

## New Maternity Rights

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Changes to maternity leave legislation came into effect last month for women whose expected week of childbirth is on or after 5th October 2008. This means that employers must continue to provide contractual benefits for up to 52 weeks, and could result in a significant cost increase for some employers.

Under new regulations employers will be obliged to continue all contractual benefits, with the exception of any benefits treated as cash, such as retail vouchers, for the full period of statutory maternity leave. This includes any benefits selected under a flexible benefit plan or other salary sacrifice arrangement that is contractual - Usually meaning any benefit that is provided through a gross pay adjustment.

Wrapped up with this extension to the maternity rights was the HMRC's clarification of the existing salary sacrifice arrangements. Employers have effectively been treating salary sacrifice arrangements incorrectly during periods of maternity leave; they have generally deducted salary sacrifice amounts from the higher level of SMP (90% of average weekly earnings) and then stopped the benefits when the SMP drops to the lower level or when pay ceases. HMRC has confirmed these practices are not permitted.

The majority of focus on this has been on childcare vouchers. Employers must therefore continue to provide the level of childcare vouchers that the employee had enjoyed prior to maternity leave. If the employer only provides Statutory Maternity Pay (SMP) then there will be no scope to recover the costs from the employee through a salary sacrifice arrangement. In effect the whole cost of childcare vouchers must be borne by the employer. If enhanced company maternity pay is provided, then this can be used for salary sacrifice arrangements so long as pay is not reduced to below SMP. So, if an employee has a salary sacrifice arrangement for the maximum £243 per month in childcare vouchers and then commences maternity leave based on SMP only, her employer will have to fund the full cost of the vouchers (an annual cost of £2,916).

It appears as though pension benefits need only be continued while the employee is in receipt of any pay – which for most employees will mean 39 weeks. However there is some debate over whether EU law actually this also to extend to 52 weeks. Most employers are complying with the 39 week rule and are awaiting further clarification.

The first action to take is to work out the likely cost exposure based on current maternity leavers. If the potential costs are unacceptably high then the ultimate sanction is to withdraw benefits such as childcare vouchers. However, this would be a blow to many employees as they would lose the valuable tax break on their childcare costs. Alternatively the employer can help to control their costs exposure, for example by:

- Limiting the ability of employees to increase these benefits at the point of going on maternity leave,
- Introducing a maximum cap on the amount of salary that can be sacrificed,
- Reviewing maternity pay definition to ensure that any enhanced maternity pay is on earnings after any salary sacrifice adjustments,
- Changing the structure of flexible benefit plans so that certain benefits with only modest tax advantages, such as dental insurance and others taxed as benefits in kind are treated as net pay deductions rather than gross. This has an effect of making the benefits non-contractual and therefore outside the scope of regulations.

For the time being most employers are ensuring they are compliant and adopting a 'wait and see' approach to see what the true financial impact will be.