LAW PUNDITS

Time Off

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TIME OFF AND HOLIDAYS

Introduction

The rights of employees and workers to take time off from work derives from a variety of statutory sources, all of which vary slightly in the way in which they work. In many cases the statutory rights may be varied (usually but not always to the worker's benefit) in a contract of employment or other relevant agreement. This note brings those statutory rights together in one place and answers the following key questions:

- What is the right and where does it derive from?
- Who is entitled to it and when?
- How is it exercised?
- How much time off may be taken?
- Is it paid and, if so, at what rate?
- Can the employer control how or when the time off may be taken?
- What are the remedies for breach?

General time off rights

Annual leave

What is the right?

In the UK The *Working Time Regulations 1998 (SI 1998/1833)* (WTR 1998) entitle all workers to a minimum of 5.6 weeks' paid annual leave per year (equivalent to 28 days for a full-time employee and a pro-rata amount for a part-time worker). This varies with countries and it is important to check what the regulation is in your specific country.

There is no obligation to also give workers holiday on bank holidays and public holidays. However, many workers receive holiday in addition to their statutory entitlements under their contract of employment or may have additional contractual rights relating to their statutory holiday entitlements. This overview is concerned with statutory annual leave entitlements.

What are the conditions of entitlement?

Employees and workers (but not the genuinely self-employed) are entitled to statutory annual leave, regardless of length of service. However, certain groups of workers are excluded from the provisions relating to paid annual leave under the WTR 1998

Generally, statutory holiday may only be taken in the leave year in respect of which it is due; there is no general right under the WTR 1998 to carry forward unused holiday into the next leave year. However, case law suggests that this rule will not apply in limited circumstances, such as where the employee has not taken all his statutory holiday because of long-term sick leave.

There is no right for the employer to pay the worker in lieu of untaken statutory holiday, except on termination

How is it exercised?
The WTR 1998 allow either the employer or the worker to give notice of the taking of annual leave by the worker:

- The notice by a worker must be at least twice as many days as the period of annual leave that they are requesting. So a worker who wishes to take five days' leave must give ten calendar days' notice before the date on which leave is due to start. The employer may refuse the request by serving a counter-notice. The counter-notice from the employer must be given at least as many calendar days before the proposed leave commences as the number of days which the employer has refused.

- The employer may also give notice ordering a worker to take annual leave on specified dates. Such notice must be at least twice as many days as the period of leave that the worker is being ordered to take.

These provisions may be varied by a written employment contract or other relevant agreement. In practice they are often varied by a contractual requirement that leave cannot be taken without the approval of the worker's line manager.

How much time off may be taken?

All workers are entitled to 5.6 weeks' statutory annual leave per leave year. Most employers will define the leave year in a contract of employment or other relevant agreement. Workers who start during a leave year will have a pro rata entitlement for the remainder of that leave year.

During the first 12 months of employment, a worker cannot give notice to take more holiday than is deemed to have "accrued". The leave entitlement accrues at the rate of 1/12 of a full year's entitlement at the beginning of each month.

Is there a right to payment?

A worker is entitled to be paid during any period of WTR 1998 annual leave at the rate of a week's pay for each week of leave, calculated in accordance with *sections 221 to 224* of the Employment Rights Act 1996 (ERA 1996). There is no cap on the amount of a week's pay for the purposes of the WTR 1998.

Does the employer have any discretion as to how or when time may be taken?

The employer may require a worker to take, or not to take, holiday on specific dates. This gives the employer, in effect, absolute discretion over when the holiday may be taken within the relevant leave year, provided it gives the requisite notice. A written employment contract or other relevant agreement may vary these notice provisions. In practice, the only limits are that the employer can never have the right to deny the worker's holiday altogether (even with a payment in lieu), or defer it beyond the end of the leave year.

What are the remedies for breach?

Under the WTR 1998, a worker can bring a claim in an employment tribunal if their employer does not allow them to:

- Take their statutory leave entitlement.
- Be paid in respect of unused leave on termination of employment.
- Be paid a week's pay during each week of leave.

Claims must be brought within three months beginning with the date on which it is alleged that the exercise of the right should have been permitted. This may be extended if the employment tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the three-month time limit. It can also be extended under the Acas (The Advisory, Conciliation and Arbitration Service) early conciliation procedure, introduced on 6 April 2014

Workers may also bring a deduction from wages claim in respect of unpaid holiday pay

The time limit provisions are more generous, as claims for a series of deductions can be amalgamated and brought within three months of the last deduction in the series

Dismissal of an employee because they have asserted a right under the WTR 1998 will be automatically unfair and, similarly, employees are protected from suffering a detriment while still in employment.

Rest breaks and rest periods

What is the right?

Regulations 8 and *10 to 12* of the WTR 1998 set out minimum periods of uninterrupted rest that workers are entitled to on a daily and weekly basis, and minimum rest breaks that workers are allowed to take away from their workstation if their working day exceeds a certain number of hours. The WTR 1998 provide a number of exceptions to the strict application of the rules on rest periods and rest breaks.

What are the conditions of entitlement?

The WTR 1998 only protect "workers". As originally introduced, the WTR 1998 did not cover workers in the transport sector, doctors in training, work at sea, including sea fishing, or the armed forces, emergency services and police. In a series of amendments, these exclusions have since been eroded. Employers must ensure that workers can take their rest periods or breaks but are not required to force workers to take them. Workers can elect to work through a rest period or break, provided they do not risk their own or others' health or safety. Where the employer requires a worker to work during a period that would otherwise have been a rest period or break (in circumstances where the WTR 1998 allow this) it is the employer's responsibility to ensure that there is an opportunity to take compensatory rest.

How is it exercised?

There is no formal means of exercising the right to rest periods. Ideally, employers should factor them into the hours of work that they set their workers.

Workers can be required to remain in or about their workplace (but not at their workstation) while taking a rest break, provided they are not still having to perform any duties. Workers cannot be required to remain at work during a daily or weekly rest period.

How much time off may be taken?

Generally, adult workers are entitled to:

- 11 hours' uninterrupted rest per day.
- 24 hours' uninterrupted rest per week (or 48 hours uninterrupted rest per fortnight).
- A rest break of 20 minutes if the working day is more than six hours.
  Young workers (who are under 18 but over compulsory school age) have greater entitlements:
- 12 hours' uninterrupted daily rest.
- 48 hours' weekly rest.
- A rest break of 30 minutes if the working day is more than four and a half hours.

Workers carrying out monotonous or pre-determined work, such as on a production line, are given special protection. Where the pattern of work is "such as to put the health and safety of a worker… at risk, in particular because the work is monotonous or the work-rate predetermined", the employer must make sure that the worker is given "adequate rest breaks".

This may therefore involve giving the worker further short breaks in addition to the above daily and weekly rest breaks and shift breaks.

The daily and weekly rest entitlements are cumulative, so that a worker should typically have 35 hours' continuous rest (24+11) once a week. Alternatively, if the employer chooses to provide 48 hours' rest every fortnight, the worker is entitled to have 11 hours' daily rest for 12 days, followed by one continuous rest period of 59 hours rest (48+11) each fortnight. If "objective, technical or organisational" (OTO) reasons apply, the employer can merge the daily and weekly rest periods without prior compensatory rest.

Is there a right to payment?

There is no right to payment during rest periods and rest breaks unless the contract specifies otherwise. They do not count as time worked for the purposes of the national minimum wage

Does the employer have any discretion as to how or when time may be taken?

The WTR 1998 allow employers, in limited circumstances, to require workers to work during periods which would otherwise be a rest period or a rest break. This might happen where:

- The worker is a "special case" worker
- The worker is a shift worker changing shifts, such as from days to nights, which prevent the taking of a full daily or weekly rest period.
- The work entails periods of work split up over the day, as may be the case with cleaning staff (*regulation 22(1)(c)*).
- There is a collective or workforce agreement varying the entitlement to rest periods or breaks

Where any such worker is required to work during a period which would otherwise have been a rest period or rest break, the employer must wherever possible allow the worker to take an equivalent period of compensatory rest within a reasonable time. In exceptional cases where this is not possible for objective reasons, the employer must afford the worker appropriate protection for their health and safety.

What are the remedies for breach?

Failure to allow workers to enjoy the specified rest breaks or periods, or to allow compensatory rest to be taken where the entitlements have been excluded or modified, may result in an award of compensation by an employment tribunal. Workers who are dismissed or suffer a detriment as a result of taking their entitlement to rest breaks may also complain to a tribunal.

Sick leave and medical appointments

There is no specific statutory right to take time off work in cases of sickness or injury. Employees may have this right written into their contracts and, if not, it is arguable that there is an implied right. In any event, the law of unfair dismissal recognises that in most cases an employer cannot simply dismiss an employee for taking sick leave; it must act fairly and reasonably and follow a fair procedure.

However, employees must have a least a year's continuous service to benefit from unfair dismissal rights (or two years' service if their employment started on or after 6 April 2012). Where the employee is absent due to a disability, the employer must avoid discrimination and may need to make reasonable adjustments for their disability, which is likely to include keeping their job open and helping to rehabilitate them. There is no qualifying period for discrimination law.

Employees who are unfit for work may be entitled to statutory sick pay after the third day of absence. In some cases their contracts may entitle them to more generous "occupational" or "company" sick pay.

There is no general right for an employee to take time off for routine medical or dental appointments if they are not unfit for work. Unless the employee's contract contains such a right, any time off for such appointments (whether paid or unpaid) is at the employer's discretion. The exception is that pregnant employees are allowed paid time off for antenatal appointments. The position in respect of elective procedures such as cosmetic surgery may be more complicated (

Time off for training (the right to request)

What is the right?

Employees working for employers with 250 or more employees are entitled to request time off work to undertake study or training.

What are the conditions of entitlement?

Only employees with at least 26 weeks' continuous service are entitled to make a request for time off. The training must be for the purpose of improving their effectiveness at work **and** the performance of their employer's business, although it need not lead to a formal qualification

How is it exercised?
An employee may (generally) only make one application to an employer in any 12-month period. The application must be in writing, be dated and include the following information:

- A statement that it is made under *section 63D* of the ERA 1996.
- The subject matter of the training.
- Where and when it would take place.
- Who would provide or supervise it.
- What qualification (if any) it would lead to.
- How the employee thinks the study or training would improve both the employee's effectiveness in the employer's business, and the performance of the employer's business.
- The date on which the employee made any previous application and how that application was made.

What is the procedure?

The procedure to be followed by an employer upon receipt of an application is set out in the Procedural Regulations.

Meeting and decision

The employer must hold a meeting with the employee to discuss their application within 28 days of receiving the application. The employer must then give the employee a written, dated notice of their decision within 14 days of the meeting.

If the employer agrees the application, the notice must state:

- The subject of the study or training.
- Where and when it will take place.
- Who will provide or supervise it.
- What qualification it will lead to.
- Whether the employee will be paid for the time spent studying or training.
- Whether any changes will be made to the employee's working hours to accommodate the study or training.
- How the training costs will be met.
  If the employer's decision is to refuse the application, the notice must state:
- Which of the grounds for refusal
- In sufficient detail, why those grounds apply.
- The appeal procedure to be followed if the employee wishes to appeal the decision.
  Where the employer's decision is to only agree in part to the application, the notice must:
- Make clear which part of the application is agreed and which part is refused.

- Give the information detailed above in respect of both the part agreed to and the part refused.

Appeal

If the employee wishes to appeal, they must, within 14 days of the employer's decision, submit a written, dated appeal to the employer setting out the grounds on which they wish to appeal.

The employer then has 14 days to either uphold the appeal and notify the employee in writing of this, or hold a further meeting with the employee to discuss the appeal.

Within 14 days of the appeal meeting, the employer must notify the employee in writing of their decision, providing the information specified above and ensuring the decision is dated.

General procedural points

The time and place of all meetings under the procedure must be convenient to both employee and employer.

The parties can agree to extend any of the time periods referred to above. It is the employer's responsibility to ensure that this is recorded in writing and a signed and dated copy should be given to the employee specifying what period the extension relates to, the date on which the extension ends.

Treating application as withdrawn

The employer can treat the application as withdrawn if the employee:

- Notifies them in writing or orally that they are withdrawing the application;
- More than once fails to attend a meeting under the procedure without reasonable cause; or
- Without reasonable cause, fails to provide the employer with the information it requires in order to assess whether to agree to the application.

The right to be accompanied

Regulation 16 of the Procedural Regulations confirms that an employee has the right to be accompanied by a colleague of their choosing to any meeting under the procedure. The companion must be allowed to address the meeting, although they are not entitled to answer questions on the employee's behalf. The employee and their companion are also entitled to confer during a meeting.

If an employee's chosen companion is not available at a time the employer proposes for a meeting, the employer must postpone the meeting to a time convenient to both employee, employer and companion. The postponed meeting should be held within seven days of the date originally proposed.

How much time off can be taken?

As there is no statutory right to have the request granted, the amount of time allowed off is at the discretion of the employer. The employer may grant all, part or none of the time off requested by the employee.

Does the employer have any discretion as to how or when time may be taken?

Employers will be required to consider all requests seriously. They may only refuse a request if they think that one of a number of specified business reasons apply. This includes the cost burden, inability to reallocate work, effect on ability to meet customer demand, or the employer's belief that the training would not improve employee effectiveness or business performance.

What are the remedies for breach?

Section 63I of the ERA 1996, *regulation 5* of the Eligibility Regulations and *regulation 17* of the Procedural Regulations give employees a right to bring a tribunal claim if the employer:

- Fails to hold a meeting with them within 28 days of receiving their application, or within 14 days of their notice to appeal against an initial decision;
- Fails to notify them of their decision within 14 days of the initial meeting to discuss their application, or within 14 days of an appeal meeting;
- Refuses the application, in full or in part, for a reason other than one or more of the permissible grounds for refusal set out in *section 63F(7) ERA* and fails to correct the decision on appeal;
- Has made the decision to refuse all or part of their application on incorrect facts and fails to correct the error on appeal; or
- Fails to allow them to be accompanied by a colleague of their choosing to any meeting under the procedure, fails to allow their colleague to address the meeting, or confer with them during the meeting, or fails to postpone a meeting under the procedure because the chosen companion is unavailable (*regulation 17(1), Procedural Regulations*).
  The tribunal must receive the claim within three months of the date of the employer's breach or the date the employee is notified of the appeal decision, as applicable. The tribunal will only extend the deadline if it considers it was not reasonably practicable for the complaint to be presented before the end of the three-month period (*section 63I(5), ERA 1996 and regulation 17, Procedural Regulations*).

The tribunal may award compensation of up to eight weeks' pay (or up to two weeks' pay for a breach of the right to be accompanied provisions) and/or order the employer to reconsider the application (*regulation 6, Eligibility regulations and regulation 17(3), Procedural regulations*).

Section 47F of the ERA 1996 confers protection from detriment for making an application and *section 104E* makes it automatically unfair to dismiss an employee because an application has been made.

Family-related time off

Antenatal care

What is the right?

All pregnant employees are entitled to time off with pay during working hours to attend appointments "for the purpose of receiving antenatal care" (*section 55, ERA 1996*).

What are the conditions of entitlement?

The entitlement extends to employees, regardless of service, but not to other workers. However, the *Equality Act 2010* (EqA 2010) also gives limited rights to anyone "in employment", which includes employees, workers, and some self-employed contractors

To qualify for her entitlement to time off, the employee must be pregnant and attending an antenatal appointment. Antenatal care is not defined by legislation. According to the BIS guidance it could include relaxation and parentcraft classes, provided that these are advised by a registered doctor, midwife or nurse. However, the statute is unclear and the approach of tribunals has not always been consistent with this advice. In *Bateman v Flexible Lamps Ltd ET/3204707/97*, a tribunal took the view that the classes in question were educational rather than medical and did not fall within the statutory right.

How is it exercised?

There are no formalities for exercising the right. The employee should simply inform her employer of the date and time of the appointment. Ideally, as much notice as possible should be given, as it may be reasonable for an employer to refuse a request at very short notice for a non-urgent appointment if it is difficult to accommodate.

If requested by her employer, the employee must produce a certificate from a registered doctor, midwife or nurse confirming her pregnancy and an appointment card, or similar document, evidencing the appointment. However, these documents are not required for a first antenatal appointment, presumably because they may not yet be available.

How much time off may be taken?

There is no guidance in the legislation as to how much time off an employee can take to attend an appointment. However, since her ability to challenge her employer's refusal to allow her time off is based on an employer having done so unreasonably, it is implicit that the amount of time that an employee proposes to take, together with the other circumstances at the employer's workplace at that time, may mean that it is reasonable for an employer to refuse permission.

Is there a right to payment?

An employee is entitled to be paid at her normal hourly rate of pay during the period of time off for antenatal care. The rate is calculated by dividing the amount of a *week's pay* by the number of the employee's normal working hours in a week. If her working hours vary from week to week, they should be averaged over the previous 12 weeks (*section 56, ERA 1996*). Overtime is only taken into account if it is compulsory and part of the normal working pattern.

Does the employer have any discretion as to how or when time may be taken?

The employer may only refuse a request for time off if it is unreasonable. Having allowed the time off, the employer is obliged to pay the employee (*see above*) even if the employer believes it is unreasonable to do so.

The timing, length and frequency of the appointments may be a factor in assessing the reasonableness of the employer's response. For example, if an employee could reasonably make arrangements outside normal working hours, it may be reasonable to refuse time off.

What are the remedies for breach?

If an employee is unreasonably refused time off for antenatal care or denied her normal rate of pay during such time off, she may bring a complaint to a tribunal. A claim must be brought within three months of the appointment concerned or, where it was not reasonably practicable for her to meet the three-month deadline, within such further period as the tribunal considers reasonable.

A successful complaint will result in a declaration and an award of compensation equivalent to the amount she was entitled to receive for taking the time off (whether or not her complaint is that her employer refused her permission to take time off or refused to pay for the time off).

Any refusal to allow an employee time off, and any detriment to which the employee is subjected as a result of taking time off without permission, is also likely to constitute unlawful discrimination under *sections 18* and *39* of the EqA 2010 and a detriment under *section 47C* of the ERA 1996. Since the EqA 2010 applies not only to employees but also to workers and some self-employed contractors, it may indirectly give such individuals a right to time off for antenatal appointments, since any unfavourable treatment related to pregnancy (or its effects) is likely to be unlawful discrimination.

Maternity leave

What is the right?

In the UK, all pregnant employees, regardless of length of service, are entitled to 52 weeks' statutory maternity leave, consisting of 26 weeks' ordinary maternity leave (OML) and 26 weeks' additional maternity leave (AML)

They are entitled to the benefit of all their terms and conditions of employment except remuneration . They may be entitled to statutory maternity pay (SMP).

Employees have a right to return to the same job on the same terms and conditions after maternity leave or, in some cases, a suitable alternative job

Their rights are set out in *sections 71 to 75* of the ERA 1996, the *Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312)* (MPL Regulations) and the *Statutory Maternity Pay (General) Regulations 1986 (SI 1986/1960)* (SMP Regulations).

What are the conditions of entitlement?

The right extends to all pregnant employees, but not other workers.

Employees who are pregnant or have given birth are entitled to OML and AML provided they have given the appropriate notification to the employer. A stillbirth or miscarriage

before 24 weeks of pregnancy does not entitle the employee to maternity leave, although a period of sick leave and/or compassionate leave will usually be necessary.

How is it exercised?

The employee must notify her employer in advance of her intention to take maternity leave and her chosen start date. The earliest date the employee can start her maternity leave is the 11th week before the EWC. However, maternity leave is triggered automatically by pregnancy-related absence in the four weeks before the EWC or by the birth of the child. In these circumstances, the employee must then notify the employer as soon as possible of the date of the birth or the date the pregnancy-related absence started (as applicable).

If an employee wishes to change the start date of her maternity leave, she must give her employer at least 28 days' notice before the date she originally intended to start her leave, or 28 days' notice before the new date, whichever is the earlier. A shorter period of notice can be given if 28 days is not reasonably practicable.

Once the employer has received notice of the date the employee has chosen to start her maternity leave, it has 28 days to notify her of the date on which her maternity leave entitlement will end. If the employee changes the date she wishes her maternity leave to start, the employer must notify her of the new end date within 28 days of the start of her leave.

How much time off may be taken?

An employee may be absent for a total of 52 weeks' leave. However, she may return to work at any time before the end of AML (or OML) on giving eight weeks' notice. She is prohibited from returning to work for at least two weeks after the birth.

Is there a right to payment?

If the employee satisfies minimum earnings criteria and has 26 weeks' continuous employment at the end of the 15th week before the EWC, she may be eligible for SMP for up to 39 weeks

Does the employer have any discretion as to how or when time may be taken?

The employer has no control over how or when the employee takes statutory maternity leave, or how much of her total leave entitlement she takes. The employer may have some degree of control over the return date if the employee decides to return early but does not give the requisite eight weeks' notice of her intention.

What are the remedies for breach?

An employee may bring a claim to an employment tribunal if the employer dismisses her or subjects her to a detriment for one of a variety of reasons, including the fact that she is pregnant, has given birth or has availed herself of her statutory maternity leave rights (*regulations 19 and 20, MPL Regulations*).

The *EqA 2010*, which extends not only to employees but also to some self-employed contractors, also makes it unlawful for an employer to treat an individual unfavourably

because of pregnancy or childbirth during a "protected period", or to treat her less favourably because she has exercised a right to statutory maternity leave (*sections 18 and 39, EqA 2010*). If the employee is denied the benefit of her terms and conditions of employment during leave, or is not permitted to return to work in accordance with her statutory rights, the employee may bring a claim that she has been subjected to a detriment, or may resign and claim constructive unfair dismissal. She may also bring a discrimination claim.

Paternity leave

What is the right?

Eligible employees are entitled to either one whole week or two consecutive weeks' ordinary paternity leave (OPL), which should be taken within the period of 56 days (eight weeks) beginning with the date of childbirth or the date of placement of an adopted child. Employees are entitled to benefit from their usual contractual terms during their period of OPL except for those terms and conditions relating to remuneration. An employee who has exercised their right to take OPL also has the right to return to the same job as that which they were employed to do immediately before taking paternity leave.

The right to OPL is set out in *sections 80A to D* of the ERA 1996 and in the *Paternity and Adoption Leave Regulations 2002 (SI 2002/2788)* (PAL Regulations).
Eligible employees who are parents of a baby due on or after 3 April 2011, and adoptive parents who were notified that they had been matched with a child on or after that date, are also entitled to additional paternity leave (APL). The right is to one period of APL, of between two weeks and 26 weeks, taken in multiples of complete weeks during a "window" that starts 20 weeks after, and ends 12 months after, the child's date of birth or placement for adoption. The right is also dependent on the employee's spouse, civil partner or partner having returned to work from their statutory maternity or adoption leave.
The right to APL is set out in *sections 80AA* and *80BB* of the ERA 1996 and the *Additional Paternity Leave Regulations 2010 (SI 2010/1055)* (APL Regulations).

What are the conditions of entitlement?

The entitlement extends to employees, not other workers. Both OPL and APL are available, subject to conditions set out below, to both men and women where they are the parent of the child or the spouse, partner or civil partner of the child's mother or adopter. This can apply to:

- The child's natural father.
- The natural mother's husband, civil partner or partner (of either sex).
- An adoptive parent of either sex who is not taking statutory adoption leave.
  The employee must also have or expect to have "responsibility" for the upbringing of the child. If they are not the natural father, they must have or expect to have "main responsibility" (with the child's mother or their co-adopter) for the child's upbringing.
  If they satisfy these criteria, an employee can take OPL if:
- They have 26 weeks' qualifying service ending with the week immediately prior to the 14th week before the expected week of childbirth (or, in the case of adoption, at the end of the week in which the employee is notified of a match).
- The purpose of the leave is to care for the child or support the mother or adopter in her caring for the child.

- The whole period of leave is taken within 56 days (eight weeks) beginning with the birth or placement for adoption.
- The employee complies with the notice requirements.
  In addition to these criteria, the employee can go on to take APL if:
- They remain in continuous employment with that employer until the week before the first week of their APL.
- The child's mother or adopter has returned to work.

How is it exercised?

An employee taking the leave must notify the employer of:

- The expected week of childbirth (EWC), or, in the case of adoption, the date when the adopter was notified of having been matched with the specific child together with the expected placement date.
- The length of the leave (one week or two consecutive weeks).
- The date on which the employee has chosen to start their leave (the employee may specify that leave is intended to start immediately on the child's birth or placement for adoption, whenever that may occur).

In relation to the birth of a child, this notification must be given in or before the 15th week before the EWC, or, where this is not reasonably practicable, then as soon as it is reasonably practicable for them to do so. With adoption, notification must be provided no more than seven days after the date on which the adopter is notified of their match with the child, with the same "not reasonably practicable" extension.

If the employer requests it, the employee must sign a declaration that the purpose of the leave is to care for the child or support the mother or adopter in her caring for the child and that he satisfies the relationship criteria to the child.

There are further rules setting out whether and how the employee can vary the date of intended leave once notice can be given. Finally, once the child is actually born or placed, the employee is required to provide a further written notice to their employer confirming the actual date of the child's birth or placement.

An employee taking **APL** must, at least eight weeks before the date on which they wish their APL to start, give their employer:

- **A written leave notice.** In birth cases this must specify the week which was the child's EWC, the child's date of birth and the employee's chosen start and finish dates for their period of APL. In adoption cases it must specify the date on which the employee was notified of having been matched for adoption with the child, the date on which the child was placed for adoption with the employee and the employee's chosen start and end dates for their period of APL.
- **A signed employee declaration.** In birth cases this must state that the purpose of their APL will be to care for the child, that they are either the child's father or married to, the partner or civil partner of the child's mother and that they have, or expect to have, the main responsibility (apart from that of the child's mother) for bringing up the child. In adoption cases it must state that the purpose of their APL will be to care for the child, that they are married to, the partner or civil partner of the child's adopter and that they have been matched for adoption with the child.

- **In birth cases, a written mother declaration from the child's mother.** This must give the mother's name, address and national insurance number, the date on which she intends to return to work, the fact that the employee is either the child's father or is their spouse, partner or civil partner, that to the mother's knowledge the employee is the only person exercising the entitlement to APL in respect of the child and that she consents to the employer processing the information that she has provided in the declaration.
- **In adoption cases, a written adopter declaration from the child's adopter.** This must give the adopter's name, address and national insurance number, the date on which the adopter intends to return to work, the fact that the employee is their spouse, partner or civil partner and that the adopter consents to the employer processing the information provided in the declaration.

How much time off may be taken?

The employee may take one week or two consecutive weeks (at the employee's choice) of OPL and one period of between two and 26 complete weeks' APL.

Is there a right to payment?
Employees taking paternity leave may be entitled to statutory paternity pay (SPP)

Does the employer have any discretion as to how or when time may be taken?

The employer has no control over when or how much statutory paternity leave the employee takes. The employer may have some degree of control over an employee's right to return early from APL,

What are the remedies for breach?

Employees are protected from detrimental treatment and dismissal for reasons connected with their rights to OPL and APL.

Parental leave

What is the right?

Parental leave is a form of statutory unpaid leave available to some working parents in order to care for a child. It can last up to 18 weeks in respect of each child and the parent can return to the same job (or in certain case a suitable alternative job) on expiry. There is a degree of flexibility as to the time at which leave is taken and the way in which the total leave entitlement may be split up into a number of shorter periods.

What are the conditions of entitlement?

The entitlement extends to employees, not other workers. It is available to birth and adoptive parents and also to anyone who has, or expects to have, parental responsibility for a child (subject to age limits on the child − *see below*). It is an individual right meaning that each parent (or other person with parental responsibility) is entitled in their own right.

To be entitled to parental leave, the employee must, at the time the leave is to be taken:

- Have been *continuously employed* for a period of at least one year unless the child is entitled to disability living allowance.
- Have, or expect to have, responsibility for a child
- Be taking the leave for the purpose of caring for a child
- Be taking the leave before the child's 5th birthday, or 18th birthday where the child is in receipt of disability living allowance. In the case of adoption, the leave must be taken before the 5th anniversary of the date of placement or the child's 18th birthday if sooner.

Unless the employer has agreed to a more flexible scheme, employees must take parental leave in blocks of a week or a whole number of weeks, and may take no more than four weeks leave a year. These restrictions do not apply if the child is in receipt of disability living allowance.

How is it exercised?

Employers are encouraged by the legislation to devise their own schemes for implementing parental leave. In some cases such a scheme will require either a collective agreement or a workforce agreement

If no agreement is reached, a default scheme (set out in *Schedule 2* to the MPL Regulations) will apply.
In order to take parental leave under the default scheme, the employee must:

- Give 21 days' notice to the employer of the beginning and end dates of the requested leave.
- Comply with any request by the employer to produce evidence of entitlement to parental leave. This may include evidence of parental responsibility, the child's date of birth or placement for adoption, and the child's entitlement to a disability living allowance (where applicable).

How much time off may be taken?

The total entitlement is 18 weeks' leave per qualifying child for each employee. However, under the default scheme an employee cannot take more than four weeks' leave in respect of any individual child during any particular year, and must take parental leave in blocks of a week or whole numbers of weeks. However, parents of a child entitled to disability living allowance may take their leave in days or periods of less than one week. Any application for parental leave of less than a week would be invalid unless a disabled child is involved

Is there a right to payment?

Statutory parental leave is unpaid.

Does the employer have any discretion as to how or when time may be taken?

Except where the employee has requested to take parental leave immediately on the birth of a child, or on the placement of a child for adoption, an employer is entitled to postpone an employee's request for leave where it considers that the operation of its business would otherwise be unduly disrupted (*paragraph 6, Schedule 2, MPL Regulations*). The employer cannot deny the leave altogether or split it up into shorter periods. The employer must consult

with the employee before reaching a decision on dates, and give the employee written notice of the new dates and the reason for the postponement. This must be given no more than seven days after the employee requested the leave

What are the remedies for breach?

An employee can bring a tribunal claim if the employer:

- Prevents or attempts to prevent the taking of parental leave.
- "Unreasonably" postpones a requested period of parental leave
- Dismisses the employee or subjects the employee to a detriment for:
  - taking or seeking to take parental leave;
  - refusing to sign a workforce agreement in relation to parental leave; or
  - performing or proposing to act as an employee representative, or a candidate in an election to become such a representative, for the purposes of negotiating a workforce agreement.

Where the claim relates to the refusal or unreasonable postponement of leave, a successful claim will result in a declaration and may result in an award of such compensation as the tribunal considers just and equitable in all the circumstances, having regard to the employer's behaviour and any loss sustained by the employee as a result.

Time off for dependants

What is the right?
Employees have the right to take a "reasonable" amount of time off work in order to take action which is necessary to deal with particular situations affecting their dependants and to make any necessary long-term arrangements.

What are the conditions for taking time off?
This entitlement is available to employees but not other workers. There is no qualifying period of employment.
The time off is to allow the employee to take action which is necessary:

- To provide assistance when a dependant falls ill, gives birth or is injured or assaulted (*section 57A(a)*).
- To make arrangements for the provision of care for a dependant who is ill or injured (*section 57A(b)*). This does not include the provision of longer-term care by the employee themselves (*Qua v John Ford Morrison Solicitors [2003] IRLR 184*).
- In consequence of the death of a dependant (*section 57A(c)*).
- Because of the unexpected disruption or termination of the dependant's care arrangements (*section 57A(d)*). Unexpected does not mean "sudden", so the unplanned absence of a childminder with two weeks' notice can still be unexpected (*Royal Bank of Scotland v Harrison [2009] IRLR 28*).
- To deal with an unexpected incident which involves the employee's child while they are at school (or another educational establishment) (*section 57A(e)*).

The employee can only take time off to take action which is "necessary" (*section 57A, ERA 1996*). In *Royal Bank of Scotland v Harrison*, the employee had two weeks' notice that her childminder would not be available. She was unable to make alternative arrangements and the EAT upheld her right to time off under paragraph (d), above. The EAT stated that the more

time the employee has to make alternative care arrangements, the less likely it will be that necessity will be established.

How is it exercised?

As soon as reasonably practicable, the employee must tell the employer the reason for their absence (*section 57A(2), ERA 1996*). This should include sufficient information to enable the employer to determine whether the statutory right applies (*Truelove v Safeway Stores PLC [2005] ICR 589*). They must also tell the employer how long they expect to be away from work (unless it is not reasonably practicable to tell the employer of the reason for their absence until they return to work) (*section 57A(2)*). If there is a change in circumstances that necessitates extending the expected duration of leave, the employee should inform the employer (*MacCulloch & Wallis Ltd v Moore EAT/51/02/TM*). There is no need for notification to be given in writing.

How much time off may be taken?

The right is to take a "reasonable" amount of time off to take action which is "necessary", and this will always depend on the circumstances. The right under paragraph (b) (*see above*) is to reasonable time off to make arrangements, not to provide care (*Qua v John Morrison Solicitors [2003] IRLR 184*;), and the right under paragraph (c) to time off in consequence of the death of a dependant is not an entitlement to take compassionate leave (*Forster v Cartwright Black Solicitors [2004] IRLR 781*)

Is there a right to payment (and if so, for how long and at what rate)?
The right is to unpaid leave only.

Does the employer have any discretion as to how or when time may be taken?

The employer may in theory prevent the employee taking more time off than is reasonable. However, disruption or inconvenience caused to the employer's business should not be taken into account in determining what is reasonable (*Qua v John Morrison Solicitors*). Furthermore, the employer has no control over when the employee takes time off. The nature of the right is such that the employee is unlikely to be able to request the time off in advance, merely notify the employer of their actual or imminent absence as the need arises.

What are the remedies for breach?

An employee who is refused permission to take time off in accordance with the right or who is subjected to a detriment for taking it (or seeking to take it) may complain to an employment tribunal. Further, it is automatically unfair to dismiss an employee where the reason (or principal reason) is that they took or sought to take time off in accordance with their right, whether or not they have completed the requisite qualifying service normally required for an unfair dismissal claim.

Any such claim must be brought within three months beginning with the date of the refusal, detriment or dismissal (as appropriate). The employment tribunal has discretion to extend this time limit where it was not reasonably practicable for the employee to have presented their claim within the three-month period. It can also be extended under the Acas early conciliation procedure, introduced on 6 April 2014

Workplace representatives

Accompanying employee to disciplinary or grievance hearing

What is the right?

Sections 10 to 15 of the *Employment Relations Act 1999* (ERelA 1999) give workers and employees a statutory right to be accompanied by a fellow worker or a trade union representative or official at a disciplinary or grievance hearing.
The worker who has agreed to accompany a colleague employed by the same employer is entitled to take time off during working hours to fulfil that responsibility (*section 10(6), ERelA 1999*). Similarly, a trade union official is entitled to time off to accompany a worker in accordance with *section 168* of the *Trade Union and Labour Relations (Consolidation) Act 1992*(TULRCA)

Trade union duties and activities

What is the right?

Trade union representatives have a statutory right to reasonable paid time off to carry out trade union duties and activities, to undergo training, and to accompany a worker to a grievance or disciplinary hearing. Union learning representatives have a right to reasonable paid time off to perform their duties and undergo training.
Union members also have a right to reasonable unpaid time off when taking part in trade union activities.

What are the conditions of entitlement?

Time off for union duties. Employees who are officials of an independent trade union recognised by their employer for *collective bargaining* are permitted reasonable paid time off to:

- Carry out their duties in connection with:
  - negotiations in relation to collective bargaining as defined by *section 178(2)* of TULRCA;
  - the performance of other permitted functions related to collective bargaining;
  - information and consultation over collective redundancies or TUPE transfers and
  - agreeing new terms for the workforce following a TUPE transfer in an insolvency situation.
- Undergo training in aspects of industrial relations relevant to those duties which has been approved by the Trades Union Congress or by the trade union.
- Accompany a fellow worker to a disciplinary or grievance hearing.

A union official means an officer of the union or an employee elected or appointed in accordance with the union's rules to be a representative of union members in the workplace (*section 119, TULRCA*). The revised *Acas code of practice on time off for trade union duties and activities* has adopted the more modern term "trade union representative" in place of the term "trade union official" used in the legislation, and this note adopts the same approach.

Time off for union activities and learning. An employee who is a member of an independent trade union recognised by his employer in relation to his position is permitted reasonable unpaid time off to take part in a trade union activity or to consult a union learning representative. Examples of trade union activities include voting in union elections and attending relevant workplace union meetings, but not participating in industrial action (*section 170(2), TULRCA*).

Time off for learning representatives. Employees who are members of an independent trade union recognised by the employer can take reasonable time off to perform duties as a union learning representative, providing that the union has given the employer notice in writing that the employee is a learning representative of the trade union and that the representative is, or will be, sufficiently trained to carry out the learning representative duties. The purpose of a learning representative includes arranging training, promoting the value of training and analysing training needs (*section 168A, TULRCA*).

How is it exercised?

There is little by way of guidance in the legislation as to the manner in which these rights to time off should be exercised. The *Acas code of practice on time off for trade union duties and activities* (revised in 2009) states that requests for time off should provide management with as much notice as possible and give further details, such as the location, timing, duration and purpose of the time off. It also sets out some criteria to guide managers in deciding whether time off should be granted.

How much time off may be taken?

In each of the cases above, the employee is entitled to a reasonable amount of time off. What is reasonable will depend on the circumstances.

Is there a right to payment?

Time off for participating in union activities is unpaid.

The calculation for paying permitted time off to perform the duties of a union representative or a union learning representative is contained in *section 169* of TULRCA. The employee is either to be paid the amount he or she would have earned, had they worked during the time taken off or, where earnings vary with the work done, an amount calculated by reference to average hourly earnings for the work they do. The average hourly earnings are those of the employee concerned or, if no fair estimate can be made of those earnings, the average hourly earnings for work of a comparable employee or, if there is no such person, a figure of average hourly earnings which is reasonable in the circumstances.

There is no requirement to pay for time off where the duty is carried out at a time when the union representative would not otherwise have been at work unless he or she works atypical hours and needs to come in outside those hours to perform his or her duties.

Does the employer have any discretion as to how or when time may be taken?

The amount of time off which an employee is permitted to take, together with the purposes for which, the occasions on which and any conditions subject to which time off may be taken

must be reasonable in all the circumstances, having regard to any relevant provisions of *Acas code of practice on time off for trade union duties and activities* (*sections 168, 168A and 170, TULRCA*). Therefore an employer can refuse an employee who wishes to take an unreasonable period of time off, and can impose reasonable conditions on the exercise of the right, including limiting the purposes for which time may be taken and when it may be taken. For example, it might impose restrictions during times of the day when work is particularly busy. The Acas Code of Practice suggests that employers and trade unions should try to agree what is or is not reasonable for the particular workplace.

What are the remedies for breach?

A union representative or union learning representative can complain to an employment tribunal that his employer has failed to permit him to take time off to carry out his duties, or has failed to pay him for such time (*sections 168, 168A and 169, TULRCA*). An employee can similarly complain about not being permitted (unpaid) time off for union activities (*section 170, TULRCA*). In addition, there is protection from suffering a detriment in connection with trade union membership, activities or services (*section 146, TULRCA*). Any dismissal by reason of the employee having exercised these statutory rights is automatically unfair (*section 152, TULRCA*).

Where a tribunal finds a complaint relating to time-off is well-founded, it shall make a declaration to that effect and may make an award of compensation. The amount of the compensation shall be such as the tribunal considers just and equitable having regard to the employer's default in failing to permit time off to be taken and to any loss sustained by the employee which is attributable to the matters complained of. Where a tribunal finds that the employer has failed to pay the employee in accordance with that section, it shall order him to pay the amount which it finds to be due.

The fact that a tribunal awarding compensation may have regard to the extent of the employer's default as well as any loss suffered by the employee means that compensation may be awarded even if there is no actual loss (*Skiggs v South West Trains Ltd UKEAT/0763/03*).

Duties outside work or family

Public duties

What is the right?
An employee is entitled to time off from work during normal working hours to carry out certain public duties (*section 50, ERA 1996*). While the list of public duties covered by ERA 1996 is extensive, there is no general right to take time off for all public duties.
In October 2008, the then government issued a consultation on widening the range of public duties currently provided under section 50.

In October 2009, it published its response to the consultation, which announced its intention to work with employer organisations, including the Institute of Directors and Federation of Small Businesses, on a "hearts and minds" campaign (including the production of an

information pack for employers explaining what is involved in volunteering and how volunteering can help their businesses).

What are the conditions of entitlement?
Employees who are:

- Justices of the peace.
- Members of:
  - a local authority
  - a statutory tribunal;
  - a police authority;
  - an independent monitoring board for a prison or a prison visiting committee
  - a relevant health body
  - a relevant education body
  - the Environment Agency
  - An employee who is a justice of the peace is entitled to take time off to perform any duties of that office (*section 50(1), ERA 1996*).
  - In other cases, the employee is entitled to time off to attend a meeting of the relevant body (listed above), or any of its committees or sub-committees, and to do any other thing approved by the body to discharge its functions. In the case of a local authority, it includes attending a meeting of its executive or an executive committee or discharging any function of that executive (*section 50(3), ERA 1996*).

How is it exercised?

There is nothing explicit in the legislation regarding the exercise of the right. However, an employer may impose reasonable conditions on the exercise of the right (for example, by requiring the employee to request leave as soon as possible in advance).

How much time off may be taken?
The amount of time off, the occasions on which it may be taken and any conditions that the employer imposes on the employee taking it must be reasonable in all the circumstances having regard, in particular, to:

- How much time off is required to perform the relevant duty and the duties of the office in general.
- How much time off for public duties the employee has already been permitted (together with any time off for trade union duties and activities;
- The circumstances of the business and the effect of the employee's absence on the running of that business.

Although the effect on the business may be taken into account, this does not necessarily outweigh other factors. For example, the tribunal in *R J Emmerson v Commissioners of Inland Revenue [1977] IRLR 458* expected the employer to find a resource to backfill the absent employee in order to release him for 30 days' public duties. In *Ratcliffe v Dorset County Council [1978] IRLR 191*, the employer had rearranged the employee's duties to enable him to perform his public duties. However, the tribunal held that the employer could not expect the employee to make up his work at another time.

Is there a right to payment?

There is no right to be paid for time off for public duties and it is left to the employer's discretion (subject to any provision in the employee's contract) to decide whether to subsidise public duties by continuing to pay employees despite their absence.

Does the employer have any discretion as to how or when time may be taken?

The employer has a certain discretion since the employee's request must be reasonable and the employer may impose reasonable conditions. The employer must therefore weigh up all the issues, balancing the needs of the employee with the needs of the employer, when responding to requests for time off for public duties.

In *Borders Regional Council v Maule [1993] IRLR 1993*, the EAT suggested that employers responding to time off for public duties requests would normally be expected to discuss the issues with the employee and reach an agreement, in order to establish a reasonable pattern for future absences. More generally, employers should document their considerations and decisions in case a tribunal claim is brought, taking into account in particular the three factors set down in *section 50(4)* of ERA 1996

What are the remedies for breach?

An employee may complain to an employment tribunal that his or her employer has failed to permit him to take reasonable time off for public duties in accordance with section 50. The time limit is three months beginning with the date on which the failure occurred, but the tribunal may extend this period where it was not reasonably practicable for the complaint to be presented in time. The time limit can also be extended under the Acas early conciliation procedure, introduced on 6 April 2014

Where a tribunal finds in favour of the employee, it may award compensation at a level which it considers just and equitable having regard to the employer's default and any relevant loss sustained by the employee.

Jury service

What is the right?

Rather than being granted a direct right to take time off in relation to jury service, employees are instead protected from being subjected to a detriment, or being dismissed, as a result of being summoned to attend for service as a juror or being absent from work on jury service. *Section 43M* of ERA 1996 sets out the detriment provisions, and *section 98B* the unfair dismissal provisions. In this roundabout way, employers must therefore allow employees to take jury service, subject to certain conditions below.

What are the conditions of entitlement?

Protection from detriment and unfair dismissal extends only to employees, not other workers. An employee will lose their automatic protection from unfair dismissal if the employer can show that:

- The circumstances were such that the employee's jury service absence was likely to cause substantial injury to the employer's undertaking.

- The employer brought those circumstances to the attention of the employee.
- The employee refused or failed to apply to the court for excusal from, or a deferral of, the obligation to attend.
- The refusal or failure was not reasonable.

How is it exercised?

The legislation does not set out any formalities for the exercise of the right to attend jury service. However, employees should ideally give as much notice as possible to the employer if they are summoned, so that the possible effect on the business can be considered. An employer may take the view that a failure to bring the matter to its attention until the last minute is a form of misconduct.

How much time off may be taken?

The amount of time that an employee may be required to serve on a jury is not fixed, and so the employer may not know immediately how much time off it is likely to have to permit.

Is there a right to payment?

Employers are not required to pay employees during jury service absence, leaving the employee to claim for travel and food expenses and for loss of earnings from the court. However, many employers choose to continue remuneration as a matter of policy.
Non-payment of the employee's remuneration during jury service absence is not to be regarded as a detriment, unless the contract of employment provides for such payment

Does the employer have any discretion as to how or when time may be taken?

If the absence is likely to cause substantial injury to the employer's undertaking, the employer may require the employee to apply for excusal or deferral. However, if the employee's jury summons remains in force, the employer has no control over when the employee must be permitted to take leave.

What are the remedies for breach?

Employees claiming a detriment or an automatically unfair dismissal on jury service grounds must present their claim to the tribunal in the normal way. A three-month time limit applies and this can be extended if the tribunal considers it reasonable where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months. It can also be extended under the Acas early conciliation procedure, introduced on 6 April 2014