Introduction


Conditions in excess of the basic statutory entitlement is a matter entirely for the employer.

LEGAL POSITION – MATERNITY


Entitlement

Under the legislation females in employment have five basic rights:

- a right to time off **without pay** for maternity leave and additional maternity leave;
- a right to time off, **without loss of pay** for ante-natal/post-natal care;
- a right to time off, **without loss of pay**, to attend one set of ante-natal classes (other than the last three);
- a right to health and safety leave where the employment results in a hazard to the employee;
- accrual of annual leave whilst on maternity leave and additional maternity leave;
- protection against unfair dismissal on grounds of pregnancy or matters connected therewith;
- a right to return to work after maternity and protective (health and safety) leave;
- at the option of her employer to either breaks of one hour in the workplace, where facilities are provided for breastfeeding or to a reduction in working hours;

- subject to the employer’s agreement, a right to terminate additional maternity leave in the event of the child becoming ill and to postpone maternity or additional maternity leave if the child is hospitalised.

It also provides a right in the case of fathers, to:

- time off to attend on a once-off basis the last two ante-natal classes before the birth;
- the balance of the maternity leave or additional maternity leave where the mother dies on maternity leave or additional maternity leave.

Social Welfare

The Social Welfare Acts provides for the payment of both a maternity and a health and safety allowance for employees taking statutory maternity and health and safety leave.

Social Welfare maternity allowance is 80% of an employee’s reckonable earnings to a ceiling of €12,000. Minimum maternity benefit currently is €165.60 to a maximum rate of €249.00 per week. This figure is tax free.

Employers are obliged to pay for the first 21 calendar days of health and safety leave, employees will receive a social welfare allowance thereafter.
Scope
The legislation covers:
- all pregnant employees;
- all employees who have recently given birth, for a period of not more than 14 weeks from the date of the birth;
- all employees who are breastfeeding, for a period of not more than 26 weeks from the date of the birth;
- and
- who have informed their employer of their condition.

Contract of Employment/Apprenticeship
- All employees covered by a contract of employment or apprenticeship are covered by the Act.

Fixed Term Employees
- All fixed term employees have maternity rights under the Acts. Where an employee's contract is due to expire during the maternity or health and safety leave period, her protection under the Act also expires on that date.

Agency Workers
- Agency workers are deemed to be employed under a contract of employment for the purposes of the Acts. The person who is liable to pay the wages is deemed to be the employer in this case, normally the employment agency.

Dismissal
The Unfair Dismissals Acts, 1977 - 2001 set out provisions:

(i) to protect an employee against dismissal, on grounds of pregnancy, giving birth or breastfeeding or for any matters connected therewith. Dismissal on these grounds will be deemed unfair;

(ii) to protect an employee against dismissal, who exercises or proposes to exercise a right under the Maternity Protection Acts, to any form of protective leave or natal care absence. Dismissal on these grounds will be deemed unfair.

In relation to (i) and (ii) above, the employee does not have to have 52 weeks continuous service to fall within the scope of the Unfair Dismissals Acts.

MATERNITY LEAVE
All employees covered by the Maternity Protection Acts are entitled to a minimum period of maternity leave of 22 weeks, subject to certain conditions. The leave period may be taken at the time the employee selects, provided that the leave commences at least two weeks before the end of the (medically certified) expected week of confinement. The employee may return to work at a time she selects, provided it is not any earlier than four weeks after the end of the expected week of confinement.

(Note: From 1st March 2007 all employees covered by the Maternity Acts will be entitled to a minimum period of 26 weeks.)

Early Confinement
Should confinement take place two weeks or more before the expected week of confinement, the employee is entitled to a full 22 weeks beginning on the date of the birth, or the first day of maternity leave (if she is already on leave) whichever is the earlier. She is required to notify her employer in writing within 14 days of the confinement of the changed circumstances.

Late Confinement
Should the birth take place later than expected and the employee has less than four weeks leave after confinement, the minimum period will be extended by up to but not more than four weeks, to ensure that she has four weeks leave after the birth.

This provision would come into operation where an employee arranged to take a substantial proportion of her maternity leave before the birth and the confinement was later than expected.

An employee is required to notify her employer in writing as soon as practical for an extension of maternity leave and to confirm the actual duration.

Miscarriage
There is no entitlement to statutory maternity leave for a miscarriage occurring up to and including the 24th week of pregnancy. Any confinement occurring after the 24th week, even if it does not result in a live birth, is covered by the Act.
Additional Maternity Leave
In addition to the minimum period of maternity leave, an employee may elect to take up to 12 weeks additional maternity leave.

During this period, there is no entitlement to social welfare maternity benefit.

(Note: From 1st March 2007 additional maternity leave will be extended to 16 weeks.)

Postponement of Maternity Leave
Subject to the employers’ agreement, a mother has the option of splitting, or postponing, the period of maternity and additional maternity leave in the event of the hospitalisation of the child. Maternity Leave may only be postponed if the employee has taken at least 14 weeks maternity leave, 4 of which have to be taken after the end of the week of confinement. The maximum period of postponement is six months.

Additional Maternity Leave and Sickness
Subject to the employers’ agreement, a mother has the right to terminate unpaid additional maternity leave in the event of her becoming ill. The request of termination by the employee and acceptance of termination by the employer must be in writing.

HEALTH AND SAFETY REGULATIONS

Scope
The health and safety provisions of the legislation are largely covered by the Safety, Health and Welfare at Work (Pregnant Employees) Regulations 2006.

These regulations apply to employees who:
- are pregnant;
- have recently given birth;
- are breastfeeding,

and
- who have informed their employer of their condition.

An employee must notify her employer as soon as it is practicable and at the time of notification give her employer a medical certificate confirming her condition.

Hazard Assessment
Every employer of employees covered by the regulation is obliged to assess any risk to their safety or health and any possible effect on the pregnancy or breastfeeding from exposure to a hazard.

There are a number of hazards specified under the regulations which broadly breakdown into physical, biological and chemical agents to which exposure would be deemed hazardous.

If any such risks are identified and it is not practicable to ensure the safety or health of the employee through protective or preventative measures, then the employer must adjust temporarily the working conditions or the working hours (or both) of the employee concerned so that exposure to such risk is avoided.

Night Work
If medical certification specifies that night work is a risk to the employee’s safety or health, she should not be required to perform night work during pregnancy or for the 14 weeks following child birth. The employer must not oblige her to perform night work during that period and should either transfer her onto day work or where this is not possible, the employee concerned is entitled to health and safety leave.

‘Night work’ is defined as working at least three hours between 11 pm and 6 am or 25% of monthly working hours between 11 pm and 6 am.

Informing Employee of Risks
Employers are obliged to inform employees or their safety representatives on:

(i) the results of hazard assessments carried out in accordance with the regulations, and

(ii) the measures to be taken concerning employees’ safety and health.

Health and Safety Leave
Action required if risk identified

If a risk is identified and it cannot be taken out of the process, then the employer must take the following steps:
(i) temporarily adjust the employee’s working conditions or working hours;

(ii) if step (i) is not technically or objectively feasible, or cannot reasonably be required on duly substantial grounds, then the employee must be transferred to other work, or, in the case of nightworkers, to day work;

(iii) if step (ii) is not technically or objectively feasible or cannot reasonably be required on duly substantial grounds, then the employee must be given health and safety leave.

Health and safety leave lasts up to:

(i) The first day on which the employee becomes entitled to maternity allowance, or

(ii) the date on which a fixed term contract expires, or

(iii) a day, seven days following receipt of written notification from her employer that the risk no longer exists, or that suitable alternative work is now available, or earlier if she returns to work earlier.

An employee who becomes aware that she is no longer vulnerable to the risk for which she has been granted health and safety leave is obliged to inform her employer in writing of the fact, as early as practical.

Likewise if a risk no longer exists or if an employer is in a position to offer suitable alternative work, an employer may notify her in writing and the employee’s health and safety leave will expire seven days after receiving her employer’s notification to return to work.

Health and Safety Pay

The employee is entitled to be paid by the employer for the first 21 calendar days of health and safety leave granted in any period surrounding a pregnancy. During the remaining leave the employee will receive a health and safety benefit from Social Welfare.

Payment from the employer for health and safety leave is basic pay plus any bonus or allowance normally paid but does not include additional amounts due to nightwork, overtime, shiftwork, working unsociable hours, standby or on-call allowances.

Where an employee is not on a fixed rate with irregular employment pattern, her basic week will be calculated over an average of the previous 26 weeks.

NATAL CARE LEAVE

An employee is entitled to such time off as is necessary from her normal working time, without loss of pay, to attend medical or related ante-natal or post-natal care.

This right is subject to the employee giving her employer at least two weeks notice, where possible, of her ante/post natal appointment and if required, a copy of the appointment card.

ANTE-NATAL CLASSES

An employee is entitled to time off from work without loss of pay to attend one set of ante-natal classes (other than the last three classes). An expectant father is entitled to time off from work without loss of pay to attend the last two ante-natal classes before the birth.

This right is subject to the employee giving his or her employer at least two weeks notice before the first class and appropriate documentation giving the dates and times of the classes.

EMPLOYMENT RIGHTS

Maternity Leave

During any period of leave or time off under this Act, an employee remains in the employment of her employer. During maternity leave, time off for natal care and time off for breast-feeding, an employee shall while so absent, be treated as if she had not been absent. Her absence does not affect any right related to her employment (except for remuneration during maternity leave) conferred on her by law, by contract or otherwise.
The Pensions (Amendment) Act, 2002 requires that employers who make any payment to an employee during maternity leave are obliged to maintain pension contributions on her behalf during the maternity leave period.

A period of maternity leave is to be treated as both continuous and reckonable for purposes of statutory redundancy. The only right that an employee loses while on maternity leave is the right to remuneration, all other rights including annual leave and public holidays are preserved.

Additional Maternity Leave
A period of additional maternity leave does not break continuity of employment. During additional maternity leave an employee’s absence from work will count for all employment rights associated with the employment (except remuneration and superannuation benefits) such as seniority. Employees accrue annual leave on their additional maternity leave.

Health and Safety Leave
During the period of health and safety leave, the employee is deemed to be in the employment of her employer and must while so absent, be treated as if she had not been absent. Her rights are not affected other than her right to remuneration in excess of 21 calendar days and she has no entitlement to any public holidays that may occur during her health and safety leave.

Breastfeeding
The Act makes a provision for breastfeeding mothers who have given birth within the previous six months, with an entitlement, without loss of pay, to a break of one hour (where suitable facilities are provided in the workplace) or a reduction of working hours to breastfeed or express milk. The one hour break may be split into shorter periods of time totaling one hour and must be agreed with the employer.

Father’s Right to Leave (Section 16 Leave)
This leave will begin within seven days of the mother’s death. This leave is conditional on the father:

(a) giving his employer written notification no later than the day he wishes to take the leave;
(b) if the employer so requests, a copy of the mother’s death certificate and the child’s birth certificate as soon as is reasonably practical.

The father will be entitled to a social welfare ‘maternity’ benefit, up to the 20th week calculated on the basis of his PRSI contributions and his reckonable earnings.

Employment Protection
Employees’ statutory and contractual rights are protected by the Maternity Protection Acts, 1994 and 2004. During any period of leave or time off under the Acts, an employee remains in the employment of the employer.

Dismissal on grounds of pregnancy or for the exercising of rights under the Acts are prohibited. The Act gives very wide protection against termination of employment during a period of statutory maternity leave or ‘protective leave’. Notices of termination of employment during maternity and to take effect during leave or after the end of maternity leave are void.

Note: The Act does not refer to notice of dismissal but to notice of termination of employment. This means notice given either by the employer or by the employee. Consequently, any notice of resignation given by an employee during maternity leave is void and cannot be relied on by the employer.

The normal obligation to have one year’s continuous employment before coming within the scope of the Unfair Dismissals Acts does not apply where it can be shown that dismissal is due to the employee’s pregnancy, giving birth or breast-feeding, or any matter connected therewith.

‘Protective leave’ means
- maternity leave;
- additional maternity leave;
- father’s leave on death of mother;
- leave on health and safety grounds.
During protective leave an employee’s continuity of employment in respect of any right (whether statutory, contractual or otherwise) with the exception of remuneration are preserved as if present at work. During natal case absence and time off for breastfeeding, an employee’s continuity of employment in respect of any right are preserved as if she had been at work. Absences on protective leave, natal care and time off for breastfeeding count as reckonable service for the purposes of annual leave and redundancy calculation and must not be counted against any other leave, such as annual leave or sick leave, to which an employee is entitled.

**Sick Leave and Annual Leave Protected**

Absence from work on protective leave may not be treated as part of any other leave, including sick leave or annual leave, to which an employee is entitled.

**Apprentices, Probationers and Trainees**

The duration of an apprenticeship, training or probationary period is extended by the period of ‘protective leave’ taken under this Act. The apprenticeship, training or probation stands suspended for the leave period and must be completed on return to work.

**Return to Work**

There is a general entitlement for employees who have been on ‘protective leave’ to return to work with the same employer (or a new employer if a change of ownership has taken place) in the same job under the same contract of employment (or an identical one in the case of a new employer).

If an employee had been in a different job than usual immediately before leave (e.g. in order to give her suitable work during pregnancy), she is entitled to return to her normal work (or as soon as is permitted by law where protective legislation is concerned).

**Alternative Work**

Where it is not reasonably practicable for an employer to permit an employee following ‘protective leave’ to return to work in the same job, suitable alternative work may be offered under a new contract of employment. Alternative work offered must be work of a kind that is suitable to the particular employee. Offers of alternative employment must not be substantially less favourable than those previously obtaining.

‘Job’ for the purposes of the Act is defined in terms of ‘the nature of the work which she is employed to do in accordance with her contract of employment and the capacity and place in which she is so employed’.

**PROCEDURES AND NOTIFICATION**

All rights under the Act are subject to employees observing notification procedures.

**Taking Leave**

The right to take maternity leave is subject to the employee concerned giving to her employer at least four weeks written notice of intention to take maternity leave and also giving or producing for inspection by the employer, a medical (or similar) certificate confirming the pregnancy and specifying the expected week of confinement.

At this stage, employees are not required to inform their employers whether or not they intend to take additional maternity leave nor are they required to indicate whether they intend to return to work after the maternity leave period. There is no obligation on the employee to return to work after the leave period.

**Additional Maternity Leave**

To be entitled to take additional maternity leave, an employee must inform her employer in writing of her intention to take such additional leave not later than four weeks before the end of the maternity leave period.

**Natal Care Leave**

Entitlement to time off is subject to written notification to the employer of the date and time of the appointment at least two weeks in advance, except for her first appointment.

In addition, the employer may require the production of an appointment card or other similar document indicating the date and time of the appointment and confirming the pregnancy or specifying the expected week of confinement.

Where circumstances prevent compliance with these requirements and non-compliance is not due to the employee’s neglect or default, any employee may comply with the requirements by furnishing evidence of having kept an appointment and an indication of the circumstances which prevented her compliance, within one week after the appointment date.
Ante-Natal Classes
An employee's right is subject to the employee giving his or her employer notice in writing of the dates and times of the classes, or class at least two weeks before the first class or class concerned. If requested the employee must produce appropriate documentation indicating the dates and times of the classes.

Revoking a Notification
An employee may revoke a notification of her intention to take maternity leave by a further written notification.

This could happen where an employee miscarried before the 24th week and no longer required leave. Alternatively, she may change her mind about the starting date of leave; in this case, a second notification must be made by the employee which also gives at least four weeks notice of the beginning of maternity leave.

Notification of Return to Work
The employee's right to return to work is conditional on compliance with the appropriate notification procedures in the Act. A written notification of intention to return to work must be given at least four weeks before the due date of return.

Failure to Notify
Return to work is dependent on the four week notice which is mandatory. If an employee fails to give the four weeks written notification of her return to work that may be a fair reason for her dismissal by her employer.

Note: Advice should be sought on this complex legal area.

RESOLUTION OF DISPUTES
The Maternity Protection Act is enforced through the machinery provided for in the Unfair Dismissals Act: Rights Commissioner, Employment Appeals Tribunal, Circuit Court and High Court. The Unfair Dismissals Act is extended to provide for the determination of disputes over entitlements under the Maternity Act as well as alleged unfair dismissal for exercising rights under the Act.

Disputes under the Acts go initially to a Rights Commissioner and only on appeal to the Employment Appeals Tribunal (EAT) and may be appealed to the High Court only on a point of law.

Disputes in relation to the health and safety regulations are taken to the Health and Safety Authority (HSA) and on appeal to the civil courts.

TEMPORARY REPLACEMENT OF STAFF ON MATERNITY AND ADOPTIVE LEAVE

(i) When an employee is on protective leave, the Unfair Dismissals Acts, 1977-2001 provides that a specified purpose contract may be given to replacement staff. The contract must be in accordance with the provisions of the Unfair Dismissals Acts, 1977-2001, ie it is in writing, signed by both parties and a clause stating that the Act does not apply to the termination of such contract. Then in such situations the unfair dismissals legislation will not apply to termination of the contract of the temporary employee when the permanent employee returns.

(ii) It is inadvisable to designate a person to be a permanent floating replacement for employees going on maternity leave. The reason being that such persons can build up continuous service under protective legislation.

ADOPTIVE LEAVE ACTS 1995 AND 2005

Scope
The following categories of employees are covered under this legislation:-

- all adopting mothers under a contract of employment;
- all sole male adopters, under a contract of employment;
- all adopting fathers, under a contract of employment, where the adopting mother has died before or during the period for adoptive leave or additional adoptive leave.

Entitlement under Adoptive Leave
All employees covered by the Adoptive Leave Acts are entitled to a minimum period of 20 weeks unpaid adoptive leave, subject to certain notification requirements from their employer.

The Social Welfare Acts provide the payment of an adoptive leave allowance for employees taking Statutory Adoptive Leave.

(Note: From 1 March 2007 all employees covered by the Adoptive Leave Acts will be entitled to a minimum period of 24 weeks).
Additional Adoptive Leave
In addition to the minimum period of adoptive leave, an employee may elect to take up to 12 weeks additional adoptive leave.

In the case of a foreign adoption, some or all of the additional adoptive leave may be taken immediately before the date of placement.

During this period, there is no entitlement to Social Welfare adoptive leave benefit.

(Note: From 1 March 2007 additional adoptive leave will be extended to 16 weeks.)

Rights During Leave
Absence from work on adoptive leave and additional adoptive leave will count for all rights (except remuneration, superannuation benefits) associated with the employment such as reckonable service, annual leave and seniority.

Absence from work on adoptive or additional adoptive leave may not be treated as part of sick leave, annual leave or any other leave that the employee may be entitled to.

The Acts currently provide, therefore, for a maximum of 32 weeks adoptive leave (20 weeks minimum leave plus 12 weeks additional leave).

Time off to attend preparation classes
An employee is entitled to time off during work hours without loss of pay to attend preparation classes and pre-adoption meetings with social workers/health board officials required during the pre-adoption process.

Additional adoptive leave and sickness
Subject to the employers agreement the adopting parent has the right to terminate unpaid additional adoptive leave in the event of illness thereby allowing the parent to transfer onto paid sick leave. Request of termination by the employee and acceptance of termination by the employer must be in writing.

Postponement of adoptive leave
The Act also provides for postponing the period of adoptive leave and/or additional adoptive leave in the event of hospitalisation of the adopted child, subject to the agreement of the employer.