

UPDATE

# Guernsey's Maternity Leave and Adoption Leave Ordinance 2016

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Whereas many Guernsey-based employers already offer contractual parental leave to their staff, there has never been a statutory obligation to do so. The Maternity Leave and Adoption Leave (Guernsey) Ordinance, 2016 (the Ordinance) was adopted on 26 January 2016 and will come into effect on 1 April 2016, bringing Guernsey somewhat into the twenty-first century. We discuss the key aspects of the Ordinance for employers.

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Whereas many Guernsey-based employers already offer contractual parental leave to their staff, there has never been a statutory obligation to do so. The Maternity Leave and Adoption Leave (Guernsey) Ordinance, 2016 (the **Ordinance**) was adopted on 26 January 2016 and will come into effect on 1 April 2016, bringing Guernsey somewhat into the twenty-first century. The main provisions of the Ordinance will not be applicable to any person who has a due date before 7 August 2016 so there is a small transitional period during which employers will have time to get their policies up to date.

In a nutshell, the Ordinance has introduced rights for eligible employees to be entitled to up to 26 weeks' unpaid maternity/adoption leave or two weeks' unpaid partner leave (as applicable). Eligible employees will have the right to antenatal appointments, keeping in touch days, to return to the same (or substantially similar) role when they return to work and to be offered a suitable alternative role in redundancy situations. In this article we summarise the main provisions and their impact on Guernsey employers.

## Background

The States of Guernsey resolved to introduce statutory maternity (and associated) leave provisions back in 2012. Since then there has been much discussion about how to fund the leave. To prevent further delay, the parental leave scheme has been staggered: parental leave entitlements are being introduced this year, and the Social Security Department's proposals for enhanced benefit entitlements are expected to be introduced by 1 January 2017.

## Dates to note

The Ordinance will come into force on 1 April 2016.

The rights under the Ordinance insofar as they relate to maternity, maternity support, adoption leave and adoption support leave will only apply to babies due (and children under the age of 18 placed for adoption) on or after 7 August 2016.

## Different types of leave

1. **Compulsory statutory maternity/adoption leave.** All employees who give birth or adopt a child are entitled to a two-week period of compulsory statutory leave starting with the birth/placement of the child. Employers who permit an employee who has given birth/adopted a child to work during this compulsory leave period will be committing an offence and liable to a fine. The level of the fine will depend on whether there was a birth (£10,000) or an adoption (£1,000).

2. **Basic statutory maternity/adoption leave.** Subject to basic notification requirements being met, a mother/main adoptive parent will be entitled to 12 weeks' basic statutory leave. This period includes the period of compulsory statutory leave. Whilst it will be for a mother/adoptive parent to elect when to commence their period of basic statutory leave (or agree an alternative date with their employer), an employer will have the right to direct a mother-to-be to commence her period of basic maternity leave if she has been absent from work as a result (wholly or partly) of her pregnancy within six weeks of her expected due date.

The Ordinance does not specify a minimum period of required absence before an employer could (or should) direct an employee to commence her period of basic maternity leave. This could be controversial for employers seeking to rely on this provision and it will remain to be seen whether the position will be clarified by the States in the future.

The onus will be on the employer to confirm the maternity leave commencement date and agreed return-to-work date before the employee commences her period of leave.

3. **Additional maternity/adoption leave.** Additional statutory leave may only be taken by a mother/main adoptive parent who is entitled to basic maternity/adoption pay and who has been continuously employed by their employer for at least 15 months prior to the 11th week before their expected due/placement date.

Eligible employees are entitled to a maximum of 26 weeks' statutory maternity/adoption leave in total (including a combination of compulsory, basic and additional leave).

### Notification requirements

In order to be entitled to statutory leave, an employee must comply with the statutory notification requirements. In particular, a mother must notify her employer in writing at least three months prior to the baby's expected due date (or if not reasonably practicable, as soon as reasonably practicable) of her:

- pregnancy;
- due date;
- intended maternity leave start date (which must be eight weeks or less before the due date); and
- intended maternity leave end date.

An adoptive parent must notify their employer in writing as soon as reasonably practicable of the:

- expected date of placement for adoption;
- the date on which they intend their adoption leave to start (which must be the placement date or no more than 14 days before this date); and
- the date on which they intend their adoption leave to end.

### Partners

If an employee is entitled to basic statutory leave, their spouse/partner/co-habiting partner or anyone they nominate in writing will be entitled to two weeks' support leave as long as he/she has been continuously employed by their employer for at least 15 months at the beginning of the 11th week before the baby's expected due date/expected placement date. It is relevant to note that this right to partner leave is limited to those who have a partner who is actually working and therefore entitled to statutory leave. Interestingly, and perhaps controversially, it does not provide a right for partners of non-working mothers to take leave.

Employees will have the right not to suffer any detriment on the ground that they took or sought to take support leave. The States had previously indicated that the award payable in the event of any detriment being suffered by a partner would be one month's pay and although the Ordinance does not refer to this, we expect this to be clarified.

### Antenatal appointments

Employees will be entitled to attend appointments to receive antenatal care where such appointments are on the advice of a doctor, midwife, health visitor or community nurse. This may include obvious appointments like scans and check-ups, however it may also include appointments like antenatal classes and parent craft classes. Whilst an employer is entitled to request proof of the antenatal appointment, it is

not entitled to request proof of the advice given by the doctor, midwife, health visitor or community nurse of the need for an antenatal appointment.

Interestingly, there is no limit on the number of antenatal appointments an employee is entitled to attend nor is there a restriction on the type of antenatal appointments that may be taken. The obligation on an employer not to unreasonably refuse to allow the employee to attend an appointment suggests that an employer could refuse to allow an employee to attend an antenatal appointment if it was reasonable to do so.

It is uncertain at this point whether the time taken by an employee to attend antenatal appointments is to be regarded as paid leave or unpaid leave as the Ordinance is silent on the issue. At this point, we would advise that employers apply a reasonable and consistent policy in respect of the issue.

### **'Keeping in touch' (KIT) days**

An employee will have the right to request to work up to ten days whilst on maternity/adoption leave and will be entitled to be paid for those days at the same rate and receive the same benefits that they received prior to their maternity/adoption leave.

The statutory right to KIT days appears to be vested in the employee, rather than the employer, with the effect that an employer will not be able to direct an employee to work during their period of statutory leave.

It is unclear whether an employer can direct an employee to undertake a different job during the KIT days to that which they had prior to their maternity/adoption leave.

### **Return to work**

At the conclusion of their period of statutory leave, employees have the right to return either to their pre-leave role or, if not reasonably practicable, to another role which is suitable and appropriate for them to perform in the circumstances. This applies both an objective and subjective test – objectively looking at whether a role is suitable and subjectively determining if it is appropriate for the particular individual. Whilst the Ordinance makes clear that any alternative role must be on terms and conditions no less favourable than those the employee enjoyed in their pre-leave role (particularly, but not limited to, in relation to remuneration, seniority, pension and continuity), there is uncertainty as to what constitutes a 'suitable and appropriate' alternative role. It will be a matter of waiting for guidance from the Tribunal on its interpretation of those words.

Subject to the giving of 21 days' written notice, an employee is entitled to request to return to work before the end of their statutory leave period. An employer is under no obligation to accept a request to return to work early but remains obliged to allow the employee to return on the previously agreed return date.

### **Protection of rights during maternity/adoption leave**

During any period of statutory leave, the Ordinance provides the right for employees to remain entitled to the benefit of any express terms relating to notice, redundancy, compensation and disciplinary and grievance procedures. The Ordinance also imposes an obligation on employees to respect their contractual obligations insofar as they relate to notice, disclosure of confidential information, acceptance of gifts or other benefits, and the participation in other businesses. This list of obligations appears to be exhaustive and implies that other than those express contractual terms listed, an employer is not bound to provide any other contractual benefit to an employee during any period of statutory leave. This would include pay, pension, benefits or participation in a bonus scheme.

Furthermore, and perhaps of concern for both employers and employees alike, the Ordinance has codified two implied contractual terms. In particular, it has imposed a statutory obligation on employers to give their employee the benefit of their 'implied obligation ... of trust and confidence'. It has also imposed a statutory obligation on employees to respect their implied obligations of 'good faith' owed to their employer. This reliance on undefined implied contractual terms creates an uncertainty for employers. It will remain to be seen how the Tribunal interprets those terms in the context of the obligations imposed by the Ordinance.

## Unfair dismissal

The Employment Protection (Guernsey) Law, 1998 already deems it automatically unfair to dismiss a woman on grounds of pregnancy or (subject to certain exceptions) any other reason connected to her pregnancy. In accordance with the Ordinance, it will now be considered automatically unfair to dismiss an employee because:

- the employee has given birth after 24 weeks of pregnancy;
- the employee has adopted a child; or
- the employee has sought to take maternity/adoption/support leave or time off for antenatal appointments.

Employees may assert that they have been automatically unfairly dismissed on the above grounds irrespective of their length of service, and the six month compensation award may only be reduced where an employee has unreasonably refused reinstatement.

## Redundancy

An employee must not be selected for redundancy on the basis of any reason associated with their statutory leave.

If, during a period of statutory leave, a genuine redundancy situation means that an employer can no longer continue to employ an employee under their existing contract, they are obliged to offer any 'suitable available vacancy' to that employee. This obligation provides employees on statutory leave with a preference over employees not on statutory leave. Such vacancy must be 'suitable in relation to the employee' and 'appropriate for her in the circumstances'. What is considered a 'suitable alternative vacancy' is not defined. How employers are expected to determine whether such a vacancy is suitable to the employee is likely to involve an objective assessment; and whether such a vacancy is 'appropriate for her in the circumstances' is likely to involve a subjective assessment of the facts. The Ordinance provides no guidance on the interpretation of these terms and we will have to see how the Tribunal applies these terms in practice.

## Sex discrimination

The Sex Discrimination (Guernsey) Ordinance 2005 already makes it unlawful to discriminate against a person on the grounds of their sex, marital status or gender reassignment. In accordance with the Ordinance, it will now also be unlawful to discriminate against a woman who:

- has given birth after 24 weeks of pregnancy;
- has adopted a child;
- has given notice to take maternity or adoption leave;
- returns to work after having been on maternity/adoption leave; or
- gives notice to attend an antenatal appointment (where she is entitled to it).

Any employee who has been subjected to unlawful discrimination will be entitled to an award of three months' pay.

## Conclusion

Now is the time, if you haven't done so already, to check your policies to ensure that they comply with the minimum requirements, as failure to do so may lead to some hefty fines and/or the potential for unfair dismissal and discrimination claims.

The new provisions are a huge step for Guernsey although it remains to be seen how they will be implemented in practice. As with any new legislation, there are questions left unanswered and, as always, the devil will be in the detail.

## Contacts

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