

Maternity leave (for NHS medical staff)

Membership guidance note – NHS employment

March 2011



Notes

- This membership guidance note gives general guidance only and should not be treated as a complete and authoritative statement of the NHS maternity leave agreement. It largely covers doctors employed on nationally agreed terms and conditions, but the situation in trusts may differ.
- Included in the guidance note are details of the statutory employee rights to parental, paternity and adoption leave, with reference to the NHS provisions where appropriate.
- Every effort was made to check accuracy at the time of printing but there may have been later changes.
- The guidance note applies to the situation in England and Wales. Although similar conditions apply to Scotland and Northern Ireland, members should contact the BMA for further information.
- *Maternity leave (for NHS medical staff)* is based on information provided by the BMA's regional services and is edited and produced by BMA Marketing & Publications.
- Members may obtain other guidance notes by calling the BMA on 0300 123 123 3. When contacting the BMA, please quote your current membership number.

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Seek advice on your rights and responsibilities at an early stage of pregnancy, preferably before becoming pregnant. There may be circumstances in which maternity pay would have to be repaid to the employing authority/trust, eg failure to give notice of return to work.

This membership guidance note describes the NHS Scheme on maternity leave for NHS employees who are employed under national agreements, and other related issues.

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Introduction

- 1.1 Subject to certain conditions, NHS staff employed under contracts incorporating national Terms and Conditions of Service and NHS agreements can be entitled to:
- paid maternity leave
 - unpaid maternity leave
 - the right to return to work
 - time off for antenatal care
 - not be unfairly dismissed because of pregnancy or childbirth.
- 1.2 In the NHS these entitlements are governed by the national Terms and Conditions of Service¹ (referred to here as the NHS Scheme). This membership guidance note sets out the main provisions.
- 1.3 In many instances, the NHS Scheme is more generous than the statutory provisions and it incorporates all the benefits of the statutory provisions.
- 1.4 The maternity provisions of the NHS are complex. This guidance note describes the position for doctors employed under national agreements and those which incorporate the NHS Scheme, which includes all doctors in the training grades. NHS trusts can create their own maternity leave arrangements for doctors not employed under national agreements.

1 Temporary appendix VI(i) of the Terms and Conditions of Service for Hospital Medical and Dental Staff and Doctors in Public Health Medicine and the Community Health Service (England and Wales) and temporary schedule 24 of the Terms and Conditions – Consultants (England) 2003.

- 1.5 It is important that a doctor obtains advice from the BMA² **at an early stage** about her rights and what action she needs to take.
- 1.6 When the new statutory maternity provisions were implemented in April 2003 new statutory rights to adoption and paternity leave were also introduced. These are explained in this guidance note as are the statutory parental leave rights.

The NHS Scheme

Definitions

- 2.1 NHS medical staff who are employed under contracts which are subject to the national Terms and Conditions of Service will be covered by the temporary appendix VI(i) and the temporary schedule 24 of the Terms and Conditions – Consultants (England) 2003, which specifically deals with maternity leave and pay (the NHS Scheme). Hospital, community health and public health doctors on standard contracts of employment incorporating the national Terms and Conditions of Service will automatically be entitled to the NHS Scheme, as long as they meet the appropriate criteria. Any other type of doctor who is offered or negotiates a contract that incorporates the national Terms and Conditions of Service will also be covered. This includes GPs employed by GMS practices, or by primary care organisations, after 1 April 2004, and the BMA recommends this should include all salaried GPs.

2 For advice and assistance members should call the BMA on 0300 123 123 3.

- 2.2 Medical staff who have contracts that do not include the national Terms and Conditions of Service provisions will either be subject to a local agreement, or to the statutory provisions that fall within the Employment Rights Act 1996 and amending legislation.
- 2.3 Prior to 1 June 2005 the maternity provisions were incorporated into the General Whitley Council Conditions of Service (section 6). On 18 September 2003 section 6 was amended to take account of the improvements in statutory maternity, paternity and adoption leave and pay provisions introduced from 6 April 2003. The new section 6 applied to any pregnant employee whose expected week of childbirth (EWC) began on or after 1 October 2003. In respect of adoption it applied where an adoption agency notified the adopter of a match with a child on or after 1 October 2003. In respect of paternity it applied to those employees whose babies were expected to be born or were born on or after 1 October 2003.
- 2.4 In June 2005, a temporary appendix VI(i) was added to the Terms and Conditions of Service for Hospital Medical and Dental Staff and Doctors in Public Health Medicine and the Community Health Service (England and Wales) and a new temporary schedule 24 was added to the Terms and Conditions of Service for those employed under the new consultant contract. These were identical and slightly altered the way in which maternity pay was made up. These new arrangements superseded section 6 of the Whitley Conditions of Service. They also introduced an additional provision for post-natal care and breastfeeding mothers. The revised arrangements applied in respect of all pregnant employees whose expected week of childbirth **began on or after 5 December 2004.**

2.5 On 30 July 2007 NHS Employers issued Pay Circular (M&D) 5/2007, which introduced a revised Temporary Appendix VI(i) of the Hospital Medical and Dental Staff, Doctors in Public Health Medicine and the Community Health Service Terms and Conditions of Service and a revised Temporary Schedule 24 of the Terms and Conditions of those employed on the new consultant contract. These changes were made to take account of the improvements to the statutory regulations introduced by the Work and Families Act from April 2007. These changes also incorporated the provisions relating to adoption leave and pay arrangements; parental and carers leave and flexible working arrangements in both Terms and Conditions of Service on a temporary basis. The new provisions take effect from 1 April 2007. In addition to this, the long awaited amendments to the Directions to Strategic Health Authorities were issued on 31 July 2007 to bring the provisions for GP registrars into line with their NHS hospital colleagues. These apply from 1 August 2007.

2.6 The Maternity and Parental Leave etc Regulations 1999 and the Paternity and Adoption Leave Regulations 2002 have been amended to remove the distinctions between the rights of employees on ordinary maternity leave (OML) and those of employees on additional maternity leave (AML).

The amendments apply to those employed whose expected week of childbirth begins on or after 5 October 2008. They also apply to an employee whose child is expected to be placed with them for adoption on or after that date or, in cases of overseas adoption as defined in the Paternity and Adoption Leave (Adoption from Overseas) Regulations 2003, an adoptor whose child enters Great Britain on or after the same date.

Under the amendments an employee taking AML is, like an employee taking OML, entitled to the benefit of (and bound by any obligations arising from) all the terms and

conditions of employment which would have applied had she not been absent excluding terms and conditions about remuneration. The same applies to an employee taking additional adoption leave.

Eligibility

2.6.1 Doctors who work either full time or part time will be entitled to paid and unpaid maternity leave under the NHS Scheme where they intend to return to work and fulfil the following criteria:

a) 12 months' continuous service, without a break of over three months (see appendix 1) with one or more NHS employers at the beginning of the 11th week before the expected week of childbirth

b) notification to their employer in writing before the end of the 15th week before the expected date of childbirth (or if this is not possible, as soon as it is reasonably practicable thereafter):

- of their intention to take maternity leave
- of the date they wish to commence maternity leave

Note: this can be changed by giving the employer at least 28 days' notice, or if this is not possible, as soon as it is reasonably practicable beforehand.

- that they intend to return to work for the same or another NHS employer for a minimum period of three months after the maternity leave has ended
- and they provide a Mat B1 from the midwife or GP giving the expected date of childbirth.

2.6.2 Where an employee is working part time, including a post as an NHS hospital locum, and qualifies for paid sick leave they will be entitled to maternity leave with pay on the same basis as a full-time employee subject to the criteria set out in paragraph 2.6.1.

Employer's responsibilities

2.7.1 Following the changes to the NHS Scheme employers now have a greater responsibility for ensuring that everything is dealt with properly. Following discussions with the employee they should confirm the following in writing:

- a) the employee's paid and unpaid leave entitlements, either NHS Scheme or statutory
- b) unless an earlier return date has been given by the employee, her expected return date based on 52 weeks' paid and unpaid leave entitlement under the NHS Scheme; and
- c) the length of any period of accrued annual leave which has been agreed may be taken following the end of the formal maternity leave period
- d) the need for the employee to give at least 28 days' notice if she wishes to return to work before the expected return date.

2.7.2 Before the employee goes on her maternity leave, agreement should be reached with the employer on any voluntary arrangements for keeping in touch during the maternity leave period including:

- any voluntary arrangements to help her keep in touch with developments at work and, nearer the time of her return, to help facilitate her return to work

- keeping in touch with any developments that may affect her intended date of return.

Keeping in touch days

- 2.8.1 The NHS Scheme has been amended to include reference to 'keeping in touch days' which were introduced under legislation which contained improvements to statutory rights, paragraphs 3.3 and 3.12 refer. This applies to those employees whose expected week of childbirth begins on or after 1 April 2007. It is important that early discussion should take place between the employer and the employee before the employee's maternity leave takes place. Employers are encouraged to consider the scope for reimbursement of reasonable childcare costs or the provision of childcare facilities to enable employees to take up the opportunity to work keeping in touch days. They are intended to facilitate a smooth return to work for women returning from maternity leave.
- 2.8.2 An employee may work for up to a maximum of 10 keeping in touch days without bringing her maternity leave to an end. Any days of work will not extend the maternity leave period. However, an employee may not work during the two weeks of compulsory maternity leave immediately after the birth of her baby. The work does not have to be consecutive and can include training or other activities which enable the employee to keep in touch with the workplace.
- 2.8.3 Any such work must be by mutual agreement and neither party can insist upon it. The employee will be paid at their basic daily rate for the hours worked less appropriate maternity leave payment for those keeping in touch days worked. Working for any part of a day will count as one keeping in touch day. Any employee who is breastfeeding must be risk assessed and facilities provided in line with the health and safety provisions as outlined in paragraph 2.19.1.

Paid maternity leave

- 2.9.1 Where an employee has notified their intention to return to work they will be entitled to:
- a) 8 weeks' full pay, less any statutory maternity pay (SMP) or maternity allowance (MA) (including any dependants' allowances) receivable
 - b) 18 weeks' half pay plus any SMP or MA (including any dependants' allowances) receivable, providing the total receivable does not exceed full pay.
 - c) 13 weeks' SMP or MA that they are entitled to under the statutory scheme (please refer to paras 3.10.1-3.10.4).
- 2.9.2 It is possible to reach a prior agreement with the employer to have the entitlement paid in a different way, for example, a combination of full pay and half pay or a fixed amount spread equally over the maternity leave period.
- 2.9.3 Where an employee qualifies for the NHS Scheme but does not have 26 weeks' continuous service with the same trust ending with the qualifying week, that is the 15th week before the EWC, the employer will not be able to claim back SMP from the state as the qualifying criteria for SMP have not been met. Therefore, the employee will need to claim the MA, which is payable where there is no entitlement to SMP, direct from the Benefits Agency rather than it being paid by the employer, as part of the NHS Scheme maternity pay. The employee will still receive their full entitlement; they will only be claiming the additional statutory benefit separately.
- 2.9.4 Where an employee does not satisfy the qualifying conditions for the NHS Scheme she may be entitled to statutory maternity pay or the maternity allowance (please

refer to paras 3.10.1-3.11.4). All employees have a right to take 52 weeks of maternity leave whether they return to NHS employment or not.

Unpaid maternity leave

- 2.10 Employees are also entitled to take a further 13 weeks as unpaid leave to bring the total of leave to 52 weeks. However, the NHS Scheme allows for this to be extended by local agreement in exceptional circumstances for example, where employees have sick pre-term babies or multiple births.

Calculation of maternity pay

- 2.11.1 Maternity pay is calculated on the basis of average weekly earnings for the eight weeks ending with the qualifying week, which is the 15th week before the EWC. Gross earnings are taken into consideration, which include regular contractual payments such as London weighting and banding supplements for junior hospital doctors, but members would need to check their own situation with their employing authorities/trusts. When considering having a baby, therefore, it is important for employees to ensure that they are earning their normal salary during the maternity pay calculation period as this determines what maternity pay they will receive.
- 2.11.2 Where a pay award or annual increment is implemented before the paid maternity period begins, the pay should be calculated as though the pay award or increment had effect throughout the entire statutory maternity pay calculation period. If such a pay award was agreed retrospectively, the maternity pay should be re-calculated on the same basis.

- 2.11.3 Where a pay award or annual increment is implemented during the paid maternity leave period, the maternity pay due from the date of the pay award or annual increment should be increased accordingly. If such a pay award was agreed retrospectively, the maternity pay should be re-calculated on the same basis.
- 2.11.4 Where an employee is on unpaid sick leave or on sick leave attracting half pay during the whole or part of the period used for calculating average weekly earnings, average weekly earnings for the period of sick absence shall be calculated on the basis of notional full sick pay.

Doctors not intending to return to work

- 2.12 Where a doctor has notified her employer that they do not wish to return to work after their maternity leave they will be subject to the statutory provisions (see paras 3.10.1-3.11.4). If an employee has notified their employer that they intend to return to work for the same or a different NHS employer and then does not do so within 15 months of the beginning of their maternity leave, they will be liable to repay the whole of their maternity pay, less any SMP/MA paid. An employer does have the discretion to waive their rights to recovery where they believe that to do so would cause undue hardship or distress.

Commencement and return to work

- 2.13.1 Maternity leave may begin at any time between the 11th week before the expected week of childbirth and the expected week of childbirth, provided that the required notice is given. If an employee wishes to return to work prior to the expected return date they need to give 28 days' notice. There is no requirement to give notice where an employee intends to return to work at the end of the full maternity leave period.

- 2.13.2 An employee has a right to return to their job under their original contract and on no less favourable terms and conditions.

Returning to work on reduced hours

- 2.14 The is no legal right for an employee to return to work on reduced hours. However, under the NHS Scheme the NHS employer has a duty to facilitate this wherever possible, with the employee returning to work on different hours in the same job. If this is not possible the employer must provide written, objectively justifiable, reasons for this. The employee will then either return to their original contract or to a post in the same grade with work of a similar nature and status to that which was held prior to their maternity absence. If flexible hours are agreed on a temporary basis there will still be a right to return to the original contract at the end of the agreed period (para 3.14.1 gives details of the statutory right to request flexible working).

Sickness prior to and following the end of maternity leave

- 2.15.1 Where an employee is off sick with a pregnancy related illness during the last four weeks before the expected week of childbirth, maternity leave will normally commence at the beginning of the fourth week before the expected week of childbirth, or the beginning of the next week after the employee last worked, whichever is the later. Absence prior to the last four weeks before the EWC, supported by a medical statement of incapacity for work or a self certificate, shall be treated as sick leave in accordance with normal sick leave provisions.
- 2.15.2 Odd days of pregnancy related illness during this period may be disregarded if the employee wishes to continue

working until the maternity leave start date previously notified to the employer.

- 2.15.3 Where sickness absence is unrelated to pregnancy the normal sickness provisions will apply up until the date notified for the start of maternity leave.
- 2.15.4 Where illness occurs following the date the employee was due to return to work, normal sick leave provisions will apply as necessary.

Premature birth

- 2.16.1 Where an employee's baby is born alive prematurely there will be an entitlement to the same amount of maternity leave and pay as if the baby was born at full term. If the birth took place before the 11th week before the EWC and the employee has worked during the actual week of childbirth, maternity leave will start on the first day of the employee's absence. Where the baby is born before the 11th week before the EWC, and the employee has been absent from work on certified sickness absence during the actual week of childbirth, maternity leave will start the day after the day of birth.
- 2.16.2 Where the baby is born before the 11th week before the EWC and the baby is in hospital the employee may split her maternity leave entitlement, taking a minimum period of two weeks' leave immediately after childbirth and the rest of the leave following the baby's discharge from hospital.

Stillbirth

- 2.17 Where an employee's baby is born dead after the 24th week of pregnancy the employee will be entitled to the same amount of maternity leave and pay as if her baby was born alive.

Miscarriage

- 2.18 Where an employee has a miscarriage before the 25th week of pregnancy, normal sick leave provisions will apply as necessary.

Health and safety

- 2.19.1 It is the employer's responsibility to carry out a risk assessment of an employee's working conditions where they are pregnant, have recently given birth or are breastfeeding. Where it is found, or a medical practitioner considers, that an employee or her child would be at risk were she to continue with her normal duties, the employer should provide suitable alternative work for which the employee will receive her normal rate of pay. Where it is considered that an employee or her child would be at risk were she to continue doing one particular area of work (for example, on call) if she continues to do her other normal duties and no alternative work is available to cover the part of the job that puts the employee and child at risk, the employee will not be expected to continue that part of her work and will still continue to receive her normal rate of pay.
- 2.19.2 It will be the trust's responsibility to arrange locum cover where the employee is not able to undertake her on-call duties. Where it is considered that the employee or the child would be at risk were she to continue with her post as a whole and it is not reasonably practicable to offer suitable alternative work, the employee should be suspended on full pay.
- 2.19.3 These provisions will also apply to an employee who is breastfeeding if it is found that her normal duties would prevent her from successfully breastfeeding her child.

Antenatal care

- 2.20.1 Pregnant employees have the right to paid time off for antenatal care. This may include relaxation and parent craft classes as well as appointments for antenatal care.
- 2.20.2 It is unlawful to dismiss an employee, or select her for redundancy in preference to other comparable employees solely or mainly because she has sought to assert her statutory right to time off for antenatal care.

Post-natal care and breastfeeding mothers

- 2.21.1 Women who have recently given birth should have paid time off for post-natal care, eg attendance at health clinics.
- 2.21.2 Employers are required to undertake a risk assessment and to provide breastfeeding women with suitable private rest facilities. The Health and Safety Executive guidance recommends that employers provide:
- a clean, healthy and safe environment for women who are breastfeeding
 - suitable access to a private room to express and store milk in an appropriate refrigerator.

The NHS Scheme also encourages employers to consider requests for flexible working arrangements to support breastfeeding women at work.

Fixed term or training contracts

- 2.22.1 Where an employee has a fixed term or training contract which expires after the 11th week before the EWC, and who satisfies the conditions of the NHS Scheme (set out in para 2.6.1), they shall have their contract extended to allow them

to receive the 52 weeks which includes paid contractual and statutory maternity pay and the remaining 13 weeks of unpaid maternity leave.

- 2.22.2 Absence on maternity leave (paid and unpaid) up to 52 weeks before a further NHS appointment shall not constitute a break in service. However, it would not count as service towards a further period of maternity leave.
- 2.22.3 If there is no right to return to be exercised because the contract would have ended if pregnancy and childbirth had not occurred, the repayment provisions will not apply.
- 2.22.4 Employees on fixed term contracts who do not have 12 months' continuous service within the NHS may still be entitled to the statutory provisions.

Rotational training contracts

- 2.23 Where an employee is on a planned rotation of appointments with one or more NHS employers as part of an agreed programme of training, she shall have the right to return to work in the same post or in the next planned post irrespective of whether the contract would otherwise have ended, if pregnancy and childbirth had not occurred. In such circumstances the employee's contract will be extended to enable the practitioner to complete the agreed programme of training. Employees should check with their royal college whether their maternity leave absence will have any effect on the duration of their training.

Contractual rights

- 2.24.1 During a period of paid and unpaid maternity leave an employee retains all of her contractual rights except remuneration.

- 2.24.2 Paid and unpaid maternity leave also counts as service for annual increments and for the purposes of any service qualification period for additional annual leave.
- 2.24.3 Annual leave will continue to accrue during maternity leave, whether paid or unpaid, under the NHS Scheme. Where the amount of accrued annual leave would exceed the normal carry over provisions (normally five days), the employer and employee could agree to the annual leave being taken before and/or after the formal paid and unpaid maternity leave period. Alternatively, it could be carried over, but this is a matter for the employer/employee to agree, preferably in writing. Payment in lieu may be considered as an option where accrual of annual leave exceeds normal carry over provisions.

Pensions

- 2.25.1 Where a doctor has indicated that they will return to work after maternity, paternity or adoption leave, then they, and the employer, will continue to contribute to the NHS pension scheme for the period of maternity leave.
- 2.25.2 The employee's contributions shall be payable as follows:
- during full pay maternity leave – contributions are payable on full pay
 - during reduced pay maternity leave – contributions are payable on reduced pay
 - during unpaid maternity leave – contributions continue to be payable at the rate applicable during reduced pay maternity leave.

- 2.25.3 When the employee is on reduced pay or unpaid maternity leave the employer continues to pay contributions as if no reduction in pay had occurred.
- 2.25.4 For those not returning to work after maternity, paternity or adoption leave, they must be given the opportunity to extend their pensionable service to take account of the statutory maternity leave. If there is entitlement to paid leave, then contributions must be paid on the actual pay received. Contributions during unpaid leave will be based on the rate of pay applicable during reduced paid leave. If a choice is made not to pay contributions during unpaid leave, then pensionable service will cease on the last day contributions are paid.
- 2.25.5 If for any reason benefits become payable under the NHS pension scheme during a period of reduced pay or unpaid maternity leave, pensionable pay will be calculated as if no reduction in pay had occurred.
- 2.25.6 For further advice about the pension implications of career breaks, members may wish to consult the BMA Pensions Department. The BMA Pensions Department has produced guidance for members on *Maternity, paternity and parental leave – effect on NHS pension*, which can be found on the BMA website.

University and honorary contracts

- 2.26.1 Doctors holding university and NHS honorary contracts will be subject to the maternity leave scheme that is in operation at their place of employment. If there is no maternity scheme in place they will be entitled to the statutory provisions. They will not be covered by the NHS Scheme because their main contract is not within the NHS.

- 2.26.2 A university contract, with or without an NHS honorary contract, does not count as continuous service under the NHS Scheme. However, where an employee has a university contract with an NHS honorary contract this period of employment will not constitute a break in service,³ although it cannot be counted towards service for the purposes of further maternity leave.
- 2.26.3 On return to the NHS after holding a university post without an honorary contract, doctors may find that because of an inadequate period of service they are not entitled either to the statutory benefits or those under the NHS Scheme, their university post having broken their NHS service.
- 2.26.4 Members considering employment with the university can seek further advice from the BMA.⁴ University authorities should be able to provide copies of their maternity benefit schemes.

Doctors not covered by the NHS Scheme

- 3.1 Employees who are not covered by the NHS Scheme will be covered by whatever contractual maternity leave scheme exists within their employment. Such schemes must be no less favourable than the statutory provisions. Where there is no separate maternity leave scheme employees will be subject to statutory maternity rights which are laid down in current maternity and parental leave legislation.
- 3.2 All pregnant women who work under a contract of employment, regardless of hours worked or length of service, are entitled to a period of ordinary maternity leave.

3 AL (GC) 6/83 maternity leave; honorary service.

4 For advice and assistance members should call the BMA on 0300 123 123 3.

Where women work for more than one employer they can exercise their maternity rights separately in relation to each.

- 3.3 The length of **ordinary maternity leave** is 26 weeks. The length of time an employee can claim a statutory maternity payment increased from 6 April 2003, for babies due on or after that date, from 18 to 26 weeks and subsequently to up to 39 weeks for those employees whose expected week of childbirth began on or after 1 April 2007. These latest changes were introduced by the Work and Families Act 2006 and the Maternity and Parental Leave etc and Paternity and Adoption leave (Amendment) Regulations 2006. The amendments are described in the relevant paragraphs below.

Time off for antenatal care

- 3.4.1 All pregnant employees are entitled to time off for the purposes of antenatal care. This is not restricted to medical examinations and can include relaxation classes and parent craft classes, as long as these are advised by a registered medical practitioner, registered midwife or registered health visitor. Employees should continue to receive their normal pay during the period of time off.
- 3.4.2 It is unlawful to dismiss an employee, or select her for redundancy in preference to other comparable employees solely or mainly because she has sought to assert her statutory right to time off for antenatal care.

Protection against detriment

- 3.5.1 An employee must not be subjected to unfair treatment because:
- she is pregnant

- has given birth
- has taken or sought to take ordinary or additional maternity leave
- has taken or sought to take any of the benefits of ordinary maternity leave
- does not return to work at the end of her leave in circumstances where her employer gives her insufficient or no notice of when it should end and she reasonably believes it has not ended and subsequently returns late
- an employer gives less than 28 days' notice of the date maternity leave ends and it is not reasonably practicable for her to return on that date and she returns on a later date
- she has been suspended from work for health and safety reasons connected with her maternity.

This protection applies regardless of length of service.

3.5.2 It is automatically unlawful for an employer to dismiss an employee, or select her for redundancy in preference to other comparable employees for reasons connected with:

- her pregnancy
- childbirth
- suspension on health and safety grounds
- taking or seeking to take ordinary or additional maternity leave
- taking or seeking to take any of the benefits of ordinary maternity leave

- not returning to work at the end of maternity leave in circumstances where the employer gives insufficient or no notice of when it should end.

It is also unlawful to dismiss an employee who does not return to work on time because the employer has not properly notified her of the date maternity leave ends and she reasonably believes it has not ended, or she has been given less than 28 days' notice of the date it ends and it is not reasonably practicable for her to return on that date. There is no minimum service requirement to claim for unfair dismissal for an automatically unfair reason.

- 3.5.3 Regardless of an employee's length of service they have a right to an accurate written statement of the reasons for dismissal, and do not have to request one. Failure to provide such a statement may give rise to a claim for unlawful discrimination on grounds of sex or marriage. These rights also apply to doctors covered by the NHS Scheme.

Compulsory maternity leave

- 3.6 An employee must take a period of two weeks' compulsory maternity leave from the date of childbirth. If the compulsory maternity leave period falls later than 26 weeks after the start of ordinary maternity leave, the period of ordinary maternity leave will continue until the end of compulsory maternity leave. All the entitlements and conditions which apply during ordinary maternity leave will continue to apply throughout compulsory maternity leave.

Additional maternity leave

- 3.7.1 Employees who have completed 26 weeks' continuous employment with their employer, by the beginning of the 14th week before the expected week of childbirth, are

entitled to take a period of 26 weeks' additional maternity leave beginning at the end of the ordinary maternity leave period. This will be unpaid unless the local maternity scheme to which the employee is subject allows for it to be paid.

- 3.7.2 For those employees whose expected week of childbirth begins on or after 1 April 2007 there is no longer a length of service requirement for additional maternity leave and all employees are entitled to take 26 weeks' additional maternity leave following the ordinary maternity leave period. There should be no gap between the ordinary maternity leave and the additional maternity leave.

Contractual rights

- 3.8.1 The contract of employment continues throughout the ordinary and additional maternity leave period unless either party expressly ends it or it expires.
- 3.8.2 During the ordinary maternity leave period an employee has a statutory right to continue to benefit from their terms and conditions of employment. For example, if annual leave would normally accrue whilst the employee is normally at work it will continue to accrue during the ordinary maternity leave period. For those employees whose expected week of childbirth is on or after 5 October 2008 they are entitled to the same benefits during the additional maternity leave period. For those employees whose expected week of childbirth is before 5 October 2008 the rights are limited unless there is a separate contractual right. However, there is no statutory right for an employee to continue to receive her salary during the ordinary and additional maternity leave period. When an employee returns to work after ordinary or additional maternity leave she is entitled to receive any benefits from increases in pay or improvements in terms and conditions which occurred while she was on maternity leave.

- 3.8.3 An employee cannot take annual leave during her ordinary or additional maternity leave, but can take it immediately before or after maternity leave subject to the employer's agreement.

Occupational pension schemes

- 3.9 During periods of paid ordinary or additional maternity leave an employer's pension contribution should be calculated as if the employee is working normally. If the rules of the scheme require the employee to contribute towards her occupational pension her contribution should be based on the amount of contractual pay or SMP which is being paid to her.

Statutory maternity pay

- 3.10.1 All employees who are pregnant or who have just given birth will be entitled to receive statutory maternity pay (SMP) from their employer (which is reimbursed by the state) for up to 39 weeks (26 weeks for those employees whose expected week of childbirth was before 1 April 2007) if:
- a) they have worked continuously for their employer (the NHS does not count as one employer for these purposes) for at least 26 weeks ending with the qualifying week, which is the 15th week before the expected week of childbirth; and
 - b) their average weekly earnings in the eight weeks up to and including the qualifying week (or the equivalent period if they are paid monthly) has been at least equal to the lower earnings limit for national insurance contributions⁵ (although they do not actually have to have paid any contributions); and

⁵ For relevant level of weekly earnings see supplement paragraph 3.

- c) they have notified their employer no later than the end of the 15th week before the expected date of childbirth that they are pregnant; the expected week of childbirth (through the production of a Mat B1 certificate signed by the doctor or midwife) and the date when they intend to start taking leave, which should not be earlier than the beginning of the 11th week before the expected week of childbirth; and
- d) they must be employed after the start of the 15th week before the baby is due.
- 3.10.2 An employee can work right up until the date the baby is born and still retain the full entitlement to SMP.
- 3.10.3 For those employees whose expected week of childbirth began on or after 1 April 2007 and who qualify for the first six weeks of SMP are paid at 90 per cent of the employee's average weekly earnings and the remaining 33 weeks are paid at the lesser of the SMP standard rate (£128.73 per week wef 6 April 2011) or 90 per cent of the woman's average weekly earnings. For those employees whose expected week of childbirth began before 1 April 2007 the first six weeks of SMP are paid at 90 per cent of the employee's average weekly earnings and the remaining 20 weeks are paid at the lesser of the SMP standard rate (£128.73 per week wef 6 April 2011)⁶ or 90 per cent of the woman's average weekly earnings.
- 3.10.4 The employee does not have to return to work to be paid SMP.

⁶ For current rates see supplement.

Maternity allowance

- 3.11.1 Where an employee does not qualify for SMP they may be entitled to the maternity allowance (MA). This can also be claimed by those who are self-employed. Their entitlement is based on the employment and earnings in the 66 weeks ending with the week before the expected week of childbirth.
- 3.11.2 To qualify, a woman must have been employed or self-employed in at least 26 weeks in the 66 week period and her gross earnings must be at least £30.00 a week averaged over a 13 week period. A woman may continue working right up until the date her baby is born and still retain her full 26 week entitlement to the MA.
- 3.11.3 For those employees whose expected week of childbirth began on or after 1 April 2007 and who qualify for the MA, the MA weekly rate is the lesser of the MA standard rate (£128.73 per week wef 6 April 2011)⁷ or 90 per cent of the woman's average weekly earnings. It is only payable while the woman is absent from work and for a maximum period of 39 weeks. The MA period will normally start no earlier than the 11th week before the expected week of childbirth or in the case of a woman who is unemployed the 11th week before the expected week of childbirth. Doctors wishing to claim the maternity allowance should ask for an MA claim pack at their JobCentre Plus/social security office, or maternity or child health clinic.
- 3.11.4 For those employees whose expected week of childbirth began before 1 April 2007 and who qualify for the MA can claim the allowance for up to a maximum of 26 weeks from their JobCentre Plus/social security office.

⁷ For current rates see supplement.

Keeping in touch

- 3.12 For those employees whose expected week of childbirth begins on or after 1 April 2007, the employer may make contact with the employee (and vice versa) while she is on maternity leave, as long as the amount and type of contact is not unreasonable, to discuss a range of issues, eg her plans for returning to work; to keep her informed of important developments in the workplace etc. The employee should be informed of any relevant promotion opportunities or job vacancies that arise during maternity leave. The employee can do up to 10 days' work under her contract of employment, as long as both she and her employer have agreed for this to happen, and agreed on what work is to be done and how much she will be paid for it. These are known as keeping in touch days. The employee will continue to receive SMP for the week in which a keeping in touch day is worked. The employee cannot be forced to work during her maternity leave. This will not bring the maternity leave period to an end and will not extend the duration of the maternity leave period.

Return to work

- 3.13.1 No notice is required by an employee who does not qualify for additional maternity leave and who intends to return to work immediately after the end of the ordinary maternity leave period. Similarly, an employee who does qualify for additional maternity leave and intends to return immediately after it has ended does not need to give notice.
- 3.13.2 For those employees whose expected week of childbirth begins on or after 1 April 2007 and who wish to return to work before the end of the ordinary or additional maternity leave period, they are required to give their employer eight weeks' notice of the date of return unless the employer has failed to notify them of their return date within eight weeks of

their notification that they are taking leave. Where there is an entitlement to additional maternity leave but an employee wishes to return at the end of the ordinary maternity leave period they should also give eight weeks' notice. For those employees whose expected week of childbirth began before 1 April 2007 the notice period is 28 days.

- 3.13.3 Where an employee is unable to return to work at the relevant time due to sickness the normal contractual arrangements for sickness absence will apply, the employer should be notified in the normal way.
- 3.13.4 Where an employee does not wish to return to work after maternity leave she must give the notice of termination required by her contract of employment or where there is none, the statutory notice.
- 3.13.5 An employee has a right to return to the same job on the same terms and conditions of employment, unless a redundancy situation has arisen, after the ordinary maternity leave period. The same rule applies to those who return after additional maternity leave, but where it is not reasonably practicable for them to return to the same job they should be offered a similar job on terms and conditions which are no less favourable than their original job.

Flexible working

- 3.14.1 There is no legal right for an employee returning from maternity leave to change her hours or working conditions unless this is provided for in the contract of employment. However, there is a right to request flexible working and employers must give such a request serious consideration, and only reject it if there is a good business reason to do so. To qualify for this right the employee must have children under the age of 18 and must have worked for that employer for 26 weeks continuously at the date of the

application and have not made such a request in the previous 12 months.

- 3.14.2 The request needs to be made formally – that is in writing and contain a statement that it is an application for flexible working under the flexible working provisions in the Employment Rights Act 1996. Employees are encouraged to seek advice from the BMA prior to making an application to ensure that the application contains all of the relevant information required by the Act and that it complies with the criteria, and may be further advised to seek their own legal advice where it is felt appropriate.
- 3.14.3 If the request is refused the employer must give objectively justifiable reasons. The employee should be able to appeal a decision and if they do, the employer should convene an appeal hearing. If following a subsequent hearing the employee believes that the correct procedure has not been followed, or that the employer has made a decision based on incorrect facts, the employee could consider making a claim to an employment tribunal or in some cases a sex discrimination claim might be brought. Employees are encouraged to seek advice from the BMA regarding their specific circumstances and may be further advised to seek their own legal advice where it is felt appropriate.

Sickness prior to maternity leave

- 3.15 Where an employee is sick with an illness that is not pregnancy related the normal sickness provisions will apply up until the date notified for the start of maternity leave. Where the illness is pregnancy related and occurs after the beginning of the fourth week before the expected week of childbirth, SMP or the MA will start automatically on the day after the first day she is absent from work because of a pregnancy related illness. Odd days of pregnancy related illness may be disregarded at the employer's discretion.

GP specialty registrars

- 4.1 The terms of the NHS Scheme will apply to doctors on a GP VTS while they are undertaking the hospital part of their training. Employment as a GP registrar with a general medical practitioner will count for the length of service requirements. Similarly, when doing the general practice part of the training, previous hospital service may be taken into account in determining the length of service requirements.
- 4.2 A GP registrar undertaking the general practice part of their training will have a contract of employment with the training practice rather than the NHS. Although technically there is no automatic right to the NHS Scheme there has been an historical agreement with the health department that GP registrar entitlements are in line with the NHS Scheme.
- 4.3 The rights of GP specialty registrars during the general practice part of their training are laid down in the National Health Service Act 1977 – Directions to Strategic Health Authorities concerning GP Registrars 2003. The Directions have been amended with effect from 1 August 2007 to bring them into line with the hospital Terms and Conditions of Service. When the Directions were amended in November 2003 the section on maternity leave was not updated and still referred to the old 18 week entitlement. On 24 June 2005 a further amendment took place to bring them into line with the General Whitley Council Conditions of Service but failed to take account of the changes introduced for employees whose expected week of childbirth began on or after 5 December 2004. This meant that GP registrars were entitled to 8 weeks' full pay, less SMP or MA (including dependants' allowances) receivable; 14 weeks' half pay plus any SMP or MA (including dependants' allowances) receivable providing the total did not exceed full pay and 4 weeks' at the standard rate of SMP or MA. There was also provision included in the Directions for GP Specialty

Registrars to be granted by their practice 2 weeks' paid paternity leave per birth and adoption leave and pay in line with the maternity provisions.

4.4 With effect from 1 August 2007 GP specialty registrars who fulfil the relevant criteria of:

- completing at least 12 months continuous service with an NHS employer without a break of over three months immediately before the beginning of the 11th week before the expected week of childbirth
- continues to be employed by the GP trainer until immediately before the beginning of the 11th week prior to the expected week of childbirth
- notifies the GP trainer, in writing, of her intention to take maternity leave and whether or not she intends to return to resume the traineeship with the same or another GP trainer after her childbirth before the end of the 15th week before childbirth or if not possible, as soon as reasonably practicable
- submits to the GP trainer a statement from a registered medical practitioner or a certified midwife indicating the expected date of confinement no later than 21 days before the commencement of maternity leave, or if this is not possible as soon as it reasonably practicable

are now entitled to:

- 8 weeks' full pay (less any SMP or MA receivable [including any dependants' allowances])
- 18 weeks' half pay (plus any SMP or MA receivable [including any dependants' allowance]) not but exceeding full pay.

Although there is no specific reference to statutory maternity pay in the Directions GP registrars will in addition be entitled to a further 13 weeks of SMP or MA if they fulfil the necessary criteria.

- 4.5 Where there is no specific reference in the GP registrar contract to either the General Whitley Council provisions or the NHS Scheme we would encourage GP Specialty Registrars to try to negotiate similar terms with their training practice to those applied to their hospital doctor colleagues in line with the previous historical arrangement, and at the very least the provisions in the Directions which are generally similar to the NHS Scheme provisions. GP trainers may need to discuss this with their PCT in terms of the funding.
- 4.6 Where a GP trainer or a primary care organisation was not prepared to offer the NHS Scheme provisions because of the way the Directions were previously worded they should be advised that, like other employees, GP registrars are entitled to the minimum statutory provisions. Although the provisions in the Directions are not entitlements, both the trainer and registrar may be required to confirm that the arrangements made have been in accordance with the conditions in the Directions in order for the trainer to be reimbursed the cost of the allowance paid to the registrar.
- 4.7 The GPC has produced a *Framework for a written contract of employment – Guidance for GP specialty registrars* and a specimen handbook, which both contain further information on the maternity provisions for GP specialty registrars. In addition, it has produced its own guidance entitled *Maternity, paternity, parental and adoptive leave for GP registrars*. These documents can be found on the BMA website (www.bma.org.uk). (Note: Guidance for salaried GPs – including flexible career scheme GPs, retainer and returner scheme GPs – can be found in the GPC document

Focus on salaried GPs: Guidance for GPs, which can be accessed on the BMA website.)

GP principals

- 5.1 GP principals are self-employed and are therefore not subject to the NHS Scheme nor the statutory provisions that would apply to employees.
- 5.2 For GMS practices under the Statement of Financial Entitlements, part 4 (paras 9.3-9.8) where a partnership employs a locum to cover an absent partner on maternity leave or paternity leave they will be entitled to claim a payment from the primary care trust towards the cost of that locum (see supplement para 4). The period for which this payment is made to cover a period of maternity leave is 26 weeks. For paternity leave purposes it is payable for a maximum of two weeks. PMS practices will need to reach agreement with their primary care organisation. (Note: Guidance on the effect of maternity, paternity, adoption and parental leave on the NHS pension scheme has been produced by the BMA Pensions Department and can be found on the BMA website.)

Parental leave

- 6.1 The right to parental leave was introduced on 15 December 1999 under the Maternity and Parental Leave Regulations etc 1999. These Regulations were made under the Employment Rights Act 1996 as amended by the Employment Relations Act 1999. The Regulations were further amended from 10 January 2002 under the Maternity and Parental Leave (amendment) Regulations 2001, which gave new rights to parents of disabled children and parents of children who were under five years old on 15 December 1999.

- 6.2 The parental leave rights apply to full time and part-time employees provided that they satisfy the qualifying conditions. The leave can be taken by both mothers and fathers, whether they are the natural or adoptive parents.
- 6.3 Employees with children born on or after 15 December 1999 who want to take parental leave must have worked for their employer continuously for a year by the time they want to take the leave. Employees of children who were born or placed for adoption between 15 December 1994 and 14 December 1999 who want to take parental leave must either have worked for their current employer continuously for one year by the time they want to take the leave, or have worked for a previous employer continuously for a year during the period 15 December 1998 and 9 January 2002.
- 6.4 Parents of children born or adopted on or after 15 December 1999 can take parental leave up to their child's fifth birthday, or the fifth anniversary of the placement date for adoption (or 18th birthday if that is sooner). For parents of children born or adopted between 15 December 1994 and 14 December 1999, parental leave can be taken up to 31 March 2005 (or in the case of adoption, up until the child's 18th birthday if that is sooner).
- 6.5 Parents of disabled children born on or after 15 December 1994 are entitled to parental leave up to their child's 18th birthday.
- 6.6 Where the formal adoption of a child, or the placement of a child for adoption, takes place on or after 15 December 1994, the adoptive parents will be entitled to parental leave; even where the child was born before that date. Where the formal adoption of a child takes place on or after the 15 December 1994, the adoptive parents will be entitled to parental leave even where the child has been placed with the family before the Regulations came into effect.

- 6.7 Each parent can take 13 weeks' parental leave for each child. Parents of disabled children can take 18 weeks' parental leave for each disabled child born or adopted. A part-time worker's entitlement is pro rata. Often there is no entitlement after a child's fifth birthday but there are exceptions if the child is adopted or disabled and employers are able to offer more beneficial parental leave rights if they wish.
- 6.8 The purpose of parental leave is to care for a child. This means looking after the welfare of a child and can include making arrangements for the good of a child. Caring for a child does not necessarily mean being with the child 24 hours a day. Parents may wish to take parental leave to spend more time with their children in their early years or may have a more specific reason such as to accompany a child during a stay in hospital or settling a child into new child care arrangements. There is no automatic right to payment during a period of parental leave and it will be up to the discretion of the employer, or to the contract of employment which exists between the employer and the employee.
- 6.9 For hospital doctors employed under national terms and conditions of service or other doctors who have contracts of employment which make reference to national terms and conditions of service, Temporary Appendix VI(vi) and Schedule 29 for consultants employed under the new Consultant Terms and Conditions of Service, 'Balancing Work and Personal Life', contains guidance on parental leave. This guidance states that an individual would have a right to at least 13 weeks' leave (18 weeks if the child is disabled) and that payment for such leave is by local agreement. The right to parental leave is applicable to any employee with 12 months' service in the NHS as a whole and it will apply to an employee who has nominated care and responsibility for a child under the age of 14 (18 in cases of adoption or disabled children). Periods of parental leave are regarded as

continuous service. This guidance replaces Section 7 of the General Whitley Council Conditions of Service.

- 6.10 Details of an employee's rights under the parental leave provisions can be found in the Department of Trade and Industry booklet *Parental leave: a guide for employers and employees* (PL 509). Copies of this booklet are available from the BMA on 0300 123 123 3.

Adoption leave

- 7.1 The Employment Act 2002 introduced a new statutory right for employees who are newly matched with a child for adoption to take time off work to build a relationship with the child when he or she starts living with them. Under those new provisions employees were given a statutory right to 26 weeks' ordinary adoption leave, paid at the lesser of £128.73 per week (wef 6 April 2011)⁸ or 90 per cent of their weekly earnings. On top of this, employees will be entitled to take 26 weeks' unpaid additional adoption leave, giving a total of one year's leave. These changes came into force in respect of children matched or placed for adoption on or after 6 April 2003 under the Paternity and Adoption Leave Regulations 2002.
- 7.2 For those employees with whom a child is expected to be placed for adoption, where the placement is expected to occur on or after 1 April 2007, and who meet the qualifying criteria are entitled to 26 weeks' ordinary adoption leave and 26 weeks' additional adoption leave. There is no longer a length of service requirement for additional adoption leave. Where they qualify for statutory adoption pay this will be payable for 39 weeks rather than 26 weeks.

⁸ For current rates see supplement.

- 7.3 The conditions that apply to ordinary adoption leave are that the employee is the child's adopter, has been continuously employed for at least 26 weeks ending with the week in which he or she was notified of having been matched with the child and has notified the agency that he or she agrees that the child should be placed with him or her and on the date of placement. An adopter is defined as the person who has been matched with a child for adoption or, where two people have been matched jointly, whichever of them has elected to be the child's adopter for the purposes of the Regulations. Where a couple adopt jointly only one member of that couple can claim ordinary adoption leave. However, the other member of the couple may be entitled to paternity leave and pay.
- 7.4 Where more than one child is being adopted as part of the same arrangement, the employee is only entitled to one period of ordinary adoption leave in respect of each placement.
- 7.5 New adoption rights are also available in respect of children adopted from overseas. This is covered in the Paternity and Adoption Leave (Adoptions from Overseas) Regulations 2003.
- 7.6 Ordinary adoption leave begins on the date chosen by the employee and lasts for 26 weeks. An employee is entitled to choose to begin the ordinary adoption leave on the day on which the child is placed with him or her for adoption or a pre-determined date which is no more than 14 days before the child is expected to be placed and no later than the day of the placement.
- 7.7 There are two situations in which the leave may end before the 26 weeks and these are where the placement has been disrupted or where the employee is dismissed while he or she is absent on the ordinary adoption leave.

- 7.8 An employee must give the employer notice of his or her intention to take ordinary adoption leave specifying the date on which the child is expected to be placed with him or her for adoption and the date on which the employee has chosen his or her leave period to begin. The notice must be in writing, if the employer so requests, and must be given to the employer within seven days of the date on which the employee is notified of having been matched with the child for adoption, or as soon as is reasonably practicable. The employer may require evidence relating to the adoption. This should be in the form of one or more documents issued by the adoption agency that matches the employee with the child and must contain the name and address of the agency; the name and date of birth of the child; the date on which the employee was notified that he or she had been matched with the child and the date on which the agency expects to place the child with the employee.
- 7.9 The notice may be changed by the employee provided that he or she gives the employer proper notice. Where the employee has chosen to begin the period of leave on the date on which the child is placed with him or her for adoption notice should be given 28 days before the placement date specified in the employee's original notice. Where the employee has chosen to begin the period of leave on a pre-determined date 28 days' notice has to be given before that date. This notice, again, must be given in writing and if it is not reasonably practicable to give 28 days' notice, notice should be given as soon as it reasonably practicable. On receipt of the notice the employer must notify the employee within 28 days of the date on which the employee's full entitlement to leave ends, taking into account the additional adoption leave to which the employee will be entitled and the date the employee must return to work.

- 7.10 An employee on ordinary adoption leave is entitled to the benefit of all the terms and conditions of employment that would have applied if he or she had not been absent, save as regards salary.
- 7.11 Any employee who has taken ordinary adoption leave will be entitled to additional adoption leave of a further 26 weeks unless the placement has ended prematurely.
- 7.12 The contract continues during additional adoption leave. For those employees whose child is expected to be placed with them prior to 5 October 2008 they are entitled during that period to the benefit of:
- the employer's implied obligation to him or her of trust and confidence
 - any terms and conditions of the employee's employment relating to:
 - notice of termination of the employment contract by the employer
 - compensation in the event of redundancy
 - disciplinary or grievance procedures.

The employee is bound during that period by:

- his or her implied obligation of good faith, and
- any terms and conditions of his or her employment relating to:
 - notice of termination of the employment contract by the employee
 - the disclosure of confidential information

- the acceptance of gifts or other benefits
- the employee's participation in any other business.

All other terms and conditions of employment are in effect suspended during the additional adoption leave period unless the contract provides otherwise. The terms and conditions do not include terms and conditions about remuneration.

- 7.13 For those employees whose child is expected to be placed **on or after 5 October 2008** they are entitled to the same benefits during the additional adoption leave period as during the ordinary adoption leave period. The terms and conditions do not include terms and conditions about remuneration.
- 7.14 The provisions within the adoption leave regulations are identical to those that apply during additional maternity leave. The additional adoption leave period will be unpaid unless the contract of employment states otherwise.
- 7.15 An employee who returns to work after ordinary adoption leave, which was an isolated period of leave or the last of two or more consecutive periods of statutory leave, but which did not include any period of additional maternity leave or additional adoption leave or a period of parental leave of more than four weeks, will be entitled to return to the job in which he or she was employed before the absence. An employee returning after a period of additional adoption leave will be entitled to return to the job in which he or she was employed before the leave or, if it is not practicable for the employer to allow the employee to return to that job, to another job which is both suitable for the employee and appropriate for him or her to do in the circumstances.
- 7.16 If an employee wishes to return to work before the end of the ordinary or additional adoption leave period, they are

required to give their employer 28 days' notice of the date of return unless the employer has failed to notify them of their return date within 28 days of their notification that they are taking leave. For those employees with whom a child is expected to be placed for adoption, where the placement is expected to occur on or after 1 April 2007, the notice requirement is eight weeks.

7.17 For those employees with whom a child is expected to be placed for adoption, where the placement is expected to occur on or after 1 April 2007, the employer may make contact with the employee (and vice versa) while she is on adoption leave, as long as the amount and type of contact is not unreasonable, to discuss a range of issues, eg her plans for returning to work; to keep her informed of important developments in the workplace etc. The employee should be informed of any relevant promotion opportunities or job vacancies that arise during adoption leave. The employee can do up to 10 days' work under her contract of employment, as long as both she and her employer have agreed for this to happen, and agreed on what work is to be done and how much she will be paid for it. These are known as keeping in touch days. The employee will continue to receive statutory adoption pay for the week in which a keeping in touch day is worked. The employee cannot be forced to work during her adoption leave. This will not bring the adoption leave period to an end and will not extend the duration of the adoption leave period.

7.18 Employees have the right not to be subjected to any detriment or any act, or any deliberate failure to act, of their employer for a reason which relates to adoption leave. Similarly, they are protected against dismissal for reasons connected with adoption leave.

- 7.19 Further guidance can be obtained from the BMA.⁹
- 7.20 For hospital doctors employed under national terms and conditions of service or other doctors who have contracts of employment which make reference to national terms and conditions of service, Temporary Appendix VI(vi) and Schedule 29 for consultants employed under the new Consultant Terms and Conditions of Service, 'Balancing Work and Personal Life', contains guidance on adoption leave. There is provision for adoption leave and pay to be available to those employees wishing to adopt a child and who have primary care responsibilities for that child. The leave should cover official meetings in the adoption process as well as time off after the adoption itself. Each trust should have an adoption policy. This should include time off after the adoption, which should cover circumstances where the child is initially unknown to the adoptive parents. If there is an established relationship with the child, such as fostering prior to adoption, time off for official meetings only should be considered. Where the child is below the age of 18 adoption leave and pay will be in line with the maternity leave and pay provisions which are set out in temporary appendix VI(i) of the Terms and Conditions of Service for Hospital Medical and Dental Staff and Doctors in Public Health Medicine and the Community Health Service (England and Wales) and the new temporary schedule 24 to the Terms and Conditions – Consultants (2003), as explained above. If the same employer employs both parents the period of leave and pay may be shared. This guidance replaces Section 7 of the General Whitley Council Conditions of Service.
- 7.21 The rights to parental leave for adoptive parents are explained in the section on parental leave in paragraph 6 of this guidance note.

⁹ For advice and assistance members should call the BMA on 0300 123 123 3.

Paternity leave

- 8.1 New statutory rights were introduced for employees whose babies were expected to be born or were born on or after the 6 April 2003. Details of the rights are mainly set out in the Paternity and Adoption Leave Regulations 2002 and the Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002.
- 8.2 Employees, regardless of hours of work, are entitled to paternity leave if they have, or expect to have, responsibility for their baby's upbringing and are either or both the biological father of the baby and/or the mother's husband or partner. Same sex partners will be included. In addition, they must have worked continuously for the same employer for 26 weeks ending with the 15th week before the baby is due and from the 15th week before the baby is due up to the date of birth. Paternity leave will be granted if the time is being taken off either to support the mother or to care for the new baby.
- 8.3 Eligible employees can choose to take either one week or two consecutive weeks' paternity leave. It cannot be taken as odd days or as two separate weeks. Employees can take only one period of leave even if more than one baby is born as a result of the same pregnancy.
- 8.4 Leave cannot start until the birth of the baby. The leave can start on the date of the baby's birth (whether this is earlier or later than expected); on a date falling after the date on which the child is born, which is notified to the employer, or on a chosen date as notified to the employer which falls after the first day of the expected week of childbirth.
- 8.5 To qualify for paternity leave an employee must tell their employer that they intend to take paternity leave by the end of the 15th week before the week the baby is due or, if this is not possible, as soon as is reasonably practicable.

- 8.6 In addition to the qualifications for paternity leave to qualify for statutory paternity pay (SPP) an employee must have average weekly earnings at or above the lower earnings limit for national insurance at the end of his qualifying week (ending with the 15th week before the baby is due).
- 8.7 To qualify for SPP an employee must tell his employer that he wants to get SPP at least 28 days beforehand. Where an employee is entitled to both pay and leave, the notice given for leave by the 15th week before the week the baby is due can count for pay as well. The employee must tell his employer the expected week of the baby's birth, whether he wishes to take one or two weeks' leave and when he wants to start his leave. He must also make a signed declaration that he is taking leave either to care for his child or to support the mother or both; has or expects to have responsibility for the upbringing of the child and is the father of the child and/or the partner or husband of the mother.
- 8.8 The rate of SPP is the same as the standard rate of statutory maternity pay (£128.73 per week wef 6 April 2011 or 90 per cent of average weekly earnings if this is less than £128.73).¹⁰
- 8.9 A contract of employment continues throughout paternity leave, unless either the employer or the employee expressly ends it or it expires. While on paternity leave, employees are entitled to benefit from all those normal terms and conditions of employment, except from terms relating to wages or salary (unless their contract of employment provides otherwise), which would have applied were they not on paternity leave. An employee would continue to accrue annual leave while on paternity leave. A period of paternity leave counts towards a period of continuous employment for the purposes of

¹⁰ For current rates see supplement.

statutory employment rights, including calculating a redundancy payment. Pension contributions will be dealt with in the same way as if the employee was at work.

- 8.10 At the end of paternity leave an employee is guaranteed the right to return to the same job as before on the same terms and conditions of employment as if they had not been absent, unless a redundancy situation has arisen. They are also entitled to benefits from any general improvements to the rate of pay or other terms and conditions introduced while they were away.
- 8.11 An employee is protected against being subjected to detriment by any act or deliberate failure to act by their employer because they took paternity leave or sought to take paternity leave. For hospital doctors employed under national terms and conditions of service or other doctors who have contracts of employment which make reference to national terms and conditions of service, Temporary Appendix VI(vi) and Schedule 29 for consultants employed under the new Consultant Terms and Conditions of Service, 'Balancing Work and Personal Life', contains guidance on paternity leave. Under this guidance there is an entitlement to two weeks' paternity leave at full pay (less any statutory paternity pay receivable) per birth. To be eligible the doctor should have 12 months' NHS service for one or more NHS employers at the beginning of the week in which the baby is due, but those doctors with less service will be entitled to unpaid leave subject to their local agreement. Local agreements will specify the period during which leave can be taken and whether it must be taken in a continuous block or may be split up over a specific period. An employee must give his employer a completed form SC3 *Becoming a parent* at least 28 days before they want to start. Reasonable paid time off to attend antenatal classes will be given. This guidance replaces Section 7 of the General Whitley Council Conditions of Service.

Additional paternity leave

- 8.12 The Additional Paternity Leave Regulations 2010, which came into force on 6 April 2010, introduced a new statutory entitlement for employees. For those who qualify this will apply where the expected date of childbirth (or matching for adoption) is on or after 3 April 2011.

Those who fulfil the criteria will be entitled to up to a maximum of 26 weeks additional paternity leave, provided the mother has returned to work. This can be taken between 20 weeks and one year after the birth or placement for adoption. It can only be taken in multiples of complete weeks and as one continuous period. The minimum period of paternity leave which may be taken is two consecutive weeks.

Not less than 8 weeks before the start date of the period of leave the employee applying for additional paternity leave must give their employer:

- (a) a written leave notice including the expected week of birth; the child's date of birth and the start and end date of the period of leave; and
- (b) an employee written and signed declaration confirming that the purpose of the period of leave will be to care for the child and that the employee satisfies the eligibility conditions; and
- (c) a written mother declaration stating the mothers name and address; the date the mother intends to return to work; her national insurance number; that the employee satisfied the eligibility conditions; that the employee is to the mother's knowledge the only person exercising the entitlement to additional paternity leave in respect of the child, and that the mother consents to the employer processing such of the mother's information as is contained in the declaration.

In addition to the eligibility criteria for ordinary paternity leave the employee must have been continuously employed with the employer for a period of 26 weeks ending with the week immediately preceding the 14th week before the expected week of child birth, which is known as the relevant week. They must also remain continuously employed with the employer until the week before the first week of the additional paternity leave (which runs Sunday to Saturday). The employee will still qualify if the reason they do not have sufficient continuous service is due to the date of birth being earlier than the relevant week and if they had been continuously employed for such a period if their employment had continued until the relevant week. The employee must be the child's father, or married to or the partner or civil partner of the mother but not the child's father, and has or expects to have the main responsibility (apart from any responsibility of the mother) for the upbringing of the child.

The mother must also be entitled, by reference of becoming pregnant, to one or more of the following:

- (a) statutory maternity leave
- (b) statutory maternity pay or maternity allowance; or
- (c) statutory adoption leave or pay; and has, or is treated as having, returned to work, ceased claiming any relevant payment with at least two weeks of unexpired statutory pay period remaining, and has signed the mother declaration.

Additional statutory paternity pay

8.13 There may be an entitlement to additional statutory paternity pay during the mother's SMP, MA or adoption pay period if the employee:

- takes additional paternity leave

- is not working for the purposes of caring for the child during the mother's SMP, MA or statutory adoption pay period

The employee must be an employed earner.

If you apply for, but do not qualify for, additional statutory paternity pay your employer must provide you with a form ASPP1 explaining the reasons why.

Additional statutory paternity pay is only payable to you during the period of your partner's 39 week SMP, MA or statutory adoption pay period. It is paid at the same rate payable during the ordinary paternity leave period.

Unpaid additional paternity leave

- 8.14 Employees will have the right to take unpaid additional statutory paternity leave if they meet the criteria for leave but not for pay.

Defence body subscriptions

- 9 Doctors who take maternity leave should contact their defence body as special beneficial arrangements may apply.

Surrogacy

- 10 Currently the law does not recognise surrogacy as a binding agreement on either party. There is very little the intended parents can do to secure their position prior to the birth, even in the case of gestational surrogacy where the baby is genetically related to both intended parents and not the surrogate, because of this the BMA believes that it would be difficult to legislate to enable intended mothers to have

equal rights to maternity leave and pay. If the intended parents are going to obtain a Parental Order after the child is born this will in effect transfer legal parenthood from the child's birth mother to them. The affect of obtaining such an Order is that in law the surrogacy is classified as an adoption entitling the intended parent to adoption leave and pay, which is equivalent to that of maternity leave and pay. Therefore, the intended parent could potentially be entitled to up to 52 weeks' statutory leave and up to 39 weeks' statutory pay. Members are advised to check with their employer to see what policy they have which covers this.

Further information

- 11 Appendix 2 gives details of where you can obtain further information on statutory maternity and other rights detailed in this guidance note. Advice and assistance is also available from the BMA on 0300 123 123 3.

Appendix 1

Continuous service

In order to be eligible for maternity leave under the NHS Scheme an employee must have 12 months' continuous service with one or more NHS employers at the beginning of the 11th week before the expected week of childbirth without a break of more than three months. For the purposes of calculating whether the employee meets the 12-month continuous service requirement with one or more NHS employers the following provisions shall apply:

- a) NHS employers include health authorities; NHS boards; NHS trusts; primary care trusts and the Northern Ireland Health Service
- b) a break in service of three months or less will be disregarded (though not count as service)
- c) the following breaks in service will also be disregarded (though not count as service):
 - employment under the terms of an honorary contract
 - employment as a locum with a general practitioner for a period not exceeding 12 months
 - a period of up to 12 months spent abroad as part of a definite programme of postgraduate training on the advice of the postgraduate dean or college or faculty adviser in the specialty concerned
 - a period of voluntary service overseas with a recognised international relief organisation for a period of 12 months which may be exceptionally extended for 12 months at the discretion of the employer which recruits the employee on her return

- absence on an employment break scheme in accordance with the provisions of temporary appendix VI(ii) of the Terms and Conditions of Service for Hospital Medical and Dental Staff and Doctors in Public Health Medicine and the Community Health Service (England and Wales) and temporary schedule 25 of the Terms and Conditions of Service for those employed under the new consultant contract
 - absence on maternity leave (paid or unpaid) as provided for under this agreement
- d) employers may at their discretion extend the period specified in b) and c) above
- e) employment as a trainee with a general medical practitioner in accordance with the provisions of the trainee practitioner scheme shall similarly be disregarded and count as service
- f) employers have the discretion to count other previous NHS service or service with other employers.

Appendix 2

Further information

You may find the following sources of information helpful:

Department of Trade and Industry booklets:

Maternity rights: a guide for employers and employees (babies due on or after 6 April 2003) [PL 958]

Flexible working: the right to request and the duty to consider – a guide for employers and employees [PL 520]

Parental leave: a guide for employers and employees [PL 509]

Working fathers: rights to paternity leave and pay – a guide for employers and employees [PL 517]

DTI Publications order line 0870 1502500

Copies of DTI booklets can also be obtained free of charge from Employment Centres.

Useful websites

<http://www.dti.gov.uk/er/maternity.htm>

<http://www.dwp.gov.uk/lifeevent/famchild/index.htm>

www.bma.org.uk

The BMA website has a useful maternity leave ready reckoner to help calculate important dates for maternity leave purposes.

Information on statutory maternity pay and maternity allowance entitlements is contained in *A guide to maternity benefits* (NI 17A) which is produced by the Department for Work and Pensions (WDP). Copies of the booklet can be obtained from local benefit offices.

BMA Marketing & Publications
British Medical Association
BMA House, Tavistock Square, London, WC1H 9JP
www.bma.org.uk

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