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Time off and pay for parents having a child through surrogacy

TUC 

If you and your partner are having a child through a surrogacy arrangement you may be eligible for new rights to time off work to attend ante-natal appointments with the surrogate mother and you may be able to take paid adoption leave, paternity leave or shared parental leave after the child is born.



Check your rights with your employer

This booklet covers the basic (sometimes called statutory) rights that employers must provide to intended parents who are having a child through a surrogacy arrangement. Your employer may offer better rights than the legal minimum and you need to check your contract of employment or your staff handbook to find out what your entitlement with your current employer is. If you work for an organisation that recognises a trade union you are more likely to have better than the legal minimum rights as unions have pushed for things like higher contractual pay for adoption leave.

Worker or employee?

This is an important question because most of the rights described in this booklet only apply to employees. Not everyone who works for someone else is an employee in the eyes of the law. If your employer tells you that you are not an employee, for example, because you are self-employed or an agency worker you should seek advice and clarification to make sure that this is really the case and you are not missing out on leave and pay that you are entitled to (see www.worksmart.org.uk for further guidance).

Same-sex partners

Same-sex partners are entitled to the same basic leave and pay rights as opposite-sex partners who are having a child through surrogacy. If employers provide better contractual rights to leave and pay then they must provide these to same-sex partners too. To exclude same-sex partners would be direct sexual orientation discrimination which is unlawful.

Surrogacy and legal parenthood

The rights to time off which are described below are dependent upon the intended parents in the surrogacy arrangement acquiring or intending to acquire legal parenthood for the child and having parental responsibility. This can be complex and you should seek legal advice or visit the Human Fertilisation and Embryology Authority's website for further information (www.hfea.gov.uk/7940.html).

At birth, the surrogate mother is considered the legal mother in the UK and will have parental responsibility. Whatever happens to the child after birth she will be entitled to 52 weeks' maternity leave and 39 weeks' pay and has exactly the same employment rights as other women who are pregnant or who have given birth (see *Leave and Pay for Mothers* in our Know Your Rights series). If the surrogate mother is married or in a civil partnership her partner will be automatically recognised as the father/second parent at birth.

If the surrogate is not married or in a civil partnership then it may be possible for one of the intended parents to be registered as the second parent on the birth certificate. They may then qualify for paternity leave following the birth. This could be the case if the intended father is the biological father or if the surrogate consented prior to the pregnancy that one of the intended parents would be registered as the second parent.

Intended parents can acquire legal parenthood by applying for a parental order. To apply for a parental order you must be married, in a civil partnership or a long-term, co-habiting relationship (if you are single you cannot apply for a parental order) and one or both of you must be the biological parent of the child (i.e. the egg or sperm donor). See www.gov.uk/become-a-childs-legal-parent on how to apply. The application must be made within six months following the birth.

Time off to attend ante-natal appointments

From 5 April 2015 if you are an intended parent who expects to apply for and be granted a parental order, you will have the right to take time off work to accompany the surrogate mother to up to two ante-natal appointments.

To qualify you must be an employee, or an agency worker with at least 12 weeks' service in the same role with the same hirer and the appointment must be made upon the recommendation of a doctor, midwife or nurse.

You are not entitled to be paid by your employer for the time off and the maximum amount of time that you can take for each appointment is 6.5 hours.

Your employer can ask for a signed declaration from you stating: the date and time of the appointment; that it is made on the advice of a registered

medical practitioner, nurse or midwife; and that you and your partner expect to apply for and be granted a parental order after the birth.

It is important to remember that this right is a right to time off work to accompany the pregnant woman not a right to attend the appointment. The purpose of ante-natal appointments is to monitor the health and well-being of the pregnant woman and the unborn baby. If the surrogate mother does not want you to attend then you can't use this right to insist that you are there.

Adoption leave and pay

From 5 April 2015 if you are an intended parent who has applied or intends to apply for a parental order and expects to be granted it by the courts, then you may be entitled to 52 weeks' adoption leave and 39 weeks' statutory adoption pay (SAP). Only one of the intended parents can exercise this right; the other parent may qualify for statutory paternity leave and pay following the birth.

To qualify for adoption leave and pay, you must have at least 26 weeks' service with your employer by the 15th week before the week in which the child is due to be born and still be employed by them at the time of the birth.

In addition, to qualify for SAP, you must have average weekly earnings that are above the Lower Earnings Limit in the eight weeks before the end of the 15th week before the week the baby is due. (Find the Sunday immediately before the due date and count back 15 Sundays from then).

From 5 April 2015 the first six weeks of SAP will be paid at 90 per cent per cent of your normal weekly earnings (as Statutory Maternity Pay is) and the remaining 33 weeks will be paid at a flat rate (or 90 per cent of your earnings if you earn less than the flat

rate). See www.gov.uk/adoption-pay-leave/pay for the current flat rate.

Notice and evidence for your employer

If you are the intended parent who wants to take adoption leave and pay, you must give your employer a written notice of your intention to take leave at least 15 weeks before the baby is due. It must specify the expected week of birth.

If the employer requests it you must also provide them with a 'parental statutory declaration' which is a declaration that you have applied or intend to apply for a parental order with your partner within six months of the birth and you expect to be granted it by the court.

Once you have given notice to your employer of your intention to take adoption leave and pay they must notify you of the date your adoption leave entitlement is due to end. They must do this within 28 days of receiving your notice.

Your adoption leave and pay will begin on the day that the child is born or on the following day if you are at work on the day of the birth.

You must notify your employer of the date the child was born as soon as reasonably practicable after the birth.

What if you don't get a parental order

Your adoption leave and pay will come to an early end if you fail to apply for a parental order within six months after the birth of a child or if the application is refused by the court.



Paternity leave and pay

If you are the second intended parent you are entitled to take one or two consecutive weeks' paternity leave after the child is born. This leave must be taken within 56 days of the birth.

You can claim statutory paternity pay (SPP) which is paid at a flat rate for each week of paternity leave (or 90 per cent of your normal earnings if that is lower). See www.gov.uk/paternity-pay-leave/pay for the current rate of statutory pay.

You are entitled to paternity leave if you:

- have at least 26 weeks' service with your employer by the end of the 15th week before the baby is due and you are still employed by them at the time of the birth
- are the registered father; or are the spouse, civil partner or co-habiting partner of the first intended parent and you expect to apply for a parental order with them and to share responsibility for raising the child.

To qualify for statutory paternity pay, you must have average weekly earnings that are more than the Lower Earnings Limit in the eight-week period before

the end of the 15th week before the week the baby is due.

Notifying your employer

If you intend to take paternity leave you have to give your employer a written notice that states:

- the week in which the baby is due
- the length of the leave that you intend to take (i.e. either one week or two weeks' leave)
- the date that you have chosen for your leave to begin (this can be the date on which the child is born, a date falling a specified number of days after the birth, or a specific date which is later than the first day of the expected week of the birth).

This notice must be given to your employer by the end of the 15th week before the week the baby is due.

Your employer can also request a signed declaration from you which states that you meet the qualifying conditions for paternity leave.

Shared Parental Leave and Pay

If your child was due on or after 5 April 2015 you may be able to access Shared Parental Leave (SPL) and Shared Parental Pay (ShPP). This could give you and your partner more flexibility over how you take time off work and care for your child in the first year after the birth.

SPL and ShPP are created by the first intended parent bringing or giving notice that they want to bring their adoption leave and pay entitlements to an early end. The remaining amount is then converted into SPL and ShPP. Once created, either parent can take SPL and ShPP, provided they meet certain eligibility criteria. The maximum amount of SPL that can be created is 50 weeks and the maximum amount of ShPP is 37 weeks (i.e. the first parent must take at least two weeks' adoption leave and SAP).

Unlike adoption leave SPL doesn't have to be taken as a single block of leave. So a parent could take a block of SPL then return to work for a period then take some more SPL. Each parent is entitled to take up to three separate blocks of SPL. SPL must be taken as a week's leave or multiples of a week's leave.

SPL must be used within a year of the birth. It can be used so that both parents are off work at the same time caring for the child. For example the first parent can give notice to their employer prior to the birth that they only intend to take 26 weeks' adoption leave and 26 weeks' SAP. This then creates an entitlement to 26 weeks' SPL and 13 weeks' ShPP which their partner may decide to use to take time off shortly after the birth while their partner is still on adoption leave.

ShPP is paid at the same flat rate as statutory paternity pay and the final 33 weeks of statutory adoption pay.

Eligibility for SPL and ShPP

To be eligible to take SPL:

- You must be sharing the main responsibility for caring for the child with your partner.
- One of you must be entitled to adoption leave and/or SAP which

has been brought to an early end.

- You must be an employee with at least 26 weeks' service with your current employer and your average earnings must be more than the Lower Earnings Limit in the eight weeks up to the end of the 15th week before the week the baby was due (if you qualify for SAP or paternity leave and SPP then you will meet these criteria).
- Your partner must have been an employee or a self-employed earner for at least 26 out of the 66 weeks immediately before the expected week of birth and have earned an average £30 a week in 13 of the 66 weeks (it doesn't have to be consecutively).



Curtailing adoption leave and pay

If you are the first parent with the entitlement to adoption leave, you can bring this to an early end either by returning to work or by giving your employer a 'curtailment notice'. If you want to convert some SAP into ShPP then you must give your employer a curtailment notice.

A curtailment notice tells your employer the date on which you want your adoption leave and SAP to end. The notice must be given to your employer at least eight weeks before your chosen end date.

Notice of entitlement and intention to take SPL

If you want to take some SPL you must give your employer two notices: a notice of your entitlement and intention to use SPL and a 'booking notice' to book a period of SPL.

The first notice is not binding it just tells your employer that you qualify for SPL and ShPP and would like to use it. It must be given to your employer at least eight weeks before you intend to take any SPL.

You must include the following information in this notice:

- your name
- your partner's name
- the expected week of birth and the actual date of birth (unless the notice is given before the birth in which case the employer should be notified of the data as soon as reasonably practicable)

- if a parental order has been granted, the date on which it was granted
- the start and end dates of the first parent's adoption leave and SAP
- the total amount of SPL and ShPP that is available once the adoption leave and pay entitlement ends
- how much SPL and ShPP you and your partner each intend to take
- an indication of when you intend to take your SPL and ShPP.

If you are the second parent you will also have to give your employer a parental statutory declaration signed by the first parent.

If you are the first parent you will only have to provide such a declaration before taking SPL if you have not yet obtained a parental order and you have not already provided one to your employer.

You also need to give your employer a signed declaration that you meet the eligibility criteria for SPL and ShPP and that you will inform them if this is no longer the case.

Your employer will need a signed declaration from your partner too that includes their name, address and national insurance number. They must also consent to the amount of SPL and ShPP you intend to claim and to your employer processing their information.

Your employer can ask for evidence of a parental order if one has been made and for the name and address of your partners' employer. If your employer does ask for this

information then you must respond within 14 days of their request.

As with adoption leave your SPL and ShPP entitlements will be brought to an early end if you fail to apply for a parental order within six months of the birth or you are refused one.

Booking notice for SPL

After you have given your notice of entitlement and intention to use SPL, you must give your employer a booking notice. This is a binding notice which tells them the start and end dates of any period of SPL you plan to take. You can give a maximum of three booking notices (unless your employer agrees to accept more).

The booking notice must be given at least eight weeks before the intended start date of SPL. It can provide notice of the start and end dates of more than one period of SPL. If it does, it will be treated as a request for discontinuous leave which your employer can refuse. However, if it provides notice of just one period of SPL then the employer must grant that leave.

Requests for discontinuous leave

If you request discontinuous leave, within two weeks of receiving your booking notice, your employer can:

- agree to the periods of leave requested
- propose alternative dates for the periods of leave
- refuse the periods of leave without proposing alternative dates.

If your employer agrees to the requested leave or agrees alternative dates with you then you are entitled to take the leave. If alternative dates are agreed you need to give a new booking notice to your employer which will not count towards your maximum of three.

If the employer refuses your request or does not respond to it within two weeks, then you are entitled to take the total amount of leave you requested in the booking notice as one continuous block. You can choose a start date for this leave by giving notice of it within five days of the end of the two-week period. The start date you choose must be at least eight weeks after the date on which you gave your original notice. If you don't notify your employer of a start date, the leave must begin on the start date of the first period of leave you requested in your booking notice.

Alternatively, if you can't reach agreement with your employer, you can withdraw your original booking notice within 15 days of giving it. It will not then count towards your maximum of three notices and you can begin again.

If you change your mind

You can change your mind about a period of SPL but you must give your employer at least eight weeks' notice before both the date you were meant to start your leave and the new date you've chosen.

If you give notice that you want to vary a period of SPL that you've already booked, it will count towards the maximum of three notices you can give, unless the variation:

- withdraws a notice of discontinuous leave that your employer wouldn't agree to
- is because you originally requested discontinuous leave and your employer suggested alternative dates which you've agreed to
- is because your child was born earlier or later than expected.

Keeping in touch during adoption leave and SPL

You can work up to 10 'Keeping in Touch' (KIT) days during adoption leave without bringing your leave and your SAP to an end.

Similarly, during SPL you can work up to 20 days – known as 'Shared Parental Leave In Touch' (SPLIT) days – without bringing your SPL or entitlement to ShPP to an end. In the case of SPLIT days, the maximum of 20 days applies to the whole period you are eligible to take SPL rather than to each block of SPL that you take.

Your employer can't make you work KIT days but you may find them beneficial, for example, to attend a staff training day or to generally keep in touch with developments in the workplace.

There is no requirement for KIT or SPLIT days to be paid at your normal rate of pay. You must agree this with

your employer. You are still paid SAP or ShPP for the weeks in which you are working KIT or SPLIT days.

These days could be used to give you a period of part-time work. This might be useful if you want to trial a period of part-time work or have a phased return to work. For example, you could take six weeks of SPL and agree with your employer that you will work three SPLIT days a week during those six weeks (18 SPLIT days in total). If your employer agrees to pay your normal pay for the SPLIT days and you are still receiving ShPP then it would make a period of part-time work more affordable too.

Working during SPL does not extend your SPL entitlement. In the example given you would still use up six weeks of your SPL entitlement even though you were actually working three days a week during those six weeks.

Terms and conditions during leave

During adoption leave, paternity leave or SPL, your employment contract and all your terms and conditions continue, except your right to receive your normal wage or salary. You are also protected from detriment or dismissal because you have tried to take, are taking or have taken a period of statutory leave.

Redundancy during adoption leave or SPL

If your job becomes redundant while you are on adoption leave or SPL you have the right to be offered a suitable and appropriate alternative vacancy if one exists with your employer.

This new post must have terms and conditions that are not substantially less favourable than your previous job.

Returning to work

If the total amount of adoption leave and SPL or paternity leave and SPL that you have taken does not exceed 26 weeks you have the right to return to the same job with the same rights and terms and conditions.

If you have taken a total of more than 26 weeks' leave then you have the right to return to the same job unless that is not reasonably practicable, in which case you have the right to return to a similar job on terms and conditions that are not less favourable.



Unpaid parental leave

If you have been continuously employed by your employer for more than a year and you have or expect to have parental responsibility for a child, you will qualify for unpaid parental leave which can be used to take time off work to care for a child up to their 18th birthday (the upper age limit increased from 5 to 18 years old from 5 April 2015).

The entitlement is to 18 weeks' unpaid parental leave per child. So if you have two children your total entitlement is 36 weeks.

Under the basic right you have to take this leave in blocks of one week or multiples of a week. If you do take less than a full week's leave it will still count as a week and be deducted from your total entitlement. However, if your child is disabled or your employer has agreed to leave being taken in shorter periods, you may be able to take the leave on a daily or even shorter basis.

Under the basic right you can't take more than four weeks' parental leave a year for each child (if you have two children the maximum amount would be eight weeks' leave a year). However, your employer may have agreed not to apply this maximum limit.

To take parental leave, you must give your employer at least 21 days' notice. Your employer can postpone a period of parental leave that you have requested if they believe it would unduly disrupt the business. However, they must allow you to take the leave at an agreed date within six months of the start date you had requested.

If you've taken less than four weeks' parental leave you have the right to return to the same job. However, if you take more than four weeks' parental leave, you have the right to return to the same job unless that is not reasonably practicable in which case you have the right to return to a similar job on terms and conditions that are not less favourable.



Right to request flexible working

Once you become a parent, you may wish to reduce or vary your working hours to accommodate your childcare responsibilities.

All employees with 26 weeks or more service with their employer have the right to request flexible working. Your employer has a duty to consider a request reasonably.

A request must be in writing and must include:

- the date of the application, the change you are requesting and when you'd like it to begin
- what effect you think the change would have on your employer and how that could be dealt with
- a statement that it is a statutory request and, if you have made a request before, the date you made that request on.

You can only make one statutory request a year.

Acas has a statutory code of practice which explains what an employer should do with a request.

It says they should arrange to discuss the request with you as soon as possible, they should allow you to be accompanied by a colleague at a meeting to discuss the request, they should inform you in writing of their decision and if they reject the request they should allow you to appeal that decision.

The employer must give you a final response within 12 weeks of receiving your initial request.

If your employer agrees to the request then it results in a permanent change in your contract. If you want to trial a period of flexible working or only want a temporary variation then you should make sure you agree this with your employer in writing.

Your employer can say no to your request for one of eight business reasons. They cover: additional costs, an inability to reorganise work, an inability to recruit additional staff, detrimental impact on quality, performance or customer service, insufficient work for the periods the employee proposes to work and a planned structural change to your business.

If you are a mother and your employer rejects your request, you may be able to claim indirect sex discrimination if you can show that by not allowing flexible working your employer is putting mothers (who still tend to have the primary caring responsibility for children) are put at a disadvantage and that your employer could have still met all their business needs if they had granted your request. If you are a father who is denied flexible working but your employer has granted similar requests from mothers then you might be able to claim direct sex discrimination.



Emergency time off for dependants

As a working parent you have a statutory right to time off that could be used in the following circumstances:

- to help if a child falls ill or is injured
- to make arrangements to help care for a child who is ill or injured
- to deal with an unexpected breakdown in childcare
- to deal with an unexpected incident at school that involves your child.

The right is to a reasonable amount of time off to deal with the immediate crisis, for example, to put alternative childcare arrangements in place if your usual nursery or childminder can't look after your child.

You must tell your employer why you are off work as soon as possible.

The time off doesn't have to be paid. However, your employer may agree to pay it or they may provide a certain amount of paid carer's leave or compassionate leave that can be used in these circumstances.



Contacts

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Free legal helpline for low income families:
0300 012 0312 or email: advice@workingfamilies.org.uk
www.workingfamilies.org.uk Twitter: @workingfamUK

Unions today – Your friend at work

The rights described in this booklet – and many others such as the minimum wage – have been won by union campaigning. Without union help and assistance many workers don't get the full benefit of their rights. Unions also help negotiate better pay and conditions than the legal minima, including far better provisions for family-friendly employment.

Every day unions help thousands of people at work and every year they win hundreds of millions of pounds in compensation for their members through legal action.

To find out more about trade unions and which is the best for you visit the TUC website www.tuc.org.uk/joinaunion

www.worksmart.org.uk

This is a one-stop site for everyone at work. The site provides a range of information about working life – whether you are a union member or not.



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