

**PENSIONS ALERT BULLETIN**  
**3 April 2003**

**NEW FAMILY FRIENDLY RIGHTS**  
**APPLICABLE TO EMPLOYEES FROM 6 APRIL 2003<sup>1</sup>**

**1. Maternity leave**

Irrespective of her length of service, for all women whose expected week of child-birth ("**EWC**") is on or after 6 April 2003, Ordinary Maternity Leave ("**OML**") is increased from 18 to 26 weeks. In addition, a woman may be entitled to take up to 26 weeks' Additional Maternity Leave ("**AML**") starting from the end of OML – giving a possible total of 52 weeks' maternity leave.

The current service qualification for **AML** is shortened from 52 to 26 weeks' continuous employment by the 15<sup>th</sup> week before **EWC**.

**2. Adoption leave**

This new right allows an employee of either sex to take up to 26 weeks' Ordinary Adoption Leave ("**OAL**") followed by up to 26 weeks' Additional Adoption Leave ("**AAL**").

To qualify, an adopting parent (or couple, if married) must be notified of a "match" with a child by an approved adoption agency on or after 6 April 2003 (or before, but the child is placed after this date). An employee must also have 26 weeks' continuous employment leading into the week in which the approved adoption agency notifies of the "match".

Only one partner may take adoption leave but, subject to certain conditions being met, the other may be able to take paternity leave – in this context, a woman may be eligible for paternity leave!

**3. Paternity leave**

Where a child is born or is expected to be born on or after 6 April 2003, an employee may be entitled to one or two weeks' consecutive leave. Paternity leave must be taken within 56 days of the child's birth (or the mother's **EWC**, if the child is born prematurely).

To qualify for paternity leave, the employee must have or expect to have responsibility for the child's upbringing and either be the biological father or the spouse or "partner" of the mother (the definition of "partner" is widely drawn and could include a same sex partner). The employee must also have completed 26 weeks' continuous employment by the 15<sup>th</sup> week before **EWC**.

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<sup>1</sup> NB: to qualify for the new rights the employee must comply with certain notice requirements which are not covered in this note

4. **Pay<sup>2</sup> and benefits**

Provided that she has 26 weeks' continuous employment by the 15<sup>th</sup> week before **EWC**, a woman on **OML** will generally be entitled to statutory maternity pay ("SMP") of 90% of average earnings for the first 6 weeks. Thereafter, the standard rate of SMP is payable, being £100 a week or 90% of earnings (if lower). During **OAL** and statutory paternity leave, the standard rate of SMP applies.

An employee's other terms and conditions of employment (except salary or wages) will also continue as though they were not absent.

Throughout **AML** and **AAL**, the employee's contract of employment continues but there is no statutory obligation to continue pay and benefits (although an individual's contract may well provide for something more favourable).

5. **Pension benefits during OML – a quick reminder**

Whilst the new legislation makes it clear that pension benefits should continue during **OML**, it does not fully explain how this should happen. However, paragraph 5 of Schedule 5 to the Social Security Act 1989 applies in respect of any period of paid maternity leave (whether contractual or statutory). This essentially requires that:

- The member's contributions are based on the remuneration she actually receives.
- The employer should maintain pension benefits as though the employee were working normally. This has different consequences depending upon whether the scheme is defined benefit ("DB") or defined contribution ("DC").
- If the employee is a member of a DB scheme, the employer will need to pick up the "balance of cost" based on the salary the employee would have been receiving had she been at work. The cost to the employer is therefore likely to be greater than usual, if the employee is paying reduced contributions.
- Under a DC Scheme, the employer will make its own contributions as if the employee was working normally but arguably does not have to pick up the shortfall in employee contributions.

There is no obligation under Schedule 5 to provide benefits in respect of unpaid maternity leave but this is inconsistent with employment legislation as regards unpaid **OML**.

6. **Pension benefits during OAL and statutory paternity leave – the uncertainty**

As with **OML**, it is clear that pension benefits should continue during **OAL** and statutory paternity leave, but here there is more uncertainty as to how they should be calculated.

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<sup>2</sup> Pay during OML, OAL and statutory paternity leave is dependent on earnings and national insurance contributions paid

Paragraph 6 of Schedule 5 to the Social Security Act 1989 requires equal treatment in respect of pensions for paid family leave but this has not been updated to take account of the new statutory rights to paid adoption and paternity leave; it only bites if paid contractual leave is provided by an employer. In addition, during paid family leave, not only does the employee pay contributions based on the remuneration he or she actually receives, but so does the employer.

It is not clear from the new legislation whether it is intended that pension benefits in respect of the new rights to **OAL** and statutory paternity leave should be maintained in accordance with paragraph 6 or the more favourable maternity leave provisions under paragraph 5. Given that the new legislation requires benefits to continue as normal and the fact that paragraph 6 deals with contractual not statutory leave, the more cautious approach would be to treat **OAL** and statutory paternity leave like **OML**. However, we have raised this issue with the Department for Trade and Industry (who are responsible for the new legislation) and we are currently awaiting a response.

7. **Pension benefits during AML and AAL**

During **AML** and **AAL** the employee's contract of employment continues but not for pay and benefits. However, any period of paid **AML** or **AAL** will be caught by the provisions of Schedule 5 of the Social Security Act 1989 (in fact, the new legislation specifically cross-refers to paragraphs 5 and 6 respectively in this instance). Furthermore, the periods before and after **AML** and **OAL** must be treated as continuous (i.e. aggregated) for pension purposes.

8. **Death in service**

Finally, how should schemes treat life assurance benefits during periods of family leave? These should continue during **OML**, **OAL** and statutory paternity leave, together with any other paid period of leave. However, pension scheme rules are often more generous than this and pay such benefits throughout maternity leave. From 6 April 2003, this could mean providing death in service benefits for up to 52 weeks.

9. **Conclusion**

This is a fairly complex area requiring many qualifying conditions to be met. For pensions, this is further complicated by the lack of cohesion between the pensions and employment legislation. Therefore, should you have any questions, please contact the usual solicitor with whom you deal.

Nothing stated in this document should be treated as an authoritative statement of the law on any particular aspect or in any specific case. Action should not be taken on the basis of this document alone. For specific advice on any particular aspect you should consult the usual solicitor with whom you deal.