

FLEXIBLE PARENTAL LEAVE AND FLEXIBLE WORKING FOR ALL: MORE CHOICE OR MORE BUREAUCRACY?

EMPLOYMENT

Much of the Government's legislative agenda has been driven by a desire to achieve greater flexibility. The hotly contested changes to the unfair dismissal and collective redundancy regimes are two examples of the Coalition's aim of liberating business from unnecessary regulation, and the radical changes to parental leave and flexible working discussed in this article are examples of its desire to free employees to take a more personalised approach to their careers.

The changes were announced by the Deputy Prime Minister in November 2012, but detailed draft legislation was only published on 4 February 2013. The changes are contained in the Children and Families Bill currently before Parliament. The key proposals, their planned implementation dates, and some of the areas that have yet to be addressed, are covered below.

FLEXIBLE WORKING

Current position	Proposal
<ul style="list-style-type: none"> ◆ Employees with: <ul style="list-style-type: none"> - 26 weeks' continuous service and - a child under 17; - a disabled child under 18; - care responsibilities for a spouse or civil partner; or - care responsibilities for a relative or person in the same household <p>may make a flexible working request.</p> <ul style="list-style-type: none"> ◆ Employers must hold a meeting with the employee within 28 days of the request, give their decision within a further 14 days, and give a right of appeal. ◆ Requests may only be rejected on specified grounds set out in the legislation. 	<ul style="list-style-type: none"> ◆ All employees with 26 weeks' continuous service will be entitled to make a flexible working request. ◆ Employers must deal with requests in a reasonable time, and in a reasonable manner.

The proposed change is designed to allow all employees, not just those with caring responsibilities, to personalise their working arrangements. It builds on the experience of the London Olympics, when many employers allowed their staff to work flexibly to accommodate travel disturbances, home working and volunteering activities. It should be noted that nothing currently prevents any employee from making a request to change his or her working pattern. The existing framework, and the proposed amendments, merely set out a regulatory framework that can be used by qualifying employees if they wish.

The change is planned to take effect in 2014, but a number of elements remain unclear. In particular:

- ◆ The obligation on employers to respond to requests in a reasonable manner and a reasonable timescale leaves employers in an uncertain position. Acas published a very brief draft code of practice on 25 February 2013, which suggests:
 - A meeting to discuss the request should be arranged as soon as possible, and the employee should be allowed to be accompanied.
 - The limited set of reasons for refusing a request currently contained in s.80G of the Employment Rights Act 1996 will continue to apply.
 - All requests must be considered and decided upon within three months. This includes the time necessary for any appeal.
- ◆ It was proposed that the new code would also deal with the thorny issue of how an employer should respond to competing or multiple requests, but this is missing from the draft code. To take an example: an employer receives two flexible working requests from employees each seeking to leave early on a particular day. The first employee needs the additional time for religious reasons, while the second needs time off to care for an elderly relative. The business can only afford to have one of the employees out of the office, but which request should be granted? Both employees might seek to rely on a protected characteristic under the Equality Act to bolster their claim for priority treatment – religious belief for the first employee, and age (by association) for the second employee. Clear guidance on how to minimize the risk of inadvertent discrimination claims will be needed if the new scheme is to be workable in practice.

SHARED PARENTAL LEAVE

Current position	Proposal
<ul style="list-style-type: none"> ◆ Mothers must take the first 2 weeks after childbirth (4 weeks in some industries) as maternity leave. ◆ Mothers may then take a further 50 weeks' maternity leave. ◆ Statutory Maternity Pay (SMP) is payable for the first 39 weeks of maternity leave, the remainder is unpaid. Mothers need 26 weeks' service by the end of the 15th week before the expected week of childbirth (EWC) to be eligible for SMP. ◆ Fathers/partners may take 2 weeks' ordinary paternity leave and between 2 and 26 weeks' additional paternity leave. Additional paternity leave is only available from week 20 after childbirth, and only if the mother has returned to work. The same eligibility requirements for pay apply. 	<ul style="list-style-type: none"> ◆ Mothers must take the first 2 (or 4) weeks after childbirth as maternity leave. ◆ Mothers and fathers/partners may then share the remaining 50 weeks in whatever way they choose: <ul style="list-style-type: none"> - leave may be taken concurrently or consecutively - leave may be taken in multiple blocks or a single period - but employers will be able to refuse leave in multiple blocks ◆ 39 weeks in total is paid as Statutory Shared Parental Pay at the usual SMP rates, the remainder is unpaid. ◆ Ordinary paternity leave will remain available, but only to fathers/partners who do not take shared parental leave. ◆ Similar arrangements will apply to adopters.

This radical new scheme is planned for 2015. Although much of the detail has not yet been confirmed, the Government's consultation paper on the administrative aspects of the scheme was published on 25 February 2013, and gives an outline of the eligibility and notification requirements that are likely to be introduced. The most significant of these are set out below:

- ◆ The scheme is based on self-certification. This appears to work well for paternity leave, for instance, where only one employee-employer relationship is involved, but it remains to be seen whether the added complexity inherent in the shared parental leave system will be easily compatible with a self-certification model.
- ◆ The eligibility requirements are complex:
 - Both parents need to meet what the Government calls the 'economic activity' test. This requires both parents to have worked for 26 of the 66 weeks before the EWC, and to have been paid at least £30 gross for 13 of those weeks. If both parents meet that test, they are eligible in principle to participate in the shared parental leave system.
 - But each parent will need 26 weeks' service with the same employer by the end of the 15th week before the EWC to be eligible for shared parental leave and shared parental pay.
- ◆ The Government's proposals for notification of leave are also complex:
 - Each parent will need to give 8 weeks' notice of each period of shared parental leave, and 8 weeks' notice of any changes.
 - Each parent will have a 2-week discussion period in which to reach agreement with their employer over the leave dates proposed.
 - If agreement is reached, leave will start as per the original notice, some 6 weeks later.
 - If agreement is not reached, multiple blocks will be replaced by a single block of leave, to start on a date of the employee's choosing.
- ◆ It appears that employers will be able to refuse agreement to leave in multiple blocks without giving reasons. If that remains the position once the legislation has been finalised, the flexibility that is said to be the key driver of the Government's plans would seem to be in jeopardy.
- ◆ Many employers offer substantial financial incentives to women on maternity leave, typically in the form of enhancements to statutory maternity pay and return to work bonuses. Companies operating these kinds of scheme will need to consider carefully whether to extend them to fathers/partners who take advantage of the new flexible parental leave arrangements, and, if they do not, whether they might face discrimination claims as a result.
- ◆ At present, the rights of women returning from ordinary maternity leave and additional maternity leave differ. Because of the flexibility of the shared parental leave system, the Government is consulting on how the right to return will operate in the shared parental leave context. Two options have been put forward: (a) to treat the first

continuous block of shared parental leave of up to 26 weeks on the same basis as ordinary maternity leave; or (b) to treat the first 26 weeks of shared parental leave, whether taken in one block or several, on the same basis as ordinary maternity leave. Further details are expected later this year.

UNPAID PARENTAL LEAVE

Less radical are two extensions to the existing unpaid parental leave system.

- ◆ The current arrangements allow parents to take a maximum of 13 weeks' unpaid leave, but this will be increased to 18 weeks with effect from 8 March 2013.
- ◆ Currently, parental leave can be taken at any time before the child's 5th birthday (or the child's 18th birthday in the case of a child who is entitled to a disability living allowance). From 2015, the Government intends to extend the entitlement to unpaid parental leave so that it can be taken at any time before the child's 18th birthday.

ANTE-NATAL APPOINTMENTS

Women already enjoy the right to time off to attend ante-natal appointments. From 2015, this right will be extended to fathers/partners, who will be entitled to attend a maximum of two appointments, each of which may last no more than six and a half hours. The Government proposes that this right should be:

- ◆ unpaid;
- ◆ available from day one; and
- ◆ available without the need for evidence of the pregnancy.

Inevitably, some businesses will fear fraudulent use of this right. One possible solution would be to allow the time off to be paid, but to require evidence in return.

COMMENT

It has long been asserted that one of the reasons for a persistent gender pay gap and a 'glass ceiling' in many industries is the perception that women are likely to interrupt their careers to have children. One potential solution is to even out that perception by equalising the right to time away from work for family reasons, and it appears that the Government subscribes to this approach.

It remains to be seen, however, whether fathers/partners make use of these new rights in significant numbers to have a meaningful impact on employers' perceptions, or to effect societal change more widely. The experience of other countries with similar schemes has been mixed, and much will depend on how the new system works in practice.

If male and female employees are freed from stereotypical assumptions about their 'commitment' to the job, and given the scope to manage their working and family commitments more flexibly, shared parental leave is likely to be warmly received.

CONTACT DETAILS

If you would like further information or specific advice please contact:

SEÁN LAVIN

DD: +44 (0)20 7849 2695
sean.lavin@macfarlanes.com

MATTHEW RAMSEY

DD: +44 (0)20 7849 2549
matthew.ramsey@macfarlanes.com

MARCH 2013

MACFARLANES LLP

20 CURSITOR STREET LONDON EC4A 1LT

T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com

This note is intended to provide general information about some recent and anticipated developments which may be of interest.

It is not intended to be comprehensive nor to provide any specific legal advice and should not be acted or relied upon as doing so. Professional advice appropriate to the specific situation should always be obtained.

Macfarlanes LLP is a limited liability partnership registered in England with number OC334406. Its registered office and principal place of business are at 20 Cursitor Street, London EC4A 1LT. The firm is not authorised under the Financial Services and Markets Act 2000, but is able in certain circumstances to offer a limited range of investment services to clients because it is authorised and regulated by the Solicitors Regulation Authority. It can provide these investment services if they are an incidental part of the professional services it has been engaged to provide. © Macfarlanes March 2013