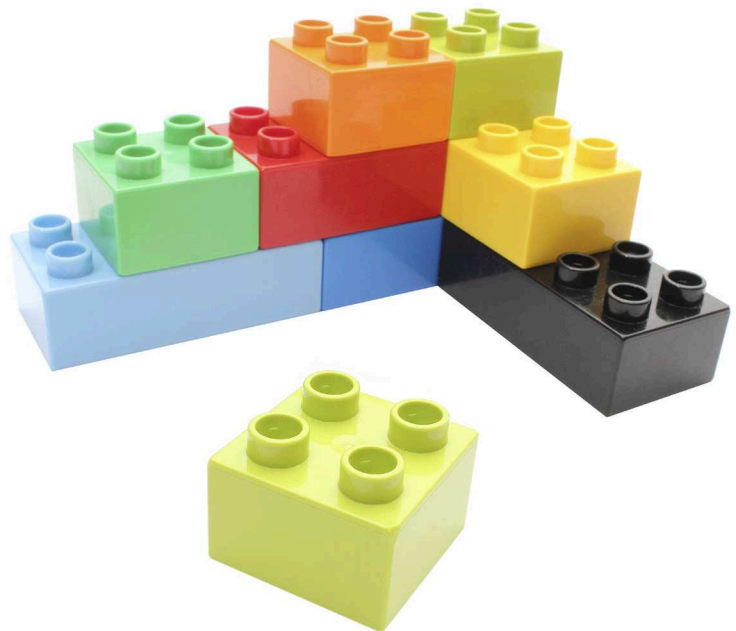


Shared Parental Leave: The CMS Guide to Implementation



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Introduction

Employers should be making changes now to their family friendly policies to prepare for the new Shared Parental Leave (SPL) regime which comes into effect on 1 December 2014 for babies born or due on or after 5 April 2015.

The Government published the final set of SPL Regulations at the end of July, and published technical guidance in September. Now that Acas has also published its good practice guide and template letters we have a clearer understanding of how the system will operate in practice. There is no doubt that the system is complex and it will take time to get to grips with new concepts like the joint eligibility test, “discontinuous leave requests” and “non-binding” discussions regarding leave plans. With these points in mind, we have produced this practical guide to assist you with implementing SPL in your organisation.

What is SPL?

In a nutshell, the scheme will allow mothers to bring their maternity leave to an end early and opt into SPL. The first 2 weeks of maternity leave is reserved to the mother. After this, the remaining period of 50 weeks leave can be shared between parents. Parents taking SPL may also be entitled to receive Shared Parental Pay (SPP). This is available for 37 weeks and is paid at the flat rate only. The new scheme will replace the current Additional Paternity Leave (APL) system, and parents wishing to take SPL will need to opt into the new regime, otherwise the default of taking maternity leave will remain. Good communication between parents and employers will be essential in order to operate this new system especially since there is scope within the system to vary leave plans.

Who is eligible?

Leave

Eligibility for SPL is very different to the maternity leave regime, where employees are eligible for maternity leave from day one of employment, although additional considerations apply before an employee is entitled to receive Statutory Maternity Pay (SMP). One of the new and potentially challenging aspects of SPL is the joint eligibility test. This has two elements: a requirement that both parents are economically active and that the parent taking the leave satisfies the continuity of employment test. Their partner must satisfy the employment and

earnings test. In essence although both parents must pass hurdles to qualify for SPL, the parent who is actually taking the leave has additional criteria to satisfy in relation to continuity of employment.

Only employees are eligible. Agency workers and self-employed parents are not eligible.

As such if a mother wants to take leave she must:

- have been continuously employed by her employer for a period of not less than 26 weeks at the end of the 15th week before the expected week of childbirth and still be employed in the first week that SPL is to be taken (the continuity of employment test)
- have, or expect to have, the main responsibility for the care of the child (with partner)
- be entitled to statutory maternity leave in respect of the child
- curtail her right to maternity leave
- comply with the evidential and notice requirements regarding leave

But she must also prove that her partner

- satisfies the employment and earnings test. This is the same as the maternity allowance test. In the 66 weeks leading up to the due date, her partner must have worked for at least 26 weeks and earned at least £30 average weekly earnings for any 13 of those 66 weeks
- and has main responsibility for the care of the child (with mother).

The situation is effectively reversed where the father or partner takes the leave. In that case the partner needs to satisfy the continuity of employment test, ensure that the mother has curtailed her maternity leave, complied with evidential requirements, and it is the mother who must satisfy the employment and earnings test outlined above.

The fact that additional criteria apply to the parent taking the leave can have some complex consequences. As the Government guidance explains:

“Sometimes only one parent in a couple is eligible to get Shared Parental Leave (SPL) and Statutory Shared Parental Pay (ShPP). This means that they can’t share the leave between them.”

This could occur where one partner is made redundant, and would no longer satisfy the continuity of employment test. However because he or she has been economically active the partner would pass the employment and earnings test, meaning that the mother could continue to take her shared parental leave, but the partner could not.

Pay

A mother who is eligible to receive SMP will also be entitled to SPP. 37 weeks of SPP are available to be shared.

Additional criteria need to be met before a father or partner may receive SPP. In addition to satisfying the leave requirement both the employee and their partner must also earn not less than the lower earnings limit (currently £111 per week) for the 8 continuous weeks leading up to the end of the 15th week before the expected week of childbirth. The mother must have curtailed her right to SMP or maternity allowance.

Amount of Shared Parental Pay

An employee's entitlement to SPP will equate to the number of weeks of unexpired maternity allowance or maternity pay that remained when the mother ended her statutory maternity leave early. Therefore, the maximum pay which a mother can share with her partner is 37 weeks.

The rate of SPP will be an amount set by the Government for each relevant tax year (currently £138.18 or 90% of the employee's earnings whichever is the lower). Unlike statutory maternity pay this is paid at the flat rate only and does not attract the higher rate of 90% of earnings for the first 6 weeks. This fact alone is important in understanding how parents are likely to plan their leave. Most will choose to take maternity leave for at least 6 weeks to gain the benefit of the higher rate of 90% of earnings and then may choose to move to shared parental leave. Of course any occupational enhanced rates of pay are likely to influence when a mother will opt into the SPL system.

How does this work in practice?

For the first time leave can be taken by both parents at the same time. Similarly both parents can go back to work at the same time. It is also possible that a mother may decide to take maternity leave, go back to work for a period of time and then take SPL, as long as she does so before her child is one. In most cases parents will want to move directly between maternity leave and SPL to maximise their period of leave.

An example scenario could be:

The mother may take the first 4 weeks maternity leave. The father may join the mother for the next 8 weeks of shared paternity leave. The mother may then take shared parental leave for the next 10 weeks before returning to work. After which point, the father may use up the remaining entitlement.

Notification and evidential requirements

It is not sufficient that an employee simply meets the eligibility criteria set out above; they must also comply with prescribed notification requirements. These are designed to allow employers time to organise their workforce when employees are absent on SPL.

In practice, this means that employees have to give notice of

- i) their intention to opt into the shared parental leave system, and curtail maternity leave
- ii) how much leave both parents are entitled to take
- iii) any specific period of leave they intend to take
- iv) when they expect to take their leave.

The Acas guidance distinguishes between a one off notification of entitlement and a leave booking notification. In some cases the two notices will be submitted together. But they clarify that a booking notice may be submitted after an entitlement notice. Notice must be in writing and can be by e-mail, post or personal delivery.

Acas describes the following 4 step process, which the employee must follow:

- Step 1** The employee becomes aware of their pregnancy and discusses their intentions with their employer.
- Step 2** They choose SPL and submit a notification of entitlement.
- Step 3** The employee then submits their leave booking notice outlining when they want to take the leave.
- Step 4** The employer then advises whether this has been granted.

One of the real difficulties with the system is the onus that it places on parents to accurately calculate the total amount of leave and pay they have available to them, especially if they vary their original request. It had been thought that the Government would produce forms setting out an individual's entitlement to leave and pay and booking the leave patterns. Instead Acas has produced guidance explaining what information should be contained in a notice of entitlement. The full list of information that an employee is required to provide to their employer is contained in the Appendix to this guide.

Self Certification

Taking SPL is a self-certification process. It is the employee's responsibility to confirm that their partner is eligible, and provide a declaration confirming that they are eligible. The Government wanted a light touch process to avoid unnecessary burdens on businesses. However, in light of the fact that this may increase the scope for fraud employers can request a copy of the child's birth certificate as well as the name and address of the partner's employer. Such information must be requested by the employer within 14 days of receiving the notice of entitlement. For these reasons, it may be prudent to make it clear in relevant policies that any abuse of the system may result in disciplinary action being taken.

Timescales

An employee is required to give at least 8 weeks written notice of their intention to opt into the shared parental leave system, starting before the first period of shared parental leave.

Discussions regarding leave

Acas recommends that employees should discuss their intentions regarding leave patterns at an early stage and before they are formally required to do so. This should assist with planning and resourcing. Employers need to understand what they can and cannot do in relation to period of leave requests.

Non-binding discussions regarding leave

The expectation is that the parent will make the request at least 8 weeks before the first date of leave. The employer will have a 2 week period in which to discuss the request. There is no ability to refuse a request taken in a single block. In the case of a discontinuous leave request the employer can either agree to it, refuse it or suggest another option. If the parties cannot agree to a pattern of leave then the employee can either withdraw their discontinuous leave notification or the total leave must be taken in one continuous block.

2 weeks is a very short period to decide on a pattern of leave where cover is required. This discussion and the employee's notice indicating how they intend to share parental leave at the outset is non-binding. If either parent changes their mind at a later date, they can simply serve a variation of their original notice, provided that they again give at least 8 weeks' notice of the new pattern of leave. Employees can only make three requests to take or vary leave in total and employers must always be given at least 8 weeks' prior notice. In practice that means one request at the start followed by 2 variation requests.

Certain requests do not count towards the limit – for example, where a notice of discontinuous leave has been withdrawn by the employee or where the baby is born earlier or later than expected.

The ability of the employee to change their mind can obviously create uncertainty for employers. However, it is unlikely this avenue will be used by parents too often, given that they themselves will be wanting a degree of certainty regarding their leave so that they may plan accordingly. However there may be some difficulties particularly where one employer refuses a pattern and this then alters a leave pattern for the other parent which has already been agreed by their employer.

Employers should also be aware that default provisions exist. If the employer refuses a discontinuous request, or fails to respond then an employee has the option within 15 days of the original notification of withdrawing their request, meaning it does not count towards their limit of three requests. But if the employee does nothing, then their discontinuous request automatically converts to a continuous leave request.

Rights during SPL

During any period of leave, the employee is entitled to all terms and conditions as if they had not been absent, except terms relating to pay. In particular, any benefits in kind (such as use of a company car, life assurance, private medical insurance) will continue and annual leave entitlement will continue to accrue.

SPLIT days

Each parent is entitled to 20 SPLIT (Shared Parental Leave in Touch) days during shared parental leave, this is in addition to the 10 KIT (Keeping in Touch days) allowed during maternity leave. Like KIT days the legislation does not address the rate of pay which should be made for SPLIT days. This should be a matter of agreement between employers and employees but employers must pay at least National Minimum Wage rates. Most employers have chosen to pay normal rates of pay for a KIT day and are likely to take the same approach with SPLIT days.

SPLIT days could also be used by parents towards the end of their leave period if they want to return to work on a part-time basis.

Right to return after SPL

An employee is entitled to return to their previous job after a period of SPL provided the total amount of leave (including any period of maternity or paternity leave) is 26 weeks or less, irrespective of whether such leave has been continuous or discontinuous.

Where an employee's total amount of leave is more than 26 weeks, and it is not reasonably practicable for them to return to the same position, the employee must be offered a suitable alternative job on terms and conditions that are no less favourable.

Redundancy and SPL

If an employee cannot return to their previous role due to redundancy, they are entitled to be offered suitable alternative employment on no less favourable terms. Accordingly, employees on SPL will benefit from the same preferential treatment in redundancy scenarios in the same way as employees on maternity or paternity leave. As such, there are some concerns that this provision may be exploited by employees in order to increase their chances of gaining suitable alternative employment.

Detriment and dismissal

From 1 December 2014 when the SPL Regulations are due to come into force an employee is protected from any detriment which results from them taking, or proposing to take, SPL. A dismissal in such circumstances will be deemed automatically unfair.

Enhanced rates of pay

A recent XpertHR survey reported that 75% of employers plan to offer parents taking SPL the same enhancement they offer to mothers on maternity leave. This survey is rather surprising since CMS is also aware that many employers are not paying enhanced rates to parents taking SPL.

The Government's guidance in the Modern Workplace consultation response (November 2012) stated that employers are not obliged to pay enhanced rates to parents taking SPL: *"Maternity Leave is a protected period, and companies are able to offer maternity benefits to women only. There is no legal requirement for companies to create occupational parental leave schemes."*

Yet there is a low risk that European case law may support an alternative view. As such employers who provide enhanced occupational maternity pay, but who have decided not to provide a similar enhancement to parents taking SPL should (if they have not done so already) document why this decision has been taken. A legitimate aim, for example, may be to encourage more women to take a longer period of maternity leave. It would not be enough to identify the cost of paying parents under SPL as being too expensive (although this can be a factor provided there are additional reasons to supplement this point).

Support for the view that there is no discrimination in failing to pay fathers an enhanced rate of pay can be found in the recent employment tribunal decision of *Shuter v Ford Motor Co*. This was the first reported case to look at a failure to pay enhanced rates to men under an APL scheme. While there are a number of differences between SPL and APL, the legal arguments are similar. Although there may still be scope to revisit the direct discrimination argument based on the European cases, it was rejected here and will require further guidance at appellate level before we have clarity on this point. This case would certainly suggest that the greatest risk from failing to pay men in these circumstances is a claim for indirect discrimination, which can be justified by employers provided they can identify legitimate aims and proportionate means.

Frequently Asked Questions

Q. How can an employer check that the partner or father has given the correct balance of SPL and SPP available to him?

- A.** An employer is not expected to check with the partner's employer but they can do so, by asking for the contact details.

Q. Can a mother change her mind about opting into shared parental leave?

- A.** Yes, mothers who have indicated their intention to share their leave prior to the child's birth will have a six-week grace period after the birth in which to change their mind.

This is likely to prove difficult for an employer who may have lined up replacement cover only to discover that the employee no longer wishes to pursue this.

A mother may still be able to opt into SPL at a later date.

The Government's technical guidance explains that if this situation arises, and the partner has already started to take SPL, the employer may require the partner to be absent from work on unpaid leave for some or all of this period. The employer will not have to accept the employee back with no notice.

Q. Is a mother required to share her leave with her partner? Can she use this as an opportunity to be flexible about patterns of work and leave?

- A.** It had been thought that the mother would have to swap her leave over to her partner. However it seems clear from the Government guidance that provided the partner satisfies the eligibility aspect of this new right that the mother does not need to swap leave over. The Government guidance states – "You can book up to 3 separate blocks of Shared Parental Leave (SPL) instead of taking it all in one go, even if you aren't sharing the leave with your partner."

Q. Can a mother take SPL before her child is born?

- A.** No. SPL is only available after the birth of the child. The first 2 weeks after birth are reserved as compulsory maternity leave. Mothers are always going to start off by taking maternity leave and then opting into SPL.

Q. Is it only biological parents who can participate in the shared parental leave system?

- A.** No, the Government's intention is that the regulations will also cover non-biological fathers, same sex partners, as well as adoptive parents, providing they meet the eligibility criteria and evidential requirements. SPL and pay will also be available to the intended parents in surrogacy arrangements if they qualify for adoption leave and/or pay.

Q. Can a mother still be on maternity leave when her partner is taking SPL?

- A.** While technically a mother should curtail her rights to maternity leave as part of the process for opting into SPL, there may be situations during the 8 week notice period where the mother is still on maternity leave. The Government guidance states "You can start SPL while your partner is still on maternity or adoption leave as long as they've given binding notice to end it."

Q. Can an employee take single days of shared parental leave?

- A.** No, leave must be taken in blocks of at least one week.

Q. Is there a point at which all shared parental leave must be taken?

- A.** Yes, SPL must be taken before the child's first birthday.

Where can I find out more?

- In September the Government published detailed technical guidance on shared parental leave. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/353019/bis-14-1076-employers-technical-guide-shared-parental-leave-and-pay.pdf
- Acas has also published a Good Practice Guide on SPL with supporting letters. <http://www.acas.org.uk/index.aspx?articleid=4911>

Appendix: ACAS Guidance: Information required in an SPL notice of entitlement

The employee must provide their employer with:

- the names of the mother and partner
- the start and end date of any statutory maternity or adoption leave
- the total amount of shared parental leave available
- the child's expected week of birth, actual date of birth, or date of placement
- how much shared parental leave the mother and partner each intend to take
- an indication as to when they intend to take shared parental leave (an employee does not have to take their leave as they indicate in this document).

A signed declaration from the employee seeking to take SPL that:

- they will be sharing responsibility for the care of the child
- the mother has given notice to end her maternity entitlement
- they meet the continuity of employment test
- the information they have given is accurate
- should they cease to be eligible they will immediately inform their employer.

The partner of the employee must also provide their partner's employer with a signed declaration stating:

- their name, address and national insurance number
- they are the father, mother of the child or partner of the mother of the child
- they meet the criteria for the employment and earnings test
- (if the mother) they are entitled to statutory maternity leave, statutory maternity pay or maternity allowance and that they have given notice to end that leave and pay/allowance
- that at the time of the birth or placement they shared the responsibility for the care of the child with the employee seeking to take SPL
- they consent to the amount of leave and pay that the employee is seeking to take
- they consent to the employer receiving this declaration to process the information contained within it
- (in the case of the mother) that the mother will immediately inform their partner should the mother cease to satisfy the eligibility conditions.

Contact us

Please get in touch if you have any questions



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