



RESEARCH PAPER 05/82
24 NOVEMBER 2005

The Work and Families Bill

Bill 60 of 2005-06

The Bill was introduced on 18 October and is due for Second Reading on 5 December. It delivers primary legislation for regulations to be made extending statutory leave and pay for parents. The intention is to increase the period of Statutory Maternity Pay, Maternity Allowance and Statutory Adoption Pay to 39 weeks by April 2007 as a step toward 52 weeks by the end of the Parliament. Additional unpaid paternity leave will be introduced after further consultation. This leave could be paid if certain conditions are met. The intention is to allow mothers to transfer some of their unused statutory pay entitlement to fathers.

Powers are also given allowing the scope of the right to request flexible working to be extended. The proposal is to include those who have caring responsibilities for adults with effect from April 2007.

Age discrimination regulations are due in October 2006 to comply with the EC *Employment Directive*. This will entail changes to the way statutory redundancy entitlements are calculated. The Bill contains a limited order making power in relation to one aspect of this calculation.

A new power will allow workers additional paid annual leave beyond the current entitlements under the *Working Time Regulations*.

Vincent Keter

BUSINESS & TRANSPORT SECTION

HOUSE OF COMMONS LIBRARY

Recent Library Research Papers include:

05/65	The <i>Electoral Administration Bill 2005-06</i> [Bill 50 of 2005-06]	19.10.05
05/66	The <i>Terrorism Bill</i> [Bill 55 of 2005-06]	20.10.05
05/67	The <i>National Insurance Contributions Bill</i> [Bill 53 of 2005-06]	26.10.05
05/68	The Burden of Taxation	26.10.05
05/69	The <i>Rights of Savers Bill</i> [Bill 15 of 2005-06]	26.10.05
05/70	The <i>Terrorism (Northern Ireland) Bill</i> [Bill 52 of 2005-06]	27.10.05
05/71	The <i>EU Accession Bill</i> [Bill 51 of 2005-06]	26.10.05
05/72	Afghanistan – The Culmination of the Bonn Process	26.10.05
05/73	The <i>Council Tax (New Valuation Lists for England) Bill</i> [Bill 57 of 2005-06]	01.11.05
05/74	Economic Indicators, November 2005	01.11.05
05/75	Background to the Forthcoming <i>Armed Forces Bill</i>	11.11.05
05/76	Unemployment by Constituency, October 2005	16.11.05
05/77	<i>Equality Bill</i> [Bill 85 of 2005-06]	17.11.05
05/78	<i>Northern Ireland (Offences) Bill</i> [Bill 81 of 2005-06]	17.11.05
05/79	The <i>Health Bill</i> : Part I Smokefree premises, places and vehicles [Bill 69 of 2005-06]	22.11.05

Research Papers are available as PDF files:

- *to members of the general public on the Parliamentary web site,
URL: <http://www.parliament.uk>*
- *within Parliament to users of the Parliamentary Intranet,
URL: <http://hcl1.hclibrary.parliament.uk>*

Library Research Papers are compiled for the benefit of Members of Parliament and their personal staff. Authors are available to discuss the contents of these papers with Members and their staff but cannot advise members of the general public. Any comments on Research Papers should be sent to the Research Publications Officer, Room 407, 1 Derby Gate, London, SW1A 2DG or e-mailed to PAPERS@parliament.uk

Summary of main points

The Bill contains a variety of powers to make secondary legislation.¹ Many of the broad objectives to be detailed in regulations were set out in the Government response to the *Work and Families* consultation, which followed publication of the *Ten Year Strategy for Childcare*.² The *Childcare Bill 2005-06* takes forward other aspects of those proposals.³

The Bill's main provisions:

- extend from 26 weeks to 52 weeks the maximum which regulations can set for statutory maternity pay (SMP), maternity allowance (MA) and statutory adoption pay (SAP) – it has been announced that these will be extended to 39 weeks from April 2007, towards the goal of a year's paid leave by the end of the current Parliament;
- allow regulations to be made for additional statutory paternity leave and pay, including entitlements for adopting parents – it is intended that fathers will be able to take up to six months additional paid leave, if the mother returns to work, subject to further consultation on the details of the scheme;
- widen the scope of the statutory right to request flexible working to enable, from April 2007, more people with caring responsibilities, including carers of adult dependants, to make statutory requests, subject to further consultation on the definition of carer with regard to sick and disabled relatives and parents of older children;
- allow regulations giving a more generous entitlement to minimum paid annual leave than that set by the *Working Time Regulations*.
- provide an order making power allowing a one-off increase in the maximum amount of a week's pay which may be taken into account in the calculation of statutory payments such as redundancy payments.

The Government has also said that it will be introducing measures to help employers in the administration of statutory leave and pay, including improved communication during maternity leave and are looking at the possibility of transferring the responsibility for making payments from employers to HM Revenue & Customs (HMRC).

¹ Explanatory notes which accompany the Bill are available at:
<http://www.publications.parliament.uk/pa/cm200506/cmbills/060/en/06060x--.htm>

² HMT, *Choice for parents, the best start for children: a ten year strategy for childcare*, December 2004 :
http://www.hm-treasury.gov.uk/media/8F5/35/pbr04childcare_480.pdf

³ See Library Research Paper: RP05/81 *The Childcare Bill 2005-06*

The Bill extends to Great Britain. Some clauses extend to Northern Ireland. It is normal for legislation to be extended to Northern Ireland by an Order in Council and the Bill makes such allowance under the *Northern Ireland Act 2000*.⁴

⁴ For example, with regard to the *Employment Act 2002* equivalent arrangements for Northern Ireland were provided by the *Employment (Northern Ireland) Order 2002*, SI No.836.

CONTENTS

I	Work Life Balance	7
	A. Background	7
	B. Policy and Consultations	10
	1. <i>Fairness at Work</i> , May 1998	10
	2. <i>Balancing work and family life</i> , January 2003	12
	3. <i>Budget Report 2004</i>	12
	4. <i>A ten year strategy for childcare</i> , December 2004	14
	5. <i>Work and Families: Choice and Flexibility</i> , February 2005	15
	C. Employers	17
	1. Small Business	17
	2. Payroll burdens	18
	3. Communication during leave	25
	4. Self employed	26
II	The Bill	28
	A. Maternity Leave and Pay	28
	B. Adoption Leave and Pay	30
	C. Paternity Leave and Pay	32
	D. Carers and Flexible Working	34
	E. Age Discrimination	36
	F. Annual Leave	39
III	Law	41
	A. Employment Rights: Current Provisions	41
	1. Maternity Leave and Pay	41
	2. Paternity Leave and Pay	47
	3. Adoption Leave and Pay	50
	4. Parental Leave	53
	5. Part time worker rights	53
	6. Time off for dependants	53

7. The right to request flexible working	54
8. National Minimum Wage	55
B. Legislation	57
1. European Legislation and the Social Chapter	57
2. UK Statutes	61
Appendix: Abbreviations	64

I Work Life Balance

A. Background

Over the past two decades there has been a dramatic change in the labour market away from the “male sole breadwinner” model, accompanied by a rise in households where all adults are in work. Employers and employees have had to adapt to this new reality, particularly when balancing competing commitments of child care and employment. “Work life balance” is a broad concept which has arisen in this context and may refer to particular policies, a variety of different legislative frameworks or a wider debate about the nature of work in society. The concept is elastic and can take in an extremely wide range of topics of concern to every category of worker.

The Work Foundation gives the following definition of work life balance:

Work-life balance is about people having a measure of control over when, where and how they work. It is achieved when an individual's right to a fulfilled life inside and outside paid work is accepted and respected as the norm, to the mutual benefit of the individual, business and society.⁵

A Government strategy document published in January 2003 set out the following key “drivers of change” behind the need for work life balance:

- a transformation in the way families organise their work, with a strong trend among couples away from single-earner towards dual-earner families and sustained growth in lone parent employment;
- a dramatic increase in the proportion of employees with caring responsibilities; and
- the combination of a competitive business environment and the current labour market context, bringing new challenges for employers and employees.⁶

The OECD publication *Employment Outlook* of June 2001 contained a comprehensive examination of the issues, in particular in relation to motherhood. It outlines increasing levels of female employment accompanied by decreasing fertility rates in most OECD countries which may lead to a decrease in the working population at some point in the future. The report sets out a case for encouraging higher employment among mothers:

Increasing the employment rates of mothers is important for many reasons. The skills of women are increasingly needed in paid employment to face the challenge posed by the likely shrinkage in the population of working age. Higher employment rates of mothers will help to ensure adequate resources for families, including lone parent families, most of which are headed by women. Unless mothers maintain contact with the labour market their skills will tend to atrophy. In

⁵ Employers for work life balance: <http://www.employersforwork-lifebalance.org.uk/work/definition.htm>

⁶ DTI & HM Treasury: *Balancing work and family life: enhancing choice and support for parents*, January 2003: <http://www.dti.gov.uk/er/individual/balancing.pdf>

addition, an increase in the proportion of women in employment is necessary to respond to the increasing demand for the independence and fulfilment that paid employment can bring for women, and to make further progress toward gender equity.⁷

The OECD *Employment Outlook* from 2002 reported on the general position of women in the workplace. This revealed contrasting tendencies for men and women in relation to family commitments:

The impact of parenthood on employment rates works in opposite directions for women and men: while women's work rates generally decrease as the number of children raises, men's increase. Furthermore, parenthood increases the incidence of part time working among mothers, particularly those with tertiary qualification.⁸

The 2002 report also examined whether mothers were less favourably treated in terms of the hourly rate at which they are paid:

Except for a few countries, there is little evidence of an hourly wage penalty attached to motherhood (i.e. the so called "family gap"). However, in some countries, mothers earn considerably less than their childless peers when account is taken of the fact that they work fewer hours.⁹

An often cited *Workplace Employee Relations Survey* was conducted in 1998 and again in 2004 covering over 30,000 workplaces. The 1998 survey found that flexible working and family friendly policies were "by no means widely (or equally) available".¹⁰ The 2004 survey found a significant increase in the proportion of workplaces providing flexible working practices to at least some of their non-managerial employees.

Amongst the other findings were the following:

- Flexible working arrangements were clearly more prevalent in the public sector.
- Women were more likely than men to report that flexible work arrangements were available to them, with the exception of working at or from home.

Between 1998 and 2004, the survey found that:

there was a significant increase in the availability of parental leave, paid paternity/discretionary leave for fathers, and special paid leave in emergencies for at least some non-managerial employees in continuing workplaces.¹¹

The following table sets out the changes in detail:

⁷ OECD *Employment Outlook* June 2001, page 129

⁸ OECD *Employment Outlook* July 2002, page 65

⁹ Ibid, page 66

¹⁰ Mark Cully, Andrew O'Reilly, Neil Millward, John Forth, Stephen Woodland, Gill Dix, Alex Bryson, *The 1998 Workplace Employee Relations Survey: First Findings*, 1998, p 20

¹¹ Barbara Kersley, Carmen Alpin, John Forth, Alex Bryson, Helen Bewley, Gill Dix, Sarah Oxenbridge, *Inside the Workplace, First Findings from the 2004 Workplace Employee Relations Survey (WERS 2004)*: <http://www.dti.gov.uk/er/insideWPfinalwebJune.pdf>

Flexible-working and leave arrangements for non-managerial employees in continuing workplaces

	Percentage of continuing workplaces	
	1998	2004
<i>Flexible working arrangement</i>		
Switching from full-time to part-time hours	46	64
Flexitime	19	26
Job-sharing	31	41
Homeworking	16	28
Term-time only	14	28
Annualised hours	8	13
Zero hours contracts	3	5
<i>Leave arrangement</i>		
Parental leave	38	73
Paid paternity/discretionary leave for fathers	48	92
Special paid leave in emergencies	24	31

Base: All continuing workplaces with 10 or more employees in 1998 and 2004.

Figures are weighted and based on responses from at least 847 managers.

Source: Barbara Kersley, et al, *Inside the Workplace, First Findings from the 2004 Workplace Employment Relations Survey (WERS 2004)*

In 1998, the DfEE commissioned research from the Institute for Employment Studies into the business benefits of family friendly practices in small and medium-sized enterprises.¹² The research identified the key business benefits:

Reduced casual sickness absence: most employers felt that sickness absence due to employees' caring responsibilities had been reduced. This was reinforced by employees who felt more able to be honest about absence due to dependants' illness.

Improved retention: each of the firms was able to identify individuals who had stayed with them longer because of their access to family-friendly provision. Most could estimate the number of employees who would have left had such provision not been available.

Improved productivity: many of the firms were convinced that employees working flexible hours were more productive than those working traditional hours.

Improved recruitment: the firms felt that offering family-friendly practices can attract potential recruits when seeking vacancies and making comparative judgements of job offers.

Improved morale and commitment: most firms believed that morale and commitment among employees with caring responsibilities was enhanced by family-friendly policies.¹³

¹² In this context, family friendly practices referred to formal or informal terms that exceed the statutory minimum designed to enable an employee to combine caring responsibilities with paid employment.

B. Policy and Consultations

A large number of government policies affect work life balance. Some of these respond to demand for further changes in the labour market by encouraging parents, including lone parents, into work. Others are aimed at diversifying patterns of work to accommodate working parents. There are many policies which can be said to have an impact on work life balance without this being their primary intention (for example the minimum wage).

The two key areas of policy are:

- tax benefit policies such as the Working Tax Credit and the Child Tax Credit, which encourage parents to take employment; and
- work/family reconciliation policies, such as maternity, paternity and parental leave, which help to reconcile work and family life.

1. *Fairness at Work, May 1998*

In their White Paper, *Fairness at Work*, published in May 1998, the Government said that it wished to support and reinforce a family friendly culture in business:

5.1 Competitiveness depends on the UK making the best use of the talents of as many people as possible. The larger the number of people - particularly skilled people - to which business can look, the better. We also need to ensure that as many people as possible who want to work should have the chance to do so.

5.2 But work and parenthood can create conflicting pressures. Parents, both men and women, need time with their children and time to create a supportive home in which their children can thrive. When they are at work they need confidence that their children are being well cared for so that they can concentrate on the job in hand. Helping employees to combine work and family life satisfactorily is good not only for parents and children but also for businesses.

5.3 Many successful modern companies, both large and small, have therefore adopted a culture and practices in support of the family. To the mutual benefit of the employee and the business, they allow flexibility over hours and working from home allowing parents to spend more time with their children. They provide time off for family crises. Some provide childcare facilities or fund employees' use of nurseries. They know how important it is to retain staff in whom they have invested and on whom they depend. The Government wishes to support and reinforce such a family-friendly culture in business. In the future it will become increasingly important to enable employees to balance satisfactorily family responsibilities and work, and children to benefit from parental care.¹⁴

¹³ *Family -Friendly Employment: the business case*, S Bevan, S Dench, P Tamkin, J Cummings. DfEE Research Report RR136, September 1999. Summarised by the Institute for Employment Studies, <http://www.employment-studies.co.uk/summary/fambussum.html>

¹⁴ Cm 3968, paras 5.1-5.3

The White Paper went on to outline the steps the Government was taking at that time to support family friendly working practices. These included:

- a National Childcare Strategy “which will meet the needs of children and support their parents in combining work and family life”;
- the “development of ways to encourage working from home by raising its status”;
- the “Working Families Tax Credit, giving financial support to working families”;
- the implementation of the *Working Time Directive*;
- the implementation of the *Parental Leave Directive* to give three months unpaid parental leave to both men and women and allow time off for urgent family reasons;
- the extension of maternity leave from 14 to 18 weeks and the reduction in the qualifying period for additional maternity leave from two years to one year.

A review of maternity pay and parental leave was announced by the Chancellor of the Exchequer in the March 2000 Budget. In late 2000 a discussion document¹⁵ and then a Green Paper were published seeking views on various changes related to maternity, paternity and adoption pay and leave.¹⁶

Consultations on parental leave¹⁷, paternity leave¹⁸ and adoption leave¹⁹ were published in May 2001. In June 2001 the Government announced a new “Work and Parents Taskforce” headed by Sir George Bain (chairman of the Low Pay Commission) to examine ways of introducing flexible working practices which would be both “family-friendly” and “business-friendly”.²⁰ The Taskforce published its report *About Time: Flexible Working* on 20 November 2001 and the Government accepted the recommendations made.²¹

A further consultation paper was published on 23 May 2002 with drafts of new regulations to implement the changes.²² A consultation on flexible working proposals was published in July 2002.²³ New child tax credit arrangements effective from April 2003 were part of the same overall scheme.²⁴

¹⁵ DTI Discussion document: <http://www2.dti.gov.uk/er/individual/discuss.doc>

¹⁶ DTI Green Paper, *Work & Parents: Competitiveness and Choice*, 7 December 2000: http://www2.dti.gov.uk/er/g_paper/summary.htm

¹⁷ DTI consultation on parental leave, 8 May 2001: <http://www2.dti.gov.uk/er/parentregs.pdf>

¹⁸ DTI consultation on paternity leave, 8 May 2001: <http://www2.dti.gov.uk/er/paternity.pdf>

¹⁹ DTI consultation on adoption leave, 8 May 2001: <http://www2.dti.gov.uk/er/adopt.pdf>

²⁰ See DTI Press Release P/2001/338 of 28 June 2001 and the *Child Tax Credit Regulations 2002 SI No.2007*

²¹ Work and Parents Taskforce, *About Time: Flexible Working*, 20 November 2001: http://www2.dti.gov.uk/er/individual/flexworking_report.pdf

²² DTI consultation, 23 May 2002: http://www2.dti.gov.uk/er/workparents_consult.htm

²³ DTI consultation, 10 July 2002: <http://www2.dti.gov.uk/er/FlexConsultation.pdf>

²⁴ See HM Treasury Press Release *Work and Family Life* 11 January 2003

The *Employment Act 2002* introduced 2 weeks paid paternity leave, paid adoption leave and extended paid maternity leave from 18 to 26 weeks from April 2003. It also introduced a right for parents of children under 6 to request flexible working.

The DTI *Employment Relations* web-site contains details of the historical development of the proposals with links to the documents.²⁵ There are also useful notes on the April 2003 “family friendly” changes on the DTI *Working Parents* website.²⁶

2. ***Balancing work and family life, January 2003***

The Government’s January 2003 strategy document, *Balancing work and family life: enhancing choice and support for parents*, detailed specific measures:

- reform of the ways in which the tax and benefit system supports families with children and those on low incomes. The reform, which involves the creation of two new tax credits – the Child Tax Credit and the Working Tax Credit – will continue the Government’s efforts to tackle child poverty and make work pay. The Child Tax Credit will be a single, seamless system of support for families with children, paid directly to the main carer in a family. The Working Tax Credit will be paid through the wage packet to working people without children as well as families with children. In addition eligibility for the childcare element of the Working Tax Credit will include those who use approved childcare in their own home; and
- more choice and support for parents to help them balance work and caring for their children. This includes increasing the level of maternity pay from £75 to £100 a week and the duration of maternity pay from 18 to 26 weeks; increasing Ordinary Maternity Leave to 26 weeks and setting unpaid Additional Maternity Leave at 26 weeks (up to 1 year in total); the introduction of 2 weeks paid paternity leave and 26 weeks paid adoption leave (both paid at the same flat rate as maternity pay); and the launch of a new right for parents of young and disabled children to request a flexible working pattern and a duty on employers to consider their applications seriously.²⁷

3. ***Budget Report 2004***

The Budget Report 2004 set out Government policy on work life balance as follows:

Supporting parents: balancing work and family life

5.20 The Government wants to support parents to balance their work and family life, to help them to fulfil their responsibilities to their children and to their employers. By increasing childcare provision and support, working with business to promote the benefits of flexible working and supporting fair working rights, the Government aims to increase choice and support for parents.

Childcare

²⁵ History of proposals: http://www2.dti.gov.uk/er/individual/workparents_hist.htm

²⁶ <http://www.dti.gov.uk/er/workingparents.htm>

²⁷ DTI & HM Treasury: *Balancing work and family life: enhancing choice and support for parents*, January 2003: <http://www.dti.gov.uk/er/individual/balancing.pdf>, page 1

5.21 The Government's vision is for every parent to have access to affordable, flexible, good quality childcare. This is key to achieving a range of Government objectives, supporting child development and removing barriers to parental employment. The Government has therefore invested heavily to support the creation of new childcare places and to extend financial support for childcare costs to more working parents. New childcare places for over 1.6 million children have been created since 1997, reaching the Government's target for 2004, and putting it on course to meet its target of new places for over two million children by 2006.

5.22 The significant investment in childcare has improved the position for many parents, but the Government recognises that more needs to be done. Budget 2003 announced a Childcare Review to consider whether the long-term projection for childcare and early years education is sufficient to meet the Government's aims; whether the expansion is proceeding quickly enough; and whether there are areas where more remains to be done.

5.23 The Childcare Review has drawn on a range of expertise from across Government and from key stakeholders in the sector. It has examined a number of issues, including the roll-out of Children's Centres and ensuring effective school-age provision. The Review has worked closely with the Child Poverty Review on the benefits of good quality early childhood education and care for disadvantaged children.

5.24 The Review's initial findings are reflected in the Budget allocation for Sure Start, childcare and early years of £669 million additional funding by 2007-08 compared with 2004-05, an average annual real growth rate of 17.3 per cent. This will establish Children's Centres in all of the 20 per cent most disadvantaged wards in England by 2007-08, making Sure Start type services available to the 56 per cent of poor children who live in these disadvantaged areas. This will mean 1,700 Children's Centres by March 2008, providing services and linked childcare places, another significant step towards the Government's goal of a Children's Centre for every community. The settlement will also support 100,000 new childcare places, including in extended schools, and a pilot to extend a free part-time early education place to 6,000 two-year olds in disadvantaged areas. Further details of the settlement for the Department for Education and Skills are set out in Chapter 6.

Financial support for childcare

5.25 The Government wants to ensure that childcare is affordable and within reach of all working parents, including those on low and moderate incomes. The childcare element of the Working Tax Credit provides support to working parents for good quality childcare. Following the introduction of new tax credits, help towards childcare costs is now reaching over 300,000 families, up from 180,000 in November 2002, and is worth over £700 million a year.

5.26 Employers can play an important role in helping employees balance their work and parenting responsibilities. As announced in Pre-Budget Report 2003, the Government is introducing new measures to improve the tax and National Insurance incentives for employer supported childcare, for implementation in April 2005. This introduces a new tax exemption on up to £50 a week of provision of good quality formal childcare contracted by the employer or paid for with childcare vouchers provided by the employer. With these new provisions there is no requirement for the employer to have management responsibility for the

childcare provision, but where such schemes operate all employees should be able to benefit from them.

5.27 The Government is keen to extend the range of good quality childcare that is eligible for financial support, through tax credits or the new tax exemption. Budget 2004 therefore announces a new light-touch voluntary scheme that will enable accreditation for financial support purposes of a broad range of childcare. This will enable working parents to access financial support. The Government will bring forward proposals for consultation in early summer 2004, for implementation by April 2005. Before that, from June 2004, parents using breakfast clubs run by schools and those paying for childcare provided by foster carers will be eligible for the childcare element of the Working Tax Credit.

Pay and leave for parents

5.28 As part of the Government's policy to promote work-life balance, new rights have been introduced for working parents. Mothers now have a right to up to one year's maternity leave and Statutory Maternity Pay was increased to £100 a week for 26 weeks, up from £60.20 a week for 18 weeks in 2000. New fathers and adoptive parents now also have rights for pay and leave and, since April 2003, all parents of children under six have had the right to request flexible working. As announced in the 2003 Pre-Budget Report, from April 2004, the Government will uprate Statutory Paternity Pay and Statutory Adoption Pay in line with Statutory Maternity Pay, to £106.00 a week from April 2005.

5.29 The Government is taking further steps to help parents balance their work and family responsibilities. Balancing work and family life: enhancing choice and support for parents set out the Government's strategy in this area and suggested possible reforms. The Government has already implemented some of these steps and is considering a number of options concerning leave for parents.

4. A ten year strategy for childcare, December 2004

Alongside the Pre-Budget Report 2004, the Government published a policy document entitled: *Choice for parents, the best start for children: a ten year strategy for childcare*.²⁸ This summarised the policy framework and proposals for future change:

Choice for parents, the best start for children

The Government's vision is to ensure that every child gets the best start in life and to give parents more choice about how to balance work and family life.

Choice and flexibility: parents to have greater choice about balancing work and family life

- a goal of twelve months paid maternity leave by the end of the next Parliament. As a first step this Pre-Budget Report announces the extension of the entitlement to nine months from April 2007;
- legislation to give mothers the right to transfer a proportion of this paid leave to the child's father by the end of the next Parliament; and
- every family to have easy access to integrated services through Children's Centres in their local community, offering information, health, family support,

²⁸ HM Treasury, *Choice for parents, the best start for children: a ten year strategy for childcare*, 2 December 2004: http://www.hm-treasury.gov.uk/media/426/F1/pbr04childcare_480upd050105.pdf

childcare and other services for parents and children. 2,500 Children's Centres will be in place by 2008 and 3,500 by 2010.

Availability: for all families with children aged up to 14 who need it, an affordable, flexible, high quality childcare place that meets their circumstances

- legislation for a new duty on local authorities in place by 2008 so that over time they will secure sufficient supply to meet the needs of families;
- a goal of 20 hours a week of free high quality care for 38 weeks for all 3 and 4 year olds with this Pre-Budget Report announcing a first step of 15 hours a week for 38 weeks a year reaching all children by 2010; and
- an out of school childcare place for all children aged 3-14 between the hours of 8am to 6pm each weekday by 2010.

Quality: high quality provision with a highly skilled childcare and early years workforce, among the best in the world

- all full daycare settings to be professionally led;
- this Pre-Budget Report announces a Transformation Fund of £125 million each year from April 2006 to invest in high quality, sustainable, affordable provision;
- radical reform of the workforce, with the Children's Workforce Development Council consulting on a new qualification and career structure in 2005; and
- reform of the regulation and inspection regime to improve standards and to give parents better information.

Affordability: families to be able to afford flexible, high quality childcare that is appropriate for their needs

- this Pre-Budget Report announces an increase in the limits of the childcare element of the Working Tax Credit to £300 a week (£175 for one child) from April 2005, and an increase in the maximum proportion of costs that can be claimed from 70 per cent to 80 per cent from April 2006;
- for a couple family on £34,000 a year with both parents working and typical childcare costs for two young children, these reforms reduce the proportion of childcare costs they pay from 85 per cent to 75 per cent, a saving to them of £700 per year. Building on this first step, the Government's long-term ambition is to reduce further the proportion of childcare costs paid by such families, making childcare increasingly affordable; and
- this Pre-Budget Report also announces £5 million from April 2006 for a pilot to work with the Greater London Authority to address childcare affordability issues in London.

A summary of consultation responses to these proposals was published in March 2005.²⁹

5. ***Work and Families: Choice and Flexibility, February 2005***³⁰

The *Work and Families: Choice and Flexibility* consultation was published on 28 February 2005 and is described on the consultation web page as follows:³¹

²⁹ HM Treasury, *Summary of consultation responses*, March 2005: http://www.hm-treasury.gov.uk/media/A75/D7/bud05_choice_for_parents_210.pdf

³⁰ Consultation document: http://www.dti.gov.uk/er/choice_flexibility_consultation.pdf

³¹ Consultation page: <http://www.dti.gov.uk/er/workandfamilies.htm>

The Government has consulted widely on proposals set out in the Ten Year Childcare Strategy and as a result, in addition to extending maternity and adoption pay from six to nine months from April 2007, towards the goal of a year's paid leave by the end of the Parliament, we will:

- Extend the right to request flexible working to carers of adults from April 2007. We will consult on the definition of carer early next year;
- Take powers to allow fathers to take up to six months paid additional paternity leave during the child's first year, if the mother returns to work. We will consult further on the details of the scheme.
- Introduce measures to help employers manage the administration of leave and pay and plan ahead with greater certainty;
- Help employers and employees benefit from improved communication during maternity leave.

The measures will be delivered through a combination of legislation, guidance and good practice in line with the Government's better regulation agenda.

The first step towards this goal is the Work and Families Bill.

The responses to the consultation were summarised as follows in the Government response document:³²

7.2. The majority of parents, carers, employees and their representatives welcomed the proposals, which they believe will make a real difference to the lives of working parents. Some respondents from these groups felt the proposals did not go far enough, and argued for additional rights such as paid parental leave and an increase in paternity pay and leave, but on the whole there was consensus that the Government is moving in the right direction.

"Maternity Alliance welcomes the Government's commitment to extend paid maternity leave and to consider the other options in this consultation. These are useful steps towards a comprehensive package of support for parents of young children."

Maternity Alliance

"We are fully supportive of the Government's initiative to help employees balance their work and home lives. As an organisation committed to helping parents make important life choices on childcare and flexible working, we strongly believe that choice and flexibility will be beneficial to both families and businesses."

Opportunity Links

7.3. Responses from employers and their representatives were more varied. There was widespread recognition that workplaces are changing. Whilst some employers saw the move towards more family friendly working as a positive change that could be good for business, others expressed concern about the potential burden the new measures would impose. There was a strong view from employers of all sizes, that there should be a balanced package of measures for

³² DTI, *Work and Families, Choice and Flexibility, Government response to public consultation*, October 2005, pages 47-48: <http://www.dti.gov.uk/er/consultationchoiceflexibility2005final1.pdf>

business which supported their rights as well as ensuring employees met their own responsibilities.

“CBI members accept in principle the Government’s desire to extend family-friendly rights further but believe there should be compensating changes to reflect the increased burden on employers.”

CBI

“As a representative of 800 local businesses we understand the need to achieve a balance between work and family life but that this needs to be done in a way that business productivity is not threatened.”

Portsmouth and SE Hampshire Chamber of Commerce & Industry

C. Employers

1. Small Business

Small enterprises currently account for 99% of all enterprises and around 37% of employment in the UK.³³ A recurring complaint of the business community has been the burden placed on them by regulations. It is widely recognised that regulations can have a disproportionate effect on small business, particularly in the area of employment. Successive governments have developed regulatory policies and principles to reform or repeal outdated provisions and guide the preparation of new regulations. Among these is the requirement that part of the development of all regulation should include an assessment of their impact, in particular on small firms.

A prominent concern is possible damage to UK competitiveness that may result from excessive regulation. In March 2005 a Trade and Industry Select Committee report considered the question of employment regulation and came to the following conclusions:

Debates about labour market flexibility in the UK have appeared polarised. Business organisations consider that an increasing burden of regulation is constraining employers’ ability to run their companies efficiently; whereas trade unions have been rather uneasy with the notion of labour market flexibility, which has at times appeared as a synonym for making it easier for companies to hire and fire. We are not convinced that the burden of regulation is excessive or damaging to competitiveness at present. But we do not argue for significant extra regulation: we support the principles of flexibility allied to social cohesion set out in the Lisbon Agenda.³⁴

The legislation for working parents provides some concessions for small firms. Under regulation 20(6) of the *Maternity and Parental Leave etc Regulations 1999*, SI No.3312 an employer with less than five employees is exempt from the normal provisions on

³³ *National Statistics* data for firms employing between 0 and 49 employees; <http://www.sbs.gov.uk>

³⁴ House of Commons Trade and Industry Committee, *UK Employment Regulation, Seventh Report of Session 2004–05*, (HC 90-I) 21 March 2005

automatically unfair dismissal in respect of refusal to allow an employee back to work at the end of maternity leave, if they can show that:

it is not reasonably practicable for the employer (who may be the same employer or a successor of his) to permit her to return to a job which is both suitable for her and appropriate for her to do in the circumstances or for an associated employer to offer her a job of that kind

They may still be liable for unfair dismissal, but an employment tribunal will not be able to move straight to a finding of unfair dismissal without considering if the dismissal was unfair “in accordance with equity and the substantial merits of the case” or whether the requirement for a period of continuous employment of one year has been met. The exemption does not provide protection from liability for unlawful sex discrimination.

Small employers (who pay £45,000 or less in gross national insurance contributions in a tax year) recover 100% of SMP paid out plus 4.5% in compensation for the fact that SMP is subject to employer’s National Insurance.³⁵

The position has changed over the years. In April 1987, national insurance maternity allowance, administered by the state, was replaced by Statutory Maternity Pay (SMP), administered by employers, under the *Social Security Act 1986*. At first, employers were able to recover 100% of their SMP payments and received an additional sum (originally 7%) to compensate them for their share of national insurance contributions (NICs) payable on SMP. In 1994 the rate of recovery was reduced to 92% and the compensation for secondary Class 1 NICs was removed. However, employers qualifying for ‘small employers’ relief’ were allowed to continue to recover their payments in full. They also continued to receive additional compensation for their secondary NICs payments. This figure varies, but as set out above, is at present, 4.5%.

2. Payroll burdens

A subset of concerns about the burden of employment regulation relates to the various administrative burdens which employers face when paying employees. These duties include the requirement to pay statutory maternity, paternity and adoption pay in addition to other responsibilities which range from deducting tax at source to administering student loan schemes. Business representatives have argued that many of these administrative burdens should be borne by Government. The Better Regulation Task Force (BRTF) conducted a Review of payroll burdens in March 2000:

Business people dislike time-consuming regulations, particularly small businesses where it is likely to be the time of the owner/manager which is diverted from growing the business. Payroll is perhaps the most burdensome area of regulation businesses have to deal with...

We considered a number of ways in which these costs could be offset in the course of our review. We do not see any one single solution. The most effective approach will involve a package of actions to tackle the specific problems created

³⁵ HMRC: http://www.hmrc.gov.uk/employers/employee_pregnant.htm#5c

by different aspects of payroll regulation. Small firms are not a homogenous group and different approaches are needed to address the problems faced by different firms.³⁶

Some of the main arguments and concerns were raised in Standing Committee during the passage of the *Employment Bill 2001-02*. Philip Hammond MP raised general concerns about the use of payroll as a method of administering benefits to employees.³⁷ With regard to statutory paternity pay, he argued that the burdens may small in practice but as a matter of principle the Government should not routinely regard business, in particular small business, as an extension of the welfare state:

They are using businesses' expensive and extensive payroll infrastructures as the mechanism for delivering benefits and financial support that would have been regarded 20 or 30 years ago as something that one collected from the post office on a Thursday morning.

That is happening because the Government are intent on wiping out the post office network, and in particular the rural sub-post office network. They have undoubtedly had to think of an alternative method of delivering those benefits because they have told us that the post office network is an administratively expensive mechanism for delivering benefits and financial support. Disingenuously, they have sought to find what would be, from their point of view, a completely free system requiring employers to shoulder the burden. Of course, we are talking not only about statutory paternity pay or statutory maternity pay, but about the working families tax credit and a panoply of other benefits. The Government appear to have resolved to use the pay packet as the principal method of delivering financial support to those who are in work.

Alan Johnson: I remember that the hon. Gentleman took part in debate on this issue in Finance Bill proceedings. We are talking about a relationship between the employer and the employee. It is right that paternity pay is issued through the pay packet. Some employers who now pay paternity leave willingly will be grateful for assistance from the state that they do not get at the moment. Under these provisions, they will be able to claim back 92 per cent. to 100 per cent. of what they already pay out.

(...)

Through the working families tax credit and the children's tax credit, we are trying, for the first time in my lifetime, to deal with the problem of people who find that marginal tax rates are an enormous disincentive to moving from the dole queue back into work, and with the fact that there is a world of difference between money arriving in a giro cheque and money arriving in a pay packet.

Let me tell the hon. Member for Hertford and Stortford that we must consider every opportunity to reduce any unnecessary burdens on business in administering the schemes. That is a world away from changing the principle—adopted by all Governments, including the previous Government and ourselves—

³⁶ BRTF: <http://www.brtf.gov.uk/reports/payrollentry.asp>

³⁷ SC Deb (F) 15 January 2002 cc366-8

<http://pubs1.tso.parliament.uk/pa/cm200102/cmstand/f/st020115/am/20115s02.htm>

that citizens or companies should not be compensated for carrying out the law. There is a vast difference between those two concepts.

Mr. Hammond replied in the following terms:

The Minister is right to say that we do not reimburse citizens for complying with their routine obligations under the law. However, it is a matter of degree. The Bill is not asking people to comply with a routine requirement of the law. It makes a wholesale transfer to employers of a responsibility that has been a responsibility of Government, and a cost to Government through the operation of the benefits system. That process has been going on for some time, and the present Government have accelerated it.

Conservative Members worry about the cumulative burden of the role that the Government are imposing on employers. It is wrong for the Minister to say that it is beyond the pale even to consider making payments to employers for shouldering that burden on the Government's behalf. I am not suggesting that the employer payroll is not the most efficient way of delivering the benefits: employers may be willing to offer that service to the Government. However, it is unreasonable of the Government to torture century-old Inland Revenue legislation, which was not established with the intention that people should ever be paid money through the payroll system of tax collection, to remove a burden hitherto borne by the state. The Minister is wholly wrong to suggest that the Government could not consider such a proposition. As my hon. Friend said, the Chancellor of the Exchequer commissioned a study of the payroll administration burdens of the part of the welfare state that employers administer through the payroll. I have referred to that previously in the Committee and the Minister and the Under-Secretary for Small Business—he is knowledgeable about and interested in the matter—will know that a system operating in the United States allows small employers to claim cost support for the administrative burden of managing payroll-based systems.

At present the following requirements in respect of payroll are in place:

a. *National Insurance and PAYE*

If any business employs people, including directors of a limited company, it is required to deduct any income tax and National Insurance contributions (NICs) owed by employees from their pay, before they receive it.

b. *The Construction Industry Scheme (CIS)*

A special tax deduction scheme for the Construction Industry has existed since 1972 in order to deal with problems, which were endemic in the Industry, of engaging workers on a “cash in hand” basis, coupled with a poor record of complying with tax obligations. The current Construction Industry Scheme (CIS) has been in place since 1999, but it retains the basic structure of its predecessor, relying on paper vouchers to evidence payments between contractors and subcontractors. The HM Revenue & Customs website describes the scheme in detail.³⁸

³⁸ HMRC information on CIS: <http://www.inlandrevenue.gov.uk/cis/section2.htm>

c. **Tax credits**

Working Tax Credit replaced, among other things, the adult elements of Working Families' Tax Credit (WFTC) and the Disabled Person's Tax Credit (DPTC) from 6 April 2003. It is for working people, whether or not they have a child, but is harder for childless people to claim. Working Tax Credit, apart from the childcare element, is paid with wages. However this is currently being phased out between 7 November 2005 and 31 March 2006.³⁹

UK businesses will save up to £115m a year in administration costs, following changes to the way the Government pays Working Tax Credit.

From today (7 November), HM Revenue & Customs is phasing out the payment of Working Tax Credit by employers. All new claimants will have their Working Tax Credit paid direct into their bank, building society or Post Office card account, and existing claimants will be switched to this system of direct payment over the next five months.

The change to direct payment of Working Tax Credit will substantially reduce the regulatory burden on businesses and save them between £110m and £115m every year from April 2006.

The changes were made following extensive consultation with employers' representatives and are part of the Government's wider agenda to reduce red tape for businesses.⁴⁰

Child Tax Credit replaced the child-related elements of WFTC and DPTC, plus the Children's Tax Credit from 6 April 2003. The child and family elements within IS and income-based JSA were to have been abolished for all families making a new claim for Income Support or income-based JSA from April 2004, but delays meant that in certain circumstances they could still be paid for new claims up to 7 September 2005. Existing recipients of IS and income-based JSA were originally to be 'migrated' to the Child tax Credit during 2004-05, but the date now set for the final abolition of all child and family elements is now December 2006.⁴¹

The Child Tax Credit is not paid with wages. Along with the childcare element of Working Tax Credit, it is paid directly to the person in the family who is mainly responsible for looking after the children.

Working Tax Credit provides in-work support for people on low incomes. The amount paid depends initially on the claimant's current personal and family circumstances and income in the previous tax year. The amount can change if the claimant's income or circumstances change. The HM Revenue & Customs website describes the Working Tax Credit as follows:

See also information about reform of the CIS: <http://www.inlandrevenue.gov.uk/cis/reform.htm>

³⁹ HMRC leaflet: <http://www.hmrc.gov.uk/taxcredits/wtphase-leaflet.pdf>

⁴⁰ HMRC Press Release, 7 November 2005:
<http://www.gnn.gov.uk/Content/Detail.asp?ReleaseID=176732&NewsAreaID=2>

⁴¹ For further details see DWP Memo DMG JSA/IS 106, *Jobseeker's Allowance and Income Support – Tax Credits, changes from September 2005*, September 2005:
<http://www.dwp.gov.uk/publications/dwp/dmg/memletrs/memjs106.pdf>

Who gets Working Tax Credit?

Anyone who is awarded Working Tax Credit by the Tax Credit Office.

Who pays?

All employers must be ready to pay Working Tax Credit with wages through the payroll.

The Inland Revenue pays the first 42 days money direct to your employee. After that you will pay Working Tax Credit, with wages, until you are told to stop or your employee leaves or dies.

We will issue a start notice, form TC700, giving you 42 days notice of when payments are due to start and how much to pay. This should give you time to get your payroll organised and look at whether you will have enough money to cover the payments.

You must pay Working Tax Credit out of the deductions you make for

- PAYE tax
- Student Loan deductions
- National Insurance contributions (employer and employee)
- Subcontractor deductions in the Construction Industry Scheme (CIS)⁴²

d. Deductions from pay

Employers need to be aware of the various provisions concerning deductions from pay. They must ensure that any deductions they make from a worker's pay are allowed for in their contract of employment. Deductions from a worker's pay are unlawful under section 13 of the *Employment Rights Act 1996* unless:

- The employer is legally authorised to make them, (for example PAYE income tax, NICs).
- The deduction is allowed by the worker's contract, as long as they have been given a copy of the relevant term or a written explanation before the deduction is made.
- Workers have agreed in writing to the deduction for other reasons, such as loan repayments or pension contributions.

e. Statutory Maternity, Paternity and Adoption Pay

With regard to SMP, SPP and SAP, in all cases employers must keep detailed records of payments and leave periods. Employers must keep records of:

- Maternity, adoption and paternity leave
- SMP, SAP and SPP paid and not paid
- Maternity certificates or other medical evidence
- Declaration of family commitment from fathers

⁴² Inland Revenue: http://www.inlandrevenue.gov.uk/employers/wtc_paid_with_wages04.htm#1

- In adoption leave, copies of evidence of matching

In October 2005, the Government made the following statement in response to the *Work and Families* consultation:

14. We are also continuing to review statutory payment mechanisms, in order to identify and examine ways to ease the burden the current system places on employers, including by considering the case for transferring the responsibility for paying SMP, Statutory Adoption Pay (SAP) and Statutory Paternity Pay (SPP) from employers to HMRC.⁴³

f. Statutory Sick Pay

Under certain conditions, employers may have to pay an employee Statutory Sick Pay (SSP). This is the minimum level of payment that must be made to an employee who is off work sick. Their contract may entitle them to more than this.

The employer must pay SSP to employees who cannot work for four or more days in a row, including weekends and holidays, because of illness or disablement. The maximum time for which an employee may be entitled to SSP is generally 28 weeks for any one period of sickness. The current SSP rate, for tax year 2005-06, is £68.20 a week (pro rata for fractions of the working week). Employers must still deduct income tax and NICs where appropriate.

Employers may be able to recover some SSP from the income tax and NICs they pay to HM Revenue & Customs. If an employer's total SSP payments are more than 13 per cent of the total gross Class 1 National Insurance liability for the whole undertaking in the same tax month, they can get the difference back. The amount they may recover is the amount by which the SSP they have paid exceeded 13 per cent of their National Insurance liability.

Employers must keep records, for at least three years, of any SSP they pay and of the dates of any periods of sickness lasting at least four days in a row.

g. Guarantee Pay

Employees may have the right to fallback pay, or Guarantee Pay, if their employer does not need them to do the work of the kind they were employed for, perhaps because there is a downturn of work or occurrences such as power cuts or floods.

h. National Minimum Wage

Employers must ensure that they pay their workers at least the National Minimum Wage (see section III(A)(8) below).

⁴³ DTI, *Work and Families, Choice and Flexibility, Government response to public consultation*, October 2005: <http://www.dti.gov.uk/er/consultationchoiceflexibility2005final1.pdf>

i. Paid Annual Leave

Under the working time rules each worker should receive minimum paid annual leave equal to four weeks in each year. This holiday should be taken by the worker and cannot be substituted by pay in lieu even if the worker agrees with the exception of accrued untaken leave at the time the employment ends.

The four week entitlement is translated by most employers into the equivalent number of days, for example 20 days for those who work a five-day week, or 24 for those who work six days a week. This allows workers to take odd days rather than having to take whole weeks.

This should be clearly set out in the worker's contract, and currently does not have to be in addition to bank holidays though, commonly, these are allowed in addition to other holiday and generally also as paid leave. This depends mostly on the commercial sector the business is in (for example, almost all offices close on bank holidays but most large shops are open).

The rate of pay is generally the normal rate for the worker. So for salaried workers, their annual salary is divided into 12 equal payments. When they take holiday has no effect on their pay slip.

Only where workers have varying pay rates, such as piece work, is there the need to work out a special payment. In those cases, the holiday pay will be equal to the average rate over the 12 weeks before the holiday.

This only applies to the statutory holiday. If extra leave is offered over and above the four weeks (including bank holidays), then the rate of pay for these can be agreed with employees.

j. Employees' pension deductions

Employers who employ five or more people are legally obliged to provide their staff with access to a stakeholder pension scheme.

Employers who run an occupational pension scheme must:

- let employees know whether or not they can join
- pass pension contributions taken from employees' pay to the pension scheme
- pass payments by the 19th day of the following calendar month

Employers who run a stakeholder or a group personal pension scheme must:

- prepare a record of payments due and send it to the scheme provider
- keep up-to-date records of the payments
- pay the contributions to the pension provider by the due date
- pass these payments by the 19th day of the following calendar month

k. Deductions from Earnings Orders

Employers may need to know about Deductions from Earnings Orders (DEOs). DEOs are a method of collecting child maintenance, introduced by the *Child Support Act*, and controlled by the Child Support Agency (CSA).

A DEO will be sent to the employer paying the relevant person's wages. They must deduct the amount shown to cover the maintenance liability. Payments must be made to the Child Support Agency by the 19th of the month following the deduction from pay. Failure to comply with a DEO is an offence under the Act.⁴⁴

l. Student Loan Scheme

Student loans are available to help students meet their expenses while they are at college. Since the introduction of the Student Loan Scheme in August 1988, these loans are related to the borrower's own level of income. HM Revenue & Customs is responsible for collecting repayments of these student loans. In most cases employers collect student loan repayments on their behalf. This can be done by making deductions from their pay, using special student loan deduction tables.⁴⁵

m. Attachment of Earning Orders

Where a judgment debt is in arrears and the debtor is in PAYE employment, an application can be made by the creditor to the court to order the judgment debtor's employer to make deductions from the judgment debtor's earnings. If the court makes an order, the employer has to make deductions, at weekly or monthly intervals (or whenever they are paid), until the judgment debt is satisfied. This is known as 'attaching' the debtor's earnings.⁴⁶

3. Communication during leave

The Government has outlined the following plans in the response to the *Work and Families* consultation:

Keeping in Touch and Planning Ahead

3.1. Chapter 3 of the consultation document outlined how the Government intended to support more effective communication between employers and their employees during maternity leave, in order to ease the return to work for mothers and enable employers to plan with confidence. Communication during leave should be based on a clear framework of rights and responsibilities. Employees have the right to take leave and the responsibility to inform their employers of their plans as soon as it is reasonably practicable. Employers have the right to receive proper notification of their employees' plans and the responsibility to

⁴⁴ For further information on how to carry out deductions is available from the Child Support Agency National Enquiry Line: 0845 7133133

⁴⁵ Further guidance on deducting student loan repayments is available from HM Revenue & Customs Employers Orderline: 0845 7 646 646; Inland Revenue Established Employers Helpline: 08457 143 143

⁴⁶ See *Attachment of Earnings Act 1971*

ensure reasonable contact with staff whilst they are on maternity or adoption leave. The chapter included proposals to extend the notice period mothers give when preparing to return to work, measures to improve dialogue between employers and employees both before and during maternity leave, and steps that could be taken to help women returning to the labour market after a longer period of time out caring for their children.

We intend to:

- **introduce 'keeping in touch days' to enable women and adopters to work for a limited number of days during their pay period without losing statutory payments for that week or ending their leave**
- **clarify, in law, that reasonable contact is permitted at any stage during maternity leave**
- **extend the period of notice that a woman has to give when returning early from maternity leave from 28 days to eight weeks**
- **apply the same length of notice period (eight weeks) to women who wish to extend their maternity leave**
- **make clear in guidance that if a mother gives her employer more than the required advance warning that she does not intend to return to work after maternity leave, this cannot of itself result in her contract being terminated early and her losing the right to accrue other entitlements.**⁴⁷

4. Self employed

Self employed women are eligible for Maternity Allowance paid by the State. However there is no equivalent State Paternity Allowance for self employed men. The issue was debated in the Standing Committee considering the *Employment Bill 2001-02* which introduced SPP but the Government remained opposed to the idea of extending paternity pay to the self-employed. Philip Hammond MP tabled an amendment intended to probe the Government's position on paternity pay for the self employed:

The Minister has effectively told the Committee that it is tough luck if someone is self-employed and therefore pays lower national insurance contributions: that person falls outside the scheme, although precisely the same argument applies to those who earn below the lower earnings limit. We had an extensive debate on that last week, instigated by the hon. Member for Doncaster, North. The consensus, which the Minister was quite prepared to accept, was that for the sake of equity someone should not be excluded from the benefit just because they did not pay the contribution. He undertook to ensure that the system would operate so that although such people do not formally receive statutory paternity pay, they will get at least equivalent benefit compensation.

Can the Minister give a similar assurance in respect of self-employed earners, so that if their earnings are such that they do not pay the employee's national insurance contribution, they will not be disadvantaged simply for that reason? People earning below the lower earnings limit are a specific group addressed by the amendments discussed last week by the hon. Member for Doncaster, North. People who are self-employed and pay self-employed contributions are another

⁴⁷ DTI, *Work and Families, Choice and Flexibility, Government response to public consultation*, October 2005: <http://www.dti.gov.uk/er/consultationchoiceflexibility2005final1.pdf>

specific group, and I ask the Minister to address the equity of the situation regarding those people, some of whom are extremely low earners.

Alan Johnson: The hon. Gentleman mentions the self-employed. It was this Government, not the previous one, that extended the right to maternity allowance to self-employed women. His Government did not do that. We examined the position of those women and, on the basis of health and safety problems, which mean that a woman has to have time off work to give birth to a child, we introduced a provision for maternity allowance.

I cannot see that the same argument relates to the hon. Gentleman's points. Of course we recognise that self-employed men will want to spend time with newborn or adopted children, but I do not see a role for the state in facilitating that for the self-employed. We are dealing with an Employment Bill, and the relationship throughout it is between the employer and the employee. I cannot immediately see any need to take action on the hon. Gentleman's point in the context of the points made by my hon. Friend the Member for Doncaster, North.⁴⁸

The matter came up again at Third Reading of the Bill, in relation to assurances given by the Minister that employees who do not qualify for SPP because their earnings are below the Lower Earnings Limit for National Insurance purposes, will nevertheless receive Income Support:

Mr. Kevin Hughes (Doncaster, North): On the issue of paternity and adoption leave, my hon. Friend will recall that in Committee I tabled probing amendments in respect of those who would not be eligible because their earnings were below the lower limit. He informed the Committee that the Department for Work and Pensions was thinking of redressing that problem to coincide with other provisions, and in correspondence the Secretary of State for Work and Pensions has informed me that the Department intends to make regulations to deal with that.

None the less, I should like to ask my hon. Friend to ensure, with his colleagues at the Department for Work and Pensions, that when those regulations are introduced there is no gap. Normally, benefits are paid after the event, because one has to claim them when one is in the given situation. We need to be sure that people are able to get the top-up income support at the time that they need it, not a couple of weeks after.

Alan Johnson: My hon. Friend raised that issue in Committee. There was general consensus on the need to do something about it, and I have been considering it in some detail with colleagues at the Department for Work and Pensions. I am delighted to say that we have now agreed that the income support regulations will be amended to enable fathers who are entitled to paternity leave but who do not receive statutory paternity pay to claim income support. In addition, parents who receive paternity pay but who are normally low paid will also be able to top up their income with income support.

Those changes will ensure that household income does not fall below a certain guaranteed minimum, currently about £130 a week for a couple with one child

⁴⁸ 11th Sitting: SC Deb (F) 15 January 2002 cc376-9

where the father takes paternity leave. That will provide a degree of financial security sufficient to ensure that all low-paid employees have the opportunity to take up their statutory right to paternity leave. Regulations will be made later in the year, to coincide with the introduction of the new paternity rights. I thought it would be helpful, in response to the intervention by my hon. Friend the Member for Doncaster, North (Mr. Hughes), to confirm that to the House today.

Mr. Hammond: As we did not reach amendment No. 6, will the Minister confirm also that self-employed people on low pay would be included within the arrangements that he has outlined to the House?

Alan Johnson: I cannot confirm that. That is a completely different problem. As I explained in Committee, that point applies to a group of people whom we would have to place in an expensive and bureaucratic new system. That would be necessary to meet the same provisions. However, we undertook to consider that as part of the employee-worker review, which I confirmed earlier will be taking place in late spring.⁴⁹

II The Bill

A. Maternity Leave and Pay

The Bill will extend from 26 weeks to 52 weeks the maximum maternity pay period which regulations can set, as prescribed by section 165(1) *Social Security Contributions and Benefits Act 1992* (SSCBA) (as amended by section 18 of the *Employment Act 2002*).⁵⁰ The regulations will initially set a period of 39 weeks for women expecting babies on or after 1 April 2007 as a step towards the Government's goal of one year's maternity pay by the end of the current Parliament.

The Government announced its intentions in its response to the *Work and Families* consultation as follows:⁵¹

9. Most working women are already entitled to 12 months' maternity leave. **We will extend the right to 12 months' leave to all employed women, while leaving untouched the existing distinctions in contractual rights between the first and second six months of leave, as well as the different rights to return.** This will minimise the administrative changes for business.

10. **We will extend the period of maternity pay from six months to nine from April 2007 on the road to 12 months.** Increasing the proportion of the leave that is paid will provide more support and more choice for women about how much of their leave they choose to take. And employers will benefit through reduced recruitment costs if more women return to work and stay at work after having taken the amount of paid maternity leave they feel they need.

⁴⁹ HC Deb 12 February 2002 c166

⁵⁰ Clause 1; Bill 60 of 2005-06

⁵¹ DTI, *Work and Families: Choice and Flexibility*, February 2005:
http://www.dti.gov.uk/er/choice_flexibility_consultation.pdf

11. Alongside these enhanced choices for parents, **we will also be taking steps to ease any possible new burdens for business. These include increasing the amount of notice mothers returning from maternity leave must give to their employers when their plans change; enabling improved contact between mothers and their employers during the maternity leave period – including by introducing Keeping In Touch Days – and provisions to help employers manage the administration of maternity pay by enabling Statutory Maternity Pay (SMP) to start from any day of the week and be paid on a daily basis. In addition we will provide more and better targeted guidance to ensure both employees and employers are aware of their rights and responsibilities.**⁵²

Statutory maternity rights fall under the following categories:

- Maternity Leave
- Maternity Pay
- Parental rights
- Time off for dependants
- Flexible working
- Sex Discrimination

Section VIII below contains details about how these rights currently work in practice. Most provide a right to make a claim in an employment tribunal (with the exception of maternity benefit entitlement such as Maternity Allowance).⁵³ This would include a right to claim for unfair dismissal if the reason for the dismissal related to the employee asserting or relying on any of the rights.

In terms of maternity pay, there are two sources: Statutory Maternity Pay (SMP) and Maternity Allowance (MA). SMP is paid by the employer via payroll and MA is paid via a Jobcentre Plus or social security office. There are provisions allowing recoupment by employers of SMP paid out.⁵⁴

In addition to the statutory rights which in general set minimum standards, an employee may have additional entitlement under the contract of employment. Contractual rights can be enforced through the civil courts or in certain circumstances via an employment tribunal.

It has been argued by some legal commentators that extending the maternity pay period may increase the likelihood of discrimination against women.⁵⁵ This kind of discrimination is sometimes referred to as “statistical discrimination” and occurs when an employer discriminates on the basis that a woman may be more likely to take maternity leave or leave the labour force as a result of family commitments. An important related concept is

⁵² DTI, *Work and Families, Choice and Flexibility, Government response to public consultation*, October 2005: <http://www.dti.gov.uk/er/consultationchoiceflexibility2005final1.pdf>

⁵³ See the Department for Work and Pensions leaflet, *A guide to maternity benefits* (NI 17A) and the HMRC booklet, *E15 Pay and time off work for parents for babies due or born on or after 6 April 2003*

⁵⁴ See section I(C) above

⁵⁵ Mike Berry, *Personnel Today*, *Work and Families Bill puts pressure on employers' rights*, 21 October 2005: <http://www.personneltoday.com/32194.article>

that of the “internal labour market” which refers to the predominance of recruitment from within organisations.⁵⁶ Statistical discrimination may be more pronounced where a position requires substantial on-the-job training. This may result in newly employed women being assigned to low-skilled positions with limited prospects of advancement.

There is no one body with overall responsibility for maternity rights enforcement and monitoring in the same way that we have the Commission for Racial Equality or the Disability Rights Commission. However the Equal Opportunities Commission (EOC) monitor this insofar as it relates to sex discrimination.

In September 2003 the EOC undertook an investigation into discrimination against new and expectant mothers in the workplace. The investigation was a statutory investigation under the *Sex Discrimination Act 1975* (SDA) into “all the issues that a woman can face around childbirth”, meaning in this context any disadvantage at work caused wholly or partly by pregnancy, or by taking maternity leave. An interim report was published in September 2004.⁵⁷ The final report was published in June 2005 and stated that:⁵⁸

- Each year almost half of the 440,000 pregnant women in Great Britain experience some form of disadvantage at work, simply for being pregnant or taking maternity leave. 30,000 are forced out of their jobs.
- Women who lose their jobs miss out on £12m in Statutory Maternity Pay each year and, on average, return to hourly earnings 5% lower than they could have expected, 14% less for those on lower incomes.
- Yet the majority of women take little or no action to assert their rights. Seven in ten pregnant women treated unfairly by their employers do not speak out. Around 3% of those who lose their job will attempt to seek financial compensation for their dismissal at an Employment Tribunal. Less than one in 20 will seek advice.

B. Adoption Leave and Pay

The Bill's changes to the adoption pay period mirror changes to the maternity pay period.⁵⁹ The limit on the adoption pay period is prescribed by section 171ZN(2) SSCBA. This will be increased to 52 weeks from 26 weeks. As with SMP, the Government have said that SAP will be extended to 39 weeks for cases where the placement for adoption begins on or after 1 April 2007 as a step toward one year's adoption pay in the current Parliament.

The *Maternity and Parental Leave etc Regulations 1999* SI No 3312 introduced a right to up to 13 weeks' unpaid parental leave over five years for parents who adopt a child on or after 15 December 1999. This was the first time that adopting parents in the UK had a statutory right to any leave to care for their children. From April 2003, adopting parents

⁵⁶ Katherine V W Stone, *Changing Nature of Employment Discrimination*, chapter in *From Widgets to Digits*, Cambridge University Press, 2004

⁵⁷ EOC, *Tip of the Iceberg*, September 2004: http://www.eoc.org.uk/PDF/p_interimreport.pdf

⁵⁸ EOC, *Greater expectations*, June 2005: http://www.eoc.org.uk/PDF/suffer_summary.pdf

⁵⁹ Clauses 2; 4; 7 & 11, Bill 60 of 2005-06

have also been entitled to a period of paid adoption leave when the child is first placed with a family. This allows one of the adoptive parents to take paid leave for the same period and at the same flat rate as Statutory Maternity Pay (SMP).

Whilst adoption leave and pay entitlements are similar to maternity and paternity rights, there is one difference. SMP is paid at 90% salary for the first 6 weeks and then £106 a week for 20 weeks, whereas Statutory Adoption Pay (SAP) is paid at £106 for 26 weeks. Some respondents to the consultation have called for this difference to be removed and that for the first 6 weeks' SAP should be paid at 90% of salary.

A related area of concern is surrogacy. There have been calls to extend adoption leave and pay to commissioning parents in surrogacy arrangements. For example, in their response to the *Work and Families* consultation the National Association of Schoolmasters Union of Women Teachers (NASUWT) stated as follows:

8. NASUWT urges the Government to consider extending adoption pay and leave to the commissioning mother in the case of a surrogate birth. In these circumstances the commissioning mother usually has the baby soon after birth but cannot formally adopt until 6 weeks after birth. Clearly, she will need to take leave from the date she receives the baby but currently she has no statutory rights to any pay or leave, even after the formal adoption.

NASUWT recommends that:

- **statutory adoption pay and leave is extended to include the commissioning parents of a surrogate child.**⁶⁰

There are various legislative provisions which apply in surrogacy arrangements. There are also different legal means by which parental responsibility is given to the intended parents and the parental rights of the surrogate mother extinguished. In summary, the possible means by which commissioning parents can acquire parental responsibility are as follows:

- **Parental Orders:** Allows for a married couple who commissioned the surrogate birth to apply for an order so that they are treated in law as the parents of a child born to a woman by total or partial surrogacy.
- **Adoption:** In a proposed surrogacy situation where a parental order cannot be obtained, the commissioning parents can apply for an Adoption Order which permanently transfers parental responsibility to the applicants.
- **Parental Responsibility Order:** In certain circumstances, a commissioning father might wish to apply to a court for an order granting him parental responsibility by virtue of the fact that he is the genetic father of the child.

⁶⁰ NASUWT response to DTI consultation: <http://www.dti.gov.uk/er/consultation/responses/nasuwt.doc>

- In addition, intended parents might apply for a **Residence Order**. This will not confer parental responsibility, but will determine on a non-permanent basis where the child is to live.

The legal framework for adoption and surrogacy is closely related. For example, Parental Orders are governed by the *Parental Orders (Human Fertilisation and Embryology) Regulations 1994 SI No.2767*. These regulations are modelled on adoption legislation, applying selected provisions of the *Adoption Act 1976* with modifications which are set out in a schedule to the regulations.

Whilst commissioning parents in a surrogacy do not qualify for statutory rights to adoption leave and pay, they may be able to rely on terms in their contract of employment governing parental leave and pay depending on how widely those terms have been written.

C. Paternity Leave and Pay

The Government's intentions as regards paternity leave and pay were set out in the response to the *Work and Families* consultation as follows:

12. We recognise that families have diverse needs, and are committed to offering choices that respond to the diversity of needs and preferences. The principles of choice and equality underpin the proposal to enable fathers to play a bigger role in caring for their young children. **We will do this by giving fathers a right to a maximum of six months' additional unpaid paternity leave, with paternity pay at the flat rate if the mother returns to work before taking her full entitlement to SMP and Maternity Allowance (MA).**

13. It is difficult to estimate the levels of take-up by fathers initially, but we want to build a modern system of statutory payments that is flexible enough to accommodate parents' reasonable expectations of choice in how they care for their children. We believe we should move towards this goal, but this is an important step and we need to make sure we get the details right, for the benefit of both employees and employers. We also need to ensure we allow enough time for business to plan to accommodate this change. We intend to consult further on how best to design the proposed new rights to Additional Paternity Leave and pay.⁶¹

The Bill will enable these proposals to be realised by regulations and for these purposes makes the following changes to existing law:⁶²

- Regulation making power for a new right to paternity leave subject to conditions - a new section 80AA will be inserted into the *Employment Relations Act 1996* (ERA)
 - Limited to 26 weeks
 - Must be taken within 12 months of the birth

⁶¹ DTI, *Work and Families, Choice and Flexibility, Government response to public consultation*, October 2005: <http://www.dti.gov.uk/er/consultationchoiceflexibility2005final1.pdf>

⁶² Clauses 3 – 10, Bill 60 of 2005-06

- There may be special provisions if the child's mother dies
- A minimum period to take leave may be set
- Provisions in relation to adoption mirroring those relating to normal paternity leave – new section 80BB inserted into ERA
- Power to make regulations about terms and conditions of employment during additional paternity leave – amendment to section 80C ERA
- New entitlement to statutory paternity pay (SPP) to be subject to conditions – new section 171ZEA inserted into SSCBA
 - Conditions may relate to mother's entitlement to SMP
 - Mother must have returned to work with some entitlement to SMP not taken
 - There may be special provisions if the child's mother dies
- Provisions in relation to adoption mirroring those for normal SPP
- General conditions for SPP – new section 171ZEC into SSCBA.
 - Notice requirements
 - Requirements as regards evidence of entitlement
- Administered by employers as with current SPP – new section 171ZED into SSCBA

A recent Written Answer dealt with the extent to which fathers take up paternity rights in employment, referring to an EOC survey on this subject:

Norman Lamb: To ask the Secretary of State for Trade and Industry how many and what percentage of those entitled to paid paternity leave took advantage of their right during (a) 2005 and (b) 2004. [17310]

Mr. Sutcliffe: The Equal Opportunities Commission's survey "Dads and Their Babies: Leave Arrangements and the First Year", published earlier this year and part-funded by DTI, found that nine out of 10 fathers take time off work to spend with a new child and that over two-thirds of fathers currently take up the paternity entitlements available to them. The survey also found that a large percentage of employers are providing support for fathers which goes beyond the statutory provision and that almost three-quarters (72 per cent.) of the surveyed fathers who took paternity leave took at least some of this at full pay. We estimate that around 415,000 working fathers are eligible for statutory paid paternity leave.⁶³

The EOC survey also highlighted the following concerns about access to information on paternity rights:⁶⁴

⁶³ HC Deb 20 October 2005 c1151W

⁶⁴ EOC, *Dads and Their Babies: Leave Arrangements and the First Year*, 2005: http://www.eoc.org.uk/PDF/dads_and_their_babies.pdf

While the vast majority of fathers find out about their right to take paternity leave before the birth of their child, those earning less than £20,000 per year are less likely to do so than those who earn more (82 and 94 per cent respectively). Fathers in manual or elementary occupations are more likely to find out about their rights through informal sources such as friends and family rather than through the workplace, and they are more likely to report not having received enough information about paternity leave. The majority of fathers overall (62 per cent) feel they had enough information about paternity leave before the birth of their child but over a third feel they did not have enough information (37 per cent).

The survey also revealed the following attitudes to paternity pay and leave in general:

The vast majority of fathers (80 per cent) thought the current level of statutory paternity pay entitlement is too low (at £106 per week). A quarter (28 per cent) felt they would have taken paternity leave at this rate, compared to 12 per cent of all fathers who actually did take it entirely at the statutory rate.

Around half of fathers (53 per cent) said that two weeks is too short – 88 per cent of these (nearly half of all fathers) would like to see at least four weeks' statutory paternity leave. Further, more than half of fathers request greater flexibility in when they can take paternity leave, with the ability to take either days or weeks at different times.

Transferable Maternity Leave

Fathers in the survey were told, "Transferable Maternity Leave would mean that the mother could give up part of her maternity leave to the father, so that he was at home with the baby while she went out to work". Respondents were overwhelmingly supportive of this policy, with four in five (83 per cent) expressing support and seven in ten (70 per cent) saying they would use it. Qualitative findings suggest that, while fathers clearly welcome the flexibility, in practice the proportion that would use it is likely to be much smaller. Many fathers voiced support for the policy although they felt it would not be practicable for their own family, while just a small minority maintained unreservedly that they would use it. Among those who would not use Transferable Maternity Leave, the primary reasons cited were financial.

D. Carers and Flexible Working

Flexible working rights were introduced by the *Employment Act 2002* which inserted section 80F into the *Employment Rights Act 1996* (ERA). The Bill will make amendments to this section of ERA.⁶⁵ These will allow a widening of the scope of the existing law so that applications for flexible working may in future be made for the purpose of caring for:

- Children falling within a description or age group to be set by regulations
- A person age 18 or over who falls within a description set by regulations

⁶⁵ Clause 12, Bill 60 of 2005-06

On 22 April 2004 the Prime Minister announced plans to extend the provisions for flexible working to carers of adult dependants.⁶⁶ The Government response to the *Work and Families* consultation gives the following overview:⁶⁷

The right to request flexible working, for parents of young or disabled children, has been a success. Many employers already offer flexible working to groups outside the scope of the existing law, and in only around 10% of cases are requests refused. Respondents to the consultation generally agreed that those caring for adults should be the next priority, although they acknowledged that this would be more novel than extending to more parents, as the nature of the caring responsibilities is likely to be different. Some businesses were concerned that extending the right to parents of older children at the same time as carers would be too much of a step change in the numbers covered. We agree this could be difficult for businesses to accommodate and might pose a risk to the smooth operation of the existing law, and to the roll-out to carers.⁶⁸

The proposals are set out in detail on page 36 of the same document:

Flexible Working

5.1. Chapter 5 of the consultation document set out how flexible working is: good for children, enabling families to spend time with their children as well as work and contribute to the family income; good for employees, helping them to find working hours to match their caring responsibility; and, good for business, enabling them to draw on a wider pool of skills and talents in the workforce, improve recruitment and retention rates and increase staff morale and productivity. It outlined the success of the new right for parents of young and disabled children to request flexible working, which was introduced in April 2003. It asked for views on the impact of the law with a view to extending its scope to cover carers of adult relatives and/or parents of older children. It particularly welcomed comments about the types of caring that the law should cover for individuals who care for other adults.

5.2. Since the end of the consultation, the EOC have published the findings of their General Formal Investigation (GFI) into flexible and part-time working. One of the recommendations they put forward is that the right to request should be extended to all employees.

5.3. We will:

- **extend the right to request flexible working to carers of adults from April 2007**
- **explore further which carers are covered by the extension when it consults on the secondary regulations in 2006**

⁶⁶ Carers Online, *Carers hail new pledge from Blair*, 22 April 2004:

<http://www.carersonline.org.uk/?CLASS=Document&DBID=ac15f8dee96ff93023cd9434d9c7418a>

⁶⁷ DTI, *Work and Families Consultation: Government Response*, October 2005, page 36: <http://www.dti.gov.uk/er/consultationchoiceflexibility2005final1.pdf>

⁶⁸ DTI, *Work and Families, Choice and Flexibility, Government response to public consultation*, October 2005: <http://www.dti.gov.uk/er/consultationchoiceflexibility2005final1.pdf>

- **work with carers, parents and their employers to develop improved guidance**

Rights in relation to flexible working came into force on 6 April 2003. The provisions confer a right on parents of children under six or disabled children under 18 to apply for flexible working to enable them to look after that child (such as part-time work or work at home).

An employer is under a duty to consider such requests seriously. The provisions allow for various grounds on which an employer can lawfully refuse such a request. The purpose of the request must be to enable the employee, who is a parent or guardian, to care for the child. The employee must have been employed for at least 6 months in order to be eligible.⁶⁹

There is a set procedure which must be followed for making and dealing with such requests, which when exhausted, allows the employee to bring a complaint to an employment tribunal.⁷⁰ If justified, this could result in an award of compensation and/or an order that the employer reconsider any refusal of an employee's application.

E. Age Discrimination

The Bill will allow a one-off change to be made to the statutory cap on the level of a week's pay used for calculating various statutory entitlements such as redundancy pay.⁷¹ Concerns have been raised that the new age discrimination provisions will mean that older workers will be faced by a reduction in their entitlements when they come into force. The power in the Bill is being taken so that the introduction of age discrimination regulations can allow for an even transition in changes to redundancy entitlements. The new power given by the Bill will let the Government adjust the value of a week's pay in the calculation on one occasion only. It is not clear what the adjustment would be or even whether the power will definitely be used.

Regulations outlawing age discrimination in the workplace are due in October 2006. There has been some delay in finalising the proposals due to an ongoing debate about the abolition of mandatory retirement ages. However, on 14 December 2004, the Government confirmed that compulsory retirement ages will become unlawful unless they can be objectively justified, subject to a national default retirement age of 65. In addition, employees will have a right to request working beyond the set retirement age. The decision to have a national default retirement age will be reviewed after five years.

It is important to note that the "retirement age" and the "pension age" are not synonymous. The retirement age is the age at which one can be required to leave work. The pension age is that age at which one can start to draw an unreduced pension.

⁶⁹ *The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002, SI 2002/3236*

⁷⁰ *The Flexible Working (Procedural Requirements) Regulations 2002, SI 2002/3207*

⁷¹ Clause 14, Bill 60 of 2005-06

The proposals for age discrimination legislation arise out of the need to implement the *EC Directive establishing a general framework for equal treatment in employment and occupation (2000/78/EC)* adopted on 27 November 2000. The purpose of this directive, commonly called the “Employment Directive”, is to prohibit discrimination in employment on the grounds of religion or belief, disability, age or sexual orientation.

Provisions covering religion or belief and sexual orientation came into force in December 2003.⁷² The provisions on disability were implemented from 1 October 2004.⁷³ The provisions on age discrimination are the last area to be decided upon and will need to be implemented by December 2006.

The Government, through the DTI, published a consultation document in July 2003: *Equality and Diversity: Age Matters*.⁷⁴ This set out the following proposals concerning statutory minimum entitlement to redundancy pay:

Redundancy: we propose removing some age-related aspects of the statutory redundancy payments scheme. Age will cease to be a factor when calculating the payment due: the calculation will be on the basis of one week’s pay per year of service, subject to the current maximum of 20 years, regardless of age; and service below the age of 18, which is currently ignored, will be taken into account.

The upper age limit for entitlement to a statutory redundancy payment will depend on the decision we make about retirement ages.

Entitlement would either:

- a. end at the employer’s normal retirement age for the job, which would have to be justified if under the default retirement age, if we decided to have one; or
- b. end at the default age if one was set out in legislation and if the employer had no normal retirement age for the job; or
- c. continue for as long as the person remained in employment – if the employer had no normal retirement age for the job and if we decided not to set out a default age in legislation.

A consultation on the *draft Employment Equality (Age) Regulations 2006* was published in July 2005: *Equality and Diversity: Coming of Age*. This confirmed that the upper and lower age limits on claiming for unfair dismissal and entitlement to minimum redundancy pay will be abolished.

The ‘age related aspects’ of statutory redundancy entitlements currently work in favour of older workers. The rules on the calculation of statutory redundancy pay are set out below. For many employees redundancy pay is set out in their employment contract and is thus not directly affected by the proposed changes.

⁷² *The Employment Equality (Religion or Belief) Regulations 2003* SI No.1660 and the *Employment Equality (Sexual Orientation) Regulations 2003* SI No.1661

⁷³ By the *Disability Discrimination Act 1995 (Amendment) Regulations 2003* SI No.1673

⁷⁴ DTI <http://www.dti.gov.uk/er/equality/age.htm>

All employees are entitled to statutory minimum payments calculated in accordance with Part XI of the Employment Rights Act 1996 (ERA).

Under the Act, employers must pay redundant employees a minimum redundancy payment made up as follows:

- (i) for each year's service aged 41- 64 (inclusive).....1.5 weeks' pay
- (ii) for each year's service aged 22 - 40 (inclusive).....1 week's pay
- (iii) for each year's service aged 18 - 21 (inclusive).....0.5 weeks' pay

However, there is a maximum of 20 years' service which counts and a limit on the amount of a week's pay which counts. This is currently set at £280. Thus the maximum statutory redundancy payment is £8,400. Generally, pay is the level of pay the employee was entitled to at the time notice of redundancy was given. Concerns have been raised that anyone who is made redundant over the age of 40 will lose out under the new proposals.

The consultation on the draft age discrimination regulations explains in detail what is proposed:

8.1 Statutory redundancy payments

8.1.1 The statutory redundancy payments scheme provides for redundancy payments to be made by the employer to employees with two years' qualifying service who are made redundant.

What was said in previous consultation, and what will the Age Regulations say?

8.1.2 The scheme has a number of age-related aspects. We discussed them in Age Matters. The following lists our proposals for these aspects in Age Matters, the responses and the final approach in the Age Regulations.

Entitlement

8.1.3 The scheme has a lower age limit of 18 on entitlement. We proposed to remove this. 79% of respondents agreed. The Age Regulations will do so.

8.1.4 There is also an upper age limit on entitlement, which is set at the normal retirement age of the business in question, or 65 if the business does not have a retirement age. In Age Matters, we proposed to remove the upper age limit only if there was to be no default retirement age. In the Age Regulations, however, we have decided to remove the upper age limit in spite of our decision to have a default retirement age. This is further explained below.

8.1.5 A final age-related rule on entitlement requires two years of continuous service before entitlement starts (this might indirectly affect certain age groups more than others, and might therefore constitute indirect age discrimination). We did not discuss the two-year qualifying period in Age Matters. This qualifying period will remain in place.

Calculation

8.1.6 The scheme uses length of service for the calculation of the redundancy payments (this could amount to indirect discrimination), and it uses a cap of 20 years on the length of service that can be taken into account for the calculation. We proposed to retain both elements. We asked whether consultees agreed that length of service should be maintained as a factor in the calculation. 88% agreed. Accordingly, the Age Regulations will not change this.

8.1.7 The statutory redundancy payment gradually tapers down to zero for those employees who are within one year of the upper age limit. We proposed to remove the tapering-down rule. 65% of respondents agreed. The Age Regulations will do so.

8.1.8 The calculation of the redundancy payment uses a multiplier with age bands: the payment is determined by multiplication with a number of weeks of pay ranging from half a week for younger workers to one and a half weeks for older workers. We proposed to remove the age bands, so that the same number of weeks of pay is used for the purpose of calculating redundancy payments for employees of all ages. We proposed that this multiplier should be brought to the average level of one week. 62% of consultees agreed with this approach, but many pointed out that they did not support the proposed level of one week's pay for the multiplier, since this would result in lower payments to older workers. The Age Regulations will remove the multiplier based on wide age brackets; we have not yet determined the level of the multiplier.

8.1.9 The calculation of the redundancy payment is also based on the employee's weekly pay, subject to a statutory limit. The limit is currently £280 per week. This factor is not age-related, but it needs to be considered alongside the multiplier. Any change to the statutory limit would also impact on other payments, such as those made under the insolvency provisions of the Employment Rights Act 1996 (including arrears of pay, holiday pay and compensatory notice pay).

8.1.10 In assessing how to set the calculation, the principal objective will be to strike the right balance between minimising the cost and administrative burden to employers, whilst ensuring employees who lose their jobs through no fault of their own are protected by a minimum financial "safety net". A range of approaches could be adopted including gearing the payments more heavily to length of service. To meet this policy objective we will take steps to gauge stakeholder opinion, with a view to settling on the most appropriate method of calculation and level of payment to be included in the Age Regulations.⁷⁵

F. Annual Leave

The *Working Time Regulations 1998*, SI No.1833, implemented the EC *Working Time Directive* (93/104/EC) in Great Britain. They came into force on 1 October 1998 and among other things gave workers the right to four weeks' paid leave each year.⁷⁶

The Bill allows regulations to be made which would give free-standing entitlements to annual leave which may be more generous than that prescribed by the working time

⁷⁵ DTI, *Equality and Diversity: Coming Of Age*, July 2005:

<http://www.dti.gov.uk/er/equality/equalitydiversity.pdf>

⁷⁶ Regulation 13

rules.⁷⁷ One possible application of this power would be to give all workers an additional entitlement to 8 days paid leave to reflect the normal number of bank holidays each year.

The Labour Party National Policy Forum met in Warwick in July 2004. A number of “concessions to unions” were reported as having been made at the meeting. Among these was an announcement that public holidays will in future not count towards minimum holiday allowance under the working time rules. This aspect of the agreement does represent a change in previous policy.

Regulations 13 and 16 of the *Working Time Regulations 1998*, gave all workers, except those in the “excluded sectors”, a right to four weeks’ paid holiday a year.⁷⁸ Subsequent legislation has brought most of those working in the formerly excluded sectors within the rules so that now most people have the right to four weeks paid holiday. The DTI guidance describes how the leave weeks are determined:

A week’s leave should allow you to be away from work for a week. So it is the same as the length of time you work in a normal week.⁷⁹

Thus a person who works 5 days per week should receive 20 days paid leave. The regulations do not mention bank holidays, but the DTI’s *Guide to Working Time Regulations*, published in September 1998, made it clear that paid bank holidays can count towards these four weeks:

7.1.5 Public holidays

There is no statutory entitlement to bank and public holidays. These are simply days where a worker may receive leave under the terms of their contract. As with other contractual leave, this can be used to discharge an employer’s responsibility for providing the statutory leave under these Regulations. [Where a worker is paid for a public holiday this will count towards their entitlement to annual leave.]⁸⁰

Revised guidance issued in March 2000 also emphasises this point:

The leave entitlement under the regulations is not additional to bank holidays. There is no statutory right to take bank holidays off.⁸¹

Accordingly, any of the paid leave days which fall on a bank holiday would currently count toward the total entitlement. There are generally eight bank holidays in a year,

⁷⁷ Clause 13, Bill 60 of 2005-06

⁷⁸ The “excluded sectors” are road, rail, air, inland waterway and lake transport, sea fishing, “other work at sea” (essentially offshore oil and gas exploration) and the activities of doctors in training. On 22 June 2000, the European Parliament and Council adopted a directive (2000/34/EC) extending the *Working Time Directive* to the excluded sectors. Member States had until 1 August 2003 to implement this extension.

⁷⁹ DTI, *Your guide to the working time regulations*, March 2000, http://www.dti.gov.uk/er/work_time_regs/wtr7.htm#section7

⁸⁰ DTI, *Guide to Working Time Regulations*, September 1998, para 7.1.5

⁸¹ DTI, *Your guide to the working time regulations*, March 2000, http://www.dti.gov.uk/er/work_time_regs/wtr7.htm#section7

though there were nine in 1999 and 2002 because of the extra day for the Millennium, and the extra day for the Golden Jubilee. This means that someone who works five days a week and is already receiving paid leave on bank holidays has at least eight days paid leave already. They would only need another 12 to reach four weeks (20 days).

The effect of altering the position so that bank holidays do not count toward working time might give that person more days of paid leave, but only if they are entitled or permitted to take paid leave on a bank holiday. The change might make no material difference if the employer can require the employee to work on all bank holidays and does so. There is no statutory right to take time off work on a bank holiday.

III Law

A. Employment Rights: Current Provisions

1. Maternity Leave and Pay

a. *Maternity pay*

Most women are entitled to up to 26 weeks' Statutory Maternity Pay (SMP), paid by their employer, during maternity leave. The DTI have published detailed guidance on maternity rights which includes sections on maternity pay and leave.⁸² To qualify, a woman must:

- be age 16 or over (there is no upper age limit);
- be employed by her employer in the 15th week (the qualifying week) before the expected week of childbirth (EWC);
- still be pregnant in the 11th week before the EWC;
- give medical evidence (usually on form MAT B1) of the pregnancy at least 28 days before the maternity pay period is due to start;
- have been continuously employed by her employer for at least 26 weeks in the qualifying week; and
- have average weekly earnings above the lower earnings limit (LEL) for national insurance contributions (currently **£82** a week).⁸³

SMP is paid at the rate of 90% of earnings for the first 6 weeks followed by up to 20 weeks at a flat rate (currently £106.00) or 90% of earnings, whichever is the lower figure.

Women who are not entitled to SMP but meet the qualifying conditions based on their recent employment and earnings record may claim from their social security/Jobcentre Plus office up to 26 weeks' Maternity Allowance (MA).⁸⁴

⁸² DTI, *Maternity Rights* PL958; <http://www.dti.gov.uk/er/individual/matrights-pl958.pdf>

⁸³ Babies due between 17 July 2005 and 15 July 2006:
http://www.hmrc.gov.uk/employers/employee_pregnant.htm#5c

⁸⁴ Job Centre Plus:
<http://www.jobcentreplus.gov.uk/cms.asp?Page=/Home/Customers/WorkingAgeBenefits/498>

- MA consists of a weekly payment worth 90% of their average weekly earnings up to a maximum of £106.00 a week.
- MA is paid to women earning at least £30 a week averaged over a 13 week period (Maternity Allowance Threshold – MAT)
- They must have been employed or self-employed in at least 26 weeks of the 66 weeks ending with the week before the expected week of childbirth (the “test period”).

The leaflet, *Social Security benefit rates* (GL 23) published by the DWP gives details of the current standard rate (at present £106.00 a week).⁸⁵

The principal statutory provisions are contained in the *Social Security Contributions and Benefits Act 1992* (as amended). Part XII of the Act covers SMP and sections 35 and 35A cover MA.

In the recent case of *Alabaster v Woolwich plc* it was settled that, during maternity leave, a women is entitled to benefit from pay rises she would have received had she been at work.⁸⁶ The *Statutory Maternity Pay (General) (Amendment) Regulations 2005* SI No.729 gave statutory effect to this European Court of Justice ruling.

b. Maternity leave

All women are entitled to 26 weeks ordinary maternity leave (OML). In addition, women who have been continuously employed by their employer for at least 26 weeks by the 15th week before the expected week of childbirth are entitled to additional maternity leave (AML). This starts at the end of OML and lasts for a further 26 weeks making a total of 52 weeks.

To qualify, a woman must notify her employer, by the end of the 15th week before her EWC, of the date on which she intends her OML to start (and if asked to do so by her employer must produce a certificate of expected confinement (form MAT B1) signed by her doctor or registered midwife). Her employer must respond in writing, within the next 28 days, informing her of the date on which she is expected to return to work if she takes her full entitlement to OML (plus AML, if she qualifies).

An employee may return to work before the end of her OML if she informs her employer, at least 28 days beforehand, of the date on which she intends to return to work. However, she may not return to work within two weeks of giving birth (or within four weeks if she works in a factory).

The principal statutory provisions are contained in Part VIII of the *Employment Rights Act 1996*, as amended by the *Employment Relations Act 1999*, and the *Maternity and Parental Leave etc Regulations 1999*, SI 1999/3312.

⁸⁵ DWP: http://www.dwp.gov.uk/lifeevent/benefits/statutory_maternity_pay.asp#howmuch

⁸⁶ ECJ reference C-147/02

c. Changes made in April 2003

The current rules described above stem from major changes which took effect in April 2003. Following a review of family friendly policies and the publication of a Green Paper, *Work and parents: competitiveness and choice*, in December 2000,⁸⁷ the Government announced a series of changes to maternity pay and leave which were designed both to simplify the system and increase the amount of paid leave to which women are entitled.

Most of the changes to leave were implemented by amendments to the *Maternity and Parental Leave etc Regulations 1999*. Some of the changes to SMP and MA required amendments to primary legislation and these are contained in the *Employment Act 2002*. Library Research Paper 01/93 on the *Employment Bill [Bill 44 of 2001-02]* gives background to and details of the changes.

The key changes made in April 2003 were:

- The payment period for both SMP and MA was extended from 18 to 26 weeks.
- Ordinary maternity leave was extended from 18 to 26 weeks.
- Additional maternity leave was changed to 26 weeks after the end of ordinary maternity leave (formerly this was from the end of OML until the end of the 29th week after childbirth).
- The flat rate of SMP and MA was increased to £100 a week.
- The qualifying period for additional maternity leave was changed to 26 weeks' continuous service into the 15th week before the expected week of childbirth
- The requirement that women must notify their employer of their pregnancy and the planned date of leave in the 15th week before the week the baby is due, was introduced. Employers must to respond, telling a woman her entitlements within 4 weeks of notification.
- New provisions were introduced allowing employers to apply for advance funding from HM Revenue & Customs if the amount they are due to pay in SMP will exceed tax, national insurance and other allowable payments due to be made to HM Revenue & Customs.

d. Recovery by employers

Employers can recover 92% of the SMP they pay out, usually by deduction from monthly payments of tax and national insurance contributions to HM Revenue & Customs. Small employers (currently defined as those who pay £45,000 or less in gross national insurance contributions in a tax year) recover 100% of SMP paid out plus 4.5% in compensation for the fact that SMP is subject to employer's National Insurance. Employers must keep records of maternity absence, SMP paid and not paid and maternity certificates or other medical evidence.

⁸⁷ Cm 5005

e. Annual leave

The relationship between maternity leave and the working time entitlement to 4 weeks paid annual leave was examined by the European Court of Justice in *Merino Gómez v Continental Industrias del Caucho SA*:

THE COURT said that the purposes of annual leave and maternity leave were different. Art 7(1) of Directive 93/104 was to be interpreted as meaning that where the dates of a worker's maternity leave coincided with those of the entire workforce's annual leave, the requirements of the Directive relating to paid annual leave could not be regarded as met. Further, one of the rights referred to in art 11(2)(a) of Directive 92/85 was paid annual leave, and Directive 76/207 was intended to bring about equality in substance rather than in form, and art 5(1) of that Directive meant that a worker had to be able to take her annual leave during a period other than that of her maternity leave. It would be no different if the period of maternity leave coincided with the general period of annual leave fixed by a collective agreement for the entire workforce. In answer to a further question referred, the court ruled that where a member state had chosen to provide for a longer annual leave entitlement than the minimum period prescribed by Directive 93/104, art 11(2)(a) of Directive 92/85 applied in respect of the entitlement to longer annual leave for women who had taken maternity leave coinciding with the period of annual leave for all staff.⁸⁸

f. Unfair dismissal

An employer's refusal to allow a person to return to work after maternity leave will be treated as a dismissal and will normally give the person the right to claim for 'automatic' unfair dismissal if it is for a 'prescribed reason' connected with pregnancy, maternity or taking maternity or parental leave.⁸⁹ These prescribed reasons are set out in regulation 20(3) of the *Maternity and Parental Leave etc. Regulations 1999* (as amended).

In addition, with effect from 24 November 2003 regulations make it automatically unfair dismissal if an employer who has failed to give an employee the required notice of the date on which her maternity leave will end then dismisses her for not returning to work on the correct date.

Unfair dismissal which is not for a reason deemed to be automatically unfair can in most cases only be claimed after one year of continuous employment. An employee's period of continuous employment is not broken by absence from work on maternity leave or otherwise on account of pregnancy or childbirth. Requirements for continuous employment do not generally apply where the dismissal is held to be for a reason which is "automatically unfair".

⁸⁸ *Merino Gómez v Continental Industrias del Caucho SA* ECJ 2004 Case C-342/01 on 18 March 2004, reported at [2004] IRLR 407: <http://www.lawreports.co.uk/ecjmare0.1.htm>

⁸⁹ ERA section 99(2)

g. Preservation of contractual rights

A woman has a statutory right under the *Employment Rights Act 1996* (ERA) to return to her job after ordinary maternity leave.⁹⁰ The same is true for a return to work after additional maternity leave, unless the employer can show that it was not reasonably practicable for her to do so, in which case suitable alternative employment must be offered on no less favourable terms.⁹¹ She is entitled to the same pay including general pay rises applicable in her absence. Employers with fewer than six employees, including the person taking maternity leave, are treated slightly differently. If they can show that it was not reasonably practicable for the person to return in her old job or a suitable alternative, then dismissal will not be 'automatically unfair' but will be decided according to normal principles of unfair dismissal (whether it was fair in all the circumstances).

h. Dismissal or detriment and maternity

Section 6(2)(b) of the *Sex Discrimination Act 1975* (SDA), provides that it is unlawful to discriminate against a woman "by dismissing her or subjecting her to any other detriment". Dismissal (or any other detrimental treatment) of a woman who is unable to work because of her pregnancy is unlawful sex discrimination contrary to Article 141 of the EC Treaty, the Equal Treatment Directive 76/207/EEC and SDA. No male comparator is required. The European Court of Justice (ECJ) held that this must be so because pregnancy is a condition unique to women. It is irrelevant that a man off work sick for the same amount of time as his pregnant female colleague would also have been dismissed. There can be no question of comparing a woman's pregnancy with a man's illness.⁹² This proposition applies equally to claims under the *Equal Pay Act 1970* as to claims under the SDA.⁹³

i. Immigration

A person's immigration status is unlikely on its own to affect entitlement to Statutory Maternity Pay (SMP). Although many people with limited leave to remain in the UK are subject to a prohibition on accessing "public funds", the list of prohibited public funds does not include SMP.⁹⁴ Accordingly, it appears that the right to maternity pay and leave is not generally affected by immigration status and the usual qualification requirements apply.

j. Armed Forces

Members of the armed forces are currently excluded from many employee rights (including maternity leave rights). However, there is provision for many employment law

⁹⁰ ERA section 71(4)(c)

⁹¹ ERA section 73(4)(c)

⁹² *Dekker v VJV Centrum* ECJ [1992] ICR 325, ECJ case 177/88 and *Webb v Emo Air Cargo (UK) Ltd* [1995] ICR 1021, HL

⁹³ *Alabaster v Woolwich plc & anor* ECJ 2004 ECJ case C-147/02 on 30th March 2004, reported at [2005] ICR 695; also at [2004] IRLR 486; *Alabaster v Barclays Bank plc and DSS* [2005] EWCA Civ 508, 3 May 2005

⁹⁴ *Immigration Rules*, HC 395 of 1993-94, para 6:

http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/immigration_rules/introduction.html

rights to be extended in due course to service personnel. Appropriate amending legislation was passed in 1993 and is now in section 192 of the *Employment Rights Act 1996* (ERA).

Section 31 of the *Trade Union Reform and Employment Rights Act 1993* (TURER) inserted a new section 138A in the *Employment Protection (Consolidation) Act 1978*, which allows for the extension of the following employment rights to members of the armed forces:

- maternity leave
- time off for ante-natal care

in addition to:

- written statement of terms of employment
- itemised pay statement
- payment during medical suspension
- written statement of reasons for dismissal
- right to claim unfair dismissal
- right to go to an employment tribunal.

The section does not give rights to statutory redundancy pay. It allows for Orders in Council to be made amending the new provisions and providing that servicemen and women may not complain to an employment tribunal without first making use of the internal service procedures for redress. There has, however, been a long delay in implementing the section, partly because of the need to tie it in with changes to the internal service procedures under the *Armed Forces Act 1996*, and partly because of drafting deficiencies which have been corrected by the 1996 Act. Nicholas Soames, then Minister with responsibility for the armed forces, explained the delay in answer to a PQ on 28 January 1997:⁹⁵

Armed Forces (Employment Rights)

Mr. Menzies Campbell: To ask the Secretary of State for Defence when he intends to implement section 31 of the Trade Union Reform and Employment Rights Act 1993.

Mr. Soames: The Trade Union Reform and Employment Rights Act 1993 along with certain other employment legislation, has now been consolidated into the Employment Rights Act 1996 and the provisions of section 31 of TURERA are now contained in sections 191 and 192 of the 1996 Act. Section 26 of the Armed Forces Act 1996 amends the detailed provisions of section 192 of ERA. Once these amendments have been brought into force, an order will be made giving effect to section 192. Work is currently being undertaken on both these measures to ensure that section 192 is in force in the appropriate form as soon as practicable.

⁹⁵ HC Deb 28 January 1997, c 203W

Section 26 of the *Armed Forces Act 1996* was brought into force on 1 October 1997 by the *Armed Forces Act 1996 (Commencement No 3 and Transitional Provisions) Order 1997*. This amends section 192 of the ERA so that the wording is now correct. Section 192, itself, will eventually be brought into force by an Order in Council which will be prepared by the Ministry of Defence and will have to be approved by Ministers. The Order in Council may exclude some of the rights listed above. It could even add to them. Section 192(3) provides that the Order may “amend subsection (2) by making additions to, or omissions from, the provisions for the time being specified in that subsection”. One reason why some rights may be excluded or altered is that the EC law from which they derive does not apply to the armed forces. In the meantime “a transitory provision” takes the place of section 192. This is set out in Schedule 2, paragraph 16 ERA as follows:

(1) If section 31 of the Trade Union Reform and Employment Rights Act 1993 has not come into force before the commencement of this Act, this Act shall have effect until the relevant commencement date as if for section 192 there were substituted—

“192 Armed forces

Section 191—

- (a) does not apply to service as a member of the naval, military or air forces of the Crown, but
- (b) does apply to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996.”

(2) The reference in sub-paragraph (1) to the relevant commencement date is a reference—

- (a) if an order has been made before the commencement of this Act appointing a day after that commencement as the day on which section 31 of the Trade Union Reform and Employment Rights Act 1993 is to come into force, to the day so appointed, and
- (b) otherwise, to such day as the Secretary of State may by order appoint.

2. Paternity Leave and Pay

Individual workers may have entitlement to paternity leave under their contracts of employment. Legislation providing this statutory right to paid paternity leave is contained in the *Employment Act 2002*, which received the Royal Assent on 8 July 2002. Details are contained in a number of Regulations, including the *Paternity and Adoption Leave Regulations 2002*, SI No.2788, and the *Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002*, SI No.2822.

a. Statutory Paternity Pay

Eligible employees are entitled to choose to take either one week or two consecutive weeks’ paid paternity leave (not odd days). During their paternity leave, most employees are entitled to Statutory Paternity Pay (SPP) of £106.00 per week or 90% of earnings, whichever is lower, provided that:

- they are still employed at the date of placement;

- their average weekly earnings are at or above the lower earnings limit for Class 1 National Insurance contributions (currently £82);
- they have given at least 28 days notice of leave, although less may be accepted if the child is adopted and there is only a short period between matching and placement;
- they have given a declaration of family commitment on form SC4.⁹⁶

By providing a completed form SC4, employees can satisfy both the notice and evidence conditions for paternity leave and pay. Employers do not need to carry out further checks.

Employees who do not qualify for SPP, or who are normally low paid, may be able to get Income Support while on paternity leave. Additional financial support may be available through Housing Benefit, Council Tax Benefit, Tax Credits or a Sure Start Maternity Grant. Further information is available from a Jobcentre Plus office or Social Security office.

b. Statutory paternity leave

A DTI guidance leaflet summarises eligibility and requirements for the scheme:⁹⁷

Eligibility

Employees must satisfy the following conditions in order to qualify for paternity leave. They must:

- have or expect to have responsibility for the child's upbringing
- be the biological father of the child or the mother's husband or partner
- have worked continuously for their employer for 26 weeks ending with the 15th week before the baby is due.

Employers can ask their employees to provide a self-certificate (see below for further details) as evidence that they meet these eligibility conditions.

Length of paternity leave

Eligible employees can choose to take either one week or two consecutive weeks' paternity leave (not odd days).

They can choose to start their leave:

- from the date of the child's birth (whether this is earlier or later than expected), or
- from a chosen number of days or weeks after the date of the child's birth (whether this is earlier or later than expected), or
- from a chosen date later than the first day of the week in which the baby is expected to be born.

⁹⁶ HM Revenue & Customs form SC4 is available online at: <http://www.inlandrevenue.gov.uk/forms/sc4.pdf>

⁹⁷ DTI Leaflet PL514 (Rev 1), *Paternity – Leave and Pay*: <http://www.dti.gov.uk/er/individual/paternity-pl514.htm> Note that the flat rate of £100 given in the guidance has since increased to £106 and the Lower Earnings Limit for National Insurance purposes has changed and is now £82 (the guidance quotes the 2002 figure of £75)

Leave can start on any day of the week on or following the child's birth but must be completed:

- within 56 days of the actual date of birth of the child, or
- if the child is born early, within the period from the actual date of birth up to 56 days after the first day of the expected week of birth.

Only one period of leave is available to employees irrespective of whether more than one child is born as the result of the same pregnancy.

The guidance also sets out other details of the scheme as follows:

Notice of intention to take paternity leave

Employees must inform their employers of their intention to take paternity leave by the end of the fifteenth week before the baby is expected, unless this is not reasonably practicable. They must tell their employers:

- the week the baby is due
- whether they wish to take one or two weeks' leave
- when they want their leave to start.

Employees can change their mind about the date on which they want their leave to start providing they tell their employer at least 28 days in advance (unless this is not reasonably practicable). Employees must tell their employers the date they expect any payments of SPP to start at least 28 days in advance, unless this is not reasonably practicable.

Self certificate

Employees must give their employers a completed self-certificate as evidence of their entitlement to SPP. A model self certificate for employers and employees to use is available in *Working fathers - rights to leave and pay (PL517)*. Employers can also request a completed self certificate as evidence of entitlement to paternity leave. The self certificate must include a declaration that the employee meets certain eligibility conditions and provide the information specified above as part of the notice requirements.

By providing a completed self certificate, employees will be able to satisfy both the notice and evidence conditions for paternity leave and pay. Employers will not be expected to carry out any further checks.

Contractual benefits

Employees are entitled to the benefit of their normal terms and conditions of employment, except for terms relating to wages or salary (unless their contract of employment provides otherwise), throughout their paternity leave. However, most employees will be entitled to SPP for this period. If the employee has a contractual right to paternity leave as well as the statutory right, he may take advantage of whichever is the more favourable. Any paternity pay to which he has a contractual right reduces the amount of SPP to which he is entitled.

Return to work after paternity leave

Employees are entitled to return to the same job following paternity leave.

Protection from detriment and dismissal

Employees are protected from suffering unfair treatment or dismissal for taking, or seeking to take, paternity leave. Employees who believe they have been treated unfairly can complain to an employment tribunal.

Employers' recovery of payments

Employers can recover the amount of Statutory Paternity Pay (SPP) they pay out in the same way as they can claim back Statutory Maternity Pay. Employers can claim back 92% of the payments they make, with those eligible for small employers relief able to claim back 100% plus an additional amount in compensation for the employer's portion of National Insurance contributions paid on SPP.

In addition, employers who need can get funding in advance for payments of SPP from the Inland Revenue.

3. Adoption Leave and Pay

a. Employment rights

The employment rights of parents who are adopting a child are as follows:

- Ordinary Adoption Leave
- Additional Adoption Leave
- Statutory Adoption Pay (SAP)
- Statutory Paternity Leave
- Statutory Paternity Pay (SPP)
- Parental Leave
- Time off for dependents
- The right to request flexible working
- The right to return to work
- The right not to suffer detriment or dismissal
- Contractual benefits

The main relevant legislation is as follows:

- The *Employment Rights Act 1996* (ERA), sections 75A to 75D, inserted with effect from 8 December 2002 by the *Employment Act 2002*, sections 3 (leave) and 4 (pay).⁹⁸
- The *Paternity and Adoption Leave Regulations 2002* SI No.2788 came into force on 8 December 2002, giving rights to adoption leave and pay for employees whose children are placed with them on or after 6 April 2003.
- The *Paternity and Adoption Leave (Amendment) Regulations 2004* SI No.923 made minor changes to the adoption leave rules from 6 April 2004.

⁹⁸ See also *Employment Act 2002 (Commencement No. 3 and Transitional and Saving Provisions) Order 2002* SI No.2866

b. Adoption leave

To be eligible for ordinary adoption leave, an employee must:

- be newly matched with a child for adoption by an adoption agency;⁹⁹
- have worked continuously for their employer for 26 weeks ending with the week in which they are notified of being matched with a child for adoption;
- inform their employer of their intention to take adoption leave within seven days of having been notified by their agency that they have been matched with a child; and
- provide documentary evidence (the “matching certificate”) if requested.

One parent (male or female) is entitled to 26 weeks leave. The other parent may be entitled to statutory paternity leave and pay. Ordinary adoption leave is normally paid leave.

Leave can be taken from the date of the child’s placement (whether this is earlier or later than expected); or a fixed date which can be up to 14 days before the expected date of placement and can start on any day of the week.

Only one period of leave is available even if more than one child is placed for adoption as part of the same arrangement. If the child’s placement ends during the adoption leave period, adoption leave can continue for up to eight weeks after the end of the placement.

The notice requirements are set out by the DTI guidance as follows:

Adopters are required to inform their employers of their intention to take adoption leave within 7 days of being notified by their adoption agency that they have been matched with a child for adoption, unless this is not reasonably practicable. They need to tell their employers:

- when the child is expected to be placed with them and
- when they want their adoption leave to start.

Adopters can change their mind about the date on which they want their leave to start providing they tell their employer at least 28 days in advance (unless this is not reasonably practicable). They must tell their employer the date they expect any payments of SAP to start at least 28 days in advance, unless this is not reasonably practicable.

Employers have 28 days in which to respond to their employees’ notification of their leave plans. An employer must write to the employee, setting out the date on which they expect the employee to return to work if the full entitlement to adoption leave is taken. A model letter for employers to use (if they wish to do so) is now available.¹⁰⁰

⁹⁹ Adoption leave and pay is not available in circumstances where a child is not newly matched for adoption, for example when a step-parent is adopting a partner’s children

¹⁰⁰ DTI guidance leaflet PL515 (Rev1): <http://www.dti.gov.uk/er/individual/adopt-pl515.htm>

Ordinary adoption leave can be followed immediately by up to 26 weeks' additional adoption leave giving a total entitlement of 52 weeks. Additional adoption leave is usually unpaid although an employee may be entitled to pay during additional adoption leave under a term in their contract of employment.

c. Statutory adoption pay

Most of those eligible for adoption leave will also be entitled to 26 weeks Statutory Adoption Pay (SAP) of £106 per week or 90% of average weekly earnings, whichever is the lower amount.

Those whose normal weekly earnings are below the Lower Earnings Limit for National Insurance Contributions (£82 a week from April 2005) do not qualify for SAP. Bearing in mind the minimum wage, these employees will probably be working part time.¹⁰¹ They may be entitled to Housing Benefit, Council Tax Benefit or Tax Credits. Information is available from Jobcentres and Social Security offices.

d. Paternity leave and pay

DTI guidance sets out the right to paternity leave in the case of adoption:

Following the placement of a child for adoption, the rights to paternity leave and pay give eligible employees the right to take paid leave to care for their new child or support the adopter.

Employees must satisfy the following conditions in order to qualify for paternity leave. They must:

- have or expect to have responsibility for the child's upbringing
- be the adopter's spouse or partner
- have worked continuously for their employer for 26 weeks ending with the week in which the adopter is notified of being matched with a child.

Employers can ask their employees to provide a self-certificate (see below for further details) as evidence that they meet these eligibility conditions.

Eligible employees are entitled to choose to take either one week or two consecutive weeks' paid paternity leave (not odd days).

They can choose to start their leave:

- from the date of the child's placement (whether this is earlier or later than expected), or
- from a chosen number of days or week after the date of the child's placement (whether this is earlier or later than expected), or
- from a chosen date which is later than the date on which the child is expected to be placed with the adopter.

¹⁰¹ The National Minimum Wage for those over the age of 22 is currently £5.05 per hour (£4.25 for those aged 18 – 22; £3 for 16 and 17 year olds).

Leave can start on any day of the week on or following the child's placement but must be completed within 56 days of the child's placement.

Only one period of leave is available to employees irrespective of whether more than one child is placed together.¹⁰²

Rights to SPP are as for natural fathers (see 2(a) above).

4. Parental Leave

The *Maternity and Parental Leave etc Regulations 1999*, SI 1999/3312, gave all parents of children born on or after 15 December 1999 the right to 13 weeks' unpaid parental leave to be taken before the child's fifth birthday. The regulations, made under Part VIII of the *Employment Rights Act 1996*, as amended by the *Employment Relations Act 1999*, implemented the *EC Parental Leave Directive (96/34/EC)* in Great Britain. This followed the Labour Government's decision to sign up to the Social Chapter in Amsterdam in June 1997.¹⁰³

Both parents are equally entitled to leave. In the case of adoption, parental leave can usually be taken up to five years from the date of placement (or the child's 18th birthday, if that is sooner).

Parents of disabled children are entitled to 18 weeks' parental leave up to the child's 18th birthday, providing they have the qualifying length of service.

5. Part time worker rights

Many people try to achieve a work life balance by working part time. Under the *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000*, SI 2000/551 part-time workers have the right not to receive less favourable treatment than comparable full-time workers, unless this was justified on objective grounds.

6. Time off for dependants

This is a right allowing employees to take a reasonable amount of time off work to deal with certain unexpected or sudden emergencies and to make any necessary longer term arrangements. The circumstances under which time off can be taken under this right are as follows:

- If a dependant falls ill, or has been injured or assaulted
- When a dependant is having a baby (other than taking time off after the birth to care for the child)
- To make longer term care arrangements for a dependant who is ill or injured
- To deal with a death of a dependant
- To deal with an unexpected disruption or breakdown of care arrangements for a dependant

¹⁰² DTI guidance leaflet PL515 (Rev1): <http://www.dti.gov.uk/er/individual/adopt-pl515.htm>

¹⁰³ Directive 97/75/EC of 15 December 1997 extended the directive to the UK

- To deal with an unexpected incident involving the employee's child during school hours

The right to time off is available to all those who have a contract of employment with an employer, whether they work full time or part time. A contract of employment need not be in writing. The right does not apply to members of the police service, armed forces or masters or crew members engaged in share fishing paid solely by a share of the catch.

The emergency must involve a dependant of the employee. A dependant is the husband, wife, child or parent of the employee. It also includes someone who lives in the same household as the employee. For example, this could be a partner or an elderly aunt or grandparent who lives in the household. It does not include tenants or boarders living in the family home, or someone who lives in the household as an employee, such as a live-in housekeeper. An employee who uses this right has statutory protection against dismissal or victimisation.

7. The right to request flexible working

From 6 April 2003, subject to regulations, parents and others (such as guardians) who are responsible for looking after children aged under 6 (or under 18 if the child is disabled) have had the legal right to ensure that requests they make for flexible working arrangements are taken seriously by their employers. Such requests may include part-time work or work at home. The request must be to enable the employee to care for the child and the employee must have been employed in his job for at least 6 months to be eligible. The legislation gives the DTI power to make regulations extending the categories of terms and conditions of employment to which changes may be requested.

The *Employment Relations Act 2004* contains provisions which clarify that dismissal for a reason related to a request for flexible working will be automatically unfair for the purposes of a claim for unfair dismissal. The DTI has published a basic summary of the right to apply for flexible working, which is available on their website.¹⁰⁴

The rights in relation to flexible working were introduced by section 47 of the *Employment Act 2002*. It inserts a new Part 8A ("Flexible Working") in the *Employment Rights Act 1996* (ERA). A summary of the stages in this process, which involves written requests and decisions by the employee and employer respectively, as well as a right to appeal, is set out in the DTI guidance, which gives the following summary of rights and responsibilities:

RIGHTS AND RESPONSIBILITIES

Employees' rights

- To apply to work flexibly.
- To have their application considered properly in accordance with the set procedure and refused only where there is a clear business ground for doing so.
- To have a companion when meeting the employer to discuss the application.
- Where an application is refused to have a written explanation explaining why.

¹⁰⁴ DTI: <http://www.dti.gov.uk/er/individual/flexible-pl516.htm>

- To appeal against the employer's decision to refuse an application.
- To take a complaint to a tribunal in certain circumstances.

Employees' responsibilities and best practice

- To provide a carefully thought-out application.
- To ensure their application is valid by checking that all the eligibility criteria are met and that they have provided all the necessary information.
- To ensure the application is made well in advance of when they want it to take effect.
- To arrive at meetings on time and to be prepared to discuss their application in an open and constructive manner.
- If necessary, be prepared to be flexible themselves, to reach an agreement with the employer.

Employers' rights

- To reject an application when the desired working pattern cannot be accommodated within the needs of the business.
- To seek the employee's agreement to extend timescales where it is appropriate.
- To consider an application withdrawn in certain circumstances.

Employers' responsibilities and best practice

- To consider requests properly in accordance with the set procedure.
- To ensure they adhere to the time limits contained within the procedure.
- To provide the employee with appropriate support and information during the course of the application.
- To only decline a request where there is a recognised business ground and to explain to the employee in writing why it applies.
- To ensure that any variation with the procedure is agreed in advance with the employee and recorded in writing.

The provisions do not alter existing sex discrimination law.¹⁰⁵ Issues of flexible working can form part of a claim for unlawful sex discrimination especially in cases which involve women returning to work after maternity leave. This is a complex area of the law which is likely to require expert legal advice in a particular case.

Disputes over flexible working can also be resolved via the *ACAS Arbitration Scheme* which came into operation on 21 May 2001. Resolution of disputes under the Scheme is intended to be confidential, informal, relatively fast and cost efficient. Procedures under the Scheme are non-legalistic, and far more flexible than the traditional model of the employment tribunal and the courts. The arbitration scheme initially only applied to unfair dismissal disputes.¹⁰⁶ From 6 April 2003 it was extended by *The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 SI No.694* to cover disputes over requests for flexible working arrangements.¹⁰⁷

8. National Minimum Wage

The National Minimum Wage applies to the following categories of workers:

¹⁰⁵ *Sex Discrimination Act 1975*

¹⁰⁶ *ACAS Arbitration Scheme (England and Wales) Order 2001 SI No. 1185*

¹⁰⁷ ACAS has set up an "Arbitration Enquiries Hotline" on 0207 7210 3742

- aged 18 and over
- (since 1 October 2004), young workers aged 16 to 17
- normally working in the UK or on UK ships - including foreign nationals
- apprentices aged 19 to 26 after 12 months' apprenticeship
- on commission only
- on stand-by
- home, agency, part-time, casual, piece or agricultural workers

Among those not entitled to the NMW are:

- (in respect of changes which came into effect on 1 October 2004), apprentices aged 16 to 17 (who are above school leaving age)
- share fishermen
- unpaid voluntary workers
- au pairs living as part of the family
- family members living at home and helping to run a family business
- some apprentices and trainees
- university or college students on placement with an employer as part of their course, ie a sandwich course that is no longer than one year
- self-employed

As of 1 October 2005, there are three rates of NMW:

- the adult rate of £5.05 per hour for workers aged 22 and over
- the development rate of £4.25 per hour for workers aged 18 to 21 and those aged 22 or over who receive accredited training for six months after they start work
- £3 per hour for workers aged 16 to 17

How the NMW is calculated depends on whether the work is:

- time work - a set number of hours or period of time
- salaried-hours work - a set number of hours each year paid by annual salary
- output work - payment is according to the number of things produced or sold
- unmeasured work - specific tasks but no set hours

Of particular relevance to work life balance is the minimum wage rate for homeworkers, since many combine child care with working from home. The way in which this is measured has been the subject of concern and was recently changed to a new system which requires the employer to set the rate by reference to objective testing of the average time taken to complete a given piece of work rather than simply estimating what this should be.¹⁰⁸

With effect from 1 October 2004, employers have either had to pay their output workers the minimum wage for every hour they work, or pay a fair piece rate that allows an average worker to earn the minimum wage. Output workers are those paid by the piece

¹⁰⁸ See DTI website: <http://www.dti.gov.uk/er/nmw/index.htm>

of work produced or task performed and includes homeworkers. Further details are available from the guide on the National Minimum Wage for employers on the Acas TIGER website.¹⁰⁹ Workers who are paid below the minimum wage can complain to HMRC or could take the case to an employment tribunal or civil court.

B. Legislation

1. European Legislation and the Social Chapter

The following is a summary of EC legislation and domestic implementing arrangements. Some of the provisions followed the UK signing of the Social Chapter at the Amsterdam summit on 16 and 17 June 1997, but prior to this were the health and safety provisions of the *Pregnant Workers Directive* and the *Working Time Directive*.

a. *Pregnant Workers Directive 92/85/EEC*

- **Employment Rights:** The right to 14 weeks' maternity leave regardless of length of service or hours of work.
- **National Implementation:** The *Trade Union Reform and Employment Rights Act 1993*. With effect from 15 December 1999 these provisions were replaced by new maternity rights provisions, the *Maternity and Parental Leave etc Regulations 1999*. These in turn were substantially amended for the benefit of women whose expected week of childbirth begins after 6 April 2003 by the *Maternity and Parental Leave (Amendment) Regulations 2002*. The 1999 provisions also introduced a right to parental leave as required by the quite separate 1996 *Parental Leave Directive 96/34/EC* (see below).
- **European legislation:** The *Directive on the Protection at Work of Pregnant Women or Women who have recently given Birth 92/85/EEC*.¹¹⁰ The Directive concerned "the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding".

b. *Working Time Directive (93/104/EC)*

- **Employment Rights:** Minimum entitlements to paid annual leave and rest and limits on working hours.
- **National Implementation:** The *Working Time Regulations 1998*, SI No. 1833, came into force on 1 October 1998. They regulate working time by placing:

¹⁰⁹ TIGER interactive website: <http://www.tiger.gov.uk/> Acas Helpline: 08457 47 47 47 National Minimum Wage Helpline: 0845 6000 678

¹¹⁰ Full Text: <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31992L0085:EN:HTML>

- a general limit of 48 hours on the working week, which can be averaged over 17 weeks. Individual workers can agree in writing with their employers voluntarily to “opt out” of the 48 hour limit.¹¹¹
- a general limit of eight hours on night work, though this, too, can be averaged over 17 weeks.¹¹²

They also confer on adult workers the rights to:

- a daily rest period of at least 11 consecutive hours in each 24 hour period;¹¹³
- a daily rest break of 20 minutes (or length determined by collective or workforce agreement) for those working more than six hours a day;¹¹⁴
- a weekly rest period of 24 hours in each seven day period (or 48 hours in 14 days);¹¹⁵
- four weeks' paid leave each year.¹¹⁶

The DTI have published detailed guidance on the Internet on how the regulations operate.¹¹⁷

- **European legislation:** *Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organization of working time.*

c. ***The Social Chapter***

The Social Chapter is the popular name for the *Social Policy Agreement* made between all the Member States of the European Union (except the UK) at Maastricht in December 1991 and incorporated in the *Social Protocol* to the *Maastricht Treaty*.

The UK originally opted out of the agreement but has been a signatory with effect from May 1999. The way in which this was achieved is that the Social Chapter was, in effect, brought back within the main Treaty covering all Member States, including the UK, by the Amsterdam Treaty – entitled the “social provisions”.¹¹⁸

The ratification process was completed in the UK when the *European Communities (Amendment) Act 1998* received the Royal Assent in June 1998. The current text of the social provisions is contained in the consolidated version of the treaty following the *Treaty of Nice*.¹¹⁹

¹¹¹ Regulations 4 & 5

¹¹² Regulation 6

¹¹³ Regulation 10

¹¹⁴ Regulation 12

¹¹⁵ Regulation 11

¹¹⁶ Regulation 13

¹¹⁷ http://www.dti.gov.uk/er/work_time_regs/wtr0.htm

¹¹⁸ The text of this Social Chapter, to which the UK is a signatory, can be found at pages 179-182 of *The Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related Acts*, Cm 3780, October 1997.

¹¹⁹ Chapter 1 of Title XI of Part Three of the consolidated version of the *Treaty establishing the European Community* - Articles 136 - 145 (“Social Provisions”)

Directives already passed under the Social Chapter were extended to the UK under Article 100 of the EC Treaty which allows the Council, acting unanimously, to issue directives “for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market”. The *Parental Leave Directive* and the *Part-time Work Directive* extended previous directives to the UK in this way:

d. Parental Leave Directive 96/34/EC

- **Employment rights:** Minimum standards of parental leave which automatically apply by law unless an employee’s contract of employment provides better terms
- **National implementation:** *Employment Relations Act 1999* sch.4 Part I inserting new sections 76 to 80 in the *Employment Rights Act 1996* with effect from 15 December 1999; *Maternity and Parental Leave etc Regulations 1999*, SI No.3312 with effect from 15 December 1999; Under the regulations as originally introduced, parents of children born before 15 December 1999 were not entitled to parental leave. After a court case (*R v Secretary of State for Trade and Industry ex p. TUC* [2000] IRLR 565) new regulations were introduced to change this - the *Maternity and Parental Leave (Amendment) Regulations 2001*, SI No.4010, with effect from 10 January 2002.
- **European legislation:** *Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.*¹²⁰

e. Part-time Work Directive 98/23/EC

- **Employment rights:** Right of part-time employees not to be treated less favourably than full time employees
- **National implementation:** *Part-time workers (Prevention of Less Favourable Treatment) Regulations 2000*, SI No.1551 with effect from 1 July 2000
- **European legislation:** *Council Directive 98/23/EC of 7 April 1998 on the extension of Directive 97/81/EC on the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC to the United Kingdom of Great Britain and Northern Ireland.*¹²¹

f. Temporary Agency Work Directive

On 1 July 2002, the Government initiated a consultation on a proposed EC directive on temporary agency workers which would give agency workers the right not to be treated

¹²⁰ Full text: <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31997L0075:EN:HTML>

¹²¹ Full text: <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31998L0023:EN:HTML>

less favourably than comparable permanent workers in the client company.¹²² The proposals were under consideration in Europe for some time but agreement was not reached in the Council of Ministers. Many parents choose temporary working because of its flexibility. The Government are concerned that in its current form the proposal will result in a decrease in employment opportunities. Those who favour the proposals argue that this form of employment is being used to circumvent employment rights and is balanced against employee interests. The employment status of temporary agency workers is a particularly vexed legal question which courts have repeatedly tried to clarify. A recent case suggested that it is likely that the end user of the agency worker will be legally treated as being the employer.¹²³

At the Labour Party National Policy Forum in Warwick in July 2004 the Government restated a commitment to support the *Temporary Agency Work Directive*.¹²⁴ The Government's position was set out in submissions to the Commission in January 2003.¹²⁵

On 27 September 2005, as part of its better regulation initiative, the EU Commission decided to withdraw a number of proposals which were found not to be consistent with the Lisbon or better regulation criteria, to be unlikely to make further progress in the legislative process or to be no longer up to date for objective reasons. After screening 183 proposals for EU laws pending at the European Parliament and Council, the Commission decided to scrap more than a third (68). The proposal on temporary workers is not among the list of measures that were abandoned, however the Commission announced that:

concerning the proposal on Temporary Workers (2002/0072/COD), the Commission reserves its position to reconsider the proposal in light of future discussions on other proposals.¹²⁶

g. Comparisons

The various forms of family-related leave are a central issue in widespread attempts across Europe to create a better work-life balance. Such leave has received increasing attention over recent years from both legislators (often prompted by EU Directives) and the "social partners" (representing employers associations and trade unions). A comparative survey by the European Industrial Relations Observatory (EIRO) published on-line in September 2004 looked at the position in 19 EU Member States and Norway in terms of legislation and collective bargaining on the key forms of family-related leave - maternity leave, paternity leave, parental leave and leave for urgent family reasons - and the views of trade unions and employers on the matter.¹²⁷ It also assessed family-related leave and its effects on gender equality.

¹²² DTI consultation: <http://www.dti.gov.uk/er/agency/directive.htm>

¹²³ *Dacas v Brook Street Bureau (UK) Ltd & anr CA*, 2004 EWCA Civ 217 on 5 March 2004

¹²⁴ Unison, *Full employment and working in modern Britain – TULO Guide to Commitments, National Policy Forum 25 July 2004*: <http://www.unison.org.uk/acrobat/B1470.pdf>

¹²⁵ <http://www.dti.gov.uk/er/agency/em.htm>

¹²⁶ http://europa.eu.int/comm/enterprise/regulation/better_regulation/docs/en_br_final.pdf

¹²⁷ The detailed comparative table is available online:

http://www.eiro.eurofound.eu.int/2004/03/word/cs_parental_annex.doc

The impact of EU initiatives was summarised as follows:

An EU Council Recommendation (92/241/EEC) on childcare of 31 March 1992 encouraged Member States to 'adopt and/or encourage measures to take realistic account of women's increased participation in the labour force, such as special leave to enable all employed parents who so wish, both men and women, to discharge effectively their working, educational and family responsibilities with, inter alia flexibility in how leave may be taken.' Member States should also take and/or encourage initiatives related to 'the sharing of occupational, family and upbringing responsibilities arising from the care of children between women and men'.

The 1992 Council Recommendation was not binding, but there have been binding EU standards in this area that have played a major role in the developments that have taken place in specific countries. Two Directives set out such mandatory norms: Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; and Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (extended to the UK by Directive 97/75/EC). These Directives have driven change by requiring Member States to bring their national legislation into compliance.¹²⁸

2. UK Statutes

a. *Operative provisions*

The current operative provisions in relation to work and families are mainly contained in the *Employment Rights Act 1996* (ERA), Part VIII, the *Social Security Contributions and Benefits Act 1992* (SSCBA) and the *Maternity and Parental Leave etc Regulations 1999* (as amended). Working time rules are mainly contained in the *Working Time Regulations 1998*. The national minimum wage is governed by the *National Minimum Wage Act 1998*, and the *National Minimum Wage Regulations 1999* (as amended).

b. *Employment Relations Act 1999*

- Reformed the law on **maternity leave**. The Act established the new structure but most of the details were contained in the *Maternity and Parental Leave etc Regulations 1999*, SI 1999/3312. Ordinary maternity leave, available to all women, regardless of length of service, was extended from 14 to 18 weeks to align it with Statutory Maternity Pay. The qualifying period for additional maternity leave (lasting for up to 29 weeks after the birth of the baby) was reduced from two years to one year. The changes applied to women whose expected week of childbirth was 30 April 2000 or later.
- Introduced a right to three months' unpaid **parental leave** to be taken before the child's fifth birthday. The Act introduced the right but most of the details were

¹²⁸ EIRO, *Family-related leave and industrial relations*:
<http://www.eiro.euroworld.ie/2004/03/study/tn0403101s.html>

contained in the *Maternity and Parental Leave etc Regulations 1999*, SI 1999/3312. It implemented the *EC Parental Leave Directive* and came into force on 15 December 1999. This followed on from our “signing up to the Social Chapter” at the Amsterdam Summit on 16 and 17 June 1997.

- Introduced a right to a reasonable amount of unpaid **time off** to care for **dependants** in an emergency. This, too, was required by the *EC Parental Leave Directive*, came into force on 15 December 1999 and followed on from “signing up to the Social Chapter” at the Amsterdam Summit on 16 and 17 June 1997.
- Outlawed discrimination against **part-time workers**. The Act required the Secretary of State to make Regulations and gave him the power to issue a Code of Practice. The *Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000*, SI 2000/551 gave part-time workers the right not to receive less favourable treatment than comparable full-time workers, unless this was justified on objective grounds. They implemented the *EC Part-time Workers Directive* and came into effect on 1 July 2000.
- Raised the limit on **compensation for unfair dismissal** from £12,000 to £50,000 from 25 October 1999.¹²⁹ The limit has subsequently been raised in line with inflation under the index-linking provisions of the Act.

c. *Employment Act 2002*

- Introduced a statutory right to two weeks’ **paid paternity leave**. Regulations made under the Act contained the detailed provisions and introduced Statutory Paternity Pay.¹³⁰
- Introduced a statutory right to **paid adoption leave**, equivalent to Statutory Maternity Pay and maternity leave. Regulations made under the Act contained detailed provisions and introduced Statutory Adoption Pay for one parent.¹³¹
- Increased the period for which **Statutory Maternity Pay and Maternity Allowance** are paid from 18 to 26 weeks.
- Introduced an **equal pay questionnaire** in employment tribunal equal pay cases. The Implementing regulations will come into force on 6 April 2003.¹³²
- Gave the parents of children aged under six or disabled children under eighteen, the right to apply to their employers to **work flexibly**; and imposed a duty on employers to consider such requests seriously. Details are contained in the *Flexible Working (Procedural Requirements) Regulations 2002*, SI 2002/3207, and the *Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002*, SI 2002/3236.

¹²⁹ *Employment Relations Act 1999 (Commencement No 2 and Transitional and Saving Provisions) Order 1999*, SI 1999/2830

¹³⁰ The *Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002*, SI 2002/2822; the *Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002*, SI 2002/2818; the *Paternity and Adoption Leave Regulations 2002*, SI 2002/2788

¹³¹ *Ibid.* Also the *Employment Rights Act 1996 (Application of Section 80B to Adoptions from Overseas) Regulations 2003* and the *Paternity and Adoption Leave (Adoption from Overseas) Regulations 2003*

¹³² The *Equal Pay (Questions and Replies) Order 2003*, SI 2003/722

d. Working Time Regulations 1998, SI No.1833

- Implemented the *EC Working Time Directive* on 1 October 1998.
- Gave all employees the right to three weeks' paid holiday a year (four weeks from 23 November 1999) and set general limits of 13 hours on the length of the working day, 48 hours on the length of the working week and eight hours on night work.
- The *Working Time Regulations 1999*, SI No. 3372, which came into effect on 17 December 1999, removed detailed record-keeping requirements and exempted voluntary, unpaid overtime from the 48-hour limit on the working week.

e. Maternity and Parental Leave (Amendment) Regulations 2001, SI No. 4010

- Increased the amount of (unpaid) **parental leave** available to the parents of disabled children from 13 to 18 weeks and (retrospectively) extended the right to this leave to parents of children under five on 15 December 1999 when the *Parental Leave Directive* was implemented.
- Came into force on 10 January 2002.

f. Maternity and Parental Leave (Amendment) Regulations 2002, SI No. 2789

- Extended ordinary (paid) maternity leave from 18 to 26 weeks
- Extended additional (unpaid) maternity leave so as to end 26 weeks from the end of ordinary maternity leave rather than 29 weeks after the week of childbirth
- Reduced the qualifying period for additional maternity leave so that an employee will qualify if she has been continuously employed for at least 26 weeks at the beginning of the 14th week before the expected week of childbirth, rather than at least a year at the beginning of the 11th week before the expected week of childbirth.

g. National Minimum Wage Regulations 1999 (Amendment) Regulations 2004 SI No. 1161

- Made changes to the way in which the National Minimum Wage applies to output workers, including homeworkers. A new "rated output work" system replaced the current system of "fair estimate agreements" under which an employer estimates the hours needed by a homeworker to do a job (subject to the much criticised "four fifths rule") and pays the national minimum wage per hour for hours worked up to that estimate.
- Came into force in October 2004

Appendix: Abbreviations

AAL Additional Adoption Leave

AML Additional Maternity Leave

DLA/AA Disability Living Allowance or Attendance Allowance

DTI Department of Trade and Industry

DWP Department for Work and Pensions

EOC Equal Opportunities Commission

HMRC HM Revenue & Customs

MA Maternity Allowance

NICs National Insurance Contributions

OAL Ordinary Adoption Leave

OML Ordinary Maternity Leave

RIA Regulatory Impact Assessment

SAP Statutory Adoption Pay

SDA Sex Discrimination Act

SMP Statutory Maternity Pay

SPP Statutory Paternity Pay

ERA *Employment Rights Act 1996*

SSCBA *Social Security Contributions and Benefits Act 1992*