



Maternity pay and leave

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Maternity leave and pay are two separate entitlements. In regard to pay, many women are entitled to up to 39 weeks' Statutory Maternity Pay (SMP), paid by their employer, during maternity leave. The first 6 weeks of SMP are earnings related at a weekly rate equal to 90% of average weekly earnings. The remaining 33 weeks are paid at the weekly standard rate SMP of £123.06. To qualify, a woman must satisfy two criteria: the continuous employment rule and the earnings rule. If a woman does not satisfy either of these criteria, she may have an entitlement to Maternity Allowance (MA), which is again payable for 39 weeks. The MA rate is also £123.06 per week. Both rates are likely to be revised in April 2010.

In regard to maternity leave, all pregnant employees are entitled to 52 weeks of leave, irrespective of length of service. There currently a compulsory period of two weeks leave following the birth of the child that most employees must take. Apart from that, a woman can choose how long the period of maternity will be; she does not have to take the full 52 week period. A woman can choose when to start her maternity leave at any date from the beginning of the 11th week before the week the expected week of childbirth.

In December 2004 the Government announced a goal of extending maternity pay to twelve months, from what was then six months. Press reports in 2009 speculated that this goal is now on hold. In September 2009 the Government did announce plans to allow for the last six months of maternity leave to be transferred to the father. The announcement explained that as maternity leave is currently paid for nine months, the father could then receive the final three months of the paid leave entitlement if the mother returns to work after six months. After consultation the Government hopes to introduce regulations to introduce this scheme by April 2010, to have effect for parents of children due on or after 3 April 2011.

A current EU Commission legislative proposal seeks to remove the limits on when a woman can commence her maternity leave before the birth and to increase the number of weeks of compulsory maternity leave to six weeks. The Government has consulted on this proposal.

This note gives a brief account of the current law on maternity pay and leave entitlements. It also sets out some proposed changes to the entitlements both from the UK Government, the European Commission and the Equality and Human Rights Commission.

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For more detailed information on how to calculate maternity leave and pay rights, the following guides may be of help:

- HM Revenue and Customs, [Employer Helpbook for Statutory Maternity Pay](#), E15 2009
- Business Link website, [Maternity Leave and Pay](#)
- Department for Work and Pensions, [NI17A - A guide to Maternity Benefits](#), April 2009

For information about paternity leave and pay, see Library Standard Note, [Paternity pay and leave](#), SN/BT/952, 15 September 2009

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1 Current system

Maternity leave and pay are two separate entitlements. All pregnant employees are entitled to take 52 weeks maternity leave, but an employee must meet qualifying conditions in order to be entitled to statutory maternity pay (SMP).¹ If a pregnant woman is not entitled to SMP, they may be entitled to Maternity Allowance (MA), which is based on different qualifying criteria. 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. This note sets out the statutory minimum schemes. An employer may of course offer maternity pay and leave provision which is more generous than this.

At EU level, the *Pregnant Workers Directive 92/85/EC* provides for a minimum maternity leave period for employees of 14 weeks and for a minimum payment during this leave at the level of sick pay. The maternity provisions in the UK generally either meet, or are more generous than the minimum requirements of this directive.

¹ Business Link website, [Maternity Leave and Pay](#) [on 13 January 2010]

1.1 Maternity pay

Statutory Maternity Pay (SMP)

Many women are entitled to up to 39 weeks' Statutory Maternity Pay (SMP), paid by their employer during maternity leave (prior to April 2007 the entitlement was 26 weeks). To qualify, a woman must satisfy two criteria: the **continuous employment rule** and the **earnings rule**. The continuous employment rule is summarised in the DWP guidance as follows:

The continuous employment rule

To qualify for SMP, you must satisfy the continuous employment rule. You must have been employed by your employer for a continuous period of at least 26 weeks into the qualifying week (which is the 15th week before the week in which the baby is due). This period must include at least one day in the qualifying week.

Although continuous employment usually means employment by the same employer without a break, there are some circumstances when breaks in employment can be disregarded. The employment rule may be modified slightly if your baby is born prematurely.²

The earnings rule is also explained:

The earnings rule

To qualify for SMP, you must satisfy the earnings rule. Your average weekly earnings must be at least equal to the lower earnings limit for National Insurance (NI) purposes. The lower earnings limit is the point at which you start to be treated as if you have paid NI contributions. You will not actually have to pay NI contributions until your earnings reach a higher point called the primary earnings threshold.

The lower earnings limit is reviewed regularly, usually in April. If it changes while you are pregnant, remember that the lower earnings limit that applies to you will be the one that was current at the end of the qualifying week.³

Lower earnings limit (LEL) is the minimum amount of earnings that an employee needs to earn per week to qualify for SMP. For tax year 2009-10 it is £95.00.⁴

The earliest date that SMP can start is from the 11th week before the week the baby is due and the latest is from the day following the birth. The amount of SMP payable is explained as follows:

The amount you get depends on your earnings. The first 6 weeks of SMP are earnings related and you will get a weekly rate equal to 90 per cent of your average weekly earnings (there is no upper limit). The remaining 33 weeks are paid at the weekly standard rate SMP of **£123.06** (from 6 April 2009) or the earnings related rate if this is less than standard rate SMP.⁵

Employers can recover 92% of the SMP they pay out, usually by deduction from monthly payments of tax and national insurance contributions to HMRC. Small employers (who pay £45,000 or less in gross national insurance contributions in a tax year) recover 100% of SMP

² Department for Work and Pensions, [NI17A - A guide to Maternity Benefits](#) [on 13 January 2010]

³ Department for Work and Pensions, [NI17A - A guide to Maternity Benefits](#) [on 13 January 2010]

⁴ HC Deb 15 December 2008 [c87-100WS](#)

⁵ Department for Work and Pensions, [NI17A - A guide to Maternity Benefits](#) [on 13 January 2010]

paid out plus 4.5% in compensation for the fact that SMP is subject to employer's National Insurance.⁶ Employers must keep records of maternity absence, SMP paid and not paid and maternity certificates or other medical evidence.

A historical table of the flat rate of SMP was given in the following PQ:⁷

Chris Ruane: To ask the Secretary of State for Work and Pensions what the level of statutory maternity pay was in each of the last 30 years at today's prices. [93471]

Mrs. McGuire: Statutory maternity pay was introduced in 1987. Since its inception, the first six weeks have been payable at 90 per cent. of the women's average weekly earnings, with no upper limit. Between 1987 and 5 April 2003 this was followed by a flat rate for the remainder of her maternity pay period. From 6 April 2003, the remainder of the maternity pay period is paid at the lesser of the flat rate or 90 per cent. of her average weekly earnings. The standard rates, together with the equivalent at 2005-06 prices, are in the table.

Rates of statutory maternity pay (SMP since 1987 and equivalent in 2005-06 prices)

	<i>Standard SMP rate</i>	<i>Rate at 2005-06 prices</i>
1987	32.85	61.30
1988	34.25	59.75
1989	36.25	59.02
1990	39.25	59.25
1991	44.50	63.30
1992	46.30	63.81
1993	47.95	64.40
1994 (part) ⁽¹⁾	48.80	64.57
1994 (part) ⁽¹⁾	52.50	69.47
1995	52.50	67.42
1996	54.55	67.77
1997	55.70	67.24
1998	57.70	67.93
1999	59.55	68.72
2000	60.20	68.50
2001	62.20	69.14
2002	75.00	80.86
2003	100.00	104.71
2004	102.80	104.75
2005	106.00	106.00
2006	108.85	108.85

⁽¹⁾ SMP rate increased for women with an expected week of confinement of 16 October 1994 or later.

Maternity Allowance (MA)

Women who are not entitled to SMP but meet the qualifying conditions based on their recent employment and earnings record may claim from their Jobcentre Plus office up to 39 weeks Maternity Allowance (MA). The qualifying conditions are explained further in DWP guidance:

To qualify for MA, you have to satisfy two basic rules:

⁶ HM Revenue and Customs, [Pay and time off work for parents](#) [on 13 January 2010]

⁷ [HC Deb 6 November 2006 c931W](#)

- the employment rule
- the earnings rule

You have to satisfy these rules in a test period. The test period is the period of 66 weeks up to and including the week before the week your baby is due.

The Employment rule

You must have been employed and/or self-employed for at least 26 weeks in your 66 week test period. The 26 weeks do not have to be in a row and it does not matter how much you earn. You do not have to be actually physically at work to be employed or self-employed; you might be off work sick or have been on Statutory Maternity Leave for an earlier pregnancy for example.

Weeks when you have not worked a full week count towards your 26 weeks.

If you are self-employed, you must be registered as such with HM Revenue & Customs according to their rules.

The Earnings rule

To get MA your earnings, on average, must be at least equal to the Maternity Allowance Threshold (MAT) which applies at the beginning of your test period. The MAT is £30 a week so you must earn on average at least £30 a week [for tax year 2009-10]⁸. If you have more than one employer, all earnings will count when working out the average.⁹

The guidance also sets out how the MA rate is calculated:

If you satisfy the employment rule and the earnings rule, you will be entitled to MA for a maximum of 39 weeks.

The amount you get depends on your gross average weekly earnings. You will get the standard rate of MA, which is £123.06 a week (from 6 April 2009) or 90 per cent of your gross average weekly earnings, if this calculation results in a figure which is less than the standard rate of MA.

If you have paid Class 2 NI contributions at the end of each week in your 13 week earnings period, you will be treated as having enough earnings to receive standard rate MA.

If you hold a small earnings exception for at least 13 weeks in your test period and you have no other earnings you will be treated as having earnings of £30 a week (equal to the MAT) and receive a weekly rate of MA of £27.00 (90 per cent of the MAT).¹⁰

1.2 Maternity leave

The principal statutory provisions in relation to maternity leave 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 (MAPLE regulations).

Irrespective of length of service a pregnant employee is entitled to maternity leave. There are two types of Maternity Leave: Ordinary Maternity Leave (OML), which is the first 26 weeks'

⁸ HC Deb 15 December 2008 [c87-100WS](#)

⁹ Department for Work and Pensions, [NI17A - A guide to Maternity Benefits](#) [on 13 January 2010]

¹⁰ Department for Work and Pensions, [NI17A - A guide to Maternity Benefits](#) [on 13 January 2010]

maternity leave and Additional Maternity Leave (AML), which is the second 26 weeks' maternity leave. The two periods run consecutively, to give an entitlement to 52 weeks leave. There can be no gap between the two periods. The difference between the two periods relates to a difference in employee's rights and duties between the two periods. However, since the introduction of the *Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2008* (SI 2008/1966) (the 2008 regulations) the distinction is now seen as "rarely relevant".¹¹

A woman can choose when to start her maternity leave at any date from the beginning of the 11th week before the week the expected week of childbirth (EWC), provided that notice is properly given to the employer. An employee must give notice before the end of the 15th week before the expected date of birth and state the expected week of childbirth and the date of the start of the leave.¹² If the employee has a pregnancy-related absence in the four weeks before the EWC, OML automatically starts immediately.¹³

A woman must take a compulsory period of two weeks leave commencing from the date of childbirth.¹⁴ This is essentially a health and safety measure. An employer who requires a woman to work during this period is guilty of an offence. Apart from this compulsory period a woman is free to choose how many weeks maternity leave she would like to take up to a maximum of 52 weeks, provided that she has given her employer sufficient notice of her return – this is currently 8 weeks notice of the date that she wishes to return.¹⁵

The *MAPLE Regulations* govern the entitlement to return to work of a woman returning from maternity leave. There is a difference in entitlement here between OML and AML. Under regulation 18(1) the right to return to work after OML is an entitlement to "return to the job in which she was employed before her absence". Under regulation 18(2) the right to return after AML is phrased slightly different: "...is entitled to return from leave to the job in which she was employed before her absence or, if it is not reasonably practicable for the employer to permit her to return to that job, to another job which is both suitable for her and appropriate for her to do in the circumstances."

The *2008 regulations* apply to women whose EWC begins on or after 5 October 2008 to give the same rights to non-pay contractual terms and conditions to a woman on additional maternity leave (AML) as when on ordinary maternity leave (OML). Prior to this entitlement to such benefits only continued during OML.

The 2008 regulations are a result of a High Court order in the case of *Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] EWHC 483 (Admin)*, in which the Court ruled that the *Employment Equality (Sex Discrimination) Regulations 2005* (the "2005 Regulations"), did not comply with the requirements of European law on equal treatment. As a consequence, the *Sex Discrimination Act 1975* has been amended to eliminate any distinction in the types of claim a woman can bring in relation to the periods of ordinary and additional maternity leave.

This now means a woman may have a claim if she is not afforded the same benefits of the terms and conditions of employment during AML as she is during OML. The seniority, annual

¹¹ Harvey on Industrial Relations and Employment Law, Part 2, Issue 196, J/213, *Maternity Leave*, section 132

¹² Regulation 4, *Maternity and Parental Leave etc Regulations 1999*, SI 1999/3312

¹³ Regulation 6, *Maternity and Parental Leave etc Regulations 1999*, SI 1999/3312

¹⁴ Regulation 8, *Maternity and Parental Leave etc Regulations 1999*, SI 1999/3312

¹⁵ Regulation 11, *Maternity and Parental Leave etc Regulations 1999*, SI 1999/3312

leave entitlements and similar rights will be unaffected by the AML absence. The Government's Business Link website explains the consequences of this further. It makes clear that the difference in the right to return to a particular job between the end of OML and AML remains:

The actual non-pay contractual terms and conditions these employees will continue to benefit from during AML will depend on their contract of employment. They could include one or more of the following:

- the build-up of contractual annual leave
- the provision of a company car or mobile phone

You will also have to take periods of AML into consideration when you calculate length of service for seniority, pension, annual leave entitlement and similar contractual rights.

In other words, employees who satisfy the above dates and who wish to exercise their right to AML will be entitled to benefit from all their non-pay contractual terms and conditions throughout their entire period of statutory leave.

The different right to return at the end of OML and AML remains.¹⁶

For more information about sexual harassment or discrimination at work, see Library standard note, [Sexual harassment at work](#), SN/BT/148, 30 June 2008.

Maternity leave provisions prior to April 2007 used to be symmetrical with maternity pay in that Ordinary Maternity Leave would be paid leave and Additional Maternity Leave would be unpaid leave. Now, the maternity pay period extends for an additional 13 weeks into the Additional Maternity Leave period. In terms of pension rights, an encyclopaedia on employment law clarifies the situation after the effect of the *2008 Regulations*. It states that under schedule 5, para 5 of the *Social Security Act 1989*, pensionable service must be credited for OML and all *paid* AML, but need not be credited for any *unpaid* period.¹⁷ The Pensions Advisory Service explains this further:

Impact on those in Salary Related Pension Schemes

Any paid maternity leave must be treated as pensionable service. Benefits are based on the salary before going on maternity leave (this includes any Death in Service benefit). Employee contributions are based on actual pay, whilst the employer must pay a contribution based on the salary the employee would have received had they not gone on maternity leave. This includes the right to any pay increase that would have occurred.

Any unpaid maternity leave which follows a period of paid maternity leave does not count as pensionable service. However, employment before and after the break must be treated as continuous.

In some schemes, the employee can make up any unpaid leave by way of extra contributions. In some generous occupational money purchase schemes, as long as she returns from maternity leave and remains in the scheme for a set period of time, the employer makes up any missed contribution.

¹⁶ Business Link website, [Changes in Additional Maternity Leave Rights](#), 30 July 2008

¹⁷ Harvey on Industrial Relations and Employment Law, Part 2, Issue 196, J/224, *Maternity Leave*, section 176

Impact on those in Money Purchase Pension Schemes (including GPPs and Stakeholders)

A woman on paid maternity leave will continue to pay contributions. The rate will apply to the amount of pay actually received.

If the employer normally contributes to the plan, he will still be required to continue contributing during paid maternity leave. These contributions will be based on the pay the employee would have received had she not gone on maternity leave. In schemes where the rules state that the employer will match the employee's contribution, the employer must still contribute at the level the employee would normally pay and not what she is actually paying during her maternity leave.

Any death benefits payable under the scheme must be based on the same benefits as would have been paid had the employee been working normally.

During a period of unpaid maternity leave, neither the employee nor the employer will be expected to contribute. The employee may, if she chooses, pay contributions during this period but the employer will not have a duty to contribute (unless their contract of employment states otherwise).¹⁸

2 Proposed changes

2.1 Government: Extension to 12 months paid maternity leave

In an associated document to the *Pre-Budget Report* of December 2004 the following future changes were announced, including a goal of extending paid maternity leave to a full 12 months. This relates to both SMP and MA:¹⁹

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

In February 2005, the Government published a consultation document, *Work and Families Choice and Flexibility*.²⁰ In it the Government set out further its case for extending maternity pay from six months, to nine months from April 2007, to one year by the end of what was then the next Parliament (now this Parliament):

Research has shown that paid maternity leave is associated with a range of significant health benefits for mothers and their babies. These include reduced levels of maternal depression, lower infant mortality, fewer low birth weight babies, more breastfeeding

¹⁸ Pensions Advisory Service, *Maternity Leave* [on 13 January 2010]

¹⁹ HM Treasury, *Choice for parents, the best start for children: a ten year strategy for childcare*, December 2004

²⁰ HM Government, *Work and Families Choice and Flexibility*, February 2005

and more use of preventative health care. Unpaid leave does not have the same protective effects.

[...] In order to give children the best start in life and to give parents more choice about how to balance their work and family responsibilities, the Government intends to extend paid maternity and adoption leave to nine months from April 2007 towards the goal of a year's paid leave by the end of the next Parliament.²¹

The Government published its response to this consultation in October 2005.²² It set out the general view of the responses it had received in relation to its proposal to extend maternity pay:

The general response to the commitment to extend maternity and adoption pay to nine months, with the goal of 12 months by the end of the Parliament, was positive. Parents' groups and unions welcomed the extension and the vast majority of employers recognised the need to work constructively with all concerned to make these new rights work for both business and employees.

[...]Some businesses – particularly small employers and their representative bodies - expressed concerns over the extension of the statutory pay period, arguing that the absence of an employee over a long period can cause difficulties and additional costs to the employer. We will ensure that the views of employers are fully understood and considered before any further extension in the period of maternity and adoption pay to 52 weeks.²³

Having considered the responses, to the *Work and Families Choice and Flexibility* consultation, the Government confirmed its proposals in its response to the consultation:

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 distinction has however, subsequently been altered by the *Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2008*]. This will minimise the administrative changes for business.

We will extend the period of maternity pay from six months to nine from April 2007 on the road to 12 months.

[...] 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.²⁴

²¹ HM Government, *Work and Families Choice and Flexibility*, February 2005 p25

²² HM Government, *Choice and Flexibility Government Response To Public Consultation*, October 2005

²³ HM Government, *Choice and Flexibility Government Response To Public Consultation*, October 2005 p10

²⁴ HM Government, *Choice and Flexibility Government Response To Public Consultation*, October 2005 p4

On 21 June 2006 the *Work and Families Act 2006* was passed. Section 1 of this Act gives provision for the Government to make regulations to extend the period of maternity pay to a maximum of 52 weeks.²⁵

In February 2009 there was unconfirmed speculation in the press however, that implementation of the extension to 12 months paid maternity leave would be delayed or postponed indefinitely amid concern about the increased cost to business in the recession.²⁶ On 31 May 2009 it was again reported that plans to extend paid maternity leave were being “reviewed” and were currently “on hold”:

PLANS to allow parents to share a year’s paid maternity leave have been shelved by Lord Mandelson after complaints from businesses. The pledge, contained in Labour’s manifesto at the last election, would have given fathers six months’ paid leave to look after a baby, allowing mothers to return to work early. Ministers also promised to extend paid maternity leave from nine to 12 months.

The plans were seen as a key plank of Labour’s family-friendly agenda, giving parents more flexibility on who looked after the children. They would also have allowed people in lesbian and gay civil partnerships to share maternity leave.

The proposals were applauded by family groups and championed by the government’s equality ministers, including Harriet Harman, the deputy Labour leader. However, they were sharply criticised by small firms which complained that they would cost too much and create more red tape.

A spokesman for Mandelson’s business department said it was now reviewing the proposals and the plans to introduce the rights this year were on hold.

“We have not yet announced a date for extending maternity and paternity rights,” he said. “We are continuing to review the appropriateness of all new regulations due to come into force in the current economic climate.

“It is only right that in tough economic times we look afresh at the costs and benefits of new regulations.”

The decision to shelve the plans was condemned by women’s and fathers’ groups. Fathers are now entitled to only two weeks’ paternity leave.

Katherine Rake, director of the Fawcett Society, which campaigns for more women in public life, said: “It looks like Peter Mandelson is undermining the equalities agenda again. He cannot use the recession as an excuse to roll back hard-won commitments to mums and dads.

“They will be hugely disappointed if ministers fail to deliver their commitment to deliver more paternity leave for dads.”²⁷

On 15 September 2009 the Government announced plans to go ahead with proposals to allow for the last six months of maternity leave to be transferred to the father.²⁸ The announcement explained that as maternity leave is currently paid for nine months, the father could then receive the final three months of the paid leave entitlement if the mother returns to

²⁵ Work and Families Act 2006 [explanatory notes](#)

²⁶ See “Lord Mandelson plan to tear up new laws splits party”, *The Times*, 23 February 2009

²⁷ Paternity leave scheme shelved by Lord Mandelson, *The Times*, 31 May 2009

²⁸ Department for Business, Innovation and Skills press release, *Families are set to benefit from new leave rights that will give more choice and flexibility to parents as to how they use maternity and paternity leave*, 15 September 2009

work after six months. After consultation the Government hopes to introduce regulations to introduce this scheme by April 2010, to have effect for parents of children due on or after 3 April 2011.²⁹ No reference was made in this announcement to the proposal to extend maternity pay to 52 weeks. The *Financial Times* reported that the plans to extend maternity leave further had been dropped:

The new right would allow mothers, who go back to work after six months, to transfer their unused six months of maternity leave to their partner. This would give fathers a statutory right to up to three months' paid and three months' unpaid leave, in contrast to the maximum fortnight's paid leave they enjoy at present. Gay couples could also share maternity leave.

Business has won its fight to persuade the government to drop a linked proposal to extend paid maternity leave from nine months to a year, in spite of a Labour manifesto commitment.³⁰

2.2 Proposed changes at EU level

On 3 October 2008 the EU Commission issued a [work-life balance "package"](#). It contains a legislative proposal (the proposal), which would amend the *Pregnant Workers Directive (92/85/EEC)*.³¹ The aim is to “strengthen women's legal entitlement to family-related leave, namely maternity leave”.

The proposal was examined by the House of Commons European Scrutiny Committee in its thirty-eighth report session 2007-08. It set out the main aspects of the proposal in relation to maternity leave and pay:

- require Member States to take the measures necessary to ensure that a worker who is pregnant, who has recently given birth or who is breastfeeding is entitled to a continuous period of maternity leave of at least 18 weeks (rather than 14 weeks, as at present);
- require that those 18 weeks include compulsory leave of at least six weeks after childbirth;
- require Member States to ensure that women can choose when to take the non-compulsory portion of maternity leave;
- require the pre-natal period of maternity leave to be extended by any period between the expected date and the actual date of childbirth, if later; and
- require Member States to ensure that additional maternity leave is granted in the event of premature childbirth, hospitalisation of the baby at birth, multiple births or birth of a baby with disabilities.³²

In terms of the proposal to increase the minimum length of maternity leave for EU countries from 14 weeks to 18 weeks, the UK provision is already more generous than this. In the UK employees are generally entitled to 52 weeks maternity leave - and if an employee meets certain requirements, 39 weeks of it will be paid at the statutory rate.

²⁹ Ibid

³⁰ “[Plan to extend UK paternity leave](#)”, *Financial Times*, 14 September 2009

³¹ [Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC 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, COM\(2008\) 600/4](#)

Some press reports claim that the proposal would increase maternity pay to 18 weeks at full pay (Daily Telegraph, [European Commission to force women to take six weeks off after giving birth](#), 20 November 2008). However, the text of the proposal suggests that Member States would be able to choose cap the level of pay:

Point 3 modifies the existing rule on the payment given during maternity leave: it provides for the principle of the payment of the full monthly salary received prior to the maternity leave. However, this is not mandatory since this payment may be subject to a ceiling, to be determined by the Member State, provided that it is not set below the rate for sick pay. Member States may determine if the level of the payment during maternity leave corresponds to the one of the last monthly salary before maternity leave or to an average to be calculated over a certain period.³³

In a Government memorandum published in the European Scrutiny Committee Report, it can be seen that the Government has asked for further clarity about this point:

The proposal for the revised directive is to require the payment of full pay during maternity leave albeit subject to a cap. The potential of full pay is a significant spending risk and is at variance with the UK's general scheme of benefit payments — basic flat rate benefits topped up according to individual family need by a system of means-tested benefits and tax credits. While a mandatory move to full pay during maternity leave is not the Commission's intention and pay may be subject to a ceiling, the UK will be seeking further legal clarity in this area.³⁴

The proposal to extend the period of compulsory leave would have an impact on the current situation in the UK. At present UK employees have to take two weeks of compulsory maternity leave after childbirth.³⁵ In the proposal this would be extended to six weeks immediately after childbirth - this is provided for in proposed article 1.

The Government memorandum highlights concern about the proposals to extend the length of leave available in the event of premature and multiple births:

The length of the leave available in the UK ensures that a mother has sufficient leave to take account of her needs if her child is premature or hospitalised, or she has a multiple birth. The proposal to allow mothers to take additional leave in these types of situations would increase the administrative burden for employers managing maternity absence and create uncertainty for mothers and their employers about the overall length of maternity leave, reducing their ability to plan. The Government will be seeking clarity about how to reconcile the objectives of the Commission proposal with the reality of a much higher maternity leave provision.³⁶

There is also concern about allowing a woman to take an increased proportion of the leave before the birth:

"In the UK women have the freedom to choose to take their maternity leave any time from the 11th week before their baby is due. The UK is concerned that Article 8.2 as

³² House of Commons European Scrutiny Committee, [Thirty-Eighth Report](#), session 2007-08, HC 16-xxxiv, 18 November 2008

³³ [Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC 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](#), COM(2008) 600/4, p8

³⁴ Government memorandum, House of Commons European Scrutiny Committee, [Thirty-Eighth Report](#), session 2007-08, HC 16-xxxiv, 18 November 2008

³⁵ Regulation 8, *Maternity and Parental Leave etc Regulations 1999*, SI 1999/3312

³⁶ Government memorandum, House of Commons European Scrutiny Committee, [Thirty-Eighth Report](#), session 2007-08, HC 16-xxxiv, 18 November 2008

proposed, in providing complete flexibility to a woman in when to take her non-compulsory maternity leave could mean that in the UK a mother could take the majority of her maternity leave prior to confinement, by choosing to start their maternity leave early in their pregnancy. This contradicts the aim of the proposal to provide additional health protections following the birth of the child."³⁷

This was a similar concern to that of the Institute of Directors who said that it thought that this proposal may cause too much uncertainty for employers:

The proposal provides for free choice as to when the non-compulsory part of maternity leave can be taken (New Article 8, paragraph 2). There is no limit placed on how soon before or after the birth the leave can be taken, or any requirement for the leave to be taken consecutively.

This has the potential to make life impossible for employers in terms of arranging cover, and would almost certainly reduce the appeal of employing women of child bearing age.³⁸

The Government issued a Consultation seeking views on the Commission's proposal on 24 March 2009.³⁹ The deadline for responses was 22 June 2009 and a Government response is still awaited. Page 5 of the Consultation has a useful comparative table showing how the Commission's proposal relates to provisions in the UK at the moment. The Consultation also contains an Impact Assessment on the potential costs and benefits of implementing the Commission's proposals.

The progress of the proposed Directive in the European Parliament can be tracked on the Parliament's Legislative Observatory website:

www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=COD/2008/0193

2.3 The Equality and Human Rights Commission

On 30 March 2009 the Equality and Human Rights Commission (EHRC) published a report, *Working Better*, which made recommendations for changes to the flexible working and parental leave regimes.⁴⁰

The report states that the paternity and maternity leave and pay regimes in Britain convey the message that child care is the primary responsibility of women:

Britain now stands out internationally for having a very long period of leave reserved for mothers, most of it at a low rate of pay, and for having relatively weak parental leave. It also has a very short period of paternity leave. This is in comparison to other countries with long well-paid periods of parental leave with higher take-up rates by fathers. Together, long low-paid maternity leave and short low-paid paternity leave convey the message that it is primarily women who are responsible for the care of young children.⁴¹

³⁷ Government memorandum, House of Commons European Scrutiny Committee, *Thirty-Eighth Report*, session 2007-08, HC 16-xxxiv, 18 November 2008

³⁸ Institute of Directors, *Briefing Paper on the Proposed Pregnant Workers and Mothers Directive*, 1 December 2008

³⁹ Department for Business, Enterprise and Regulatory Reform, *European Commission proposals to amend the Pregnant Workers Directive: a Consultation*, 24 March 2009

⁴⁰ Equality and Human Rights Commission, *Working Better*, 30 March 2009

⁴¹ Equality and Human Rights Commission, *Working Better*, 30 March 2009, p22

The report finds that women's career prospects can be "damaged" after having children and that men's choices about helping with parenting are "constrained":

Many women's career prospects are damaged after they have children. The gender pay gap more than trebles when women reach their 30s as a result of the financial penalties associated with motherhood. Women often take part-time work in lower paid jobs and - let us be clear here - that may be out of choice. But there is strong evidence that it is not all based on choice.⁴²

The report concluded that gender-neutral parental leave, as in some European countries, would enable "real choice" for men to take up caring responsibilities and women to make "fuller economic use of their skills".⁴³ The EHRC made a number of recommendations to change the parental leave system. For mothers this includes eventually reducing the maternity pay period to 6 months, but at a higher rate of 90% pay:

For fathers:

- the first two weeks' paternity leave at the birth of their child would be retained, but at 90 per cent pay
- four months of dedicated 'parental leave' which can be taken after the mother's six months of maternity leave comes to an end. This right would be available until their child's fifth birthday
- at least eight weeks of that leave should be supported at 90 per cent of pay.

For mothers:

- The first 26 weeks would remain dedicated maternity leave for mothers. The number of weeks paid at 90 per cent pay would be increased from six to 26 weeks
- After six months, mothers would get the same 'parental leave' arrangements as fathers.

For both:

- Four months of parental leave that either parent can take, at least eight weeks at 90 percent of pay.

For low income parents:

- the research found that fathers in families with an income of up to £15,000 are much less likely (46 per cent) to take paternity leave than those in the highest income group (59 per cent)
- 48 per cent of mothers who are lone parents are far more likely to take a short period of maternity leave, compared to 31 per cent of mothers in a relationship
- the Commission's recommendations would increase the rates of pay for both mothers and fathers, ensuring more low income and single parents can afford to take leave.⁴⁴

⁴² Equality and Human Rights Commission, *Working Better*, 30 March 2009, p23-24

⁴³ Equality and Human Rights Commission, *Working Better*, 30 March 2009, p29

⁴⁴ Equality and Human Rights Commission press release, *Commission calls for radical approach to parental leave that gives mothers and fathers real choice*, 30 March 2009

The EHRC suggests that the changes to the parental leave system should be made over the next ten years, by way of an incremental approach:

Stage 1: Expand eligibility; improve levels of payment; introduce paternity allowance

The key features of this stage are as follows:

- Retain entitlement to 80 weeks leave in total before the child is five years old
- Expand eligibility for benefits: remove requirement for the claimant to have worked for the same employer continuously for 26 weeks
- Introduce paternity allowance (PA) as an equivalent entitlement to maternity allowance (MA) for fathers
- Extend higher rate statutory maternity pay (SMP) to 18 weeks at 90 percent pay (leaving 21 weeks at the flat rate)
- Improve level of payment for statutory paternity pay (SPP) to 90 percent of pay
- Increase the flexibility of paternity and parental leave, so there is no need to take leave in blocks of a whole week.

[...]

Stage 2: Introduce dedicated, non-transferable periods of leave for mothers / fathers

The key features of this stage are as follows:

- Retain entitlement to 80 weeks' leave in total before the child is five years old and other features of Stage 1
- Reduce the flat rate SMP period from 21 weeks to eight weeks, and instead introduce up to 52 weeks' parental leave, divided equally between mothers and fathers: 12 weeks at 90 percent pay; 12 weeks at a flat rate of £117.18 per week; and 28 weeks unpaid
- Within parental leave, assign dedicated, non-transferable 'mummy months': four weeks at 90 percent pay and four weeks at the flat rate and dedicated, non-transferable 'daddy months': four weeks at 90 percent pay and four weeks at the flat rate – both with a 'use it or lose it' condition to encourage take-up.

[...]

Stage 3: Extend periods of paid parental leave for mothers / fathers

The key features of this stage are as follows:

- Retain entitlement to 80 weeks' leave in total before the child is five years old and other features of Stage 2
- Extend higher rate statutory maternity pay (SMP) to 26 weeks at 90 percent pay
- Divide the 52 weeks' parental leave into 4 'mummy months' (17.3 weeks); 4 'daddy months' (17.3 weeks); and 4 months (17.3 weeks) for either parent

- Increase payment for the 52 weeks' parental leave: either 26 weeks at 90 percent pay and 26 weeks unpaid; or all 52 weeks at 50 percent pay.⁴⁵

A report in the press said that the Government would consider the costs of the proposals and assess the implications:

A Department for Business spokesman said: "These are difficult times for businesses and families and the EHRC's proposals look to have considerable costs attached to them. We will need to take time to more fully assess the implications."⁴⁶

The CBI was reported to have expressed concern about the costs of the proposals:

The Commission estimates that it would cost £5.3 billion (introduced incrementally over three years) above the £2.07 billion the UK already spends annually on parental leave. It argues the total cost of 0.53 per cent of GDP is lower than the 0.84 per cent spent on child benefit.

However, the CBI insisted yesterday that such costs were unaffordable, bearing in mind the "alarming state of the public finances". Katja Hall, CBI Director of HR Policy, added: "While this report raises some interesting talking points, the proposal to introduce paid parental leave to be shared between parents would be complex and costly for companies to administer."⁴⁷

⁴⁵ Equality and Human Rights Commission, *Working Better*, 30 March 2009, p42-45

⁴⁶ "A gender for change: fathers to get months of paid leave in paternity rights shake up" *The Guardian*, 30 March 2009

⁴⁷ "Do we need to change the rules on maternity and paternity leave?" *The Independent*, 31 March 2009