

Employment Write News

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A number of important changes to employment law are coming into force in April. In particular, a new right to paternity leave is being introduced, and the right for employers to retire employees is coming to an end. Employers are well advised to familiarise themselves with these changes in order to identify whether it is worth making decisions prior to the changes and to avoid costly breaches of the new rules.

Paternity leave – A new right for fathers

A brand new right to take paternity leave takes effect in April of this year. It is designed to encourage the sharing of childcare responsibilities beyond just the mother of a new child. Employers therefore need to be ready to deal with impending paternity leave requests from their employees.

Existing Paternity Leave

Employers should already be aware that, since 2003, fathers have had a statutory entitlement to a period of leave of either one week or two consecutive weeks within 56 days of a child's birth (or, in adoption cases, when the child is placed with the adopter).

This leave is now known as ordinary paternity leave (OPL) and is available to an employee who:



- a) has 26 weeks' service;
- b) is the child's father or is the spouse/civil partner/partner of the mother (including same sex partner); and
- c) has responsibility for the child's upbringing.

The purpose of OPL is to enable an employee to care for the child and/or support the mother and the right to OPL will continue unchanged. There is no entitlement to full pay during OPL.

New Paternity Leave

The right to Additional Paternity Leave (APL) will apply to parents of a child due on or after 3 April 2011 (or, in the case of adoption, parents who are notified of a match with a child on or after 3 April 2011). An eligible employee is entitled to take a period of leave of between 2 and 26 weeks. This must be taken within a specific timeframe that runs from 20 weeks after the baby is born to the baby's first birthday. It is dependant on the mother returning to work from maternity leave and, effectively, amounts to the transfer of the mother's remaining maternity leave to the father.

Who is eligible?

Eligibility for APL is similar to OPL, in that it applies to an employee who:

- a) has 26 weeks' service;
- b) is the child's father or is the spouse/civil partner/partner of the mother (including same sex partner); and
- c) has, or is expected to have, main responsibility for the upbringing of the child (in addition to the child's mother).

However, there are certain additional requirements which apply to APL:

- a) the employee must be in continuous employment with the employer until the week before APL; and
- b) the mother of the child needs to have been entitled to maternity leave, statutory maternity pay or maternity allowance AND has returned to work.

Notice and evidence

At least eight weeks prior to the date that an employee wishes to take APL, the employee must provide the following information to their employer:

- 1) written notice specifying the child's date of birth and the start/finish dates for APL;
- 2) a signed declaration stating that the purpose of APL is to care for the child, identifying the employee's relationship with the child and confirming they have main responsibility for the child; and
- 3) a declaration from the child's mother confirming the date she intends to return to work, the father's relationship to the child (or relationship with her) and providing her consent to the employer processing the information in this declaration.

Following receipt, the employer has 28 days in which either to confirm in writing the request for APL or to make a request for a copy of the child's birth certificate. An employee has 28 days in which to respond to any requests for further evidence from the employer. However, there is no right to refuse APL if that evidence is not forthcoming. Therefore, potential problems could arise if an employer does not believe that an employee is genuinely intending to take APL to care for a child.

An employee might also make a request to vary or cancel APL. This is referred to as "subsequent notice" and must be provided to the employer at least six weeks prior to the intended date of APL or, where this is not possible, as soon as is reasonably practicable.

Rights during APL

In the same way as maternity leave, an employee on APL is entitled to all of their usual contractual terms, except for those relating to remuneration. An employee may choose to work for up to ten days without bringing APL to an end – these are known as 'keeping in touch days' (KIT days).

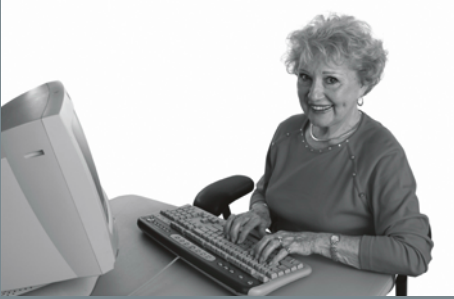
An employee is entitled to be paid additional paternity pay whilst on APL. This equates to any remaining maternity pay that would have been paid to the mother had she remained on maternity leave. Employers need to be aware of the risk of a discrimination claim if female employees are usually paid enhanced maternity pay and an equivalent payment is not made to male employees on APL.

What does this mean for employers?

From a practical perspective, employers need to be aware that the law relating to paternity leave is changing and consider introducing a system which manages requests for APL in a compliant manner.

The changes are likely to mean that employers have to consider the operational impact on their business. In particular, employers may need to prepare for an increased number of employees being out of the business for extended periods whilst on APL. Further, employers could be faced with lengthy absences on relatively short notice, given that the minimum requirement for notice is only eight weeks.

In addition, those employers who offer enhanced maternity pay need to decide whether these enhanced benefits will apply to APL also.



An end to Compulsory Retirement

The Government has finally confirmed its proposals to phase out compulsory retirement at 65 by 1 October 2011. Transitional provisions take effect from 6 April 2011, with the result that notice of retirement cannot be given (without the risk of a discrimination claim) after that date.

Background

In a society where people are living longer, and need to work for longer, the idea of compulsory retirement has started to be questioned. In addition high profile legal challenges to the current default retirement age (DRA) of 65, most notably by Age Concern, has meant the Government has been forced to consider whether it can continue to justify the age discriminatory impact of allowing employers to retire

employees at 65. The conclusion has now been reached that it cannot and, as a result, the DRA of 65 will be removed.

When does this happen?

As part of a phasing-out process, transitional provisions will run from 6 April 2011 to allow for the retirement of employees where a retirement process is already underway at that date, so long as the following conditions are met:

- a) the notification to retire has been issued before 6 April 2011; and
- b) the person will reach 65 (or, if higher, the normal retirement age) between 6 April 2011 and 30 September 2011.

Unfortunately, the way in which the Government has drafted the regulations means that, in their current form, even if a legitimate notice of retirement has been issued prior to 6 April 2011, if an employee is not due to be 65 and retire until after 30 September 2011, their retirement will be unlawful. This was not the intention and, hopefully, will be corrected prior to 6 April 2011. However, in the meantime, if you are intending to make use of the current legislation to retire employees after 30 September 2011, you should consider the position carefully.

What are the changes?

Notice of compulsory retirement arising on or after 6 April 2011 (or notice of retirement before 6 April 2011, where an employee does not reach 65 between 6 April 2011 and 30 September 2011) will be discriminatory on the grounds of age unless it can be justified. In addition, an employer will no longer be able to use retirement as a fair reason to dismiss an employee. Under existing legislation, an employer can fairly dismiss an employee on the grounds that they have reached the DRA of 65. Instead an employer will need to use one, or more, of the remaining potentially fair reasons to dismiss (such as capability or misconduct), as well as demonstrating that a fair procedure has been used.

None of these changes affect an employee's right to elect to retire, at a time of their choosing. The Government has promised to produce guidance on how employers should broach the issue of retirement with employees, without falling foul of age discrimination rules.

Options for managing an older workforce

Given the changes, employers need to review their retirement procedures. For many employers, references to a fixed retirement age (whether 65 or above) will need to be removed from contracts of employment and policies.

Some major organisations have already taken this approach. For example, B&Q was one of the first companies in Britain to target older employees on the basis that an older worker force can add higher levels of experience and maturity to an organisation.

Alternatively, some employers may decide to retain a fixed retirement age, as long as they can demonstrate the following:

- a) there is a real business need for a retirement age;
- b) using a particular retirement age will meet this need; and
- c) using that retirement age is proportionate to achieve that aim.

Being able to justify a policy of a fixed retirement age is likely to be difficult. Even if a role requires certain levels of significant physical or mental fitness, the use of a general age limit could still be unjustifiable as different individuals have different levels of fitness at different ages.

What employers should do

- If you have employees who are eligible for retirement, consider whether you wish to serve notice of retirement under the current regime (in advance of the 6 April 2011 deadline). However, ensure that you also comply with the new conditions too.
- Where employees have requested the right to work, following a notice of retirement, proceed with caution. Any extension of employment after 5 April 2011 will give the employee protection under the new regime.
- Consider updating contracts of employments to remove any reference to a DRA, unless the employer is confident that it can meet the strict requirements which allow a fixed retirement age to be used.
- Review performance management procedures within the business, to ensure a consistent approach to all employees, regardless of age.

Other News in Brief

Increase in compensation limits

The annual increase in compensation limits has been published. They apply to dismissals occurring from 1 February 2011 onwards. The main changes are:

- Maximum unfair dismissal compensatory award to increase from £65,300 to £68,400.
- Maximum 'week's pay' for redundancy and basic awards to increase from £380 to £400.
- Minimum basic award in cases where the dismissal was unfair by virtue of health and safety, employee representative, trade union, or occupational pension trustee reasons to increase from £4,700 to £5,000.

Flexible Working

From April 2011, the right to request flexible working will be extended to parents with children under 18. This right is currently available to parents with children under 17 or with disabled children under 18. It is estimated that nearly 300,000 people will benefit from this new right, in addition to an estimated 10.5m employees who are eligible for the right to request flexible working under the existing rules.

Bank Holidays

Following the confirmation of new bank holidays on 29 April 2011 and 5 June 2012, some employers have queried their employees' entitlement to additional bank holidays.

As a starting point, there is no statutory right to time off (paid or otherwise) on any public holiday. However, where a query does arise, employers must check the wording of their employees' contracts. If, for example, they refer to a particular number of days' holiday entitlement "plus all public holidays" then there will be a contractual right to take bank holidays, including the extra bank holidays in 2011 and 2012. If, however, there is a total entitlement to holiday, for example "28 days per year", or a specific reference to eight bank holidays, then there is no strict entitlement to additional bank holidays; it is ultimately a question for the employer to decide whether to allow employees to take the bank holiday or not.

The Employment Department - Key Contacts



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Jo read Law at Cambridge University before working at Addleshaw Sons & Latham, now Addleshaw Goddard. She has specialised in employment law since 1996 and became a partner in 2003. She joined Neil Myerson in 2007 to head up the firm's team of employment specialists.

Jo has significant experience of dealing with Employment Tribunal claims, discrimination matters and the employment aspects of corporate and commercial transactions. She also regularly provides training to clients on HR and employment law issues. She is described by the independent legal directories as "bright, decisive, proactive and switched on", providing clients with "astute advice, straightforward thinking and client focus".

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Joanne read Law at the University of Leeds before working at leading commercial firms including Eversheds LLP. She joined Neil Myerson in March 2009.

Joanne has experience in a wide range of employment matters and is an experienced Employment Tribunal advocate. She advises on executive arrangements and terminations and in addition has a particular interest in the employment law aspects of corporate and commercial transactions, restructuring and redundancy.

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John read Law at Cardiff University before working at DLA Piper UK LLP and Beachcroft LLP. He joined Neil Myerson in June 2008.

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Charlotte read Law at the University of Durham before joining Neil Myerson as a trainee solicitor in 2006. On her qualification as a solicitor in 2008, she joined our employment team.

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