

Maternity Rights Factsheet

Pay increases for women on maternity leave

Where the employee is in receipt of Statutory Maternity Pay (SMP)

SMP is based on an employee's average earnings during an eight-week reference period ending with the 15th week before the estimated week of childbirth (the "**Calculation Period**").

If an employee receives a pay rise between the start of the Calculation Period and the end of her maternity leave period you are required to recalculate her weekly earnings for the purposes of the SMP calculation and backdate the pay increase to the start of the Calculation Period.

Even if the pay rise is awarded in the last week of statutory maternity leave (by which time the employee may have already exhausted her entitlement to SMP), her whole SMP entitlement from day one will have to be recalculated and a top-up payment made.

(Regulation 21(7) SMP Regulations)

Where the employee is in receipt of contractual maternity pay

If there is a usual time (e.g. a particular month) when you make pay increases and you have an employee on maternity leave, that employee must receive the pay rise at the time it would otherwise have been awarded had she not been on maternity leave. Her contractual maternity pay must be adjusted to take account of the pay rise.

(Sections 73, 74(1), (6) and (8) Equality Act 2010)

Unlike for SMP, you are not required to backdate pay rises for contractual maternity pay purposes (i.e. it takes effect from the usual pay increase date).

Bonuses

Whether bonuses are payable during maternity leave largely depends on whether they are treated as "pay" (because as an employer you are not required to continue to pay an employee on maternity leave as usual, but other terms and conditions of employment must continue).

Generally, bonus payments are treated as "pay" and are therefore not payable during maternity leave to the extent they relate to the maternity leave period.

Bonuses based on personal performance are usually regarded as pay and therefore not payable. However, bonuses that are staff wide (such as a Christmas bonus) are likely to be treated as a contractual benefit and therefore payable.

It would be discriminatory and an unlawful deduction of wages if you failed to pay the proportion of a bonus relating to:

- ♥ time spent at work;
- ♥ time spent working "Keeping in Touch" (KIT) days;
- ♥ periods of annual leave; and
- ♥ period of compulsory maternity leave (first two weeks of maternity leave)

An employer should pro-rata an employee's bonus entitlement to take account of these periods.

Pension contributions

You must continue to make pension contributions while the employee is on ordinary maternity leave (OML) or paid additional maternity leave (AML) (whether the employee is receiving SMP or company maternity pay). These employer contributions must be calculated by reference to the employee's normal rate of pay (i.e. by reference to her pre maternity leave pay) and cannot be reduced to reflect the actual pay she is receiving.

The employee, on the other hand, may make contributions at a pro-rata rate, reflecting her reduced pay.

(Section 75, Equality Act 2010)

If the employee is eligible for a pay rise during maternity leave this must also be taken into account in the employer's contributions from the point of the pay rise.

Making contact with your employee during maternity leave

Reasonable contact

You are allowed to make "reasonable contact" with your employee while she is on maternity leave (*Regulation 12A(4), MPL Regulations*).

What is reasonable depends on the individual circumstances, including the attitude of the employee. It is good practice to discuss and agree with the employee before the start of her maternity leave to understand how much contact she would like during her leave and the preferred form of communication (e.g. email/phone call/text).

KIT days

As distinct from "reasonable contact", an employee can agree to work up to 10 days during her maternity leave without bringing her OML or AML to an end (*Regulation 12A(1), MPL Regulations*).

Whether an employee works one or more KIT days is up to the employee: it is unlawful for you to require an employee to work KIT days or to dismiss and/or subject her to a detriment for refusing to do so.

(Regulations 19 and 20, MPL Regulations)

During KIT days, employees can carry out work for you and may be paid for this. The rate of pay is a matter for agreement between you and the employee, but would usually be expected to be her usual contractual rate of pay, depending on the work done and what is agreed between you. There are also implications for SMP, which may be offset.

KIT days cannot be taken during the two-week compulsory maternity leave following the birth of the baby (*Regulation 12A(5), MPL Regulations*)

Any work done will count as a KIT day, even if it's for an hour.

Appraisals

It may be discriminatory to deny an employee an appraisal because they are on maternity leave, particularly where promotion opportunities and/or bonuses/pay rises are contingent on appraisal outcomes.

It is good practice to hold an appraisal for an employee before they go on maternity leave and shortly after they return.

Redundancy

An employee on maternity leave can be made redundant provided there is a genuine redundancy situation. It is automatically unfair to select and/or dismiss an employee for redundancy because of pregnancy or maternity or based on factors related to the pregnancy or maternity.

(Section 99, Employment Rights Act 1996 ("ERA") & Regulation 20(1) and (3), MPL Regulations)

(It is also likely that an unfair dismissal under Section 99 of ERA 1996 and Regulation 20 of the MPL Regulations would also amount to unlawful discrimination because of pregnancy or maternity under section 18 of the Equality Act 2010.)

Suitable alternative vacancy

If a redundancy situation arises during an employee's maternity leave and "it is not practicable by reason of redundancy" for you to continue to employ her under her existing contract she is entitled to be offered a suitable alternative vacancy (where one is available) to start immediately after her existing contract ends (*Regulation 10, MPL Regulations*).

This gives an employee on maternity leave priority over other employees and is a lawful form of positive discrimination.

The new contract offered to the employee must be such that:

- ♥ the work to be done is both suitable and appropriate for her to do in the circumstances (*Regulation 10(3)(a), MPL Regulations*)
- ♥ the terms under which she is to be employed (including location), are not substantially less favourable to her than if she had continued to be employed in her old job (*Regulation 10(3)(b), MPL Regulations*).

Right to return to the same job

If the employee takes only OML, returns before the end of OML, or combines maternity leave with a period of shared parental leave where the total leave is 26 weeks or less, she is entitled to return to the same job in which she was employed before her absence.

Right to return to a suitable alternative job after maternity leave

An employee is entitled to return to a different job, on no less favourable terms, which is both suitable for her and appropriate in the circumstances where she has:

- ♥ taken any period of AML;
- ♥ taken shared parental leave which when combined with maternity leave amounts to total leave of more than 26 weeks; or
- ♥ taken a period of at least four weeks' parental leave on top of her OML, and there is some reason (other than redundancy) why it is not reasonably practicable for you to allow her to return to the same job.

(Regulation 18(1), MPL Regulations)

You must demonstrate that it is not reasonably practicable to allow the employee to return to her old job. One example would be where there has been a genuine business reorganisation. However, a mere preference for someone else to perform the role would not suffice.

If the employee is not permitted to return to the same job on no less favourable terms and conditions, or (where it is not reasonably practicable to permit her to return to the same job after AML) if you do not offer the employee a suitable alternative job, you risk of a claim of pregnancy and maternity discrimination and automatic unfair dismissal (if there is a dismissal) and/or unlawful detriment (if there is no dismissal).

Holiday entitlement during maternity leave

An employee continues to accrue their annual leave entitlement during the period of maternity leave.

An employee also has a right to carry over unused holiday entitlement to the next holiday year if it cannot otherwise be taken because of maternity leave.

Case law has established that annual leave cannot be taken during maternity leave and therefore an employee must be allowed to take her full statutory annual leave entitlement outside of her maternity leave period (*Merino Gomez v Continental Industrias del Caucho SA*).

Good practice is considered to be to allow employees on maternity leave to carry over the unused balance of their full contractual entitlement.