EMPLOYMENT

Law guide - Family matters

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Annual leave

Introduction

An employee is entitled to a minimum amount of paid leave (statutory annual leave) of four working weeks in any leave year. The employer can optionally use an accrual system whereby during the first year of employment the proportion of the leave which may actually be taken (with the employer's agreement) builds up over the year. The amount of leave which may be taken builds up monthly in advance at the rate of one-twelfth of the annual entitlement each month.

The statutory annual leave to which the employee is entitled is not in addition to leave that may have been granted under the terms of a contract of employment.

Leave year

Usually the 'leave year' will be specified in the contract of employment. If no mention is made of the 'leave year' it will start on the date on which your employee commences employment, and each subsequent anniversary of either of these dates.

Leave may only be taken in the leave year in respect of which it is due. There are exceptions where it has not been possible to take annual leave because of absence through sickness, or where the employee is on a period of statutory leave (such as Maternity Leave). Leave entitlement may not be replaced by a payment instead of the leave, except where employment is terminated. Your employee must give you written notice specifying the dates on which leave is to be taken unless there is an agreement to vary or exclude the notice.

Notice period

You have the power to issue a notice to your employee requiring them not to take leave on particular days. Such notice must be given to your employee as many days in advance of the earliest day specified in the notice as the number of days to which the notice relates. Once again this right can be modified or excluded by an agreement between you and your employee.

Payment instead of leave

Where your employee loses part of their entitlement to annual leave because their employment terminates during the year, they do have a right to payment instead of leave. The amount that is due and the way in which that amount is calculated may form part of an agreement between you and your employee. If not, the period of leave to which your employee is entitled is multiplied by the proportion of the leave year that expired before employment ended. The period of leave taken by your employee between the start of the leave year and the date of termination of his employment is deducted.

If your employee received more leave in a particular year than was properly due, the regulations do provide for you to be compensated.

A normal week's pay is therefore:

- if your employee works regular hours, what they would earn for a normal working week
- if the normal working hours vary from week to week, the average hourly rate of pay your employee receives, multiplied by an average of normal weekly working hours over the previous twelve weeks
- if your employee does not work normal hours at all it is the average pay received over the previous twelve weeks

Normal working hours are said to be the normal hours fixed by the contract of employment. Overtime working hours are not normal working hours unless the contract fixes a minimum number of hours (in which overtime is included) that is more than the notional fixed hours.

Sickness absence and annual leave

There are special rules regarding the treatment of an employee's entitlement to statutory annual leave whilst they are unable to work due to sickness or injury.

Any employee who is sick while on annual leave should get a medical certificate from their doctor as soon as possible, in order to cover the days that they were sick. They should then give this certificate to their employer as soon as they return to work. By doing this, the sick days will not count as annual leave and will be available to employees' at a later date.

Following Court of Justice of the European Union rulings on accrual of annual leave, the Organisation of Working Time Act 1997 has been amended to make important legislative changes. As a result, workers will be able to accrue annual leave when they are on long term sick leave. Now employees will be able to carryover such accrued annual leave for a period of 15 months after the leave year in question.

Maternity Leave and annual leave

If a woman is on Maternity Leave, she must be permitted to take her statutory annual leave during a period other than the period of Maternity Leave.

Failure to comply

If you fail to provide your employee with paid annual leave, the sanctions are similar to those that were imposed for breach of rest entitlements as outlined above. Where you fail to provide payment for a period of annual Leave or pay for untaken leave on termination of employment, the employment tribunal must order payment of the amount due to the employee.

Agreeing alternative work times

Introduction

The Organisation of Working Time Act 1997 (the "1997 Act") enables you and your employee to enter into an agreement to establish the way in which some of the working time rules apply in the workplace. Provision is made for workforce agreements with the workforce representative, collective agreements which are made with the independent recognised trade unions and written agreements of employment that are legally enforceable agreements entered into between you and your employee.

Limits on working time

The main situation in which written agreement between you and your employee can be utilised, is to modify or exclude the limits on weekly working time. If you enter into an agreement with such modifications or exclusions, you must allow your employee wherever possible to an equivalent period of compensatory rest.

If it is not possible in the circumstances to provide the required rest periods, you must safeguard your employee's health and safety by implementing appropriate protection.

In the case of a workforce agreement, the 1997 Act provides for the following conditions:

- the agreement is in writing
- it has effect for a specified period not exceeding five years
- it applies either to 'relevant members of the workforce' or to all relevant members of the workforce who belong to a 'particular group'
- it has been signed by representatives of the workforce/group (or, if an employer employs 20 or fewer workers, by the majority of workers)
- before it was made available for signature, the employer provided all workers to whom it was intended to apply, with copies of the text of the agreement and such guidance to those workers who might reasonably require it, in order to understand it fully

For these purposes, the relevant members of the workforce are all the workers employed by a particular employer, excluding any worker whose terms and conditions are provided for, wholly or in part, in a collective agreement.

Workforce/group

A particular group is a group of the relevant members of the workforce who undertake a particular function, work at a particular workplace or belong to a particular department or unit within the employer's business.

The requirements relating to the election of representatives of the workforce/group are the following:

- the number of representatives to be elected is determined by the employer
- the candidates for election are relevant members of the workforce/group
- no one who is eligible to be a candidate is unreasonably excluded from standing for election
- all the relevant members of the workforce/group are entitled to vote and may cast as many votes as there are representatives to be elected
- the election is conducted so as to secure that insofar as it is reasonably practicable, those voting do so in secret, and votes given at the election are fairly and accurately counted

Adoptive Leave

Adoptive Leave and pay

Adoptive Leave and pay allows one member of an adoptive couple to take paid time off work when their new child starts to live with them. Paternity leave and pay may be available for the other member of the couple, or the adopter's partner.

The adoptive parent may take up to 24 weeks ordinary Adoptive Leave (OAL) followed by a further 16 weeks Additional Adoptive Leave (AAL).

Notice of intention to take Adoptive Leave

Adopters are required to inform their employers of their intention to take Adoptive Leave the employee giving their employee four weeks' notice. The employee should tell their employers:

- when the child is expected to be placed with them
- when they want their Adoptive 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).

Employers have 28 days in which to respond to their employee's 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 Adoptive Leave is taken

Carer's Leave

Who are dependants?

A dependant is defined in the Social Welfare (Consolidation) Act 2005 and can be a husband, wife, child or parent of the employee. It can also include 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.

In cases of illness or injury, or where care arrangements break down, a dependant may also be someone who reasonably relies on the employee for assistance. This may be where the employee is the primary carer or is the only person who can help in an emergency; for example, an aunt who lives nearby who the employee looks after outside work falls and breaks a leg, where the employee is closest on hand at the time of the fall.

Carer's Leave

An employee has a right to take a reasonable amount of time off work to take necessary action to look after a dependant and deal with family emergencies. This right to dependent care leave does not include an entitlement to pay so whether or not an employee will be paid is left to the contract of employment. Employees may be eligible for carer's benefit if they have enough PRSI contributions.

Employees must have worked for their employer's for a continuous period of 12 months before they are eligible for Carer's Leave. Employees must give their employer at least 6 weeks' notice of their intention to take Carer's Leave.

The employee must give four weeks' notice in writing of their intention to return to work. There may be exceptional circumstances where an employee returns to work before it was possible to contact the employer, but he or she should still tell the employer the reason for the absence on returning.

Employers who think that an employee is abusing the right to time off should deal with the situation according to their normal disciplinary procedures.

Protection from dismissal and detriment

Employees are protected from being penalised or dismissed because they have taken, or have sought to take, time off under their right to Dependant Care Leave. For example, someone who is moved to lower grade work because they have exercised this right would be able to make a complaint that they have suffered a detriment.

The term 'detriment' can cover a wide range of discriminatory actions, such as denial of promotion, facilities or training opportunities which the employer would otherwise have offered or made available.

An employee who believes that he or she has unreasonably been refused time off or has suffered a detriment for taking or seeking to take time off, should first seek to resolve the dispute by mutual agreement with his or her employer - perhaps through the business's own grievance or appeals procedure where one exists.

Family emergencies

This right enables employees to take action which is necessary to deal with an unexpected or sudden problem concerning a dependant, and make any necessary longer term arrangements.

If a dependant falls ill, or has been injured or assaulted

The illness or injury need not necessarily be serious or life-threatening, and may be mental or physical. The illness or injury may be a result of a deterioration of an existing condition; for example, a dependant may be suffering from a nervous breakdown. He or she may not require full-time care, but there may be occasions where his or her condition deteriorates, and his or her partner or parent, son or daughter, needs to take time off work in consequence. The right to time off is available where a dependant has been assaulted but is uninjured; for example, when a dependant has been a victim of a mugging incident, but has not been physically hurt, the employee can take time off work if necessary to comfort or help the victim.

When a dependant is having a baby

Where necessary, an employee can take time off to assist a dependant when she is having a baby. This does not include taking time off after the birth to care for the child – see Parental Leave.

Longer term care arrangements

Where a dependant needs to be cared for because of an illness or injury, the employee can take time off work to make longer term care arrangements. This might mean making arrangements to employ a temporary carer or taking a sick child to stay with relatives.

To deal with a death of a dependant

When a dependant dies, an employee can take time off to make funeral arrangements, as well as to attend the funeral. If the funeral is overseas, then the employer and employee will need to agree a length of absence which is reasonable in these circumstances.

Disruption to a dependant's care

Time off can be taken where the normal carer of the dependant is unexpectedly absent; for example, a child-minder or nurse may fail to turn up as arranged, or the nursery or nursing home may close unexpectedly.

Incidents during school hours

An employee can take time off to deal with a serious incident involving his or her child during school hours. For example, if the child has been involved in a fight, is distressed, has been injured on a school trip or is being suspended from school.

Frequently asked questions

Q: Can both parents take time off work if their child falls ill?

A: There may be times when both parents want to take time off work under this right and it may be necessary for them to do so. Employers and employees need to adopt a common-sense approach depending on the circumstances of the situation. Both parents need to take time off if their child has had a serious accident, but it is unlikely to be necessary for both parents to be absent from work if the child-minder fails to turn up.

Q: Can an employee take time off work if a boiler bursts?

A: No. Time off for emergencies which are not covered by this right is a contractual matter between an employer and employee.

Q: What happens if the employee needs longer time off, or knows in advance that the problem is going to arise?

A: The dependent care leave right is generally for unexpected matters. The Employment Appeals Tribunal would suggest that unexpected difficulties that were known about for 14 days will still entitle a mother to dependent care leave, employers should encourage their employees to ask for leave in the usual way if they know in advance that they are going to need time off. This may involve someone taking annual leave or some other form of leave if the employer provides it. Or, if the reason they need leave relates to their child then they may be entitled to take Parental Leave.

Q: Does an employer need to keep records of time off taken under this right?

A: Employers are not required to keep records of time off taken under this right, although may want to do so for their own purposes.

Pregnancy at work

Ensuring the health and safety of pregnant workers

In addition to your general duties to the health and safety of your workers, you have an additional legal duty to protect the health and safety of all women of child bearing age and pregnant mothers at work. This includes workers who could be pregnant as well as those who you know are pregnant.

Risk assessments

You should carry out a specific health and safety risk assessment taking both preventive and protective measures for female workers in this group.

You should take all reasonable and practical steps to:

- avoid risks, such as removing or preventing exposure to the hazards
- reduce or remove any unavoidable risks
- adapt the workplace or equipment for a worker
- develop an overall prevention policy covering such matters as work conditions, working environment and organisation of work

Some substances, processes and working conditions may affect human fertility as well as pose a risk to a pregnant worker and/or her unborn child. Therefore, you must think about the health of women of childbearing age (whether or not they are pregnant), not just those who have told you that they are pregnant.

In particular, you should undertake a risk assessment if there is a possibility of exposure to any of the following risks:

- physical agents such as shock, vibration or movement, manual handling, travel, mental and physical fatigue or other physical burdens, excessive mental or physical pressure, extremes of temperature or pressure
- biological agents such as HIV, hepatitis B, typhoid, chickenpox, rubella etc.,
- chemical agents such as any substances that may cause an irreversible effect, cause cancer or a heritable genetic damage, carcinogenic agents, drugs or dangerous chemicals which may be absorbed through the skin, mercury and mercury derivatives, carbon monoxide and lead or lead derivatives

This list is not exhaustive.

You have a specific duty to prevent a new or expectant mother from being exposed to a risk provided that she has given you written notification that she is pregnant, has given birth within the last six months or is breastfeeding.

You may consider encouraging workers, e.g. via your maternity policy or employee handbook, to notify you as soon as possible if they become pregnant. This is so you can identify if any further action is needed.

You are required by law to provide somewhere for pregnant and breastfeeding mothers to rest.

It is also good practice to provide a private room for nursing mothers to express and store breast milk. Toilet facilities are not suitable for this purpose.

Written notice of pregnancy

You are entitled to ask a pregnant worker to provide, within a reasonable time, a written certificate from a registered medical practitioner or a registered midwife showing that she is pregnant.

Note that you do not have an obligation to protect a worker or her child until she gives you the written notification that she is pregnant, has given birth within the last six months or is breastfeeding. This will include:

- taking any action in relation to a particular pregnant worker's health and safety
- maintaining any action in relation to her where she has failed to give you the certificate within a reasonable period of time - although you must have requested in writing to see the certificate

Where an employee has not yet given notice

Although you do not have any legal obligation to protect a worker and her unborn child until she has notified you of her pregnancy, it is good practice to do a risk assessment for her if you become aware that she is pregnant (and she has not yet formally notified you).

Review of risk assessment

Once a worker notifies you she is pregnant, you should review the risk assessment for her specific work and identify any changes that are necessary to protect her health and that of her unborn baby. Involve the worker in the process and review the assessment as her pregnancy progresses to see if any further adjustments are needed.

Hazards

Things that might be hazardous to pregnant workers in particular include:

- long hours
- night-time working
- stress
- noise

- violence from customers
- exposure to toxic substances, e.g. lead, pesticides, mercury
- radiation
- manual handling

If you identify a hazard to a pregnant worker, you must take steps to remove it, e.g. by adjusting working conditions or working hours.

If this cannot be done, you can offer her a suitable alternative job, if available.

If a suitable alternative position is not available or if it is refused by the worker then so long as the risk is not remote and it remains necessary to protect the worker's (or her child's) health or safety, you should suspend the worker on full pay for as long as the risk to her and/or her unborn child remains. This should not be done lightly and you must ensure that all possible adjustments to minimise the risks have been considered and are found to be unreasonable or unsuitable in the circumstances.

A worker is not entitled to receive her pay whilst on suspension if she has unreasonably refused a suitable alternative job.

Employees' right to paid time off for antenatal care

All pregnant employees have the right to paid time off to attend antenatal care appointments. Antenatal care covers not only medical examinations, but also, for example, relaxation classes and parent craft classes.

However, the right to time off only applies if the appointment is advised by a midwife, health visitor or registered medical practitioner.

Evidence of antenatal appointments

You are entitled to ask for evidence of antenatal appointments - except in the case of the very first appointment.

You can request that the employee shows you:

- written documentation from a registered medical practitioner, a midwife or a health visitor confirming that she is pregnant
- an appointment card or some other document showing that an appointment has been made

You must pay the employee her normal hourly rate during the period of time off for antenatal care.

Protection from dismissal/discrimination

A pregnant employee could bring an unlawful discrimination and/or unfair dismissal claim to a tribunal if you:

- dismiss her or treat her unfairly because she tried to exercise her right to time off for antenatal care
- unreasonably refuse her time off for antenatal care
- refuse to pay her normal rate of pay during such time off

Unfair dismissal and pregnancy

A dismissal (or selection for redundancy) is automatically unfair if you dismiss, or select an employee solely or mainly:

- for a reason relating to her pregnancy or Maternity Leave
- because she tried to assert her right to paid time off for antenatal care

Only employees can claim unfair dismissal, but all workers can claim unlawful sex discrimination if they are dismissed for a reason relating to their pregnancy.

Sex discrimination and pregnancy

You must not treat a worker less favourably because she is pregnant as it may result in a claim of sex discrimination. Such treatment includes dismissal.

It amounts to unlawful sex discrimination if you:

- treat a pregnant worker less favourably for a reason related to her pregnancy
- dismiss or select a pregnant worker for redundancy solely or mainly for a reason related to her pregnancy
- dismiss or select a pregnant employee for redundancy solely or mainly because she tried to assert her right to paid time off for antenatal care
- refuse to interview or employ a job applicant solely or mainly on the grounds that she is pregnant (or you believe that she may be, or may become, pregnant)

You can never justify this type of discrimination.

As pregnancy-related dismissals are discriminatory, it is likely that a pregnant employee would not only claim unfair dismissal but also unlawful sex discrimination. It is important to note that while there is a limit on the amount of compensation a tribunal can award for unfair dismissal, there is no cap in unlawful discrimination cases, which means any case brought before employment tribunal can be very costly to your business.

Maternity rights

Maternity Leave

Ordinary Maternity Leave

All pregnant employees have a right to 26 weeks' ordinary Maternity Leave (OML) regardless of their length of service, (i.e. they qualify for the right from the day they start work). Note that to qualify for this right, the pregnant woman must be an 'employee' and not be a worker or self-employed. Employers are not obliged to pay women on Maternity Leave, however an employee's contract can provide for additional rights to payment during the leave period.

What is the difference between an 'employee' and a 'worker'?

The majority of people in work are employees; however, most agency temps and freelance contractors are not. A person is more likely to be an employee than not if their work provider:

- describes them as an employee
- tells them which work to do
- controls when, where and how they do their work
- supplies the equipment that they need to do their work
- pays tax and government contributions on their behalf
- pays them sick and holiday pay
- subjects them to the usual disciplinary and grievance procedures

Additional Maternity Leave

If your employee is entitled to ordinary Maternity Leave, she will be entitled to additional Maternity Leave (AML) of a further 16 weeks commencing from the end of OML.

Employee's notification of leave

In order to be entitled to take her Maternity Leave, an employee must notify you:

- that she is pregnant
- when the expected week of childbirth (EWC) will be (this may be evidenced by means of a medical certificate if you so request)
- when she intends her Maternity Leave to start

These requirements can be given separately.

Late notification

You must accept a late notification from your employee if it was not reasonably practicable for her to notify you earlier (e.g. because she didn't realise that she was pregnant or because she only started to work for you after notification was due).

If it would have been reasonably practicable to provide notification in time, but an employee still failed to do so, then you could insist that the employee should provide at least four weeks' notice before starting their Maternity Leave.

Start of Maternity Leave

An employee should take their Maternity Leave at least two weeks before the end of the week of the baby's expected birth and for at least four weeks after.

Automatic commencement of leave

Maternity Leave starts automatically, regardless of when the employee has said she actually wants her Maternity Leave to start, the day after:

- she is absent from work wholly or partly because of her pregnancy at any time from the beginning of the four weeks before the start of her EWC
- she has given birth

Changing the start date

The employee can change her start date, provided that she gives you the required amount of notice. If she wants to start her date earlier than the first date she gave you, she must give you at least 28 days' notice before her new start date. If she wants to delay her start date, she must give you at least 28 days' notice before the original start date. She can choose to further vary the start date using the same procedure. You can request that she notify you of the change in writing.

Notification from you

After receiving notice of your employee's proposed or varied start date (or of the automatic commencement of Maternity Leave), you must give your employee notice of when her full Maternity Leave (i.e. her OML and AML) will end. This document must be sent to her within 28 days of receiving her notification. If you have received notification from your employee of a change to her start date you must notify her of the new end date within 28 days of the new chosen start date.

Terms and conditions during leave

An employee's contract of employment continues throughout both OML and AML unless either you or the employee expressly ends it or it expires.

During OML and AML an employee has a statutory right to continue to benefit from all the terms and conditions of her employment. The only exceptions are terms relating to wages or salary - you are still obliged to pay her statutory maternity pay.

Examples of contractual terms and conditions that continue during OML and AML include:

- gym membership
- participation in share schemes
- reimbursement of professional subscriptions
- use of a company car or mobile phone (unless provided for business use only)

Performance-related pay

Generally, you will not be liable to make any payments related to an employee's performance (such as bonuses and/or commissions). However, an employee will still be entitled to the pro rata amount for bonus or commission payments that relate to the time before her OML.

Statutory employment rights

Both OML and AML count towards an employee's period of continuous employment for the purposes of entitlement to other statutory employment rights, e.g. the right to a redundancy payment, and for assessing seniority and personal length-of-service payments, such as pay increments, under her contract of employment.

Pensions

For the purpose of pension rights, if the employee is a member of a pension scheme, her membership must continue while on statutory Maternity Leave. She will continue to accrue pensionable service during the period of OML. While the employee is on AML her employer is under no obligation to make contributions to the pension scheme in respect of her but her membership must continue.

If the employee is being paid by her employer during her Maternity leave her employer may be required to continue paying employee contributions to a pension scheme if applicable. An employee will not have to make any contributions towards her pension during the period that she is on AML. However, she may still make voluntary contributions if the pension scheme rules allow her to do so.

Annual leave entitlement

An employee continues to accrue her statutory annual leave entitlement of four weeks or otherwise throughout both ordinary Maternity Leave (OML) and additional Maternity Leave (AML).

Similarly, contractual annual leave entitlement will continue to accrue throughout both OML and AML.

An employee may not take annual leave during Maternity Leave. You should instead allow the employee to take any untaken annual leave before and/or after her Maternity Leave. You cannot make payment in lieu of her taking her statutory annual leave unless her employment contract is terminated.

Carrying over leave

What if an employee has not been able to take all her annual holiday leave within an employer's holiday year? There are limitations on carrying over unused holiday entitlement from one holiday year to the next. An employee cannot carry over any unused statutory holiday entitlement at all unless her employment contract allows this or a collective agreement provides for this.

However, these restrictions are at odds with the view of the European Court of Justice since it is a requirement that employees continue to accrue statutory entitlement during their leave and that they should be allowed to take this leave before or after their Maternity Leave.

Therefore it is suggested good practice for employers to allow their employees to take any unused holiday entitlement on their return from Maternity Leave.

Contact during leave

The general rule is that if an employee works for her employer during her Maternity Leave this will bring her leave and maternity pay to an end. However, some contact between the employer and employee is allowed during the Maternity Leave period and, consequentially, you can make reasonable contact with an employee and she may make contact with you.

Contact can be made with the employee by any means, e.g. telephone, email, letter or a meeting in the workplace.

What amounts to 'reasonable contact' will depend on each employee's particular circumstances, such as whether an agreement has been reached between you and the employee regarding the extent and frequency of the contact, their position, the nature of their job or whether contact is required due to important events, such as changes to the workplace, keeping an employee informed of promotion opportunities and other information relating to her job that she would normally be made aware of if she was working, such as redundancy situations.

Right to return

An employee has the right to return to work when her Maternity Leave comes to an end. However, the employee must return immediately after her Maternity Leave expires, or provide you with the requisite notice to return to work early and return on the date given in the notice.

Unless the employee has notified you otherwise, the date on which she returns to work will normally be the first working day 26 weeks after her Maternity Leave began.

Returning early

If an employee wishes to return to work earlier than the original return date then she must give you at least eight weeks' notice prior to the date she wishes to return. You can accept less or no notice at your discretion.

For example, if an employee was due to return to work after 42 weeks' Maternity Leave, but then decided to return to work after 26 weeks of leave, she would need to give you eight weeks' notice of the new date.

Note that if you did not provide the employee with the appropriate notification of when her leave should end, the employee does not have to give you eight weeks' notice.

If the employee attempts to return to work earlier than planned without giving you notice, you can postpone her return by up to eight weeks or until her Maternity Leave entitlement ends, whichever is earlier. You may not postpone her return to a date later than the end of her 26 week Maternity Leave period.

If the employee still comes to work during the period of postponement, you do not have to pay her.

If an employee has already given you notice that she wishes to return to work early and she subsequently decides that she wants to return to work earlier or later then her original return date (the return date given to you in her previous notice) then she will have to give you not less than eight weeks' notice.

Returning later

If she wants to delay her return then the notice must be given at least eight weeks' from the date that her original return date. So, for example, if she previously changed her date of return so that she would return to work in April, she must send this letter eight weeks before in February.

Not returning to work

An employee who does not wish to return to work after her Maternity Leave must give you notice of this as required by her contract of employment. However, as long as she specifies the date on which she wishes to terminate the contract (e.g. the date she was due back at work after Maternity Leave), her Maternity Leave continues.

Employees who don't return are not required to pay back any Maternity Benefit they have received.

In addition, if she terminates her contract before the end of the Maternity Benefit period, you must continue to pay her Maternity Benefit provided she has not started work for another employer.

Where an employee fails to return without good reason on the specified date, it may be a disciplinary matter. However, you should investigate whether the employee has a good reason for failing to return (such as illness) before deciding whether or not to take disciplinary measures.

Type of job on return

Returning to work during or at the end of OML

An employee who returns to work during or at the end of her OML period is entitled to return to the same job on the same terms and conditions of employment as if she had not been absent. Her position, role and place of work must therefore remain the same unless her contract of employment states otherwise. For example if the employment contract states that your employee will be required to perform a range of work then on her return you may require the employee to perform a different role, it is within the range of work described in the contract.

If you prevent an employee returning to work, she may make a complaint of unfair dismissal to the employment appeals tribunal.

If she returns to work but does not get her old job back, she may have a claim against you for either unfair or constructive dismissal (if she resigns) and/or for sex discrimination if you fail to address it.

Returning to work during or at the end of AML

An employee who returns to work during or at the end of her AML period is entitled to return to the same job on the same terms and conditions of employment as if she had not been absent.

However, if it is not reasonably practicable for you to let her return to her old job, you should offer her a job:

- that is both suitable and appropriate for her to do in the particular circumstances
- on terms and conditions that are no less favourable than those for her original job

A suitable and appropriate alternative job must be as close as possible to the previous role held by the employee.

If you offer the employee a job that fulfils the criteria above and she unreasonably refuses it, she will have effectively resigned.

If you offer the employee a job that does not fulfil the criteria, she may have a claim against you for either unfair or constructive dismissal (if she resigns) and/or for sex discrimination if you fail to address it. You will have to prove that it was not reasonably practicable to give the employee her same job back.

Note that an employee returning to work has a right to request flexible working conditions.

Changes to terms and conditions during leave

An employee on Maternity Leave is entitled to receive a pay rise or other improvements to her terms and conditions given to other employees in her grade or class of work.

You should consult with employees during their Maternity Leave about any proposed changes to their job in preparation for their return.

Maternity Leave and protection against detriment or dismissal

General protection

Employees are protected from suffering a detriment or dismissal for taking, or seeking to take, Maternity Leave. You must not subject an employee to any detriment by acting or deliberately failing to act, because she took Maternity Leave or sought to take Maternity Leave. This could include denying promotion, facilities or training opportunities which would normally have been made available to the employee.

If an employee believes you have treated her detrimentally then she can make a claim of sex discrimination at the employment appeals tribunal.

Redundancy situations

If a redundancy situation arises at any stage during an employee's Maternity Leave and you may not be able to continue to employ her under her existing contract of employment then you must offer her (before that contract ends) any suitable alternative vacancies, where one is available. This includes a vacancy with an associated employer or with a successor to the original employer.

The new job must start immediately after the end of the original one and must:

- be suitable and appropriate for her to do (taking into consideration that she has a young infant to care for which may affect, for example, her working times and the location of her work place)
- have terms and conditions that are not substantially less favourable to her than if she had continued to be employed under the original contract

This requirement takes precedence over the general requirement to offer suitable alternative positions to all employees who are at risk of redundancy, i.e. an employee on Maternity Leave must be offered any suitable alternative vacancies first.

If you fail to comply with these requirements and dismiss the employee, the dismissal may be unfair. She may also have a claim for sex discrimination.

If you end up making an employee on Maternity Leave redundant because you had no suitable alternative work to offer her, or if you offered her suitable alternative employment which she unreasonably refused, then the dismissal may be fair.

Note that on dismissal:

- her Maternity Leave period comes to an end, but
- her entitlement to Maternity Benefit continues until the end of the 26-week Maternity Benefit period (if it has not already ended)

The dismissal of an employee will be automatically unfair if you dismiss her - or select her for redundancy in preference to other comparable employees - solely or mainly because she:

- has taken Maternity Leave
- benefited from the terms and conditions of employment to which she was entitled during that leave
- failed to return from her Maternity Leave on time because you failed to give her any or adequate notification of the end date of her leave

Dismissal, selection for redundancy or other detrimental treatment in these circumstances may also amount to sex discrimination, for which employment tribunal compensation is uncapped.

It is still possible for you to fairly dismiss an employee who is on - or who has recently returned from - Maternity Leave. However, the reason for the dismissal must:

- be largely or wholly unrelated to her Maternity Leave
- not be for any other reason that is unfair or discriminatory

You must comply with the correct disciplinary and dismissal procedure when dismissing an employee.

You can fairly dismiss an employee you took on to replace an employee on Maternity Leave. However, make sure you inform them that their position is only for maternity cover before they start.

Maternity Benefit

Overview

Maternity Benefit is a payment made to women who are on Maternity Leave from work and who are covered by social insurance. Maternity Benefit is payable for no more than 26 weeks. It is payable when the employee is not at work because of her pregnancy or because she has given birth.

Some employers will continue to pay an employee, in full, while she is on Maternity Leave and require her to have any Maternity Benefit paid to them.

Qualifying for Maternity Benefit

An employee qualifies for Maternity Benefit provided she has sufficient PRSI contributions.

She must also have been employed earner, i.e. an employee or office holder (someone working as a director of a company).

Although this specifically covers employees, an agency worker can also be eligible for Maternity Benefit even if she is not eligible for Maternity Leave.

If the employment comes to an end

If a qualifying employee's employment ends within 16 weeks of the end of the week in which their baby is due and they satisfy the PRSI conditions, Maternity Benefit is payable from the day after the date on their P.45.

This will apply regardless of whether her employment ended voluntarily, e.g. she resigns, or because you dismissed her.

If an employee returns to work, but then for any reason she has to stop work and she is still in her Maternity Benefit period, she will be entitled to be paid her Maternity Benefit again.

Ending Maternity Benefit payments

Where an employer has continued to pay an employee while she is on Maternity Leave they can stop paying her if she;

- dies
- starts working for another employer after the birth

Maternity Benefit rates

The Department of Social Protection sets the Maternity Benefit rates payable.

Paternity leave

Paternity leave

Currently, in Irish law, there is no statutory right to paternity leave for the father. Employers are not obliged to grant male employees special paternity leave (either paid or unpaid) following the birth of their child.

Parental Leave

Overview

Parental Leave is a right for parents to take time off work to look after a child or make arrangements for the child's welfare before the child's eight birthday (or 16th birthday if the child is disabled and receiving disability living allowance). There is no requirement for an employee to be paid during Parental Leave.

When is it available?

Parental Leave is available to employees who have, or expect to have, parental responsibility for a child. To be eligible, employees generally have to have one year's continuous service with their current employer.

Employees get 18 working weeks leave in total for each child.

Details of Parental Leave

Employees are able to take Parental Leave in one continuous period or in two separate blocks of a minimum of six weeks. If your employer agrees you can separate your leave into periods of days or even hours.

An employee must give at least six weeks' written notice of a wish to take Parental Leave. The employer can postpone the leave for up to six months where the business would be particularly disrupted if the leave were taken at the time requested but leave cannot be postponed when the employee gives notice to take it immediately after the time the child is born or is placed with the family for adoption.

Employers may be justified in postponing leave when, for example, the work is at a seasonal peak; where a significant proportion of the workforce applies for Parental Leave at the same time; or, when the employee's role is such that his or her absence at a particular time would unduly harm the business.

After Parental Leave

At the end of Parental Leave, an employee is guaranteed the right to return to the same job as before if the leave was for a period of four weeks or less; if it was for a longer period the employee is entitled to return to the same job, or, if that is not reasonably practicable, a similar job which has the same or better status, terms and conditions as the old job.

When Parental Leave follows Maternity Leave, the general rule is that a woman is entitled to return to the same job she had before the leave. If at the end of additional Maternity Leave, this would not have been reasonably practicable, and it is still not reasonably practicable at the end of Parental Leave, she is entitled to return to a similar job which has the same or better status, terms and conditions as the old job.

Time off

Paid time off

An employer may be required to give paid time off to employees to:

- Undertake trade union duties or undergo training for such duties if they are officials (e.g. shop steward) of a recognised trade union.
- Undertake the functions of a safety representative or undergo union approved training for such functions.
- Attend appointments for ante-natal care (e.g. at an ante-natal clinic).
- Look for another job or make arrangements for training for future employment if they have been given notice of dismissal because of redundancy.
- Undertake study in order to obtain a relevant qualification.
- Perform duties as an occupational pension scheme trustees.
- Perform a function as part of a European Works Council.
- Under the Juries Act 1976 an employee or apprentice who is called for Jury Service is entitled to be paid while absent from work.

Unpaid time off

Employees may also be entitled to time off work, but not necessarily with pay:

- to take part in certain trade union activities
- to undertake public duties (e.g. as a Justice of the Peace, member of a local authority or a health authority, governor of a state maintained educational establishment)
- For Parental Leave or care of a dependant
- To take up duties as a reservist in the armed forces.
- To undertake studies or training.

Force Majeure Leave

In a situation where there is a family crisis the Parental Leave Acts provide the employee with a limited right to leave from work. This is known as Force Majeure leave. It arises where the immediate presence of the employee is indispensable owing to an illness or injury of a close family member.

Compassionate Leave

Where a close family member dies there is no right to force majeure leave. Whether an employee is able to take time off on such occasion depends on any provision in the employee's contract, the existence of a custom and practice within a job, or the employer's discretion.

Whistleblowing

Introduction

The Government recently announced the commencement of the Protected Disclosures Act 2014 which introduces a new standard of International best practise for whistle-blowers in Ireland. Workers (not just employees) are protected from being victimised or dismissed or being subjected to detriment for making a disclosure about certain matters (often in breach of contractual terms concerning confidentiality) in certain circumstances. The thinking behind this law is that, in general, workers should be able, out of a sense of public duty, to make disclosures about wrongdoing without fear of reprisals or adverse consequences.

Who is protected?

Most employees and workers are protected from being subjected to a detriment by their employer or by the person or organisation for whom they work.

A worker is a person offering their personal service to someone who is not their client or customer. Those who are self-employed and are in business to provide a client or customer with professional or other services are not workers. Self-employed contractors/freelancers, subcontractors, and casual workers who are in a subordinate and dependent position, and are not providing their services in a client or professional relationship, will be workers. The definition of 'worker' is extended for the purpose of the whistleblowing provisions to include home workers, certain agency workers, National Health Service practitioners such as GPs, certain dentists, pharmacists and opticians and certain categories of trainees.

Detriment may take a number of forms, such as denial of promotion, facilities or training opportunities, which the employer would otherwise have offered. Employees who are protected by the provisions may make a claim for unfair dismissal if they are dismissed for making a protected disclosure. Workers who are not employees may not claim unfair dismissal; however, if the employer has terminated their contract because they made a protected disclosure, they may instead make a complaint that they have been subjected to a detriment.

Retrospective application

An important feature of the act is that it is retrospective in effect. This means that any disclosure made before the date of the act (15th July 2014) may be a protected disclosure. It is unknown however how far back this protection will go.

What can be disclosed?

Certain kinds of disclosures qualify for protection ('qualifying disclosures'). Qualifying disclosures are disclosures of information which the worker reasonably believes tend to show one or more of the following matters is either happening now, took place in the past, or is likely to happen in the future:

- a criminal offence
- the failure to comply with a legal obligation
- a miscarriage of justice
- a danger to the health or safety of any individual
- a danger to the environment
- deliberate covering up of information tending to show any of the above five matters

It should be noted that in making a disclosure the worker must have reasonable belief that the information disclosed tends to show one or more of the situations listed above ('a relevant failure'). The belief need not be correct - it might be discovered subsequently that the worker was in fact wrong - but the worker must show that he or she held the belief, and that it was a reasonable belief in the circumstances which existed at the time of disclosure.

Protection under the provisions applies even if the qualifying disclosure concerns a relevant failure that took place overseas, or where the law applying to the relevant failure was not that of Irish Law.

Disclosure of information by a worker is not a qualifying disclosure if in making it the worker commits an offence. A disclosure of information which would be protected from disclosure because of legal professional privilege cannot be a qualifying disclosure if made by the legal adviser (or, say, a typist in the adviser's office) to whom the information was disclosed in the course of providing legal advice.

Protected disclosure

A qualifying disclosure will be a protected disclosure if the disclosure is made in an acceptable manner. The intent is that except in certain or exceptional circumstances, the worker does try to resolve the matter internally, or through any other appropriate channel, before going public.

However the disclosure is made, it must be made in good faith. For example, a worker will not be acting in good faith if he or she is motivated by the desire to advance a grudge or if he or she is simply seeking to bolster an otherwise weak unfair dismissal claim. If the employer asserts that the worker is not acting in good faith, it is for the employer to prove that that is the case.

Protection does not extend to a worker threatening to make a disclosure. The worker must actually make the disclosure.

Disclosures about health and safety matters

The Safety, Health and Welfare at Work Act 2005 provide additional protection to employees who raise concerns about health and safety matters. For example, the Act provides that it would be automatically unfair to dismiss an employee who acts to protect himself or herself or others from serious and imminent danger.

Where there is a recognised health and safety representative present, the worker should normally tell them about the problem, as it is part of the representative's role to raise such matters with the employer.

Acceptable methods of disclosure

A qualifying disclosure will be a protected disclosure where it is made:

- to the worker's employer, either directly to the employer or by procedures authorised by the employer for that purpose; or
- to another person whom the worker reasonably believes to be solely or mainly responsible for the relevant failure

Disclosure to the employer will, in most cases, ensure that concerns are dealt with quickly and by the person who is well placed to resolve the problem. In some small companies, this may be the employer himself. But often an authorised procedure will be helpful. Employers should ensure that any such procedure is communicated to their workers so that they are aware of what to do if they need to make a qualifying disclosure. Consideration should be given to adapting procedures, for example, to facilitate confidential disclosures by workers or to vary the person to whom a disclosure should be made depending upon the seriousness of the allegation or the seniority of the worker.

Internal procedures that are simple to use, readily accessible and which workers are encouraged to use are more likely to result in disclosure of concerns to the employer first, rather than external disclosures that could be damaging to the employer's business. Employers will wish to consider the best way to secure trust and confidence in such procedures to ensure that they will be used, perhaps by involving the workforce, or their representatives.

Workers who are concerned about wrongdoing or failures can, instead of making a disclosure to their employer, make a disclosure to an appropriate prescribed regulator, which is a person or body that has been prescribed by a Minister for the purpose of receiving disclosures about the matters concerned.

If a worker makes a qualifying disclosure to such persons, it will be a protected disclosure provided the worker:

- reasonably believes that the information, and any allegations it contains, are substantially true
- reasonably believes that the matter falls within the description of matters for which the person or body has been prescribed (for example, breaches of health and safety regulations can be brought to the attention of the Health and Safety Authority or appropriate local authority)

A qualifying disclosure will be a protected disclosure if it is made to a legal adviser in the course of obtaining legal advice, for example, as to their right to make a disclosure or as to how to make a disclosure.

A qualifying disclosure made in good faith by a worker employed in a Government-appointed organisation, such as a non-departmental public body, will be a protected disclosure if made to a Government Minister (either directly or via departmental officials).

A worker may make a qualifying disclosure to the public or any other body if at the time the worker makes the disclosure:

- The worker reasonably believed that he would be subjected to a detriment by his employer if disclosure were to be made to the employer or to an appropriate public authority.
- In the absence of an appropriate public authority, the worker reasonably believed that disclosure to the employer would result in the destruction or concealment of information about the wrongdoing.
- The worker had previously disclosed substantially the same information to the employer or to an appropriate public authority.

However, the following conditions must be satisfied:

- The worker must reasonably believe that the information, and any allegations contained in it, are substantially true.
- The worker must not act for personal gain. This does not prevent a worker receiving money for the information if the worker can show that the main motivation was to act in the public interest rather than out of self-interest. This will be a question of degree.
- Finally, it must be reasonable for the worker to make the disclosure in this way.

The employment appeals tribunal will decide whether the worker acted reasonably, in all the circumstances, but in particular, will take into account:

- The identity of the person to whom the disclosure was made (e.g. it may be more likely to be considered reasonable to disclose to a professional body that has responsibility for standards and conduct in a particular field, such as accountancy or medicine, than to the media).
- The seriousness of the relevant failure.
- Whether the relevant failure is continuing or is likely to occur again.
- Whether the disclosure breaches the employer's duty of confidentiality to others (e.g. information that is made available by the worker may contain confidential details about a client).

The action which has or should reasonably have been taken in response to a disclosure made previously to the employer or an appropriate public authority. In assessing the reasonableness of the employer's response to the previous disclosure, the tribunal will consider whether the worker complied with any policy of the employer on whistleblowing.

Unfair dismissal claims

Any dismissal of an employee due to the making of a protected disclosure will be automatically unfair. No qualifying period of continuous employment is necessary. An employee will also be unfairly dismissed if the reason or principal reason for selecting the employee for redundancy is that he or she made a protected disclosure.

Where a tribunal finds that a complaint of unfair dismissal is justified, it will order reinstatement or re-employment, or the payment of compensation. In addition, employment tribunals may have the power to send details of whistleblowing claims directly to a prescribed regulator where the claim (or part of it) has been justified, the employee has expressly consented to this and the tribunal considers that it is appropriate to do so.

EAT remedies and protected disclosures

Workers protected by the public interest disclosure provisions (including employees) can complain that they have been subjected to detriment by their employer for making a protected disclosure. An 'employee' can make a claim of unfair dismissal; a 'worker' who is not an employee and whose contract has been terminated by his/her employer because he made a protected disclosure can claim that he/she has been subjected to a detriment.

The claim must be made before the end of six months beginning with the date of the act or failure to act which caused the detriment.

Where a worker complains that he/she has been subjected to a detriment and the tribunal finds the complaint well-founded, it will make a declaration to that effect and may order the payment of compensation.

Staff rights, information and consultation.

Basic staff rights

If you sell the business and there is a new owner, it does not mean that your employee will be obliged to work for the new owner. The employee will have the right to inform you or the new owner that they object to becoming employed by the new owner.

If the employee is prepared to accept employment with the new owner, they are not entitled to anything more than they enjoyed under the previous employer.

However, if they refuse to work for the new employer, they will be considered to have resigned as opposed to being dismissed. This means that they will not be entitled to a statutory redundancy payment. If the employee resigned because the transfer to the new job would have resulted in a substantial and detrimental change to their working conditions, they may have a claim for constructive/wrongful dismissal.

The sale of a business would often be governed by the Transfer of Undertakings (Protection of Employment) Regulations 2003, better known as TUPE.

Information & consultation

Where you elect to dispose of your business to some other party and TUPE applies, there is a duty on you and the new owner of your business to provide information to, and to consult with your employees or their appropriate representatives should the transfer affect them.

The duty to consult comes from the TUPE regulations but may also be required under any information and consultation (I&C) agreement you may have in place.

You do not have to consult under both TUPE and any I&C agreement at the same time and you can opt out of the I & C regime provided you consult under TUPE.

You have an obligation to inform all appropriate representatives of the following:

- the fact that a relevant transfer is to take place
- when it is to take place (employees must be consulted not later than 30 days)
- the reason for it
- the legal, economic and social implications of the transfer for the affected employees
- the measures which you envisage taking in relation to those employees (and if no measures are envisaged, then that fact)
- if you are the transferor (i.e. the seller), the measures which the new owner envisages that they will take in relation to those employees who are to be

automatically assigned to them on the transfer (or if no measures are envisaged, then that fact)

The appropriate representatives who you must inform and consult with are either:

- representatives of the recognised trade union - if there is one
- employee representatives appointed specifically to be consulted on the transfer or who have already been appointed for a different purpose and are suitable for this purpose too

You must inform the appropriate representatives long enough before the transfer to enable consultation to take place between you and those representatives.

You are also under a duty to enter into consultation with the appropriate representatives of the employees in an attempt to seek agreement of the measures to be taken. At all times, consultation should be carried out by all parties in good faith.

Failure to consult

Should you or a new owner fail to inform and consult with employees' representatives, the remedy is for your employee's representative (or the individual employees if they do not have one) to make a complaint (not later than six months after the date of the transfer) to the rights commissioner. If the complaint is upheld, the rights commissioner must make a declaration in those terms and has discretion to award compensation in respect of each affected employee.

In considering how much compensation to award, the rights commissioner will have regard to the seriousness of the breach.

The liability for the payment rests on both the seller and new owner of the business.

How the employee is affected under TUPE regulations

EU legislation has given rise to the implementation of certain regulations to protect employment in a situation where one employer transfers the undertaking for which the employee works to a new owner. These regulations are called the Transfer of Undertakings (Protection of Employment) Regulations 2003 (TUPE).

TUPE provides that where you transfer an undertaking which retains its identity to a new owner the contract of employment of the existing employee’s transfers automatically to the new employer on the same terms and conditions.

TUPE will also apply in circumstances where services are outsourced, in sourced or assigned by a client to a new contractor (known as a 'service provision change'). Again, in these circumstances, the contract of employment of the existing employees transfers automatically to the new employer on the same terms and conditions.

TUPE would not usually apply when the transfer is by share transfer, but this is not always the case. The most typical situation where TUPE applies is the sale of the whole of a business as a going concern. However, TUPE has not been restricted to such a typical transaction and can be applied to a variety of situations such as contracting out and the grant of franchises. The position is not always clear and there are difficult legal issues that arise from time to time.

TUPE does not allow changes to employment contracts for 'a reason connected with the transfer' unless this is for an 'economic, technical or organisational reason entailing changes in the workforce'. Additionally, employees to which TUPE applies have the right to claim constructive dismissal where substantial changes for the worse are made to working conditions to such an extent that those changes would force the employee to resign.

Contract of employment

Once it has been established that the relevant transfer of an undertaking or a service provision change has occurred, TUPE provides that the contract of employment will be transferred from the old employer to the new. The employees will have the same rights against the new owner as they had against the old employer and the transfer does not affect the continuity of their employment.

The transfer of the contract of employment and rights duties under it will not occur if the employee informs the old or the new owner that he objects to becoming employed by the new owner. In that event, the transfer will terminate the contract of employment with the old employer. The employee will not be treated for any purpose as having been dismissed by either of the old or new employers.

Dismissal and TUPE

If the employee is dismissed and the reason for the dismissal is connected with the transfer then the dismissal is automatically unfair unless it can be shown that it was for an economic, technological or organisational reason entailing a change in the workforce. This is known as the ETO defence and employees require one year's service to bring this type of claim. Whether the reason for a dismissal is connected with the transfer is a question of fact and will have to be decided on the circumstances of each case.

If you can show that the dismissal was for economic, technical or organisational reasons which have entailed a change in the workforce and not for reasons solely connected with the transfer the dismissal may not be automatically unfair but will be judged by an employment tribunal on the ordinary principles of fairness.