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Backhouse Solicitors

Shared Parental Leave - A Guide for Employers and Employees

Backhouse Solicitors Ltd
71 Duke Street
Chelmsford
Essex CM1 1JU

Tel: 01245 893400

Fax: 01245 281266

e-mail: info@backhouse-solicitors.co.uk

website: www.backhouse-solicitors.co.uk

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Introduction

The new “Shared Parental Leave and Statutory Shared Parental Pay” regulations introduced on 1 December 2014 have brought about one of the biggest changes to employment law in the last few years. Media coverage was on a much smaller scale than the “hot topics” of zero hours contracts and changes to holiday pay calculation, but it’s safe to predict that the Shared Parental Leave changes will affect virtually every employer at some point in the coming years.

The government has estimated that around 285,000 working couples will be eligible to take Shared Parental Leave with agreement from their employers. We predict that while applications for Shared Parental Leave may start slowly, there will be a gradual cultural change and sharing the childcare will become much more common over the next 5-10 years.

Unfortunately for employers and employees, while the principles of Shared Parental Leave are relatively simple, the practical detail is complicated. The aim of this guide is to explain the process in straightforward terms, so we will cover:

- What is Shared Parental Leave?
- Who qualifies for Shared Parental Leave?
- Shared Parental Pay
- Employees – the process of applying
- Employers – preparing for Shared Parental Leave
- Employers – the process of dealing with applications
- Keeping in touch during Shared Parental Leave
- Potential issues to be aware of
- How to get further help

What is Shared Parental Leave?

Shared Parental Leave (“SPL” for short) is a new entitlement to leave and pay for eligible parents of either new babies or new adoptive children. The rules came into force on 1 December 2014 and apply to children being born/adopted from 5 April 2015 onwards.

SPL sits alongside the existing Maternity, Paternity and Adoption leave rules and doesn’t replace them. Mothers are still entitled to 52 weeks maternity/adoption leave (39 weeks paid) and fathers are still entitled to two 2 weeks paid paternity leave.

What is new is that mothers can now choose to end their maternity leave before they have taken their 52 weeks (although they must take at least 2 weeks, or 4 weeks for manual workers in a factory environment to allow them to recover from the birth). Any unused weeks can be converted to SPL which can be taken either by the mother or father, and potentially both at the same time.

Another change is that unlike maternity and adoption leave, SPL can be started and stopped. Each eligible parent is entitled to apply for up to 3 separate periods of leave, although employers can allow more if they wish. SPL can start on any day of the week, but must be taken in 1 week blocks and within 1 year of the birth/adoption.

Who Qualifies for Shared Parental Leave?

This is one of the more complex calculations as there are 4 stages:

1. To qualify for SPL, a mother must:
 - have a partner
 - be entitled to either maternity/adoption leave or to statutory maternity/adoption pay (or maternity allowance if she doesn’t qualify for SMP or SAP)
 - give notice to reduce her maternity/adoption leave or statutory maternity/adoption pay (or maternity allowance)
2. For either the mother or father to be able to take SPL, they must:
 - be an employee (not self-employed)
 - share main responsibility for the new child with the other parent at the time of birth/adoption
 - notify their employer in advance and provide all the appropriate paperwork

So far, so good, but then it gets a little more complicated.

3. Either parent wishing to take SPL must pass:
 - **The “Continuity of employment test”**: They have worked for the same employer for at least 26 weeks at the end of the 15th week before the child’s expected due date/matching date and are still working for the employer at the start of each leave period.
4. AND their partner must pass:

- **The “Employment and earnings test”:** In the 66 weeks leading up to the baby’s expected due date/adoption matching date, they have worked for at least 26 weeks and earned an average of at least £30 (as of 2015) a week in any 13 weeks.

So, if both parents wish to take SPL, they must both pass both of the tests 3 and 4. It is possible that only one parent will be eligible to take SPL – for example a self-employed parent wouldn’t be eligible, but if they passed the employment and earnings test, their partner might be eligible.

What is Shared Parental Pay?

Mothers are usually entitled to 39 weeks of maternity pay, adoption pay or maternity allowance once their maternity leave starts. As with Shared Parental Leave, a mother can opt to reduce this entitlement and then the balance of the 39 weeks is available as Shared Parental Pay (“SPP”).

SPP can be divided between the mother and father in the same fashion as SPL and each must notify their employer of their entitlement and how much they wish to claim.

To qualify to claim SPP, an employee must pass the **Continuity of employment test** and their partner must pass the **Employment and earnings test**, just as for SPL. In addition however, they must also have earned above the “lower earnings limit” in the 8 weeks leading up to and including the 15th week before the due date or adoption date of the child. They must also still be employed by the same employer at the start of the first period in which they claim SPP. The lower earnings limit increases at the beginning of each tax year and the rates are available on the HMRC website.

Applying for Shared Parental Leave – The Process for Employees

The first decision for an employee is whether SPL is right for them. This is a personal decision which will be influenced by family circumstances, as well as by the relative financial positions of the mother and father. If one partner has higher levels of pay and/or the levels of maternity/paternity/parental pay are very different, then a financial calculation would be wise. For example, if the mother’s employer only pays statutory maternity pay, while the father’s employer pays full pay for a longer period, or vice versa, the financial implications could be substantial.

Even if the initial decision is not to apply for SPL, this can be changed later as long as the mother has not taken all of her maternity leave, and there is time left within the 1 year deadline to give 8 weeks’ notice and take the SPL.

It is up to employees to calculate their own eligibility for SPL and employers are only obliged to check the financial details of their own employees, not their partners. If a mistake is made and an employee is incorrectly paid SPP, or paid too much, then employers may legally deduct the overpayment from future earnings.

If the parents decide to make an application for SPL then this is how the process works:

- Firstly the mother must notify her employer that she wishes her maternity/adoption leave to come to end and giving a date.

- This notice cannot normally be withdrawn unless:
 - within 8 weeks of notifying, it turns out that neither parent qualifies for SPL
 - if the notice is given before birth/adoption it may be withdrawn up to 6 weeks after birth/adoption
 - one of the parents dies
- Then the parents must send notices of entitlement to take SPL to their respective employers at least 8 weeks before they want their SPL to start
- These notices are signed by both parents and include an indication of how much SPL each parent is entitled to take, how much they intend to take and when
- The dates they give are not binding and can be changed, but the idea is to help the employers plan for the leave
- If the parents do decide to change the dates, they must send in a new notification of entitlement containing the old details, advising that they are to be changed and giving the new details – both the split of leave and the dates can be changed
- The parents must book their leave at least 8 weeks before they want to take it. They are entitled to book up to 3 periods, although employers may allow more.
- If a single booking is for a continuous block of leave, the employer must accept it
- If a single booking is for a discontinuous block of leave, e.g. 2 weeks off, 2 weeks back at work and then another 2 weeks off, then an employer may refuse this – there is a 14 day discussion period for both parties to talk about it.
- If the discontinuous booking is refused, or the employer does not respond within 14 days, it automatically changes to become a booking for a continuous block of the same length (4 weeks in the example above) and starting when the first discontinuous block would have started, unless the parent notifies an alternative start date within 19 days from the original notification or withdraws the booking within 15 days from the original notification
- If a booking is withdrawn at this stage it does not count towards the limit of 3 bookings
- It would therefore be wise to discuss any discontinuous booking with the employer before formally making it, to get an idea of whether it is likely to be accepted or not
- Once a booking is agreed or defaults to a continuous block, nothing else is needed and the parent takes the leave as booked unless they withdraw the booking
- If a parent needs decides to vary or cancel an agreed booking, they must do so in writing at least 8 weeks before any new proposed dates begin
- A notice to vary leave will count as a new booking and will use up one of the employee's limit of 3 bookings unless the employer agrees otherwise

While on SPL, a parent will accrue annual leave as normal and is also entitled to benefit from the same employment protections as while they are in work. For example if there is a redundancy they must be offered an alternative position if one is available.

Preparing for Shared Parental Leave – Advice for Employers

The **first step** that employers should take, preferably before SPL requests start to come in, is to update their staff policies and handbooks. They will need a SPL/SPP policy and will also need to amend their existing maternity/paternity/adoption policies to reflect the changes.

The **second step** will be to look at the levels of maternity, paternity and shared paternity pay. The key issue will be to avoid claims of discrimination from either mothers or fathers by setting different levels for pay for each for the same type of leave.

Employers have always had a choice with maternity pay:

- pay the statutory requirement – 90% of average weekly pay for 6 weeks and then the lower of this amount and statutory maternity pay (see HMRC website for the most up to date rates) for the next 33 weeks
- pay an enhanced amount, for example full salary for 6 months

Paternity pay has usually been calculated the same way - 90% of average weekly pay for 6 weeks and then the lower of this amount and statutory paternity pay (see HMRC website for the most up to date rates). The difference with paternity leave is that less than 1% of fathers have taken any more than the Ordinary Paternity Leave amount of 1-2 weeks, so the impact has been very limited.

Going forward, employers will need to make 3 decisions:

- Whether to pay statutory or enhanced maternity pay
- Whether to pay statutory or enhanced shared parental pay
- Whether to pay statutory or enhanced paternity pay (very small impact now paternity leave is capped at 2 weeks)

A simple table can be used to weigh up the options:

		Maternity Pay	
		Statutory	Enhanced
Shared Parental Pay	Statutory	<ul style="list-style-type: none"> • Equality of treatment for men and women, so no risk of discrimination claims. • Cheaper for the employer. • May not achieve "family friendly" goal of many employers - less good for staff engagement and retention. • Likely to be most popular with small businesses who have smaller budgets. 	<ul style="list-style-type: none"> • Favours mothers over fathers and also mothers who stay on maternity leave over those who opt for SPL - potential discrimination claims from both men and women • The second most expensive option as maternity leave will be more popular than SPL. • Sends mixed messages for a "family friendly" organisation.
	Enhanced	<ul style="list-style-type: none"> • Favours fathers over mothers and penalises mothers who stay on maternity leave (the most common option) over those who opt for SPL - potential discrimination claims from women • The second cheapest option as maternity leave will be more popular than SPL. • Sends very mixed messages for a "family friendly" organisation - probably the worst option in this respect 	<ul style="list-style-type: none"> • Equality of treatment for men and women, so no risk of discrimination claims. • The most expensive option for the employer. • Helps achieve "family friendly" goal of many employers which may aid staff engagement and retention. • Likely to be most popular with large businesses who have bigger budgets.

We can see from the table that the safest options are either to pay statutory levels to everyone, or enhanced levels to everyone.

Finally, the **third step** that employers should take is to provide training to their managers to understand the changes in the rules and to ensure that they are ready to deal with SPL requests as they come in.

Handling Applications for Shared Parental Leave – The Process for Employees

Once an employer has followed steps 1, 2 and 3 above then it is a matter of waiting for the first SPL request. There is unlikely to be a flood of applications as research suggests that less than 1% of fathers have taken additional paternity leave since it was introduced.

- Once the next request for maternity/paternity/adoption leave is received by an employer, ACAS guidance suggests that SPL could be discussed with the employee as an option. This is certainly not mandatory and it is up to the employer whether this fits in with their organisational goals
- Once an actual notification of entitlement to SPL is received it will be a good idea to hold an informal discussion with the employee. The goal of the discussion is to get an idea of the type, timing and amount of leave they would like to take, to assist planning
- This initial meeting will also allow the employer to indicate what, if any, discontinuous blocks of leave they would be prepared to agree to
- After this initial meeting the employer can start making plans for accommodating the expected SPL booking, such as planning for staffing cover
- On receiving the first notice to book leave, there are two possibilities. If it is a **continuous** leave booking, then the employer must accept it, inform the employee and move straight to planning for the leave. If they don't reply to the request the employee may take the leave anyway. If it is a **discontinuous** leave booking the employer has 14 calendar days to consider the request and discuss with the employee as necessary
- If the employer agrees to the discontinuous booking request then again they should inform the employee in writing within 14 days and move straight to planning for the leave
- If the employer is not sure whether the business can cope with the request, then it would be good practice to hold a meeting with the employee to discuss it and work out whether it can be accommodated, or perhaps to agree whether a revised version can be accommodated
- If after this meeting a modified request is agreed, both parties should confirm agreement in writing within 14 days stating the new leave dates
- If the employer decides to refuse the request, they should confirm this in writing within 14 days AND propose alternative dates if possible AND outline the options available to the employee (withdraw, agree modifications or let the default provisions automatically kick in)
- The default provisions will automatically apply for discontinuous applications if after 14 days no agreement has been reached OR the employer refuses the application OR the employer doesn't respond to the application
- Under the default provisions, the employee may withdraw their request within 15 days of the original notification and it doesn't count towards their limit of 3 bookings
- If they don't withdraw their request then it will default to a continuous booking. They then have until 19 days from the original notification to adjust the start date, after which it defaults to the start date of the first period of discontinuous leave they requested.

Keeping in Touch during Shared Parental Leave

While an employee is taking SPL, there will be occasions when contact is useful between the employer and employee. These will either be less formal “reasonable contact” occasions or more formal Shared Parental Leave In Touch (“SPLIT”) days.

- Reasonable Contact – this is where the employee updates the employer with any changes in circumstances and the employer gives updates to the employee, for example on team changes, pay rises, job opportunities or other important matters. The format is usually agreed in advance, e.g. by phone or email.
- SPLIT days are an opportunity for the employee to attend the workplace for important occasions such as team training, important meetings or to assist a gradual return to work. Up to 20 days can be taken this way and the format and any additional pay is usually agreed in advance

Potential Issues for Employers and Employees

For employees the new SPL/SPP regulations have little downside and bring welcome additional flexibility to a young family. The biggest hurdle to overcome will be cultural – less than 1% of fathers took their entitlement to additional paternity leave and this is unlikely to change quickly. Fathers tend to earn more than mothers, so this financial disincentive will not help, but we can expect to see a gradual change over time.

For employers, there are bigger challenges to face:

- The first is the administrative burden – the process is obviously complicated and updating policies, training managers, keeping track of leave requests, responding by deadlines, adjusting payroll and other issues will take some doing.
- The second issue is avoiding discriminating against either mothers or fathers by choosing new policies which treat everyone fairly and equally. For bigger employers this will be more straightforward, but there are many smaller employers who don't have any staff policies in place and are vulnerable to making mistakes in both the procedure and decision making.
- The third issue is logistical when it comes to covering staff who are on SPL. At the moment maternity leave is taken in one block, and this is easier to plan for. SPL can be taken in 3 or more blocks and this will make cover harder to arrange, and indeed harder to plan for when the employer may only get 8 weeks' notice.
- The fourth issue is adapting the culture of a business which may currently employ few or no women. There are plenty of employers who, despite equality rules, only take on men in key roles to avoid the issue of maternity leave. They now face the real possibility that their male staff may take up to 49 weeks of SPL which they won't be able to refuse.

Getting Further Help

Shared Parental Leave and Shared Parental Pay bring in a lot of new rules and some complicated procedures. We appreciate that there is a lot to take in, and employers and employees will need some help to understand what they need to do.

If you are struggling to interpret these complex rules or you are an employer who would like help getting your policies and procedures in place, then we are here to help. For expert, easy to understand advice, contact Backhouse Solicitors today for a free 30 minute consultation with one of our specialist employment law solicitors.

Tel: **01245 893400**

Email: info@backhouse-solicitors.co.uk

Web: www.backhouse-solicitors.co.uk

We look forward to hearing from you.

The Backhouse Solicitors Team