



A. Unpaid OML

There are some details and issues regarding pensions and maternity leave which remain unresolved. Social security and employment legislation interact in this area and there are apparent inconsistencies between them. The Social Security Act 1989, for example, does not seem to require pensionable service to accrue during unpaid absence but the Employment Rights Act 1996 and Regulation 9 of the Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312) appear to say that the OML period is pensionable even if unpaid.

However, the policy intention seems relatively clear. The intention seems to be that the following periods are pensionable:

- the 26 week OML period whether paid or not; and
- any part of the AML period which is paid.

This position would be supported by the legislation if the above-mentioned Regulation 9 is viewed as supplementing the requirements of SSA 89.

What is beyond doubt is that from 1 April 2007, when the SMP Period is 39 weeks, where SMP is paid, pensionable service and employer contribution requirements will apply for at least that 39 week period.

B. Unpaid AML

The Sex Discrimination Act 1975 (Amendment) Regulations 2008 (SI 2008/656) as they impact on AML have raised additional doubts. Some legal commentators believe that these anti-discrimination regulations have the effect, where EWC is 5 October 2008 or later, of requiring pension contributions and accrual to continue for the entire maternity leave period (i.e. beyond the 39 week SMP Period to the end of the AML period even where this is unpaid).

The intention of these regulations was to deal with the circumstances in which a discrimination claim could be made. In particular, they remove the statutory requirement for a comparator and so provide that a woman who claims discrimination on grounds of pregnancy or maternity leave will not have to show that she has been less favourably treated than she would have been had she not been pregnant or sought to exercise, or exercised, her right to maternity leave. It is this change that has led some people to conclude that the entire period of maternity leave is pensionable as it will not be possible to argue that any unpaid period would be non-pensionable for a comparator (or for the claimant were she not pregnant).

Subsequent regulations with the title The Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2008 (SI 2008/1966) clarify matters, however. The effect of these regulations is to remove distinctions between the rights of employees on OML and those of employees on AML.

Regulation 5, though, sets out an amendment to Regulation 18A(2) of the Maternity and Parental Leave etc. Regulations 1999 (SI 1999/3312). The revised wording says:

"In the case of accrual of rights under an employment-related benefit scheme within the meaning given by Schedule 5 to the Social Security Act 1989, nothing in paragraph (1)(a) concerning the treatment of additional maternity leave shall be taken to impose a requirement which exceeds the requirements of paragraphs 5 and 6 of that Schedule."

The Explanatory Memorandum to the regulations contains the following:

"As was the case with the Sex Discrimination Act 1975, the amended 1975 Act has no impact on entitlement to terms and conditions relating to pay, as defined by European community law. Employers are therefore not obliged to go beyond the obligations of the Social Security Act 1989 which provides that pension contributions must continue during periods of paid family leave. The Maternity and Parental Leave etc. and the Paternity and Adoption Leave (Amendment) Regulations 2008 do not change this provision or extend pension rights during unpaid additional maternity or adoption leave."

The last sentence is unequivocal. So, whilst some doubts remain, the position should be that the 26 week OML period whether paid or not is pensionable as is any part of the AML period which is paid. However, unpaid AML is not pensionable. It remains to be seen whether the legal commentators who have expressed doubts about the effect of The Sex Discrimination Act 1975 (Amendment) Regulations 2008 (SI 2008/656) will modify their opinions.

[SSA 89 Sch 5 para 5; Employment Rights Act 1996 s.71, as amended by Employment Relations Act 1999 Sch 4 Part I; SI 1999/3312 Reg 9; SI 2008/656; SI 2008/1966]

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Aries Pension & Insurance Systems Ltd

**Aries House
29 Station Road
Desborough
Kettering**

Northants NN14 2RL

Telephone: **01536 763352**

Fax: **01536 762567**

Email: info@ariespensions.co.uk

Media Contacts

For all media enquiries please contact **Kate Boyle**

Email: kate@kateboyle-pr.co.uk

Tel: **020 8590 1315**

Mobile: **07930 442 883**