

A-Z Guide

PARENTAL LEAVE



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# Use This Guide to Help You Understand

- What parental leave is and how it applies to your business
- When an employee may take parental leave
- The process for applying for, and taking, parental leave
- Your legal rights, obligations, and liabilities in relation to parental leave
- Your employee's rights and obligations in relation to parental leave

## What is Parental Leave?

The Parental Leave and Employment Protection Act provides eligible parents with leave from their employment on the birth of a child and on the adoption of a child under 6 years of age. Whilst an employee is on parental leave, their employment is protected.

Parental leave is the inclusive term for different types of leave. It includes:

- Primary carer leave (previously called maternity leave)
- Special leave
- Partner's leave
- Extended leave
- Negotiated carer leave

Under the law you have no obligation to pay an employee during a period of parental leave, as payments are made by the Inland Revenue Department. However, your policies and/or the employment agreement may provide the employee with entitlements that are additional to their statutory rights.

Parental leave may be taken to coincide with the birth or adoption of a child. The various forms of parental leave have different tests for eligibility. Below is a table setting out the types of parental leave available, their eligibility requirements, and entitlements.

	Who may take it	Eligibility or length of service required to gain leave	Amount of leave available
Primary carer leave	Female employee who is pregnant or has given birth to a child; or the spouse/partner of the biological mother if the mother has transferred her entitlement; or a person who takes permanent primary responsibility for the care, development and upbringing of a child who is under 6 years of age.	Must meet either the 6-month employment test or the 12-month employment test	26 weeks from 1 July 2020
Special leave	Pregnant female employee for reasons connected with her pregnancy	Can be taken prior to taking of primary carer leave if eligible for primary carer leave	10 days unpaid
Partner's leave	Partner/spouse of primary carer and intends to assume responsibility for the care of that child	Must meet the 6-month employment test	1 week unpaid

## Parental Leave

	Who may take it	Eligibility or length of service required to gain leave	Amount of leave available
Partner's leave	Partner/spouse of primary carer and intends to assume responsibility for the care of that child	Must meet the 12-month employment test	2 weeks unpaid
Extended leave	Employee who is the primary carer in respect of a child; or is the spouse/partner of the primary carer and assumes or intends to assume responsibility for the care of that child.	Must meet the 6-month employment test	26 weeks unpaid
	If both the primary carer and the spouse/partner want to take extended leave it must be shared (dependent on eligibility).	Must meet the 12-month employment test	52 weeks unpaid
Negotiated carer leave	Employee who is the primary carer in respect of a child; and	Must not be entitled to primary carer leave; but Must be entitled to parental leave payments	Flexible, depending on the request

## Primary carer leave

Primary carer leave (previously called maternity leave) is a period of up to 26 continuous weeks of leave.

An employee may become entitled to primary carer leave if they meet the 6-month or 12-month employment test (page 8).

An employee may choose to commence primary carer leave on a date that is earlier, by not more than 6 weeks, than the expected date of delivery or the date the employee intends to become the primary carer in respect of the child.

The term “primary carer” refers to:

- The biological mother of the child.
- The mother's spouse or partner if the mother's entitlement to a parental leave payment has been transferred to the partner (or if the partner has succeeded to the payment).
- A person other than the biological mother or her partner, who takes permanent primary responsibility for the care, development and upbringing of a child who is under the age of 6 years.

### Examples

- If a child under the age of 6 years goes to live with their aunt, who intends to raise the child in place of the child's biological parents, the aunt is the child's primary carer.
- If a couple formally adopt a child under the age of 6 years, or undertake to care for the child permanently, the member of the couple that is nominated is the child's primary carer.
- If a child under the age of 6 is temporarily placed with a foster parent, that person is not a primary carer because the placement is not permanent.
- If a child's grandmother minds the child every day while his or her parents are at work, the grandmother is not a primary carer, because the child's parents still have primary responsibility for the child's upbringing.

## Extended leave

Extended leave is a period of either 26 or 52 weeks' leave. It may be taken in more than one continuous block, if you and the employee agree. Any primary carer leave taken by the employee will reduce the number of weeks that can be taken as extended leave. As an example, if an employee is entitled to 52 weeks of extended leave and takes 26 weeks of paid primary carer leave, she will have a remaining 26 weeks of extended leave available to take. Extended leave can be taken by either partners or shared between both (depending on eligibility).

Extended leave can be taken in any period or periods, up to the maximum entitlement, between the applicable start date and the applicable end date.

The applicable start date is:

- If the employee takes primary carer leave, the date of expiry or termination of the primary carer leave
- If the employee takes partner's leave, the date of expiry or termination of the partner's leave
- If the employee is entitled to take primary carer leave or partner's leave but does not: or the date of confinement (where the child is born to the employee or her partner)
  - the date on which the employee or their partner becomes the primary carer in respect of the child; or
- Any other date that is agreed on by the employee and the employer

The applicable end date is:

- If the employee or their partner qualifies for 26 weeks' extended leave:
  - the date on which the child turns 6 months old (where the child is born to the employee or their partner); or
  - the date that is 6 months after the employee or their partner became the primary carer of the child
- If the employee or their partner qualifies for 52 weeks' extended leave:
  - the date on which the child turns 12 months old (where the child is born to the employee or their partner); or
  - the date that is the first anniversary of the date on which the employee or their partner became the primary carer of the child
- Any other date that is agreed on by the employee and the employer

## Special leave

The Act provides up to 10 days' unpaid leave for a pregnant employee for reasons connected with her pregnancy, which may be taken by a pregnant employee before she commences maternity leave. Special leave is not counted as part of the 52-week total parental leave entitlement. The Act does not specify any form of notice for special leave. This is a matter that should be addressed when an employee who is eligible under the Act makes her pregnancy known to you. Your policies could address this matter also.

## Partner's leave

Partner's leave is an entitlement of either 1 or 2 weeks of leave, depending on the employee's length of service. It is available to the spouse or partner of the person who has given birth to a child, or who intends to become the primary carer in respect of a child. The leave is unpaid and is additional to the 26 or 52-week extended leave entitlement. Please refer to the chart on page 4 to ascertain an employee's eligibility for partner's leave.

Partner's leave can commence, at the option of the employee:

- In the case of a child born to the employee's partner:
  - on the date of confinement of the employee's partner
  - on any date by agreement with the employer
  - on any date in the period
    - beginning on the 21st day before the expected date of delivery
    - ending on the 21st day after the actual date of delivery, or on the close of the day on which the child is discharged from a hospital (if it is more than 21 days after the actual date of delivery)
- In any other case: on the date on which the employee's partner becomes the primary carer in respect of the child; or
  - on any date by agreement with the employer
  - on any date in the period
    - beginning on the 21st day before the date that the employee's partner intends to become the primary carer
    - ending on the 21st day after the actual date that the employee's partner becomes the primary carer

In the event, that the primary carer in respect of the child either has a miscarriage, ceases to care for the child, or if the child dies, the spouse, or partner of the primary carer may in certain circumstances still be entitled to partners leave. The Ministry of Business, Innovation and Employment (MBIE) recommend that if the spouse, or partner has already requested partner's leave prior to discovering that the primary carer will no longer be caring for a child or giving birth to a child, then they may still be entitled to partner's leave. However, if the spouse, or Partner did not request partners leave during the time that the primary carer was expecting to care for a child or give birth to a child, then the spouse, or partner may not be entitled to partner's leave.

## Negotiated carer leave

Where an employee is the primary carer of the child and is not entitled to primary carer leave, but is entitled to a parental leave payment, they may request a period of leave from their employment to enable them to receive the parental leave payment.

The request must be made at least:

- 3 months before the expected date of delivery (where the child is to be born to the employee or their partner); or
- 14 days prior to the date on which the employee intends to become the primary carer in respect of the child (in any other case)

The request must also be in writing and state:

- The employee's name
- The date on which the request is made
- That the request is made under Part 3A of the Parental Leave and Employment Protection Act 1987; and
  - specify the proposed date that the employee wishes to begin negotiated carer leave and the proposed duration of that leave
  - include a statement that the employee will be the primary carer in respect of the child during the specified period, and will be entitled to receive parental leave payments during that time
  - explain, in the employee's view, what changes (if any) the employer may need to make to the employer's arrangements if the request is approved

## Parental Leave

An employer who receives a request for negotiated carer leave must notify the employee in writing as soon as possible, but no later than one month after receiving it, whether the request is approved or refused and state the ground for refusal along with an explanation of why the ground applies. There are limited grounds for an employer to refuse a request:

- Inability to reorganise work among existing staff
- Inability to recruit additional staff
- Detrimental impact on quality
- Detrimental impact on performance
- Planned structural changes
- Burden of additional costs
- Detrimental effect on ability to meet customer demand

A penalty of \$2,000 applies for an employer who fails to notify their employee about their decision, and the amount is payable to the employee.

## Eligibility for Leave

An employee may be eligible for more than one type of leave, depending on whether they meet the 6-month employment test or the 12-month employment test. The requirements of each are set out below.

### The 6-month employment test

An employee meets the 6-month employment test if they have worked for the employer for at least an average of 10 hours a week in the six months immediately before:

- the expected date of delivery (where the child is to be born to the employee or their partner)
- assuming responsibility for the care of the child (in any other case)

### The 12-month employment test

An employee meets the 12-month employment test if they have worked for the employer for at least an average of 10 hours a week in the twelve months immediately before:

- the expected date of delivery (where the child is to be born to the employee or their partner)
- assuming responsibility for the care of the child (in any other case)



## Table of eligibility for leave

	Primary carer meets 12-month employment test	Primary carer meets 6-month employment test	Primary carer does not meet either test
Partner meets 12-month employment test	<b>Primary carer is entitled to:</b> <ul style="list-style-type: none"> <li>26 weeks of primary carer leave</li> <li>10 days' special leave</li> </ul> <b>Partner is entitled to:</b> <ul style="list-style-type: none"> <li>2 weeks of partner's leave</li> </ul> <b>Parties entitled to share:</b> <ul style="list-style-type: none"> <li>52 weeks of extended leave</li> </ul>	<b>Primary carer is entitled to:</b> <ul style="list-style-type: none"> <li>26 weeks of primary carer leave</li> <li>10 days' special leave</li> </ul> <b>Partner is entitled to:</b> <ul style="list-style-type: none"> <li>2 weeks of partner's leave</li> </ul> <b>Parties entitled to share:</b> <ul style="list-style-type: none"> <li>52 weeks of extended leave (primary carer may only take up to 26 weeks of this)</li> </ul>	Primary carer does not have an entitlement under the Act, but could apply for negotiated carer leave.  <b>Partner is entitled to:</b> <ul style="list-style-type: none"> <li>2 weeks of partner's leave</li> <li>52 weeks of extended leave</li> </ul>
Partner meets 6-month employment test	<b>Primary carer is entitled to:</b> <ul style="list-style-type: none"> <li>26 weeks of primary carer leave</li> <li>10 days' special leave</li> </ul> <b>Partner is entitled to:</b> <ul style="list-style-type: none"> <li>1 week of partner's leave</li> </ul> <b>Parties entitled to share:</b> <ul style="list-style-type: none"> <li>52 weeks of extended leave (partner may only take up to 26 weeks of this)</li> </ul>	<b>Primary carer is entitled to:</b> <ul style="list-style-type: none"> <li>26 weeks of primary carer leave</li> <li>10 days' special leave</li> </ul> <b>Partner is entitled to:</b> <ul style="list-style-type: none"> <li>1 week of partner's leave</li> </ul> <b>Parties entitled to share:</b> <ul style="list-style-type: none"> <li>26 weeks of extended leave</li> </ul>	Primary carer does not have an entitlement under the Act, but could apply for negotiated carer leave.  <b>Partner is entitled to:</b> <ul style="list-style-type: none"> <li>1 week of partner's leave</li> <li>26 weeks of extended leave</li> </ul>
Partner does not meet either test	<b>Primary carer is entitled to:</b> <ul style="list-style-type: none"> <li>26 weeks of primary carer leave</li> <li>10 days' special leave</li> <li>52 weeks of extended leave</li> </ul> Partner does not have an entitlement under the Act.	<b>Primary carer is entitled to:</b> <ul style="list-style-type: none"> <li>26 weeks of primary carer leave</li> <li>10 days' special leave</li> <li>26 weeks of extended leave</li> </ul> Partner has no entitlement.	Neither party has an entitlement to parental leave under the Act, but the primary carer could apply for negotiated carer leave.

## Process for a Parental Leave Application

### Step 1: Employee's notice

The employee must give written notice to the employer of their wish to take parental leave at least 3 months before the expected date of delivery. The notice must:

- State the proposed date that the employee would like to begin their parental leave
- State the duration of the leave
- Be accompanied by a certificate from a midwife or medical practitioner certifying that the employee (or the employee's partner) is pregnant and stating the expected date of delivery



Where the employee intends to share extended leave with their partner, the notice must also state:

- The type/s of leave their spouse is taking
- The dates the spouse is taking that leave
- The spouse's name and address, the name and address of their employer
- An assurance that the leave periods applied for do not exceed the parties' maximum combined entitlements for each type of leave

If the notice is not given within the required time frame, you must still consider whether or not it is reasonable to grant the leave. If the notice is incomplete, you must advise the employee of this within 7 days and tell them what is needed to make the notice complete.

The Ministry of Business, Innovation and Employment provides guidance for employees on its website, accessible [here](#).

#### *Notice for other primary carers*

An employee may take parental leave in respect of a child who is not their biological child, if they fulfil the eligibility requirements. This may apply in the case of adoption, Home for Life, whāngai, extended family arrangements and other situations where the employee has permanent primary responsibility for the care, development, and upbringing of a child under 6 years of age.

The notice requirements are as above, except that only 14 days' written notice is required before the employee intends to become the primary carer, and instead of a medical certificate the employee must attach either:

- A certified copy of a Court order in relation to the custody or day-to-day care of the child
- A copy of a letter from the Ministry of Social Development confirming the date the employee will become the primary carer for the child
- The employee's statutory declaration in the required form

## Step 2: Employer's response

Once you receive notice from an employee of their intention to take parental leave you must, within 21 days of receiving the notice, respond to the employee:

- Stating whether the employee is entitled to take parental leave
  - Where you state that the employee is not entitled to take parental leave, stating the reasons why the employee is not entitled
- Stating that until the end of the parental leave the employee's position can or cannot be kept open (as the case may be)
  - Where you state that the employee's position cannot be kept open, informing the employee:
    - a. That the employee may dispute your statement that the position cannot be kept open
    - b. That you will, for the period of 26 weeks beginning with the day after the date on which the parental leave ends, give the employee preference over other applicants for any position which is vacant and which is substantially similar to the position held by the employee at the beginning of their parental leave
- Informing the employee of their rights under the Act.

A template response is provided by the Ministry of Business, Innovation and Employment on their website, accessible [here](#).



## Step 3: Employer's notice once leave has begun

If the employee takes parental leave, within 21 days of the leave commencing the employer must give the employee a written notice stating:

- The date on which the leave will end and
- Either:
  - The date on which the employee will be required to return to work (if the employer is able to keep the position open)
  - The period of 26 weeks during which the employer will give the employee preference over other applicants for any position which is vacant, and which is substantially similar to the position held by the employee at the beginning of their parental leave (if the employer is unable to keep the position open)
- The employee's obligations to give notice at least 21 days before their return to work (if the employer is able to keep the position open)
- The employee's right to return to work in certain circumstances

A template response is provided by the Ministry of Business, Innovation and Employment on their website, accessible [here](#).

## Step 4: Employee's notice prior to return

An employee who is on parental leave and whose position is being kept open by you must give you 21 days' notice before the date on which their parental leave ends of whether or not they will be returning to work. An employee may in certain specific circumstances return before their parental leave is due to end (see below). In these situations they must give you 21 days' notice of their intention to return.

# Extending or ending parental leave early

## Early ending of parental leave

An employee taking parental leave may return to work earlier than the nominated date where one of the following conditions are present:

- A miscarriage is suffered
- The child is stillborn or dies
- Some other person assumes the care of the child that was to have been adopted
- The employee (or their partner) fails to become or ceases to be the primary carer in respect of the child
- You consent to an earlier return.

## Parental Leave

The employee has no right of early return unless one of the above conditions is present. Where one of the above conditions is present an employee must give 21 days' notice before they may return.

If a female employee on primary carer leave wants to end her leave early, you may consent to the return on the condition that the employee give you a certificate from a medical practitioner confirming that she is fit to return to work.

## Extending parental leave

If the full entitlement of parental leave has not been taken, the leave may be extended, but only on notice and with the agreement of the employer.

# Parental Leave Payments

The parental leave payment scheme is administered by the Inland Revenue Department ("IRD"), and provides a payment to those who are eligible, for a period of 26 weeks. The amount of the payment is reviewed each year and is currently a maximum of \$754.87 per week before tax.

From the 1 March 2021, the Parental Leave and Employment Protection Amendment Regulations 2021 amend the 2016 regulations, introducing a simplified parental leave payment process. If your employee is eligible, they may make an application to IRD for a parental leave payment using the online process available on the IRD website [here](#), or by telephone. Applicants who apply on the phone can provide the required documentation by post, email, or using the online process. Employers are no longer required to sign applications, provide their own names, IRD numbers and postal addresses.

The employee may apply for payments at any time prior to the earliest of:

- Their return to work
- The date the child turns 12 months old
- The first anniversary of the employee or their partner becoming the primary carer for the child (where the child is not the employee's biological child)

As of the 1 March 2021, if an employee or their partner wishes to transfer all or some of their paid parental leave, they must complete an application using the online process provided by IRD on the website [here](#), or by telephone. Applicants who apply on the phone can provide the required documentation by post, email, or using the online process. Once notified, transferees will then have to apply to accept the paid parental leave payment from the transferor.

Entitlement to parental leave payment ceases if the person receiving it returns to work before the 26-week paid leave period has ended (not including work performed on keeping-in-touch days) or if they cease to be the primary carer of the child. A mother who transfers her entitlement to her partner loses her own entitlement. However, entitlement to a parental leave payment is not lost if the employee has a miscarriage, or ceases to care for the child, or if the child dies, provided that the employee does not return to work during the 26-week payment period.



## Parental leave payment threshold test

The test for whether a person is eligible for a parental leave payment is different to the test for eligibility for parental leave. It is possible for a person to be eligible for a parental leave payment even if they are not entitled to parental leave, and in some cases may be eligible for a payment where they are no longer employed. The parental leave payment threshold test is set out below.

An employee meets the parental leave payment threshold test if he or she will have been employed as an employee for at least an average of 10 hours a week for any 26 of the 52 weeks immediately preceding:

- The expected date of delivery of the child (in the case of a child to be born to the person or his or her spouse or partner)
- The first date on which the person, or his or her spouse or partner becomes the primary carer in respect of the child (in any other case)

An employee is treated as being employed for any time that they are absent from work on:

- Leave with pay
- Leave without pay (other than parental leave) with the employer's agreement
- ACC
- Primary carer leave before the expected date of delivery (except where this occurs within 6 months of a previous period of parental leave)
- Primary carer leave before the expected date of delivery (except where this occurs within 6 months of a previous period of parental leave)

## Preterm babies

### *Preterm baby payment*

If the employee's, or their partner's, baby is born prematurely (before the 37th week of pregnancy) and the employee or their partner are entitled to a parental leave payment, they are entitled to a "preterm baby payment". This is an additional weekly payment that is paid in a continuous period that corresponds to the number of weeks, up to a maximum of 13, between the date of birth of the child and the date on which the 36th week of gestation would have ended had the child not been born prematurely.

The payment will end sooner if the person returns to work (not including any Keeping-In-Touch days) or if they cease to be the primary carer in respect of the child.

### Additional Keeping-In-Touch hours

An employee who receives a preterm baby payment is entitled to additional Keeping-In-Touch ("KIT") hours. During the period that an employee receives preterm baby payments, the employee may perform work for his or her employer:

- Up to a total of 3 hours multiplied by the number of weeks in the payment period
- On any day in the payment period, if both the employee and employer consent to this

If the employee works more than their entitled hours, they will be treated as having returned to work and their preterm baby payments will be recoverable by the IRD.

## Before the Leave Commences

### Starting primary carer leave early

Primary carer leave may begin earlier than 6 weeks before the expected date of delivery in limited situations:

- In the case of a pregnant employee, where: a registered medical practitioner or midwife specifies that the leave should begin earlier
  - where you appoint a date for the leave to begin, because by reason of her pregnancy, the employee is unable to perform her work either safely or adequately, and there is no other suitable work available
  - where you and the employee agree that it should begin on a date earlier than the confinement or the date the employee intends to become the primary carer

An employee is entitled to primary carer leave for 20 weeks beyond the expected (not actual) date of delivery, regardless of its early commencement, where situations 1 or 2 occur. In these circumstances the maximum number of weeks of parental leave entitlement extends to include the additional weeks of primary carer leave.

If the primary carer leave begins earlier than 6 weeks before the expected date of delivery because of circumstance 3, the period of primary carer leave is not extended and the entitlement to parental leave remains 52 weeks.

### Your rights where the employee cannot perform her work

While generally speaking pregnancy is a safe condition, sometimes the nature of the work of a pregnant employee does pose a risk to herself or others. Alternatively, it may become increasingly difficult for a pregnant employee to fulfil her employment obligations as the pregnancy progresses.

If you have serious concerns about the safety of your pregnant employee or others, or the pregnant employee is incapable of performing her work adequately, you may, if no other work is available, direct your employee to commence her primary carer leave early.

If other work is available, you may transfer the pregnant employee to alternative employment. If an employee is transferred to another position, payment should be at the employee's usual rate even if the position to which she is transferred would normally be paid at a lower rate. On returning to work after parental leave the employee returns to their original employment, not the alternative employment.

## Taking annual leave before parental leave payments begin

An employee may take a period of annual leave at the start of his or her parental leave, and can elect to start their parental leave payment period the day after the annual leave ends.

## During the Parental Leave

### Temporary replacements

You may take on temporary employees to cover the parental leave of permanent employees. The provisions of the Employment Relations Act guide your obligations in respect of employees whom you employ for the purpose of temporary replacement.

Refer to our A-Z Guide on **Fixed Term Employment** for more information.

If you hire a temporary employee to replace an employee on parental leave, you must inform the temporary employee in writing that:

- They are being employed on a temporary basis in place of an employee who is on parental leave
- That the incumbent (employee on parental leave) may return to work under certain circumstances before the nominated end date of the fixed term

Contact **AdviceLine** for a sample Parental Leave Cover Clause.

### Keeping-In-Touch ("KIT") days

An employee who takes parental leave may perform 64 hours or less of paid work for his or her employer while they are receiving parental leave payments, without losing their entitlement to the payment.

The employee may perform work for his or her employer on a Keeping-In-Touch ("KIT") day, provided that:

- This does not occur within 28 days of the child's birth
- The employer and employee consent to the work being performed on that day

If the employee performs paid work for his or her employer within 28 days of the child's birth, or performs more than 64 hours of paid work during the period of parental leave, the employee is treated as having returned to work and their parental leave payments are recoverable by the IRD.

# Employee's Return to Work

## Return to part time work

The Act only requires an employer to keep open the position the employee held prior to going on parental leave. This means the employee has no entitlement to demand reduced hours or days.

If you and the employee come to an agreement to return to part-time work this agreement should be recorded in writing. The agreement should be recorded as a variation to the employee's employment agreement and should state whether the variation is temporary or permanent. If the variation is temporary the agreement should clearly state when the employee is expected to return to their full-time position.

An employee may make a request for Flexible Working Arrangements under the Employment Relations Act 2000, if they are eligible. See our A-Z Guide to **Flexible Working Arrangements** for further information about that process.

## Temporary return to work due to COVID-19

Changes to parental leave due to the COVID-19 Response (Further Management Measures) Legislation Act 2020 (2020 No 13) mean that some employees may return to work temporarily during their period of parental leave without losing their remaining parental leave entitlements.

To qualify, the person must be a "COVID-19 Response Worker" and are returning to work because:

- Their role cannot be reasonably filled by another person due to the person's skills, qualifications, or experience
- There is an unusually high demand for their role

If the employee meets these requirements, then they can return to work for one continuous period of up to 12 weeks. In effect, this means all remaining parental leave payments and entitlements will be paused by IRD and will resume when the employee finishes their temporary return to work arrangement and resume their parental leave.

## Employee Resigns or Fail's to return to work

Where an employee fails, without good cause, to return to work following a period of parental leave or informs the employer that they have decided not to return to work, subject to any agreement between the parties, their employment shall be deemed to have ended as from the day on which the period of parental leave began.

Upon resigning from their employment, any calculations for annual holiday payments under the Holidays Act 2003 would also be brought back to the day on which the period of parental leave began.

## Second period of parental leave

Employees may not take a further period of parental leave unless the gap between the end of one parental leave period and the start of a new leave period is greater than 6 months. In other words, an employee has to work for the same employer for at least a further 6 months before being entitled to parental leave again.

## Annual holidays

Annual holidays continue to accrue while an employee is on parental leave. If an employee becomes entitled to annual holidays, during either:

- Any period when the employee is on parental leave
- Any period when the employee is subject to a period of preference
- The period of 12 months commencing on the date on which the employee returns to work after a period of parental leave or a period of preference

Then the employee is entitled to annual holidays. However, the value of those annual holidays may be affected by the taking of parental leave. If an employee becomes entitled to annual leave in any of the above circumstances, then the employee's annual holiday pay will be at the rate of the employee's average weekly earnings for the 12 months immediately before the end of the last pay period.

When an employee who has become entitled to annual holidays in any of the above circumstances, takes those annual holidays, or cash's up 1 weeks' worth of that annual leave. You must pay the employee annual holiday pay for the agreed portion of the entitlement at the rate of the employee's average weekly earnings for the 12 months immediately before the end of the last pay period before the annual holiday. This is not at the greater of ordinary weekly pay or average weekly earnings and includes any weeks in which the employee was not earning due to parental leave.

This differing method of calculation where parental leave is involved only applies when the employee takes leave to which they have become entitled; the Act makes no provision for when annual leave is taken in advance. Therefore, should an employee take annual leave in advance of an entitlement date for a year that includes parental leave, it is arguable that they should be paid the higher of average weekly earnings or ordinary pay. In short, should the employee take annual leave in advance, it likely will be worth substantially more than had they waited till after their entitlement date.

## Where The Position Cannot be Kept Open

### Presumption that the position can be kept open

Where an employee takes a period of parental leave that does not exceed 4 weeks (inclusive of any statutory holiday falling within that period) and it is the first period of parental leave taken in respect of the child and they have given the required notice, you are presumed able to keep the employee's position open until the end of the period of parental leave. However you can refuse to keep the position open if you can prove that there is a redundancy situation occurring. Where you are unable to keep the position open due to a redundancy situation you will need to advise the employee of this when replying to their request for parental leave.



Refer to the **A-Z Guide** on **Restructuring and Redundancy** for further information.

Where an employee takes a period of parental leave over 4 weeks in length, you will be presumed to be able to keep the employee's position open until the end of the period of parental leave unless you prove that the employee's position cannot be kept open because:

- A temporary replacement is not reasonably practicable due to the key position (see below) occupied by the employee within your enterprise
- Because of the occurrence of a redundancy situation

## Redundancy

Where a redundancy situation exists at the time you are giving the employee notice as to whether their position can be kept open you should inform the employee at the time and should NOT advise the employee that their position can be kept open. Where a redundancy situation occurs after you have given the employee notice that their position can be kept open it shall be a defence if you can prove that:

- You terminated the employee's employment on account of a redundancy situation of such nature that there was no prospect that you could appoint the employee to a position which was vacant and which was substantially similar to the position held by the employee at the beginning of their parental leave.
- You have not prejudicially affected either the employee's seniority or the employee's superannuation rights during the period commencing with the beginning of the employee's parental leave and ending with the termination of their employment.

If an employee's employment is terminated in the 26 week preference period you must also show that during the period between the end of the employee's parental leave and the termination you had (despite being prepared to accord the employee preference over other applicants) been unable to appoint the employee to a position which was vacant and which was substantially similar to the position held by the employee at the beginning of the employee's period of parental leave.

In the case of *Lewis v Greene* Judge Shaw held that justification for a redundancy situation in the case of an employee on parental leave was to be judged on the statutory criteria in the Parental Leave Act which creates a higher threshold for an employer to meet than in a non-parental leave case. The usual definition of redundancy is that a position is superfluous to an employer's requirements.

Furthermore, Judge Shaw held that an employer who is contemplating the redundancy of an employee on parental leave should take extra precautions to ensure that she has an opportunity to be actively involved in the consultation process. This is due to the fact that being on leave increases her vulnerability and the employer should take steps to ensure that the employee is completely up to date and in a position to be able fully participate in the consultation process.

## Key position

Key position means one where the size of the employer's enterprise and the training period involved, or the skill required for the job, makes finding a temporary replacement not reasonably practicable.

The legal tests for a key position are strict and the presumption strongly favours the employee in that their position is not a key position. For the presumption to be rebutted the employer must prove that:

- The position occupied by the employee is of such a crucial and pivotal nature to the efficient operation of the employer's enterprise that it is required to be filled on a permanent basis; and, despite that requirement.
- A temporary replacement is none the less not reasonably practicable because of the nature of that position.
- The claim of the employer to such non-practicability is such that it outweighs the maintenance of the employee's right to return to his or her position at the end of a period of parental leave: P Jagose, *Babies and bosses*: "An examination of section 41 of the Parental Leave and Employment Protection Act 1987" (1994) 19(2) NZJIR 131.

Before informing an employee that their position cannot be kept open due to the fact that it is a key position, it is strongly advised that you seek further advice. If you wish to discuss a situation you may contact AdviceLine and our Legal Team or Employment Relations Consultants can provide formal assistance.

## Period of preference

When you are giving the employee notice of whether their position can or cannot be kept open you must, in the event that the position cannot be kept open for any of the reasons stated above, give the employee preference over other applicants for any position which is vacant and which is substantially similar to the position that was held by the employee at the beginning of their parental leave. This period of preference lasts for 26 weeks beginning with the day after the date on which the parental leave ends.

If an employee fails, without reasonable excuse, to take up any position substantially similar to the position ordinarily held by the employee before taking parental leave that is offered to the employee during the 26 week preference period their employment shall be deemed to have been at an end as from the day on which the period of parental leave began.

## Dismissal

It is a breach of the Act to dismiss an employee:

- By reason of:
  - a. (a) Pregnancy
  - b. (b) State of health during her pregnancy
  - c. (c) An indication by an employee that they wish to take parental leave
  - d. (d) An employee or their partner becoming the primary carer in respect of a child
- During the employee's absence on parental leave
- During the period of preference (26 weeks beginning with the day after the date on which any period of parental leave ends)

## Parental Leave

This does not affect your right to dismiss an employee for a substantial reason not related to the pregnancy or parental leave, such as serious misconduct.

## Parental leave complaints

Employees may use the procedure set out in the Act to resolve any parental leave complaint relating to dismissal or action to the employee's disadvantage (including transfer to alternative employment or a direction to begin leave early).

Complaints must be made within 26 weeks of the date when the subject matter of the complaint arose, within 26 weeks of the expected date of delivery or the date on which the person became the primary carer for the child, or within 8 weeks of the expiry of any parental leave period, whichever is the later. They should be made first to the employee's immediate supervisor and be settled as rapidly and as near to their point of origin as possible. Unsettled complaints can go to the Employment Relations Authority for mediation and/or investigation and determination, together with a written statement of the facts. Employees may act on their own behalf or through a representative. All parties have a duty to promote a settlement.

## Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide.
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our Legal team or consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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