There is a presumption that a position can be kept open for longer than 4 weeks unless the employer can prove that a temporary replacement is not reasonably practicable due to the key position occupied or because of redundancy.
- 5.3 It will usually be presumed that an employer can keep a position open for employees with skills that can be temporarily replaced. Whether a position is 'key' depends on the role, size of the organisation, skills required for the job and any period of training needed.

6. HOLIDAY PAY WHILE ON LEAVE

- 6.1 Holiday leave still continues to accrue while on maternity leave, but the holiday pay for any annual holiday during the leave period is based on the average weekly earnings for the 12 months before the annual holiday is taken.
- 6.2 This takes into account that some of those weeks will be unpaid leave and the average will be lower than usual (in some cases the holiday pay will be near to or actually zero).

7. EMPLOYMENT CONTINUOUS

- 7.1 Employment is treated as continuous while on maternity, paternity or extended leave except in certain circumstances for superannuation contributions.

8. REPLACEMENT WORKERS

- 8.1 Replacement workers must be told that their position is temporary for someone who is on maternity or paternity leave and that that person can return early from leave. Their employment agreement should set out the fixed term nature of their employment and that the term will come to an end on the date the maternity leave ends or earlier if the person gives notice to return to work early.

9. SUBSEQUENT PREGNANCIES

- 9.1 Employees are now entitled to further periods of leave so long as they have been back at work for 6 months before their expected due date (previously 12 months).

10. PAID LEAVE

- 10.1 The government pays a parental leave entitlement ... presently 14 weeks. Employees must apply for this leave and they must actually be on leave to qualify.
- 10.2 Employers must give employees a notice of their rights to apply for paid leave.
- 10.3 From 1 July 2006 self-employed people are also entitled to apply for paid parental leave. The government pays up to \$372.12 before tax per week for a maximum of 14 weeks. Self-employed parents must not work in their business other than occasional oversight or administrative tasks during their period of paid leave.

11. FURTHER ADVICE

- 11.1 The provisions of the Act provide for numerous complicated calculations and assessments to be made. This article is a guide to the most common situations. If in doubt you should take more specific advice in any particular circumstance.

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