Shared Parental Leave
Nine Months and Counting

The question of enhanced pay

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Overview
Many employers currently choose to enhance pay above the statutory rate for women on maternity leave. Although there is no statutory obligation on such employers to also enhance pay for men and women on shared parental leave (‘SPL’), where men are not offered or offered less enhanced pay there is a risk of successful discrimination claims. There are also many other reasons why employers might consider enhancing pay for SPL, including recruitment and retention objectives, matching employees’ expectations and employer branding and ethos. Considerations such as cost and take-up rates will be relevant to any decision to offer enhanced pay and there are a number of assumptions that can be made to assess this. An employer contemplating enhancements must then consider how such enhancements might be structured, including the duration and rate of pay, interaction with existing enhanced maternity and paternity pay entitlements and any conditions that may apply to the enhancement.
Do I have to enhance pay for SPL?

No statutory obligation

Ever since SPL was first proposed in May 2011, employers have been asking one key question: ‘Do I have to enhance pay during SPL if I currently enhance pay during maternity leave?’

Even at the early stages of the consultation process, it seemed very unlikely that there would be any statutory requirement to do so. The final legislation certainly does not include any positive obligation on employers to pay more than the statutory rate of SPL, which will be the same as the lower rate of statutory maternity pay, currently £138.18 per week. While the consultation paper, and subsequent government statements, expressed a ‘hope’ that employers would offer contractual enhancements to pay during SPL, which would match those offered during maternity leave, and it has now been announced that civil servants will receive enhanced pay during SPL, private-sector employers have been left with a clear choice as to whether they wish to do so.

Maternity/paternity enhancements and discrimination – the existing legal position

Special treatment: The existing legislation relating to maternity leave protects employers who offer enhanced pay to women on maternity leave against discrimination claims. Section 13(6)(b) of the Equality Act 2010 provides that ‘no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth’.

Distinct rights: Case law has consistently found that in the UK maternity leave schemes fall within this exception. On this basis alone, most employment lawyers have formed the view that enhancements offered to women on maternity leave do not need to be offered to employees on other forms of leave, such as ordinary or additional maternity leave. Even without this specific exclusion, employment lawyers have argued that a man taking paternity leave could not seek to compare himself to a woman on maternity leave, but rather his correct comparator would be a woman taking pregnancy leave (for example, a same sex partner, or a female secondary adopter). It would only be if a woman taking the same leave was offered an enhancement that a man may have a direct discrimination claim.

Tribunal guidance: Indirect discrimination claims have been less clear, as it is difficult to see that enhanced maternity leave, which of necessity is available only to women, could be a provision criteria or practice (PCP) applied equally to both men and women but putting men at a disadvantage. Until recently the concepts of direct and indirect discrimination in relation to enhanced pay for ‘family’ leave had not been tested. However, the recent case of *Shuter v Ford Motor Company Ltd* (case number 3203504/2013) has provided first instance tribunal guidance on this point. In that case, a man taking family leave paid at the statutory rate (in this case additional maternity leave) failed in both his claims of direct and indirect discrimination on the grounds that a woman on maternity leave at the same point in a child’s life would be paid full pay.

In respect of the direct discrimination claim, the tribunal found that the father could only compare himself to others taking additional paternity leave, not a woman taking maternity leave as that was a different right altogether. In respect of indirect sex discrimination, the arguments in relation to a PCP were less clear. The outcome was also specific to *Ford* as the tribunal found that any disadvantage in the practice of paying enhanced pay to men and women when on leave beyond 20 weeks from the birth of a child could be a provision criteria or practice (PCP) applied equally to both men and women but putting men at a disadvantage. Until recently the concepts of direct and indirect discrimination in relation to enhanced pay for ‘family’ leave had not been tested. However, the recent case of *Shuter v Ford Motor Company Ltd* (case number 3203504/2013) has provided first instance tribunal guidance on this point. In that case, a man taking family leave paid at the statutory rate (in this case additional maternity leave) failed in both his claims of direct and indirect discrimination on the grounds that a woman on maternity leave at the same point in a child’s life would be paid full pay.

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SPL and discrimination

A different type of leave: Employers can take some comfort from *Shuter* because SPL will be a different form of leave to maternity leave, and by analogy, a man taking SPL who does not receive enhanced pay should not therefore be able to compare himself to a woman who, taking maternity leave at the same time in a child’s life, receives enhanced pay. As it stands, *Shuter* therefore supports the proposition that it is not discriminatory to enhance pay for women on maternity leave but not for men and women taking SPL.

Could still be challenged: However, *Shuter* is only a first instance case and there is some credible concern that it is only a matter of time before the conclusions put forward within it are challenged. For many, the labelling of different types of family leave is artificial and following this argument through, where the purpose of the leave (whether it be maternity/paternity or SPL) is to care for a child during the first year, the same treatment in relation to enhanced pay should apply to both men and women. Women will be able to take SPL instead of maternity leave from two weeks after the birth, and men can also take SPL from this time onwards. This means that a man can effectively take ‘maternity leave’ in the form of SPL instead of (or at the same time as) the mother. In these circumstances it may be harder to apply the special treatment exception in the Equality Act, afforded to women in connection with childbirth, to maternity leave.

The justification of indirect sex discrimination may also be harder for other employers to establish, particularly those with a more gender-balanced workforce. Ford had both compelling evidence that the enhancement of maternity leave was a deliberate decision designed to recruit and retain women into a male-dominated workforce; and could also demonstrate that their actions had achieved a significant increase in representation of women in the workforce, and in particular in management roles. Few employers would be able to produce such a compelling justification.

Despite the helpful ruling in *Shuter*, as has been the case for some time, there remains an ongoing risk that men may bring discrimination claims if they are not entitled to the same pay enhancements as women taking maternity leave.

Offering some enhancement might minimise the risks: In practice, the extent of the risk for any given employer of claims for enhanced pay from men is likely to depend at least in part on whether any enhancements at all are offered. If some enhancements are offered and these are within the expectations of most men in the employer’s workforce, the risk of claims should be lower. For example, if enhancements are paid for up to three months of SPL and most men intend/do take SPL for that period or less, then they may feel less aggrieved. It is worth remembering here that the more SPL a man takes, the more maternity leave the mother must sacrifice, which may mean it is more attractive to parents for the father to take a comparatively short period of SPL. Please see below for more information on structuring enhancements.
Even if I don't have to enhance SPL payments, why might I want to?
Employers faced a similar question in 2010 when additional paternity leave was first introduced. In relation to that right very few employers decided to offer any financial enhancement over the statutory payment rate. However, for a variety of reasons, additional paternity leave has not been a well publicised right and has not had a high take-up rate.

Publicity/employee expectations: Given the publicity around SPL, it seems likely that employees are and will be more aware of this right and may have expectations that it will be seen as a simple transfer of maternity rights between parents, and will therefore expect enhancements to be available. This issue of employee expectations, particularly the expectations of mothers, is likely to increase the pressure on employers to provide the same enhancements for SPL as for maternity leave.

Supporting women's careers: SPL may be a way for mothers to take shorter periods of leave and reduce any risk of career interruption. This strand of thought reflects the increase in pressure on companies to ensure diverse senior employee representation, particularly at board level, and SPL is perceived as a tool to achieve these diversity objectives.

Employer branding: Enhancements to SPL may be seen as an employer branding issue and present an opportunity for employers to present themselves as an employer of choice in family friendly and diversity issues.

Possible loss of enhanced maternity benefits: Women who want to share some of their maternity leave with their partner will need to end their own maternity leave early and either return to work or take SPL themselves. A woman taking a period of SPL which appears to her to be in all respects identical to maternity leave may in fact lose the contractual enhancements that her employer offers to those on maternity leave.

To reduce risk of actual/perceived discrimination issues: As mentioned above, there is a risk that men who feel that they are not being treated fairly in relation to women in the workforce will bring discrimination claims. The extent of this feeling may vary according to whether any enhancements at all are offered.

How can I assess the cost of enhancing SPL?
Before deciding on enhancements for SPL, employers will need to assess the cost of doing so.

This requires consideration of the likely take-up rate of SPL, the cost of cover and the likely reduction in the length of maternity leave that women take.

The likely take-up rate of SPL: This critical piece of information is extremely difficult to estimate. The closest currently available form of leave is additional paternity leave, which has a notoriously low take-up rate, estimated to be below 1% of those eligible. The government estimate is that between 2% and 6% of those eligible will take up SPL. However, given the key attraction of flexibility offered by SPL in comparison with the existing additional maternity leave, it is likely that take-up will be higher. A better way to estimate take-up may well be to look at the take up rate of ordinary paternity leave (as fathers who take this may well be likely to take some additional leave). This is likely to give something of an over-estimate of the number of partners of mothers who will take up SPL, but in carrying out a cost assessment an over-estimate would be of more use than an under-estimate. A further assumption will need to be made as to the level of take-up of SPL by mothers on maternity leave.

Cost of cover: Periods of SPL are likely to be shorter than maternity leave or additional paternity leave (the latter will no longer be available). There may well, therefore, be a saving for the employer, as a period of leave of less than a month may not be covered at all whereas the absence of the mother taking the full year of maternity leave would be much more likely to require a temporary employee as maternity cover. Again, making assumptions as to patterns of leave is difficult as the structure of SPL is entirely new.

Reduced periods of maternity leave: It is likely that if men take-up SPL, there will be a corresponding reduction in the length of maternity leave that women take (as the leave is shared, some maternity leave must of course be sacrificed to entitle a man to take SPL). This may not be helpful in quantifying cost, however, if the maternity leave that is sacrificed is the unpaid portion or that for which the employer is not paying any enhancement.

All of these estimates involve making material assumptions about employee behaviour in relation to a brand new right. The only way to really have a clear picture of how employees will react when the new right comes into force would be to observe their responses, or to survey them in advance.

Survey: We have recently commissioned a survey of employees to try to establish attitudes to the new right to SPL and likely take-up rate. We will be reporting in detail on the data that we have produced in our next bulletin and at our event on 19 November. Our findings show that the take-up rate is likely to be significantly higher than expected with more than two thirds of the employees of FTSE 100 companies that we surveyed saying they were interested or very interested in taking up SPL, with a relatively even split between men and women. Based on this, the government estimate of a 2%-6% take up rate is likely to be wholly inaccurate.

How might I structure enhancements for SPL?
Employers looking to enhance pay for SPL, have two basic options, (1) to match the enhanced pay structure for SPL with that for maternity leave (for example, in terms of rate, duration and conditions), or (2) to create a new system of enhanced pay for SPL altogether. Some of the issues relevant to these options are considered below.
How much pay and for how long?

Same structure for men and women: To avoid discrimination, pay enhancements for SPL (for example, duration and rate) should be the same for men and women, irrespective of whether they match those available for maternity leave. This is because men and women are taking advantage of the same right and a direct comparison can be made.

Interaction with enhanced maternity pay: Employers will need to decide if any enhanced entitlement to SPL is payable in addition to existing enhancements available to women on maternity leave or as an alternative to those enhancements. For example, if men and women are entitled to a maximum of three months' enhanced pay (assume full basic pay) during SPL, and women to six months' full pay during maternity leave, a woman could be entitled to take six months of maternity leave followed by three months of SPL and be paid enhanced pay for the total nine month period. This may not be what the employer intended, be prohibitive in cost terms, and the large differential in enhancement may be unpalatable to men. An alternative would be to provide that women are entitled to a total period of enhanced pay whilst on either maternity leave or SPL (for example six months using the example above) but that a maximum of three months of this enhancement can be taken as SPL (as the SPL period must match a man’s entitlement, which in the above example is three months).

Rate of pay. This should be the same for men and women taking SPL, but could be different to that offered for maternity leave, although the discrimination and practical issues mentioned above in relation to any differences between maternity and SPL enhancements apply.

Reducing or removing maternity entitlements

Employers who are concerned about discrimination and cost if they try to match enhancements for SPL to those for maternity, may wish to consider reducing existing maternity entitlements, effectively reassigning some of the cost of that benefit to SPL. The disadvantage of doing this is that it is likely to be unpopular, particularly with women who are not entitled to SPL, perhaps because their partner/the child’s father is not economically active. Further, there may be difficulties and practical risks in effecting the change if women have a contractual entitlement to enhanced maternity benefits, and it is important to remember that an entitlement may have become contractual simply by custom and practice.

Attaching conditions

Patterns of leave: Employers will need to think about whether enhancements can/should be offered to encourage employees to take SPL in a way that is mutually beneficial. For example, an employer might look to offer enhanced pay to individuals who take SPL in one single block but not if it is taken in discontinuous blocks. As above, the approach must be consistent for men and women (which may preclude, for example, only paying enhanced pay to a woman who takes SPL immediately following maternity leave, if a man is entitled to receive enhanced pay whenever in the child’s first year he takes it).

Pay-back: Employers should consider whether they wish to impose any conditions on pay-back of the enhancements if men/women do not return to work from a period of SPL or leave within a short period of returning.

Next month

Next month we will be reporting on the detailed findings of our survey of the attitudes of employees of FTSE 100 companies to SPL. To hear our presentation of these findings, along with insight from Talking Talent, please join us for a breakfast briefing on 19 November. Click here for the invite and to rsvp.

We would also like to gather information from employers in relation to shared parental leave, the results of which we intend to share in due course. If you haven’t already done so, it would greatly help us if you would fill out our short survey (anonymously) by clicking here.