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MATERNITY AND PARENTAL LEAVE

Introduction

Maternity rights have been long established across the EU, ever since the Pregnant Workers Directive was introduced in 1992. More recently, the focus has been on the appropriate balance between maternity rights, which are solely available to mothers, and parental rights, which also benefit fathers. Most countries now recognise the importance of both parents taking an active role in childcare, and also maintaining links with the workplace. However, the way in which the law in each country seeks to achieve that balance reveals some interesting differences.

In this briefing, we review the maternity and parental rights regimes in France, Germany and the UK. We give an overview of the rights to leave and pay, as well as the wider protections which apply to parents in each jurisdiction.

Maternity Leave

In **France**, maternity leave (**ML**) is available to all women with an effective contract of employment. The amount of ML which is available to an employee depends on the number of children:

- For single births, ML is available from six weeks prior to the expected date of birth of the child (the **EDoB**) until 10 weeks after the birth (a total of around 16 weeks).
 - For births of twins, ML is available from 12 weeks prior to the EDoB until 22 weeks after the birth (a total of around 34 weeks).
 - For births of three or more children, ML is available from 24 weeks prior to the EDoB until 22 weeks after the birth (a total of around 46 weeks).
 - For women who already have two or more children, ML is available from eight weeks prior to the EDoB until 18 weeks after the birth (a total of around 26 weeks).
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In all cases, there is an eight week general prohibition to work, which must include the six weeks following the birth. The rest of ML is not compulsory, and the employee can decide to work instead. However, ML is usually taken in full. It is also common for the employee to add a period of annual leave to the end, or sometimes to the beginning of ML.

In **Germany**, ML is available to all women in ongoing employment relationships, including employees in their probationary period, trainees and employees in time-limited employment. Self-employed women, freelancers or management board members (*Vorstandsmitglieder*) currently do not have a right to ML. Managing directors (*Geschäftsführer*) have traditionally been denied a right to ML since they do not constitute employees in the legal sense. However, in the light of European case law (*Danosa v LKB*, ECJ C-232/09, 11 November 2010) ML now has to be granted to externally-hired managing directors (*Fremdgeschäftsführer*), i.e. managing directors who are not substantial shareholders of the company.

As in France, the amount of ML varies depending on the number of children:

- For single births, ML is available from six weeks prior to the EDoB until eight weeks after the birth (a total of around 14 weeks).
- For multiple or premature births, ML is available from six weeks prior to the EDoB until 12 weeks after the birth (a total of around 18 weeks).

Women may work during the six week pre-birth period of ML if they explicitly agree to waive their right to ML (which is rare in practice), whereas during the eight week period of ML following the birth an absolute prohibition to work applies.

In the **UK**, all female employees are entitled to up to 52 weeks' ML, regardless of how many children they have or are expecting. There is a compulsory minimum period of two weeks' ML immediately following the birth, which must be taken in all cases. The woman can choose how much of the remaining 50 weeks ML she wishes to take. Employees in the UK typically add a period of annual leave to the beginning and/or end of ML.

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ML can begin at any time from the beginning of the 11th week before the EDoB. It may also start automatically in some cases of premature birth or pregnancy-related absence. The employee must give the employer notice of the intended start date of ML by the end of the 15th week before the EDoB. There is a presumption that the employee will take the full 52 weeks' ML, but if she wishes to return early, she must give her employer at least eight weeks' notice of her date of return.

The normal rule is that an employee cannot work during her ML; if she does, it will bring her ML to an end. However, an employee is entitled to up to ten "keeping in touch" (**KIT**) days, which can be used to attend work or training.

Maternity Pay

In **France**, employees are entitled to maternity pay (**MP**) for at least eight weeks, and usually for the whole duration of ML. MP is payable via statutory health insurance, and is equivalent to the net daily earnings of the employee, calculated as 1/92.25 of the amount of the remuneration for the last three months preceding ML. Under statutory law, the employer is not obliged to top up MP to ensure that the actual remuneration of the employee is maintained during ML, but many collective bargaining agreements do require this.

In **Germany**, during ML, women in an ongoing employment relationship who are entitled to sick pay are entitled to MP (*Mutterschaftsgeld*). MP is payable partly via statutory health insurance (or the German Insurance Office (*Bundesversicherungsamt*)), and is topped up by the employer.

The amount of MP is calculated based on the employee's last three complete average net monthly paychecks or the last 13 weeks of pay preceding ML. The statutory health insurance will pay no more than €13 per day. If the employee's pre-maternity pay is higher than this amount, the employer is obliged to make up the difference. Alternatively, women insured through a private health insurance company receive a one-off MP payment of up to €210 from the German Insurance Office. The employer is obliged to top this up by the same amount he would have to pay if the employee received MP from statutory health insurance.

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Employers topping up MP are entitled to a refund of their costs. This is financed through mandatory “U2 contributions” which all employers pay to the statutory health insurance companies.

In the **UK**, MP is available to female employees, and also office holders and agency workers (who may not be entitled to ML). The mother must also have at least 26 weeks’ continuous service by the end of the 15th week before the EDoB, and have normal weekly earnings of not less than a prescribed limit (currently £111 per week).

MP is payable for up to 39 weeks, and will usually start in the 11th week before the EDoB, although it may start automatically in some cases of premature birth or pregnancy-related absence. MP will stop when the employee returns to work (other than on a KIT day). However, MP will not cease when employment terminates. This means that if the employee resigns or is dismissed during the MP period, the employer must continue to pay MP post-termination of employment.

The rate of MP is:

- for the first six weeks, 90% of the employee’s normal weekly earnings;
- for the remaining 33 weeks, the statutory rate (currently £138.18) or 90% of the employee’s normal weekly earnings, whichever is lower.

Employers can recover 92% of MP paid to their employees (or 100%, for small employers) from HM Revenue & Customs, through their tax returns.

It is relatively common for UK employers to offer some form of enhanced MP.

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Parental Leave

Under **French** law, parental leave (**PL**) can be taken by employees (both mothers and fathers) with at least one year of service in the company, to care for a child in her/his household. PL can either take the form of a full-time absence, or of a reduction of the employee's usual working time. PL can be taken by both parents at the same time, or separately.

PL is initially available for a maximum of one year, but can then be extended up to the child's third birthday (for each parent). An employee should request PL at least one month before the expiry of ML, or at least two months in advance if PL is not taken immediately following ML (although the employer cannot usually refuse PL even if these timescales are not met). If an employee opts for PL in the form of part-time employment, the employer cannot refuse, although the working time schedule must then be agreed between the employer and the employee.

Under **German** law, PL can be taken by employees who care for a child in their own household. This will include the biological, adoptive or foster parents of the child, as well as step-parents and (subject to further conditions) grandparents or other relatives (all referred to as **parents** for these purposes).

The maximum duration of PL is three years from the birth, adoption or fostering of the child. The amount is not extended in the event of the birth of twins or other multiples, but there will be a separate entitlement for each child. This has the effect that by clever spacing out, parents of twins can take up to five years of parental leave. The mandatory post-birth period of ML is deducted from the PL term.

As in France, PL can be taken by both parents at the same time, or separately. Employees have a right to split their PL into at least two portions. With the consent of the employer, it can be split into more portions, and up to 12 months of PL can be reserved for the time period between the child's third and eighth birthday.

A parent who wants to take PL must usually give the employer at least seven weeks prior written notice. Legally, receipt of this notice by the employer has the effect that PL applies as requested

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(without the need for employer consent). The notice is in principle irrevocable, except with the employer's consent, or for one of a number of specified reasons.

During PL, a parent may work up to an average of 30 hours per week. Parents have a right to reduce their working time during PL subject to a number of conditions, which include a minimum tenure of six months, the employer regularly employing more than 15 employees, and there being no overriding operational requirements to the contrary.

In the **UK**, there is a distinction between unpaid parental leave and shared parental leave.

Unpaid parental leave (UPL) is available to anyone who has, or expects to have, parental responsibility for a child. This includes both birth and adoptive parents, but would not include grandparents or other relatives. The employee must however have at least one year's continuous employment in order to be eligible for UPL.

UPL is available for up to 18 weeks per child (so parents of twins would both be entitled to 36 weeks' UPL). UPL must be taken within five years of the child's birth or adoption (or by the child's 18th birthday if the child is disabled; this deadline will in fact apply in all cases with effect from 5th April 2015). Employees must usually give their employer at least 21 days' notice of their intention to take UPL. Employees cannot take more than four weeks' UPL per year (in respect of any one child), unless the employer agrees otherwise.

Shared parental leave (ShPL) is a new right which will be available to parents of children whose EDoB (or adoption) is on or after 5th April 2015. It requires that the mother must decide to end her ML in order to opt-in to the ShPL regime. The effect is that any remaining ML is converted to ShPL, which can be shared between both parents. Due to the requirement for the woman to take two weeks' compulsory ML, the maximum amount of ShPL is 50 weeks.

ShPL is available to employees who have at least 26 weeks' continuous service by the end of the 15th week before the EDoB. The other parent must have been an employed or self-employed earner for at least 26 of the 66 weeks immediately preceding the EDoB, and have average earnings of at least £30 per week for 13 of those weeks.

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ShPL must be taken in the 52 week period commencing with the birth or adoption of the child. The parents can choose how much ShPL each of them will take. They then need to agree with their respective employers what pattern of ShPL they will take. In theory, the parents can take ShPL together at the same time, and in discontinuous blocks (returning to work in-between). However, if the employer does not agree to this, ShPL will need to be taken in a continuous block (although there may be up to three separate continuous blocks of ShPL per employee). There is a complex series of notification requirements to be followed, but generally employees need to give at least eight weeks' notice of their intention to take ShPL.

As for ML, the normal rule is that an employee cannot work during ShPL. However, employees will be entitled to up to 20 ShPL "in touch" (**SPLIT**) days, which can be used to attend work or training.

Parental Pay

In **France**, employees on PL are not entitled to have their remuneration maintained by the employer. They can however benefit from parental pay (**PP**) payable by the state. The amount of PP is up to €576 per month during full-time PL, which is pro-rated for part-time PL. PP is payable for up to six months for parents of a single child, and up to the third birthday of the child for parents of two children or more.

A new law passed in August 2014 has introduced the possibility of shared PP being taken more flexibly between the parents. However, the details of these new arrangements are to be determined by a decree which has not yet been passed.

In **Germany**, employees taking PL may be entitled to PP (*Elterngeld*) or a child care subsidy (*Betreuungsgeld* - **CCS**) through the state. Employers are not liable for these payments, and usually do not make additional payments to employees in this context.

PP is available to parents earning less than certain annual income levels (€250,000 as an individual, or €500,000 as a couple). The amount of PP is between €300 and €1,800 per month, depending on the relevant parent's pre-PL earnings.

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Currently, the usual maximum term of PP is 12 months per parent but 14 months per child, which is intended to incentivise both parents to take PL. However, a new law will take effect on 1st January 2015, which will require that in order to receive PP for 14 months, at least one parent must receive *reduced* compensation payments for at least two months of PL. Additionally, as a new option, instead of claiming one month of PP, parents will be able to claim two months of Parental Pay Plus (*Elterngeld Plus – PPP*) which is 50% of the current PP. As a consequence, parents can increase the term of their entitlement by up to four months of PPP per parent and up to 28 months in aggregate if both reduce their working time to 15-30 hours per week for at least four concurrent months (*Partnerschaftsbonus*).

CCS is payable at €150 per month to parents of a child between 15 and 36 months old which does not attend a state-subsidised childcare institution. No other requirements apply.

PP and CCS (and this will also be the case for PPP) must be applied for in writing to the competent authority, stating which parent shall receive payments for which time-period. Later changes are permissible to a limited extent. If parents cannot agree, each receives 50% of the payments (provided each of them qualifies for the payments).

In the **UK**, as the name suggests, UPL is unpaid (unless the employer chooses to pay the employee).

Shared Parental Pay (**ShPP**) will be available to most employees who take ShPL, and also office holders and agency workers (who may not be entitled to ShPL). There are however a number of qualifying conditions, most importantly:

- The employee must have at least 26 weeks' continuous service by the end of the 15th week before the EDoB.
- The employee must also have normal weekly earnings for the eight weeks ending with the 15th week before the EDoB of not less than a prescribed limit (currently £111 per week).
- The employee must intend to care for the child during each week he/she receives ShPP, and be absent for each of those weeks (on ShPL, if he/she is an employee).

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The other parent must have been an employed or self-employed earner for at least 26 of the 66 weeks immediately preceding the EDoB, and have average earnings of at least £30 per week for 13 of those weeks.

The amount of ShPP is 39 weeks less any MP taken (which in practice means a maximum of 37 weeks). This must be taken before the child's first birthday. The parents can choose how much ShPP each of them will take, and unlike ShPL, there is no requirement for the employer to agree the pattern of ShPP. All that is required is for the employee to give the employer eight weeks' notice of their intention to take ShPP.

ShPP is payable at the statutory rate (currently £138.18) or 90% of the employee's normal weekly earnings, whichever is lower. As for MP, employers will be able to recover 92% of ShPP paid to their employees (or 100%, for small employers) from HM Revenue & Customs, through their tax returns.

Many UK employers are currently considering whether to offer some form of enhanced ShPP, particularly if they offer enhanced MP. The guidance from the UK government is that there is no need to enhance ShPP.

Protections

Various protections are available to employees during maternity and parental leave. While the details of protection vary, certain basic protection rights apply in all three jurisdictions. In summary, these are the following:

Employment contracts: Under **French law**, employment contracts are suspended during ML, but all rights attached to length of service continue to apply and accrue (severance, profit-sharing, etc). This is different for times of PL. Of these, only 50% count for the calculation of such rights. In **Germany**, ML is deemed to be a regular period of employment; whereas during PL, the employment relationship is dormant. In the **UK**, all contractual terms are maintained during ML and ShPL (except salary), although pension contributions usually only continue during any paid period of ML or ShPL. During UPL, only limited contractual terms continue.

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Right to return: In the **UK**, employees have the right to return to the same job after a period of ML or ShPL of up to 26 weeks, or a period of UPL of up to four weeks (otherwise a more qualified right to return applies). In **France** they have a right to resume their former position, or be offered a similar position with equivalent remuneration (the same applies for employees who take PL). Whereas in **Germany**, as a rule, employees returning from ML or PL do not have a right to return to the job previously held, but may be given a job requiring similar qualifications and equivalent or better remuneration.

Dismissal: In **France and Germany**, dismissal is generally prohibited from the beginning of a pregnancy, until four weeks following the return to work (**France**), or until four months after the birth (**Germany**). In **Germany**, dismissals during ML and PL require the consent of a competent authority, whereas in **France**, dismissal during ML is prohibited. Dismissals of pregnant women outside the period of ML and dismissals of parents during PL are only permissible for gross misconduct or reasons unrelated to pregnancy/maternity/parenthood, which are strictly assessed. In the **UK**, a dismissal will be automatically unfair where the reason (or principal reason) for the dismissal is related to the employee's ML, ShPL or UPL.

Discrimination and detrimental treatment: In all three jurisdictions, employees may not be discriminated against or suffer detrimental treatment on grounds of pregnancy, ML, PL, ShPL or UPL.

Health and safety: In the **UK and Germany**, the employer must conduct a risk assessment and alter working conditions or hours of work to avoid any significant risk to pregnant employees or their babies. Where it is not reasonable to alter working conditions or hours, or such alterations would not avoid the risk, employers must offer suitable alternative work on terms that are not substantially less favourable (**UK**) or at least equivalent to those preceding pregnancy (**Germany**). If this is not possible, the pregnant employee must be suspended on full pay. In **France**, the employee's position may have to be adapted (or suitable alternative work may have to be offered) if a publicly endowed physician considers this necessary following a statutory medical examination. If this is not possible, the pregnant employee must be suspended on full pay.

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Holiday: In the **UK**, holiday will continue to accrue (but cannot be taken) during ML and ShPL. The employee will be able to carry forward any unused annual leave to the next leave year, if she cannot take it due to her ML or ShPL. During PL, statutory holiday will continue to accrue, but the employer can limit accrual of any additional holiday. In **Germany**, the same applies for ML. For every full month of PL taken during a calendar year, the employer may reduce the employee's holiday claim by 1/12. In **France**, statutory holiday will continue to accrue during ML, but not during PL.

Conclusion

There are some important differences between the maternity and parental rights which employees enjoy in these three jurisdictions. Both France and Germany have more limited maternity rights, but more extensive parental rights, when compared to the UK. The concept of parents sharing leave, and of undertaking some work during parental leave, is far more developed in France and Germany than the UK, even with the introduction of ShPL. These differences highlight the need for employers to be aware of the rights which their employees enjoy in each jurisdiction.

NEWS

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This material is for general information only and is not intended to provide legal advice.

Further information

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