

Employment

Winning hearts & minds?

Anna Thomas & Suzanne McKie analyse the potential effects of the additional paternity leave regulations

IN BRIEF

- New right to take additional paternity leave up to 26 weeks.
- Right dependent on mother's early return to work.
- Low take-up is predicted in absence of non-transferable leave.

Within the raft of legislation brought into force on 6 April, one provision stands out. The Additional Paternity Leave Regulations 2010 (APLR) confer a new right for employee fathers of children born on or after 3 April 2011 to take additional paternity leave of up to 26 weeks.

The APLR implement a power in the Work and Families Act 2006 incorporated by that Act into the Employment Rights Act 1996 (ERA 1996) which governs entitlement to additional paternity leave. By the Additional Statutory Paternity Pay (Weekly Rates) Regulations 2010 (ASLR) the leave may be paid if it is taken during the mother's maternity pay or allowance pay period. Additional paternity leave and pay will also be available to adopters where there is an entitlement to statutory adoption leave and pay.

Like the Flexible Working Regulations, the APLR are part of a wider policy objective to enable fathers to play a more significant role in bringing up their children and provide parents with greater choice in how to divide childcare responsibilities in order to improve the reconciliation of work, private and family life for working parents. The APLR are also designed, says the accompanying explanatory note, to be "light-touch" so that only minimal additional burdens are imposed on businesses. Given these objectives, the APLR

build on existing arrangements for employees who take up paternity leave and pay rather than establish a new regime.

Baby steps?

The bark of the scheme introduced by the APLR is likely to be louder than its bite and a smaller step towards the gender-neutral parental leave promoted by both the European Commission (EC) and the Equality and Human Rights Commission (EHRC) than might appear at first sight.

In particular, although the right introduced by APLR may stretch to 26 weeks in duration, eight weeks more than the right to parental leave set out in the new Parental Leave Directive of 7 April 2010, the right afforded to fathers and partners by the APLR does not approach the individual, non-transferable right envisaged by the EC's Framework Agreement Council Directive 2010/ID/EU on parental leave. Nor does it follow the EHRC's recommendations in its 2009 *Working Better Report*, which advocates phasing in a radical change of policy to create a gender-neutral system of family leave. Nonetheless, from 3 April 2011, fathers and partners will be significantly better off and the APLR should be welcomed by parents and litigators alike.

Entitlement to APL

The qualifying period for additional



paternity leave (APL) and additional paternity pay (APP) is based on entitlement to existing ordinary paternity leave and pay. An employee (P) is entitled to be absent from work for the purpose of caring for a child born on or after 3 April 2011 (C) if he has been continuously employed for not less than 26 weeks ending with the relevant week and remains in continuous employment with that employer (E) until the week before the first week of APL: reg 4(2). P must be either C's father or married to or the partner or civil partner of the child's mother (M) and have, or expect to have, the main responsibility for the upbringing of C apart from M. The definition of "partner" again mirrors that for ordinary paternity leave arrangements and extends to partners and civil partner of M: a person who lives with M and C in an "enduring family relationship" but is not a relative of M. The definition does not, therefore, extend to grandparents or other family members.

The entitlement to APL and pay does



not stand alone. It rests on M first, being entitled to maternity leave, statutory maternity pay or maternity allowance and, secondly, having returned to work or being treated as having returned to work under reg 25 without having exercised her full entitlement to maternity leave, namely before the end of M's additional maternity leave. M's collaboration is also required in order to satisfy tricky notice requirements set out in reg 6 and discussed below.

The right to APL

APL is the right to a maximum of 26 weeks which may be taken by those entitled pursuant to reg 4. P may commence APL at any time within the period which begins 20 weeks after C's birth and ends 12 months after this date. The first 20 weeks after C's birth is ring-fenced for the mother. Paternity leave must be taken as one continuous period and so cannot be used to reduce weekly working hours. The minimum period of leave is two consecutive weeks: reg 5(3).

STOP PRESS!

- At the time of writing, parental leave does not feature in the Conservative-Liberal Democrat coalition negotiation agreements. However, both parties independently promised new systems of flexible parental leave before the election to encourage parents to share leave. It remains to be seen how the coalition government will take this forward and how much closer detailed proposals will be to those advocated by the EC and the EHRC.
- The Liberal Democrats have further proposed increasing shared leave to 18 months.
- It is unlikely that the Additional Paternity Leave Regulations in their current form will survive until March 2012 but as things stand, in this area as in others, parents and litigators can only watch and wait.

Notice requirements

The right does not bite until the notice and self-certification requirements of reg 6 have been carried out. M's role in the provision of notice is significant. P must provide written notice at least eight weeks before the start date chosen by P for APL. The notice must state C's expected week of birth and actual date of birth together with dates for start and end of the period of APL: reg 6(1). P must provide written declarations concerning his relationship to M and the purpose of leave: reg 6(2). In addition, P must give his employer a "mother declaration" written by M and stating, *inter alia*, (i) the date M intends to return to work (ii) P's relationship to her and that P has or expects to have the main responsibility for the upbringing of C (apart from M) and (iii) that P is to M's knowledge the only person exercising the right to APL: reg 6(2)(c).

M's active co-operation and the requirement of a "mother declaration" is likely to forestall two claims for paternity leave, for example by a natural and step-father, being made at the same time even where two people have potential eligibility under reg 4. This is a practical method of implementing the policy intention to prevent more than one person being out of the job market at the same time.

At P's employers request only, P must go on to provide a copy of C's birth certificate and details of M's employer: reg 6(3). A father wishing to change the date he starts leave or returns to work early must give at least six weeks' notice without which the employer may be entitled to defer the father's start or return dates: P's obligation to keep his employer informed is ongoing. In the event that circumstances change and he or M no longer satisfy the eligibility requirements of reg 4 he must provide his employer with written notice "as soon as reasonably practicable": reg 6(4). If, then, M decides to return to work early, P should

tell his employer as soon as M has agreed a date. The effect of providing this notice (a "withdrawal" notice) is not that APL ends *per se* but that the employer may require P to remain on leave where P has given the withdrawal notice not less than six weeks before the start date given in P's original leave notice *and* it is not "reasonably practicable" for the employer to accommodate the change in P's arrangements: reg 6(5). In these circumstances the leave shall be treated as APL and shall last no more than six weeks after the date on which the withdrawal notice was given: reg 6(6). The assumption is that APL will end as soon as the employer says so following the date M returns to work. However, this is not clearly set out because the focus of regs 6 and 8 is on the employers' right to extend the leave and it is open to argue that, once granted, APL cannot be terminated without P's agreement.

The right to additional statutory paternity pay (ASPP)

ASPP is closely connected with the mother's right to Statutory Maternity Pay (SMP). ASPP is paid at the lesser of the standard SMP rate (currently £123.06) or 90% of the father's average earnings. It is only payable during the period when the mother would be entitled to SMP, Maternity Allowance or Statutory Adoption Pay. The regulations require that the mother reports the start date of her SMP or MA pay period to the father's employer so that the period for which the father is able to claim ASPP can be calculated. Mirroring entitlement to leave itself, the mother must have returned to work before the father is entitled to receive pay.

Work during APL

Regulation 26 provides that P may carry out up to 10 days work (or any part of 10 days) for E without bringing the period of APL to an end. "Reasonable contact" between P and E shall not bring that

period to an end; an example is given of a meeting to discuss return to work.

Application of terms & conditions during APL

Like the amended Maternity and Parental Leave Regulations (MPLR), P is entitled to the benefit of all terms and conditions of employment which would have applied if he was at work and is bound by any obligations arising under those terms (except s 80C(1) of ERA 1996). Again, like MPLR "Terms and conditions" of employment have the meaning given by s 80C(5) of ERA 1996 and accordingly do not include terms and conditions about remuneration. Only sums payable to P by way of wages or salary are to be treated as remuneration: reg 27. Hence, as for maternity leave, the key question will be which employee payments or benefits are caught by the definition of remuneration and fall outside the protection of APL Regs. As a rule of thumb, all pay and benefits liable to Class 1 NICs will be caught. Contractual bonuses are likely to be "remuneration" and will not be protected whereas discretionary bonuses may be payable and policies will need careful consideration.

Part of package

Again mirroring the MPLR, the APLR provide for P to be offered alternative employment with E, his successor or an associated employer where P is made redundant during APL and there is a suitable alternative vacancy (reg 28); a right to return to the same job with seniority and pension rights as they would have been if P had not been absent (regs 31 and 32); a right under s 47C of ERA 1996 not to be subjected to any detriment because P took or sought to take APL or because E believed P was likely to take APL (reg 33); and a right not to be unfairly dismissed under s 99 of ERA 1996 for a principal reason connected with taking or seeking to take APL or because E believed P was likely to take APL (reg 34).

Impact & the future

The impact assessment estimates 10,000–20,000 fathers will take up the new right to APL each year. This represents only between 4%–8% of eligible fathers. These figures are based on a survey carried out by the Department for Business, Innovation & Skills. Figures from Scandinavian countries operating similar systems indicate

that where parents can share leave the proportion of fathers taking leave is low ranging from 4% in Finland to 16% in Iceland. This means that take-up next year is likely to be low.

The low proportion of fathers taking leave is a focus in the preamble to the new Parental Leave Directive 2010/18/EU. It goes on to state that the right of parental leave is an individual right and is in principle non-transferable. The rationale is that making leave non-transferable, unlike APL in UK, can act as a positive incentive for take-up by fathers. It is for this reason that the Directive will require member states to provide at least one month of non-transferable parental leave out of the minimum four-month period. Nor should member states exclude workers or contracts of employment solely because they relate to fixed-term contract workers or contracts of employment with a temporary agency. The Directive may not require implementation until March 2012; however, it does provide a forecast and direction against which the APLR will be judged. **NLJ**

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