



Shared Parental Leave

Are you ready?

The new right to shared parental leave and the flexibility this affords today's parents is a major change for most employers. This checklist highlights the key areas to think about.

What is shared parental leave?

An eligible employee whose baby is due on or after 5 April 2015 has the right to end her maternity leave early (after her two weeks compulsory leave) and share the balance of her maternity leave (up to a maximum of 50 weeks) as shared parental leave (SPL) with her eligible partner. For example, this might mean the mother takes a total of 40 weeks maternity leave and the father takes 10 weeks shared parental leave.

Who is eligible?

Not every parent will be eligible for SPL. Eligibility will depend in part upon the circumstances of the partner but one parent passing the eligibility test will not necessarily mean that the other parent will also do so. Conversely, some employees may be eligible for, and opt to take, SPL even though their partner is not entitled to share it with them.

So, what are the eligibility requirements to request SPL?

Four criteria must be satisfied to be eligible:

- Continuity of employment
- Responsibility for the care of the child
- The employment and earnings test
- A written declaration

Continuity

To qualify for SPL, an employee must have been continuously employed by their employer for 26 weeks up to and including the 15th week before the week in which the baby is due to be born. The employee must still be employed by their employer the week before any SPL is due to start.

Responsibility for care

Your employee must share main responsibility for the care of the child with the other parent/partner.

The employment and earnings test

The other parent/partner must meet the "employment and earnings test" for your employee to qualify for SPL. The other parent/partner must have been employed or self-employed for a total of 26 weeks (not necessarily continuously) in the period of 66 weeks leading up to the week in which the child is due and to have earned an average of £30 a week in 13 of those weeks.

Declaration

Your employee must provide:

- A written declaration that they are entitled to SPL
- A written declaration that their partner (1) fulfils the employment and earnings test and (2) consents to your employee taking SPL

It is important to note that being eligible for SPL does not automatically equate to being eligible for Shared Parental Pay (ShPP), so this needs to be checked separately (see below).

So, if an employee is eligible does that mean I have to give unlimited periods of leave?

No, the maximum amount of leave that parents may share is 50 weeks. This can be taken in no more than three separate blocks. Employees are only entitled to serve up to three notices to "book" SPL (see below).

It will be very difficult for our business to cover broken periods of leave - do we have any choice?

Yes, you have the right to refuse requests for discontinuous leave (e.g. one week on one week off). If you wish you may discuss an alternative pattern of leave with the employee. However, you do not have the right to refuse a request for a single block of leave.





How does my employee tell me they want to take SPL?

To take SPL the mother must end (curtail) her maternity leave. An eligible partner of the mother can take/share whatever leave after the maternity leave would end. Your employee must also give you at least eight weeks notice that they wish to take leave. This is called a notice of entitlement. In addition to confirmation of the eligibility requirements above, the notice of entitlement must include a statement of:

- The number of weeks maternity leave taken
- The number of weeks of SPL available
- How much SPL the employee intends to take
- An indication of how the leave will be taken

Do I have to make any additional checks?

You do not have to check that the information you have been given is correct, however, you may ask for the details of the other parent's employer and a copy of the child's birth certificate.

Could an employee take some holiday leave and then SPL?

Absolutely, as long as the mother has ended her maternity leave and returned to work she can take holiday leave; as long as the appropriate SPL notices have been given an employee is entitled to take the balance of the maternity leave as SPL either alone or shared with the partner/father. The only other condition is that SPL must be taken within one year of the birth of the child.

Can surrogate or adopting parents take SPL?

An employee adopting a child or a parental order parent in a surrogacy plan can enjoy the benefit of SPL in the same way as other parents.

What do I have to pay my employee during SPL?

Where a mother brings her maternity pay period to an end the untaken statutory maternity pay will be available for the mother and father/partner to be paid as ShPP for up to a maximum of 37 weeks.

To qualify for ShPP your employee must satisfy the same eligibility criteria for SPL (see above) and have a partner who satisfies the employment and earnings test. In addition your employee must not have earned less than the lower earnings limit in the eight weeks leading up to the qualifying week i.e. the end of the 15th week before the week in which the baby is due to be born. Your employee must also include in the "notice of entitlement" (see above) how many weeks of ShPP is available to them and their partner.

If I pay enhanced maternity pay for a period of time do I have to pay enhanced ShPP to my male employees if they are on SPL during that period?

While Department of Business guidance says "no", there is currently a great deal of legal debate around the lawfulness of having different pay under different schemes and how this relates to the risk of discrimination claims. A direct discrimination claim would be difficult for a man to bring because of the fact that the comparator could be a woman on SPL and therefore there is no detriment. However, there is a risk of an indirect discrimination claim.

If enhanced (company) pay is paid to anyone on "maternity leave" (as most policies describe it) this may be a provision, criterion or practice for the purposes of the Equality Act with which a man cannot comply. A man is clearly put at a disadvantage as he does not receive the enhanced maternity pay.

Employers may try and rely on the "special protection" for women (a woman's biological status has historically allowed different pay and treatment levels), however, in the case of SPL there is a suggestion that the special protection given to women ends after a certain period of time (as yet undefined), as theoretically her partner could take over and she could return to work. This means an employer would not be able to rely on the special treatment exception during a period of SPL to justify less favourable treatment.

Prudent employers are at least reviewing their maternity pay policies in light of the legal risks, albeit these risks may be theoretical at this stage.



What action should I take?

There are several options that you can consider whilst the position of enhanced pay remains unclear.

- **Option 1:** Pay enhanced pay. Some employers are taking the decision to mirror any enhanced maternity pay scheme and to pay the same or the equivalent period of SPL. Whilst this may be good for morale and employee retention there is obviously an additional financial burden on the employer and a likely greater take-up of SPL by male employees.
- **Option 2:** Other employers are taking a more robust approach and are choosing to pay SPL at the statutory rate. Whilst this has financial advantages there is a risk of discrimination claims (see above). If you choose to take this option keep the position under review.
- **Option 3:** The third option is to take the “middle ground” i.e. pay something but not as generous as enhanced maternity pay. Employers may consider reducing enhanced maternity pay to fund a scheme that is available for a wider group of employees or introducing a “family pot” to allow employees to choose.
- **Option 4:** Revising maternity benefits to make it unlikely that men would qualify even if there is a risk of discrimination claims. This could involve increasing the payment in the first short period of maternity leave or, for example, having a maternity return to work bonus that applies only where the parent is absent for six months’ or more.

Find out how DWF can help you



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Whatever option an employer chooses to take make sure that you have a clear SPL and ShPP policy which has been communicated to your employees.

For more information on SPL visit our SPL hub <http://employment.law-ondemand.com/shared-parental-leave/>

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