

Statutory maternity leave – salary sacrifice and non-cash benefits

Contents

Introduction

1. “Salary sacrifice” during Statutory Maternity Leave

What is salary sacrifice?

Calculating SMP (with examples)

Paying SMP (with examples)

Making deductions from SMP (with example)

The impact of “salary sacrifice” on the other Statutory Payments [SPs]

Salary sacrifice and the National Minimum Wage

Providing contractual non-cash benefits during statutory maternity leave

Great Britain and Northern Ireland

Occasional misunderstandings

2. Contractual non-cash benefits during Statutory Maternity Leave

Introduction

*What **must** the employer continue to provide to a woman when she is on statutory maternity leave?*

Are there any exclusions?

Return-to-work rights

Contractual non-cash benefits and salary sacrifice

Provision of contractual non-cash benefits during the Average Weekly Earnings period for calculating SMP

Timing

Great Britain and Northern Ireland

Examples

Occasional misunderstandings

3. Summary Table – entitlements during statutory maternity leave

Statutory maternity leave – salary sacrifice and non-cash benefits

Introduction

- The law changed in 2008 on what benefits employers must provide to employees on maternity leave. Employers often provide benefits under salary sacrifice arrangements. This guidance looks at what impacts salary sacrifice arrangements have on Statutory Maternity Pay [SMP]; and at what non-cash benefits employers should provide to their employees during statutory maternity leave.
- Parallel changes in the law took place in 2008 on what benefits employers must provide to employees on adoption leave. The remainder of this note applies equally to adoption cases as it does to maternity cases.

1. “Salary sacrifice” during Statutory Maternity Leave

This section looks at the impacts of salary sacrifice arrangements on SMP - and also on the other Statutory Payments. Its impact in these areas is extremely limited.

What is salary sacrifice?

Salary sacrifice is not a term that you will find in legislation. It describes a legally-binding change in the contractual arrangements between employer and employee - most commonly where the employment contract is amended to reduce the employee’s entitlement to cash salary, and a non-cash benefit is provided. The value of the non-cash benefit may equate to the amount of salary “sacrificed”. The effect of the salary sacrifice must be that the employee has given up the right to some of their cash pay.

The variety of non-cash benefits can be considerable. Their treatment for tax and National Insurance Contributions [NICs] purposes varies – they can be subject to tax under PAYE or under the P11D (Expenses and Benefits) procedure; they can be subject to NICs under Class 1, Class 1A or Class 1B. Indeed some can be exempt from tax or NICs, in whole or in part. It is important to look at the relevant rules that set-out the charge to tax and NICs on each provided benefit.

Salary sacrifice arrangements are covered by employment and contract law. Employers should consider taking legal or HR advice when making amendments to employment contracts.

Calculating SMP

SMP entitlement is calculated on gross earnings which are subject to Class 1 NICs during a set period. Such earnings would consist of -

- any salary or wages (including cash allowances – e.g. car allowance);

Statutory maternity leave – salary sacrifice and non-cash benefits

- any other element of the person's remuneration which is chargeable to Class 1 NICs (including in very limited circumstances Class 1B) – for example:
 - some non-cash benefits (such as childcare vouchers where the excess over a tax and NICs-exempt amount - £55 per week at time of drafting - is chargeable to tax and Class 1 NICs);
 - shares or share options;
 - retail vouchers (where the cost is taxable under the P11D procedure and subject to Class 1 NICs).

Therefore where a salary sacrifice arrangement is in place during the set period, the SMP average weekly earnings [AWE] calculation will be based on gross earnings subject to Class 1 NICs. Under that arrangement, the salary or wages will be payable at a reduced level; and any other remuneration chargeable to Class 1 NICs may also be changed. So any SMP due will be based on that lower salary and changed remuneration.

It is important to emphasise that the definition of earnings used to calculate SMP has not changed. The calculation has always been based on gross earnings subject to Class 1 NICs.* In particular the salary sacrifice arrangement does not change the definition of earnings.

More detailed guidance on calculating SMP can be found in Employer Helpbook E15 (Pay and time off work for parents).

<http://www.hmrc.gov.uk/helpsheets/e15.pdf>

If the figure of AWE is below the Lower Earnings Limit [LEL] for NICs purposes, then the woman will not be entitled to SMP. A salary sacrifice arrangement could lower a woman's AWE below the LEL.

Where a salary sacrifice arrangement is not in place an employer might nevertheless agree to provide the employee with childcare vouchers or other benefits on top of her salary. The salary taken into account in her AWE calculation will include her full salary without reduction. Her childcare vouchers or other benefits are only included in her AWE calculation insofar as they are subject to Class 1 NICs.

* The definition may be found in regulation 20 of the Statutory Maternity Pay (General) Regulations 1986. Follow this link to the definition -

http://www.dwp.gov.uk/advisers/docs/lawvols/bluevol/pdf/a4_5701.pdf

Statutory maternity leave – salary sacrifice and non-cash benefits

Example 1 – SMP calculation without salary sacrifice but with childcare vouchers within the tax and NICs exemption limits:

An employee has a salary of £350 per week. Her employer also provides her with childcare vouchers of £50 on top of the £350 cash pay. She therefore receives £350 cash plus £50 in childcare vouchers. She is only liable to Class 1 NICs on £350 because the £50 in childcare vouchers is within the exemption limit from both tax and NICs.

Her Average Weekly Earnings [AWE] is, therefore, £350 per week and

- For weeks 1 to 6, SMP (payable at 90% of AWE) is payable at £315 per week;
- For weeks 7 to 39, SMP (payable at standard rate £117.18, or 90% of AWE if less) is payable at £117.18 per week.

Example 2 – SMP calculation with salary sacrifice and childcare vouchers within the tax and NICs exemption limits:

Another employee's salary is £350 per week - she enters into an arrangement with her employer to sacrifice £50 of that salary; she receives childcare vouchers to the same value. As a result of that arrangement she is paid £300 per week cash salary plus £50 in childcare vouchers which are exempt from both tax and NICs up to a limit of £55 per week. She is therefore liable for Class 1 NICs on the £300 cash salary only.

Her AWE is £300 (the earnings subject to NICs), and

- For weeks 1 to 6, SMP (payable at 90% of AWE) is payable at £270 per week;
- For weeks 7 to 39, SMP (payable at standard rate £117.18, or 90% of AWE if less) is payable at £117.18 per week.

Statutory maternity leave – salary sacrifice and non-cash benefits

Example 3 – SMP calculation with salary sacrifice and childcare vouchers exceeding the tax and NICs exemption limits:

Another employee's salary is also £350 per week - but she enters into an arrangement to sacrifice £100 of that salary and gets childcare vouchers in return. She is therefore paid, under that new arrangement, £250 per week cash salary plus £100 in childcare vouchers (£55 worth of those vouchers is exempt from both tax and NICs; but £45 is liable for both tax and Class 1 NICs). She is liable to Class 1 NICs on the £250 salary plus £45 worth of childcare vouchers - total £295.

Her AWE, based on the amount subject to NICs, is £295 and

- For weeks 1 to 6, SMP (payable at 90% of AWE) is payable at £265.50p per week.
- For weeks 7 to 39, SMP (payable at standard rate £117.18, or 90% of AWE if less) is payable at £117.18 per week.

Paying SMP

No contractual agreements can exclude, limit or otherwise modify SMP payments due. Therefore any SMP payable must be paid in full and in cash, for up to 39 weeks, regardless of any contrary contractual arrangements. In particular, the SMP payable cannot be further reduced by the terms of a salary sacrifice arrangement.

Contractual maternity pay (e.g. Occupational Maternity Pay as in Example 4), however, is different. A salary sacrifice arrangement can reduce not just salary entitlement; depending on the terms of the contract, it can reduce also an employee's entitlement to contractual maternity pay which is payable in excess of SMP.

In **Example 1** above the weekly SMP is payable in full and in cash throughout. The woman must not be given childcare vouchers as a substitute for any part of her SMP entitlement.

In **Example 2** above the weekly SMP payable, based on the reduced level of salary, cannot be further reduced – £270 remains payable in full and in cash as SMP for weeks 1 to 6; and £117.18 for weeks 7 to 39. This must be paid fully in money, not a lower sum of money plus childcare vouchers to make up the total.

Statutory maternity leave – salary sacrifice and non-cash benefits

In **Example 3** above the weekly SMP payable, based on the reduced level of salary, cannot be further reduced – £265.50 remains payable in full and in cash as SMP for weeks 1 to 6; and £117.18 for weeks 7 to 39. This must be paid fully in money, not a lower sum of money plus childcare vouchers to make up the total.

Example 4 – SMP calculation with salary sacrifice and childcare vouchers within the tax and NICs exemption limits, and with Occupational Maternity Pay [OMP]:

Another employee's salary is £750 per week. She enters into an arrangement to sacrifice £50 of that salary, and gets childcare vouchers in return. She is therefore paid, under that new arrangement, £700 per week salary plus £50 in childcare vouchers (which are within the tax and NICs exemption limits), and is subject to Class 1 NICs on the £700 salary only. She is also entitled under her altered contract to OMP of 100% of her reduced salary (less SMP payable) for the first 6 weeks; and 50% of her reduced salary (less SMP payable) for weeks 7 to 39. What SMP and OMP are payable?

Her AWE are £700 (the earnings subject to NICs), and

- For weeks 1 to 6, SMP (payable at 90% of AWE) is payable at £630 per week. This is payable in full and in cash without any further reduction.
- For weeks 1 to 6, OMP (payable up to 100% of reduced salary) is payable at £700 per week less SMP payable £630 – so she is entitled to OMP of £70 per week. This is payable on top of the SMP £630.
- For weeks 7 to 39, SMP (payable at standard rate £117.18, or 90% of AWE if less) is payable at £117.18 per week. This is payable in full and in cash without any further reduction.
- For weeks 7 to 39, OMP (payable up to 50% of reduced salary) is payable at £350 per week less SMP payable £117.18 – so she is entitled to OMP of £232.82 per week. This is payable on top of the SMP £117.18.

Making deductions from SMP

Authorised deductions may be made from SMP provided those deductions would have been made from the woman's cash salary. Such authorised deductions may have been required by law (e.g. PAYE, National Insurance Contributions), or by contractual agreement between employer and employee (e.g. occupational pension contributions); or may be voluntary, reflecting the employee's personal choice (e.g. trade union subscriptions, payroll giving).

Deductions from SMP cannot be made for Attachment of Earnings Orders or Deductions from Earnings Orders for the Child Maintenance and Enforcement Commission (Arrestment of Earnings Orders in Scotland).

Statutory maternity leave – salary sacrifice and non-cash benefits

It is not correct to make deductions from SMP to reflect salary sacrifice arrangements. Salary sacrifice is not a deduction - it is simply the term used to describe a change in the contract between employer and employee. Essentially the amount sacrificed through the change reduces the amount of contractual pay the employee is entitled to be paid. (These reductions are sometimes shown on wage/salary slips - to record the amount of wages/salary to which the employee has ceased to become entitled. These entries on the payslip can be misleading – they suggest that the amount of salary sacrificed is a deduction from pay. It is not.)

In **Example 2** above authorised deductions from the SMP payable could be made as follows:

<i>Weeks 1 – 6</i>			
SMP payable weekly			£270.00
Less PAYE	say	£20.00	
NICs	say	£10.00	
Payroll Giving (voluntary)		£ 5.00	
Total authorised deductions			£35.00
Net amount payable			£235.00
<i>Weeks 7 – 39</i>			
SMP payable weekly			£117.18
Less PAYE	say	£5.00	
NICs	say	£1.00	
Payroll Giving (voluntary)		£5.00	
Total authorised deductions			£11.00
Net amount payable			£106.18.

The impact of “salary sacrifice” on the other Statutory Payments [SPs]

The impact of a salary sacrifice arrangement on the other Statutory Payments (Statutory Sick Pay [SSP], Statutory Adoption Pay [SAP] and Statutory Paternity Pay [SPP]) is the same as its impact on SMP -

- Calculation of the SPs – this is based on gross earnings (altered by the salary sacrifice arrangement) which are subject to Class 1 NICs.
- There is no impact on -
 - i. Payment of the SPs – these must be made in full and in cash, regardless of any contrary contractual arrangements. They cannot be reduced by the terms of any salary sacrifice arrangement.
 - ii. Deductions from the SPs – these are limited to authorised deductions which would have been made from the employee’s own salary (for example PAYE, National Insurance Contributions, pension contributions, trade union subscriptions, payroll giving). It is not correct to deduct from the SPs amounts that have been sacrificed under a salary sacrifice arrangement.

Statutory maternity leave – salary sacrifice and non-cash benefits

Salary sacrifice and the National Minimum Wage

The National Minimum Wage [NMW] provides legally binding minimum hourly rates of pay to workers aged 16 years or over – with few exceptions. It takes no account of how the worker is paid, be it hourly, daily, weekly, or by session.

Apart from accommodation, benefits in kind do not count towards the NMW.

A salary sacrifice arrangement to provide non-cash benefits in kind in place of some cash salary cannot reduce a worker's cash pay below the NMW. However, Statutory Payments themselves and any deductions properly made from them are not covered by the NMW rates and rules.

Providing contractual non-cash benefits during statutory maternity leave

As explained above contractual non-cash benefits may sometimes be provided under a salary sacrifice arrangement in lieu of sacrificed salary. During any Ordinary Maternity Leave [OML] (weeks 1 to 26) they must continue to be provided.

In future, following amendments made to Regulations in 2008, the period during which such benefits must continue to be provided is being extended. The contractual non-cash benefits must continue to be provided during any Additional Maternity Leave (weeks 27 to 52) as well as during any OML – regardless of any contrary contractual agreement between employer and employee and regardless of any salary sacrifice arrangement. (See section 2. of this note for greater detail.)

Example 5 – employee entitled to SMP, but not entitled to any Occupational Maternity Pay [OMP]; has contractual entitlement to childcare vouchers and gym membership (contractual non-cash benefits); and requests employer to deduct union subscription of £5 per week from salary or wages. What must the employer pay and provide to the employee during Statutory Maternity Leave?

OML (weeks 1 – 26) - Employer (a) must pay SMP; (b) must continue to provide the non-cash benefits (childcare vouchers and gym membership) he was obliged to provide in the period before statutory maternity leave; and (c) may continue to deduct union subscription £5 per week from the SMP.

AML (weeks 27 – 39) – employer (a) must pay SMP; (b) must continue, following the amendments to Regulations in 2008, to provide the non-cash benefits (childcare vouchers and gym membership) he was obliged to provide in the period before statutory maternity leave; and (c) may continue to deduct union subscription £5 per week from the SMP.

Statutory maternity leave – salary sacrifice and non-cash benefits

AML (weeks 40 – 52) – employer (a) must stop paying SMP (not payable beyond week 39); (b) must continue, following the amendments to Regulations in 2008, to provide the non-cash benefits (childcare vouchers and gym membership) he was obliged to provide in the period before statutory maternity leave; and (c) can no longer deduct union subscription £5 per week as employee has no SMP or OMP or other salary or wages to deduct them from.

Great Britain and Northern Ireland

The impacts of salary sacrifice as described above for SMP and for the other Statutory Payments apply in both Great Britain and N Ireland.

Occasional misunderstandings

- *Misunderstanding:* employers sometimes believe that the effect of a salary sacrifice arrangement is that the employee is still entitled to the previous gross salary but that a deduction, representing the amount of salary sacrificed, should be taken from that gross figure to leave a net salary entitlement.
- *Comment:* a salary sacrifice arrangement involves a legally binding change in the contractual terms and conditions relating to pay. While the sacrifice remains in force the employee is only entitled to the reduced amount of cash wages or salary.

- *Misunderstanding:* employers sometimes believe that an employee's agreement to sacrifice salary applies equally to Statutory Payments.
- *Comment:* no agreement (whether salary sacrifice or any other agreement) can exclude, limit or otherwise modify SPs due. SPs must therefore be paid in full and in cash, regardless of any salary sacrifice arrangement, or any other contractual arrangement.

- *Misunderstanding:* employers sometimes believe that salary sacrifice is a "scheme" designed to enable an employee to purchase benefits from their employers by paying for them directly through sacrificing some of their cash salary.
- *Comment:* salary sacrifice is not a method by which an employee "pays" the employer for the non-cash benefits they receive. A remuneration package may contain a number of elements. A common arrangement is set out below:
 - Salary or wages
 - Car provided by the employer and available for the employee to use privately

Statutory maternity leave – salary sacrifice and non-cash benefits

- Private Medical Insurance
- Childcare vouchers.

Each element stands alone. The benefits are all provided by the employer as a way of rewarding the employee. This is specified in the contract of employment. But even though the employee may agree to reduce the amount of cash wages in order to receive childcare vouchers, for example, there is no legal connection between the two. The contract simply specifies that the employee is entitled to receive an amount of salary and the provision of certain benefits.

- *Misunderstanding:* Employers sometimes believe that, where there is a salary sacrifice arrangement, the SMP calculation (based on earnings in the AWE period) should reflect earnings before - and not after - the salary sacrifice arrangement, in order to preserve the employee's entitlement to a larger amount of SMP.
- *Comment:* The SMP calculation must be based on actual gross earnings subject to Class 1 NICs in the AWE period. Earnings in that period depend on the terms of the contract. It is not correct to use in the SMP calculation a notional figure of earnings – which the employee would have earned had the salary sacrifice arrangement not been in place – whether or not the purpose was to benefit the employee. (However the notional figure can be used by employers to calculate pension contributions, redundancy payments, bonuses and pay increases for example – this is usually reflected in the contract when the terms and conditions relating to pay are amended by the salary sacrifice arrangement.)

- *Misunderstanding:* Employers sometimes believe that if the employee reverts to her pre-salary sacrifice level of salary, at any time from the start of the AWE period to the end of her maternity leave, then that constitutes an increase in pay for the purposes of recalculating SMP.
- *Comment:* this is not correct. The woman who withdraws from her salary sacrifice arrangement has not had a pay rise in the generally accepted sense of the term. She has simply given up the salary sacrifice arrangement, but the overall value of her remuneration package may well remain unchanged. Both the judgement of the European Court of Justice in the Alabaster case and UK legislation require the recalculation of SMP where a woman has been **awarded** a pay increase. An employee who has merely given up a salary sacrifice arrangement cannot in any meaningful sense be described as having been awarded a pay increase. However the SMP to which she is entitled may increase if her gross earnings subject to Class 1 NICs in the AWE period have increased following her withdrawal from the salary sacrifice arrangement.

Statutory maternity leave – salary sacrifice and non-cash benefits

- *Misunderstanding:* employers and employees sometimes believe that all childcare vouchers will automatically qualify for the £55 exemption from tax and NICs.
- *Comment:* it is not true that all childcare vouchers automatically qualify for exemption. Childcare vouchers only qualify for the tax and NICs exemption when they are used to pay for registered or approved childcare.

- *Misunderstanding:* employers sometimes believe that HMRC should provide advice on setting up, drafting, operating or varying salary sacrifice arrangements.
- *Comment:* Employment contracts are covered by contract and employment law. HMRC is not able to provide this specialist legal advice. Employers should consider taking advice from employment law and HR professionals. HMRC will provide advice on the employer's obligation arising from the amended contracts - in particular, the amounts on which PAYE and Class 1 NICs should be applied, the P11D and Class 1A NICs requirement, and the SPs implications.

- *Misunderstanding:* employers sometimes believe they have to continue to provide the non-cash benefit during statutory maternity leave in every circumstance.
- *Comment:* subject to the terms of the contract the employee may be able voluntarily to opt out of receiving the non-cash benefit under the salary sacrifice arrangement. However it is important to emphasise that the employer cannot compel the employee to opt out of receiving the benefit.

Statutory maternity leave – salary sacrifice and non-cash benefits

2. Contractual non-cash benefits during Statutory Maternity Leave

NOTE A: The following reflects changes to regulations made in 2008. For implementation details see paragraph below on timing.

NOTE B: The term “contractual non-cash benefits” used in this document refers to all the terms and conditions of employment other than those relating to remuneration. Remuneration means sums payable to an employee by way of wages or salary.

Note C: The detail of contractual non-cash benefits will vary according to the contract, and therefore the question of whether a particular benefit is something that an employer should continue to provide to an employee during AML will sometimes be a matter on which employers may need to seek independent legal advice.

Introduction

When a woman is on statutory maternity leave there is no statutory obligation that she should continue to receive remuneration from her employer.

However the terms and conditions of her employment may entitle her normally to receive benefits other than remuneration. If so, amendments made in 2008 to the Sex Discrimination Act [SDA] have extended the period during which she may continue to benefit from contractual non-cash benefits during statutory maternity leave. (There will be no change to the position for sums payable as wages or salary or pension contributions.)

At present, employees must continue to receive all their contractual benefits other than remuneration during Ordinary Maternity Leave (OML - the first 26 weeks). These may be described as contractual non-cash benefits.

As a result of the amendments employees must continue to receive all their contractual benefits except pay during Additional Maternity Leave (AML – the second 26 weeks). Employees who are denied this entitlement will be able to bring a claim of sex discrimination against their employer. This is explained in more detail below – including timing of implementation.

The effect of the changes to the Regulations is to do no more than extend the period during which contractual non-cash benefits must be provided.

The variety of non-cash benefits can be considerable. Their treatment for tax and National Insurance Contributions [NICs] purposes varies – they can be subject to tax under PAYE or under the P11D (Expenses and Benefits) procedure; they can be subject to NICs under Class 1, Class 1A or Class 1B. Indeed some can be exempt from tax or NICs, in whole or in part. It is important to look at the relevant rules that set-out the charge to tax and NICs on each provided benefit.

Statutory maternity leave – salary sacrifice and non-cash benefits

What **must** the employer continue to provide to a woman when she is on statutory maternity leave, as a result of these changes to maternity leave legislation?

- Employers must continue during AML (as well as OML) to provide any non-cash benefits that they have agreed to provide as a term of the employment contract.
- These non-cash benefits are what she is entitled to under her contract of employment, apart from sums payable by way of monetary wages or salary. These non-cash entitlements would include:
 - company cars, mobile phones, living accommodation or other assets provided to the employee for non-business use, without being transferred to the employee;
 - medical / dental / critical illness / travel / car insurance provided under company insurance policies; employer-provided health checks;
 - non-cash vouchers, such as childcare vouchers which can only be used by the employee for qualifying childcare and are not transferable;
 - the right to accrue contractual annual leave (employees are already entitled to the statutory minimum amount of annual leave per year, regardless of whether or not they take any maternity leave).

Please note:

- a. This list is not exhaustive – it is merely illustrative.
- b. No contrary contractual agreement between employer and employee can override this requirement. Employees denied such contractual benefits may be able to bring a claim against their employer.
- c. If an employer proposes to change the contractual benefits provided to women only, it may give rise to a claim under the Equal Pay Act or the Maternity and Parental Leave Regulations. However if an employer proposes to change the contractual benefits provided to all employees (not just to women only), then this is less likely to constitute less favourable treatment for women giving rise to such a claim.

Are there any exclusions?

- *Wages or salary* - There is no statutory obligation for employers to continue during OML or AML to provide any monetary wages or salary previously payable. (However employers may continue to pay them voluntarily or under the terms of the employment contract – e.g. Occupational Maternity Pay.)

Statutory maternity leave – salary sacrifice and non-cash benefits

- *Cash benefits* - Employers need not continue during OML or AML to provide contractual cash benefits – such as:
 - cash allowances (e.g. housing allowance, car allowance, fuel allowance, or first aid allowance);
 - vouchers which have a transferable cash value. This could include, for example, luncheon vouchers, retail vouchers and some vouchers for recreational benefits like membership of sports or other clubs or attendance at sporting fixtures. However this does not include non-cash benefits, such as childcare vouchers which can only be used by the employee and are not transferable – these must continue to be provided during OML and AML.

Such cash benefits are treated as remuneration. (However employers may continue to pay them voluntarily or under the terms of the employment contract.)

- *Pension contributions* - Employers need not continue during unpaid AML to make employers' occupational pension contributions, or to count unpaid AML as reckonable service for the purposes of occupational pension contributions. (However, the law already requires employers to continue to provide occupational pension contributions during any period of **paid** maternity absence and this requirement is unaffected by the changes described here. The law also requires that employers continue pension contributions during OML, regardless of whether the employee is in receipt of maternity pay. For more details please see guidance on OCCUPATIONAL PENSION SCHEMES DURING ORDINARY AND ADDITIONAL MATERNITY LEAVE at the following link -

<http://www.berr.gov.uk/employment/employment-legislation/employment-guidance/page34244.html#Statutory#Statutory>

- *Non-cash benefits for business use only* – Employers need not provide during OML or AML any contractual non-cash benefits that they previously provided for business use only – e.g. some company cars or company vans.

Return-to-work rights

The right to return to work from maternity leave is a measure of protection already conferred by different legislation. Therefore the different rights of return that currently apply during OML and AML remain unaffected by these changes.

Statutory maternity leave – salary sacrifice and non-cash benefits

Currently if the woman returns to work during or at the end of OML, she is entitled by law to return to the same job. If she returns to work during or at the end of AML, she is entitled to return to the same job unless the employer considers it not to be reasonably practicable to hold open her old job, in which case he must offer her another suitable post on terms and conditions no less favourable. There will be no alteration of these rights.

Just as before these changes to the Sex Discrimination Act, where contractual non-cash benefits are more generous to the employee than the legislation requires, the employee continues to benefit from those more generous arrangements. Therefore, if the contract gives the employee a right, after AML, to return to the same job and if that contractual right is greater than that provided by the legislation, then the contractual right will prevail.

Contractual non-cash benefits and salary sacrifice

Contractual non-cash benefits may sometimes be provided under arrangements in which the employee agrees to sacrifice cash salary of a comparable value.

Non-cash benefits provided under these arrangements must be treated in the same way as any other contractual non-cash benefit during AML - ie they must continue to be provided during AML as well as during OML. This obligation continues to apply even though the employee may not be receiving any salary or wages that can be sacrificed.

SMP cannot be sacrificed in any circumstances.

Provision of contractual non-cash benefits during the Average Weekly Earnings period for calculating SMP

SMP entitlement is calculated on gross earnings which are subject to Class 1 NICs during a set period. Such earnings would consist of -

- any salary or wages (including cash allowances – e.g. car allowance);
- any other element of the person's remuneration which is chargeable to Class 1 NICs (including in very limited circumstances Class 1B) – for example:
 - some non-cash benefits (such as childcare vouchers where the excess over a tax and NICs-exempt amount - £55 per week at time of drafting - is chargeable to tax and Class 1 NICs);
 - shares or share options;
 - retail vouchers (where the cost is taxable under the P11D procedure and subject to Class 1 NICs).

Statutory maternity leave – salary sacrifice and non-cash benefits

So, in calculating SMP non-cash benefits which are chargeable to Class 1 NICs must be taken into account.

Timing

These changes to the rules for contractual non-cash benefits during AML will apply to women where the week their baby is due begins on or after 5 October 2008 – regardless of when their baby is actually born.

Great Britain and Northern Ireland

These new rules governing contractual non-cash benefits during AML will apply in both Great Britain and N Ireland.

Examples

Example 6 - where the week the baby is due begins on 14 September 2008:

Employee A's contract of employment (with salary sacrifice) entitles her to:

- 1) Cash:
 - a) Salary - £500 per week;
 - b) Cash allowance - housing allowance £100 per week.
- 2) Contractual non-cash benefits:
 - a) Exempt from tax and NICs - childcare vouchers up to the exemption limit (£55 per week at time of drafting);
 - b) Subject to tax and Class 1 NICs - childcare vouchers provided £100 per week, tax and NICs-exempt £55, so subject to tax and Class 1 NICs £45 pw.
 - c) Subject to tax and Class 1A NICs –
 - i) provision of company car;
 - ii) health insurance;
 - iii) gym membership.
 - d) 10 days' contractual annual leave on top of her statutory annual leave entitlement.
- 3) Occupational pension contributions to be paid by her employer.

In addition to these rights under her contract of employment she has rights of return from maternity leave, not as a term of her contract, but simply as a measure of protection conferred by the law.

Her contract does not provide any occupational maternity pay, but she qualifies for SMP.

Statutory maternity leave – salary sacrifice and non-cash benefits

As she is expecting a baby prior to the new rules having effect she will not be subject to them - regardless of when the baby is actually born, and even if it were to arrive on or after 5 October 2008.

What will employee A be entitled to during her Statutory Maternity Leave?

OML (weeks 1 – 26)

During OML the Regulations do not give her an entitlement to the following (although these may be provided by the employer voluntarily or contractually):

- 1) Cash –
 - a) Salary - £500 per week;
 - b) Cash allowance - housing allowance £100 per week.

She will be entitled to continue to receive:

- 2) Contractual non-cash benefits (because her employer was required to provide them in the period before statutory maternity leave):
 - a) Exempt from tax and NICs - childcare vouchers up to the exemption limit (£55 per week at time of drafting);
 - b) Subject to tax and Class 1 NICs - childcare vouchers provided £100 per week, tax and NICs-exempt £55, so subject to tax and Class 1 NICs £45 pw.
 - c) Subject to tax and Class 1A NICs –
 - i) provision of company car;
 - ii) health insurance;
 - iii) gym membership
 - d) 10 days' contractual annual leave on top of her statutory annual leave entitlement. She will continue to accrue her contractual annual leave in the normal way. (Where she does not take her full contractual leave there are no regulations that prevent an employer agreeing to pay an employee cash in lieu of that contractual annual leave. It's a matter for the two parties.) And she remains entitled to her full statutory annual leave allowance (although she cannot take this at the same time as being on statutory maternity leave).

For further details on statutory and contractual annual leave see the guidance provided by the Department for Business Enterprise and Regulatory Reform under the heading ANNUAL LEAVE AND MATERNITY LEAVE at -

<http://www.berr.gov.uk/employment/employment-legislation/employment-guidance/page34244.html>

- 3) Occupational pension contributions to be paid by her employer – the employer must carry on making pension contributions as though she were still at work and working, for as long as he pays her SMP.

She will become entitled to receive:

Statutory maternity leave – salary sacrifice and non-cash benefits

4) SMP as calculated in the normal way based on her gross earnings subject to Class 1 NICs in the Average Weekly Earnings [AWE] period:

- 1) a) Salary - £500
- b) Housing allowance - £100.

2) b) Contractual non-cash benefits that are subject to Class 1 NICs– childcare vouchers excess over exemption limit - £45.

Total AWE - £645 per week. First 6 weeks' SMP payable at 90% of AWE – so £580.50 SMP payable per week for 6 weeks. SMP can be payable for up to 39 weeks. From week 7 to week 39 SMP is payable at the standard rate £117.18 or 90% of AWE if less. In this example, SMP payable will be the standard rate £117.18 from weeks 7 to 26 (during OML). These sums are payable in full and in cash.

In addition to her entitlements above if she returns to work during or at the end of OML, she is entitled by law to return to the same job.

AML (weeks 27 – 52)

During AML the Regulations do not give her an entitlement to the following (although these may be provided by the employer voluntarily or contractually):

- 1) Cash –
 - a) Salary - £500 per week;
 - b) Cash allowance - housing allowance £100 per week.

She will not be entitled to continue to receive the following, because her baby was due before the changes apply:

- 2) Contractual non-cash benefits:
 - a) Exempt from tax and NICs - childcare vouchers up to the exemption limit (£55 per week at time of drafting);
 - b) Subject to tax and Class 1 NICs - childcare vouchers provided £100 per week, tax and NICs-exempt £55, so subject to tax and Class 1 NICs £45 pw.
 - c) Subject to tax and Class 1A NICs –
 - i) provision of company car;
 - ii) health insurance;
 - iii) gym membership.

She will be entitled by law to the following during AML:

- d) Annual leave entitlement. She remains entitled to her full statutory annual leave entitlement (although, as above, she can't actually take it

Statutory maternity leave – salary sacrifice and non-cash benefits

while on statutory maternity leave) but, once on AML, is no longer entitled to accrue contractual annual leave.

- 3) Occupational pension contributions to be paid by her employer. During AML, she remains an employee and her employer must continue making pension contributions as normal for as long as she receives SMP. But once the SMP pay period finishes (not due beyond week 39), her employer can stop making pensions contributions.

She will become entitled to receive:

- 4) SMP as calculated in the normal way based on her gross earnings subject to Class 1 NICs in the Average Weekly Earnings [AWE] period:

- 1) a) Salary - £500

- b) Housing allowance - £100.

- 2) b) Contractual non-cash benefits that are subject to NICs – childcare vouchers excess over exemption limit £45.

Total AWE - £645 per week. SMP can be payable for up to 39 weeks. From week 7 to week 39 SMP is payable at the standard rate £117.18 or 90% of AWE if less. In this example, SMP payable will be the standard rate £117.18 from weeks 27 to 39 (during AML). These sums are payable in full and in cash. After week 39 no SMP is payable – so any deductions (e.g. for trade union subscriptions) will cease.

In addition to her entitlements above if she returns to work during or at the end of AML, she is legally entitled to return to the same job unless the employer considers it not to be reasonably practicable to hold open her old job, in which case he must offer her another suitable post on terms and conditions no less favourable.

Example 7 - where the week the baby is due begins on 19 October 2008, when the new regulations will have taken effect:

Employee B works at the same company as Employee A and her contract of employment is exactly the same in all respects (covering 1) cash; 2) contractual non-cash benefits; and 3) occupational pension contributions). She has the same rights of return from maternity leave. Her contract does not provide for occupational maternity pay – but she qualifies for SMP.

However, the week her baby is due begins after 5 October 2008 when the new regulations take effect, which means that she is covered by the new rules - regardless of when the baby is actually born, even if it is before 5 October 2008.

OML (weeks 1 – 26) and AML (weeks 27 – 52)

Statutory maternity leave – salary sacrifice and non-cash benefits

During OML and AML the Regulations do not give her an entitlement to the following (although these may be provided by the employer voluntarily or contractually):

- 1) Cash –
 - a) Salary - £500 per week;
 - b) Cash allowance - housing allowance £100 per week.

She will be entitled to continue to receive:

- 2) Contractual non-cash benefits:
 - a) Exempt from tax and NICs - childcare vouchers up to the exemption limit (£55 per week at time of drafting);
 - b) Subject to tax and Class 1 NICs - childcare vouchers provided £100 per week, tax and NICs-exempt £55, so subject to tax and Class 1 NICs £45 pw.
 - c) Subject to tax and Class 1A NICs –
 - i) provision of company car;
 - ii) health insurance;
 - iii) gym membership
 - d) 10 days' contractual annual leave on top of her statutory annual leave entitlement. She will continue to accrue her contractual annual leave in the normal way. And she remains entitled to her full statutory annual leave allowance (although she cannot take this at the same time as being on statutory maternity leave). However unlike employee A in Example 6 she will continue to accrue contractual annual leave during AML.

- 3) Occupational pension contributions to be paid by her employer. The employer must carry on making pension contributions as though she were still at work and working, for as long as he pays her SMP. She remains entitled to receive SMP until the end of the 39-week maternity pay period. Her employer must continue making pension contributions as normal for as long as she receives SMP, but once the SMP pay period finishes, her employer can stop making pension contributions.

She will become entitled to receive:

- 4) SMP as calculated in the normal way based on her gross earnings subject to Class 1 NICs in the Average Weekly Earnings [AWE] period:
 - 1) a) Salary - £500
 - b) Housing allowance - £100.

- 2) b) Contractual non-cash benefits that are subject to tax and NICs – childcare vouchers excess over exemption limit – this amounts to £45.

Statutory maternity leave – salary sacrifice and non-cash benefits

Total AWE - £645 per week. SMP can be payable for up to 39 weeks. For weeks 1 to 6 it is payable at 90% of AWE - SMP payable will be £580.50 per week. From week 7 to week 39 SMP is payable at the standard rate £117.18 or 90% of AWE if less. In this example, SMP payable will be the standard rate £117.18. These sums are payable in full and in cash. After week 39 no SMP is payable – so any deductions (e.g. for trade union subscriptions) will cease.

In addition to her entitlements above if she returns to work during or at the end of OML, she is entitled by law to return to the same job. In the same way as Employee A in Example 6, if she returns to work during or at the end of AML, she is entitled to return to the same job unless the employer considers it not to be reasonably practicable to hold open her old job, in which case he must offer her another suitable post on terms and conditions no less favourable.

Example 8 - Pensions and Keeping in Touch [KIT] Days.

Employees C and D both work for the same employer and both take their full 52 week maternity leave entitlement. They both receive Statutory Maternity Pay for 39 weeks. They are both enrolled in identical occupational pension schemes, to which their employer contributes an amount calculated as a percentage of their salary.

Employee C does not return to the workplace or undertake any work for her employer during her maternity leave or maternity pay periods. However, Employee D agrees with her employer that she will do one week's (five days') work (KIT days) during the 51st week of maternity leave - at the end of which she will have one week's maternity leave left. She is paid the appropriate percentage of her normal monthly salary for this work.

Employee C's employer is obliged to continue making pension contributions as though the woman was working normally and had taken no maternity leave at all throughout the period during which she receives statutory maternity pay (ie weeks 1-39). However, since Employee C receives no maternity pay - either statutory or contractual - during weeks 40-52 of her maternity leave, the employer is no longer obliged, during that period, to continue to make pensions contributions.

Employee D, on the other hand, has received remuneration in respect of the five day's work she carried out in the penultimate week of her maternity leave. Therefore, in addition to the employers' contributions to which she is entitled during the maternity pay period (as in employee C's case) she is also entitled to employer pension contributions in respect of the five days' remunerated work she performed. The employer does not, however, need to make pension contributions during the other 12 weeks of unpaid maternity leave.

Statutory maternity leave – salary sacrifice and non-cash benefits

Occasional misunderstandings:

- *Misunderstanding:* employers sometimes believe that, where during statutory maternity leave the employee has no cash pay (or insufficient cash pay) to sacrifice, they should not continue to provide benefits as part of a salary sacrifice arrangement.
- *Comment:* the employee is entitled to continue receiving during OML and AML any non-cash benefits she was entitled to in the period before statutory maternity leave. This entitlement continues to apply even though the employee may not be receiving any salary or wages that can be sacrificed. SMP cannot be sacrificed in any circumstances. It may be discriminatory for a woman's pay to be reduced after her maternity leave as a direct result of her employer providing contractual non-cash benefits during her statutory maternity leave.

- *Misunderstanding:* employers sometimes believe that the employee or the employer is free to opt out of a salary sacrifice arrangement at will, and as a consequence the employer may cease providing non-cash benefits during OML or during AML.
- *Comment:* This may not always be the case. It will be a question of employment and contract law whether a salary sacrifice agreement can be changed and when any change is effective. However, the employee is entitled to continue receiving during OML and AML any non-cash benefits she was entitled to as a term of her employment contract. No contrary contractual agreement between employer and employee can override this requirement. If an employer proposes to change the contractual benefits provided to women only, it may give rise to a claim under the Equal Pay Act or the Maternity and Parental Leave Regulations. However if an employer proposes to change the contractual benefits provided to all employees (not just to women only), then this is less likely to constitute less favourable treatment for women giving rise to such a claim.

- *Misunderstanding:* employers sometimes believe they have to continue to provide the non-cash benefit in every circumstance.
- *Comment:* subject to the terms of the contract the employee may be able voluntarily to opt out of receiving the non-cash benefit under the salary sacrifice arrangement. However it is important to emphasise that the employer cannot compel the employee to opt out of receiving the benefit.

- *Misunderstanding:* employers sometimes believe that employees who are not entitled to SMP are not entitled to receive non-cash benefits during statutory maternity leave.

Statutory maternity leave – salary sacrifice and non-cash benefits

- *Comment:* all employees on statutory maternity leave continue to be entitled to the non-cash benefits they were entitled to as a term of their employment contract, whether they are receipt of SMP, Maternity Allowance or receive no maternity payment.

For more detailed advice on contractual non-cash benefits during statutory maternity leave contact the ACAS helpline on 08457 47 47 47.

Statutory maternity leave – salary sacrifice and non-cash benefits

3. Summary Table – entitlements during statutory maternity leave					
Scenario	Employee's entitlements	Pre maternity leave	Ordinary Maternity Leave (weeks 1 – 26)	Additional Maternity Leave (weeks 27 – 39)	Additional Maternity Leave (weeks 40 – 52)
1. Normal (no salary sacrifice arrangement)	Salary or wages (including cash allowances eg car allowance)	Payable by employer in accordance with contract of employment	No statutory obligation for employer to continue to pay these. But employer may pay - <ul style="list-style-type: none"> ▪ voluntarily, ▪ or contractually (e.g. under Occupational Maternity Pay scheme). Such contractual payment is payable in accordance with contract of employment.		
	Contractual non-cash benefits	To be provided by employer in accordance with contract of employment	Statutory obligation for employer to continue to provide these throughout in accordance with contract of employment. <i>Employee denied the benefit of these non-cash benefits will have a claim for sex discrimination against her employer</i> - regardless of any contrary contractual agreement between employer & employee.		
	Statutory Maternity Pay [SMP]	Not payable – but future SMP will be based on gross earnings subject to Class 1 NICs in average weekly earnings [AWE] period: <ul style="list-style-type: none"> ▪ salary or wages; ▪ any other NIC'able benefit (see NOTE 2 below). 	Statutory obligation for employer to pay this throughout, in full and in cash - based on gross NIC'able earnings in AWE period: <ul style="list-style-type: none"> ▪ salary or wages; ▪ any other NIC'able benefit (see NOTE 5. below). NOTE 1. Authorised <i>deductions</i> from SMP can be made provided they would have been made from cash salary or wages (eg union subscriptions).		Not payable after week 39.
	OR				
	Maternity Allowance [MA] – if due, paid by DWP	Not payable by employer – but any future MA will be based on gross NIC'able earnings in set period.	Payable by DWP through Jobcentre Plus [JCP], in full and in cash - based on gross NIC'able earnings in set period. NOTE 2. Woman responsible for supplying information to JCP - but JCP may ask employer for specified data.		Not payable after week 39.

Statutory maternity leave – salary sacrifice and non-cash benefits

Scenario	Employee's entitlements	Pre maternity leave	Ordinary Maternity Leave (weeks 1 – 26)	Additional Maternity Leave (weeks 27 – 39)	Additional Maternity Leave (weeks 40 – 52)
<p>2. Salary sacrifice arrangement (<i>contract of employment amended - salary or wages payable at <u>reduced level</u>; <u>revised benefits to be provided</u></i>)</p> <p><u>NOTE:</u> Key Changes From Scenario 1 denoted by underlining</p>	Salary or wages (including cash allowances eg car allowance)	Payable by employer at <u>reduced level</u> in accordance with <u>amended</u> contract of employment	<p>No statutory obligation for employer to continue to pay these. But employer may pay -</p> <ul style="list-style-type: none"> ▪ voluntarily, ▪ or contractually (e.g. under Occupational Maternity Pay scheme). <p>Such contractual payment <u>may</u> be payable <u>at reduced level</u> in accordance with <u>amended</u> contract of employment.</p>		
	Contractual non-cash benefits	To be provided by employer in accordance with <u>amended</u> contract of employment	<p>Statutory obligation for employer to continue to provide these throughout in accordance with <u>amended</u> contract of employment.</p> <p><i>Employee denied the benefit of these non-cash benefits will have a claim for sex discrimination against her employer</i></p> <p><i>- regardless of any contrary contractual agreement between employer & employee</i></p> <p><i>- regardless of any Salary Sacrifice arrangement.</i></p>		
	SMP	<p>Not payable – but future SMP will be based on gross earnings subject to Class 1 NICs in AWE period:</p> <ul style="list-style-type: none"> ▪ <u>reduced</u> salary or wages; ▪ any other NIC'able benefit (see NOTE 2 below). 	<p>Statutory obligation for employer to pay this throughout, in full and in cash</p> <ul style="list-style-type: none"> - based on gross NIC'able earnings in AWE period: ▪ <u>reduced</u> salary or wages; ▪ any other NIC'able benefit (see NOTE 5. below). <p>NOTES:</p> <p>1. Authorised <i>deductions</i> from SMP can be made - provided they would have been made from cash salary or wages (eg union subscriptions).</p> <p>3. Cannot be further reduced by terms of a salary sacrifice agreement.</p>	NO CHANGE FROM SCENARIO 1 - not payable after week 39.	
OR	Maternity Allowance [MA] – if due, paid by DWP	Not payable by employer – but any future MA will be based on gross NIC'able earnings in set period (as <u>reduced</u> by salary sacrifice arrangement)	<p>Payable by DWP through Jobcentre Plus [JCP], in full and in cash</p> <ul style="list-style-type: none"> - based on gross NIC'able earnings in set period (as <u>reduced</u> by salary sacrifice agreement). <p>NOTE 2. Woman responsible for supplying information to JCP - but JCP may ask employer for specified data.</p>	NO CHANGE FROM SCENARIO 1 - not payable after week 39.	

Statutory maternity leave – salary sacrifice and non-cash benefits

NOTE 4. The effects of Salary Sacrifice on SSP, SAP and SPP are the same in principle as above on SMP.

NOTE 5. Some benefits in kind are NIC'able, such as childcare vouchers where the excess over a tax and NICs-exempt amount (£55 per week at time of drafting) is chargeable to tax and Class 1 NICs.