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DRAFT STATUTORY INSTRUMENTS

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**2014 No.**

**The Statutory Shared Parental Pay (General) Regulations 2014**

**PART 4**

**CONDITIONS OF ENTITLEMENT RELATING  
TO EMPLOYMENT AND EARNINGS**

**Conditions relating to employment and earnings of a claimant's partner**

**29.**—(1) In relation to the entitlement of M, P, A or AP to statutory shared parental pay a person satisfies the conditions as to earnings and employment specified in regulations 4(3)(b), 5(3)(b), 17(3)(b) and 18(3)(b) if that person—

- (a) has been engaged in employment as an employed or self-employed earner<sup>(1)</sup> for any part of the week in the case of at least 26 of the 66 weeks immediately preceding the calculation week; and
- (b) has average weekly earnings (determined in accordance with paragraph (2)) of not less than the amount set out in section 35A(6A) (state maternity allowance) of the 1992 Act<sup>(2)</sup> in relation to the tax year before the tax year containing the calculation week.

(2) A person's average weekly earnings are determined by dividing by 13 the specified payments made, or treated as being made, to or for the benefit of that person in the 13 weeks (whether or not consecutive) in the period of 66 weeks immediately preceding the calculation week in which the payments are greatest.

(3) Where a person receives any pay after the end of the period in paragraph (1) in respect of any week falling after that period, the average weekly amount is to be determined as if such sum had been paid in that period.

(4) Where a person is not paid weekly, the payments made or treated as made for that person's benefit for the purposes of paragraph (1), are to be determined by dividing the total sum paid to that individual by the nearest whole number of weeks in respect of which that sum is paid.

(5) In this regulation—

“calculation week” means in relation to—

- (a) statutory shared parental pay (birth) the expected week of birth of C; and
- (b) statutory shared parental pay (adoption), the week in which A was notified as having been matched for adoption with C;

“employed earner” has the meaning given by section 2 of the 1992 Act<sup>(3)</sup>, subject for these purposes to the effect of regulations made under section 2(2)(b) of that Act;

“self-employed earner” has the meaning given by section 2 of the 1992 Act, subject for these purposes to the effect of regulations made under section 2(2)(b) of that Act;

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(1) References to ‘employed earner’s employment’ are construed in accordance with section 2(3) of the Social Security Contributions and Benefits Act 1992.

(2) Section 35A(6A) was inserted by the Employment Act 2002, Schedule 7, paragraph 4(4).

(3) Section 2 was amended by the Income Tax (Earnings and Pensions) Act 2003 (c.1), Schedule 6(2), paragraph 171.

“specified payments”—

- (a) in relation to a self-employed earner who satisfies the conditions in paragraph (6), are to be treated as made to the self-employed earner at an amount per week equal to the amount set out in section 35(6A) of the 1992 Act that is in force at the end of the week;
- (b) in relation to an employed earner, are all payments made to the employed earner or for that employed earner’s benefit as an employed earner specified in regulation 2 (specified payments for employed earners) of the Social Security (Maternity Allowance) (Earnings) Regulations 2000(4);

“tax year” means the 12 months beginning with the 6th April in any year.

(6) The conditions referred to in paragraph (a) of the definition of “specified payments” are that, in respect of any week, the self-employed earner—

- (a) does not hold a certificate of exception issued pursuant to regulation 44(1) of the Social Security (Contributions) Regulations 2001(5) and has paid a Class 2 contribution (within the meaning of section 1 of the 1992 Act), or
- (b) holds such a certificate of exception.

**Conditions as to continuity of employment and normal weekly earnings relating to a claimant for statutory shared parental pay (birth)**

**30.**—(1) The conditions as to continuity of employment and normal weekly earnings referred to in regulation 4(2)(a) and 5(2)(a) are—

- (a) the person has been in employed earner’s employment with an employer for a continuous period of at least 26 weeks ending with the relevant week;
- (b) the person’s normal weekly earnings (see regulation 32) with the employer by reference to which the condition in sub-paragraph (a) is satisfied for the period of eight weeks ending with the relevant week are not less than the lower earnings limit in force under subsection (1)(a) of section 5 (earnings limits and thresholds for class 1 contributions) of the 1992 Act at the end of the relevant week;
- (c) the person continues in employed earner’s employment with the employer by reference to which the condition in sub-paragraph (a) is satisfied for a continuous period beginning with the relevant week and ending with the week before the first week falling within the relevant period relating to that person under section 171ZY(2) of the 1992 Act.

(2) Where C’s birth occurs earlier than the 14th week before C’s expected week of birth paragraph (1) shall have effect as if, for the conditions set out there, there were substituted conditions that—

- (a) the person would have been in employed earner’s employment for a continuous period of at least 26 weeks ending with the relevant week had C been born after the relevant week;
- (b) the person’s normal weekly earnings for the period of eight weeks ending with the week immediately preceding C’s actual week of birth are not less than the lower earnings limit in force under section 5(1)(a) of the 1992 Act immediately before the commencement of C’s actual week of birth; and
- (c) the person continues in employed earner’s employment with the employer by reference to whom the condition in sub-paragraph (a) is satisfied for a continuous period beginning with the date of C’s birth and ending with the week before the first week falling within the relevant period relating to that person under section 171ZY(2) of the 1992 Act.

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(4) S.I. 2000/688 amended by S.I. 2002/2690, S.I. 2007/1154.

(5) S.I. 2001/1004, to which there are amendments not relevant to these Regulations.

(3) The references in this regulation to the relevant week are to the week immediately preceding the 14th week before C's expected week of birth.

(4) Where more than one child is born as a result of the same pregnancy the date the first child is born is to be used to determine C's actual week of birth or the date of C's birth.

**Conditions as to continuity of employment and normal weekly earnings in relation to a claimant for statutory shared parental pay (adoption)**

**31.**—(1) The conditions as to continuity of employment and normal weekly earnings referred to in regulations 17(2)(a) and 18(2)(a) relating to the entitlement of A and AP to statutory shared parental pay (adoption) are—

- (a) the person has been in employed earner's employment with an employer for a continuous period of at least 26 weeks ending with the relevant week;
- (b) the person's normal weekly earnings (see regulation 32) with the employer by reference to which the condition in sub-paragraph (a) is satisfied for the period of eight weeks ending with the relevant week are not less than the lower earnings limit in force under subsection (1)(a) of section 5 (earnings limits and thresholds for class 1 contributions) of the 1992 Act at the end of the relevant period;
- (c) the person continues in employed earner's employment with the employer by reference to which the condition in sub-paragraph (a) is satisfied for a continuous period beginning with the relevant week and ending with the week before the first week falling within the relevant period relating to that person under section 171ZY(2) of the 1992 Act.

(2) The references in paragraph (1) to the relevant week are to the week in which A was notified of having been matched with C.

**Normal weekly earnings of a claimant for statutory shared parental pay**

**32.**—(1) For the purpose of section 171ZZ4(6) (which defines normal weekly earnings for the purposes of Part 12ZC of the 1992 Act) "earnings" and "relevant period" have the meanings given in this regulation.

(2) The relevant period is the period—

- (a) ending on the last normal pay day to fall before the appropriate date; and
- (b) beginning with the day following the last normal pay day to fall at least eight weeks earlier than the normal pay day mentioned in sub-paragraph (a).

(3) In a case where a person has no identifiable normal pay day, paragraph (2) shall have effect as if the words "day of payment" were substituted for the words "normal pay day" in each place where they occur.

(4) In a case where a person has normal pay days at intervals of or approximating to one or more calendar months (including intervals of or approximating to a year) that person's normal weekly earnings shall be calculated by dividing their earnings in the relevant period by the number of calendar months in that period (or, if it is not a whole number, the nearest whole number), multiplying the result by 12 and dividing by 52.

(5) In a case to which paragraph (4) does not apply and the relevant period is not an exact number of weeks, the person's normal weekly earnings shall be calculated by dividing their earnings in the relevant period by the number of days in the relevant period and multiplying the result by seven.

(6) In any case where a person receives a back-dated pay increase which includes a sum in respect of a relevant period, normal weekly earnings shall be calculated as if such a sum was paid in that relevant period even though received after that period.

(7) The expression “earnings” refers to gross earnings and includes any remuneration or profit derived from a person’s employment except any amount which is—

- (a) excluded from the computation of a person’s earnings under regulation 25 (payments to be disregarded) of, and Schedule 3 to, the Social Security (Contributions) Regulations 2001 and regulation 27 (payments to directors to be disregarded) of those Regulations (or would have been so excluded had they not been made under the age of 16);
- (b) a chargeable emolument under section 10A (class 1B contributions) of the 1992 Act<sup>(6)</sup> except where, in consequence of such a chargeable emolument being excluded from earnings, a person would not be entitled to statutory shared parental pay (or where such a payment or amount would have been so excluded and in consequence the person would not have been entitled to statutory shared parental pay had they not been aged under the age of 16).

(8) The expression “earnings” includes—

- (a) any amount retrospectively treated as earnings by regulations made by virtue of section 4B(2) of the 1992 Act<sup>(7)</sup>;
- (b) any sum payable in respect of arrears of pay in pursuance of an order for reinstatement or re-engagement under the Employment Rights Act 1996;
- (c) any sum payable by way of pay in pursuance of an order made under the Employment Rights Act 1996 for the continuation of a contract of employment;
- (d) any sum payable by way of remuneration in pursuance of a protective award under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992<sup>(8)</sup>;
- (e) any sum payable by way of statutory sick pay, including sums payable in accordance with regulations made under section 151(6) of the 1992 Act;
- (f) any sum payable by way of statutory maternity pay;
- (g) any sum payable by way of statutory paternity pay;
- (h) any sum payable by way of statutory shared parental pay; and
- (i) any sum payable by way of statutory adoption pay.

(9) In paragraphs (2) to (4)—

- (a) “the appropriate date” means—
  - (i) in relation to statutory shared parental pay (birth), the first day of the 14th week before the expected week of the child’s birth or the first day in the week in which the child is born, whichever is earlier (but see paragraph (10)),
  - (ii) in relation to statutory shared parental pay (adoption) the first day of the week after the week in which A is notified of being matched with the child for the purposes of adoption;
- (b) “day of payment” means a day on which the person was paid; and
- (c) “normal pay day” means a day on which the terms of a person’s contract of service require the person to be paid, or the practice in that person’s employment is for that person to be paid if any payment is due to them.

(10) Where more than one child is born as a result of the same pregnancy, the date the first child is born is to be used to determine the week in which the child is born.

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<sup>(6)</sup> Section 10A was inserted by section 53 of the Social Security Act 1998 (c.14).

<sup>(7)</sup> Section 4B was inserted by section 1(1) of the National Insurance Contributions Act 2006 (c.10).

<sup>(8)</sup> 1992 c.52; section 189(1) was substituted by, section 189(1A) and (1B) was inserted by and subsection (4) was amended by S.I. 1999/1925; subsection (5) was amended by S.I.1995/2587 and subsection (5A) was inserted by the Enterprise and Regulatory Reform Act 2013 (c.24), Schedule 2, paragraphs 1 and 11 and was amended by S.I.2014/431.

### Treatment of persons as employees

**33.**—(1) A person is treated as an employee for the purposes of Part 12ZC of the 1992 Act (even though not falling within the definition of ‘employee’ in section 171ZZ4(2) of that Act) where, and in so far as, that person is treated as an employed earner by virtue of the Social Security (Categorisation of Earners) Regulations 1978(9) (but see paragraph (3)).

(2) A person shall not be treated as an employee for the purposes of Part 12ZC of the 1992 Act (even though falling within the definition of ‘employee’ in section 171ZZ4(2) of that Act) where, and in so far as, that person is not treated as an employed earner by virtue of those Regulations (but see paragraph (3)).

(3) Paragraphs (1) and (2) shall have effect in relation to a person who—

- (a) is under the age of 16; and
- (b) would, or as the case may be, would not have been treated as an employed earner by virtue of those Regulations had they been over that age;

as they have effect in relation to a person who is, or as the case may be, is not treated as an employed earner by virtue of those Regulations.

(4) A person is treated as an employee for the purpose of Part 12ZC of the 1992 Act (even though not falling within the definition of ‘employee’ in section 171ZZ4(2) of that Act) where that person is in employed earner’s employment under a contract of apprenticeship.

(5) A person is not to be treated as an employee for the purposes of Part 12ZC of the 1992 Act (even though falling within the definition of ‘employee’ in section 171ZZ4(2) of that Act) where that person is in employed earner’s employment but that person’s employer—

- (a) does not fulfil the conditions prescribed in regulation 145(1) (conditions as to residence or presence) of the Social Security (Contributions) Regulations 2001 in so far as that provision relates to residence or presence in Great Britain; or
- (b) is a person who, by reason of any international treaty to which the United Kingdom is a party or of any international convention binding the United Kingdom—
  - (i) is exempt from the provisions of the 1992 Act; or
  - (ii) is a person against whom the provisions of the 1992 Act are not enforceable.

### Continuous employment

**34.**—(1) A week is to be treated for the purposes of sections 171ZU and 171ZV of the 1992 Act (see also regulations 30 and 31) as part of a period of continuous employment with the employer even though no contract of service exists with that employer in respect of that week in the circumstances mentioned in paragraph (2) and subject to paragraphs (3) and (4).

(2) The circumstances mentioned in paragraphs (1) are that in any week the person is, for the whole or part of the week—

- (a) incapable of work in consequence of sickness or injury;
- (b) absent from work on account of a temporary cessation of work; or
- (c) absent from work in circumstances such that, by arrangement or custom, that person is regarded as continuing in the employment of their employer for all or any purposes;

and returns to work for their employer after the incapacity for or absence from work.

(3) Incapacity for work which lasts for more than 26 consecutive weeks shall not count for the purposes of paragraph (2)(a).

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(9) S.I. 1978/1689, amended by S.I. 1978/1689, 1980/1713, 1990/1894, 1994/726, 1998/1728, 2003/736, 2003/2420, 2004/1770, 2005/3133, 2006/1530 and 2014/635; there are other amending instruments but none is relevant.

- (4) Where a person—
- (a) is an employee in employed earner’s employment in which the custom is for the employer—
    - (i) to offer work for a fixed period of not more than 26 consecutive weeks;
    - (ii) to offer work for such period on two or more occasions in a year for periods which do not overlap; and
    - (iii) to offer the work available to those persons who had worked for the employer during the last or a recent such period; but
  - (b) is absent from work because of incapacity arising from some specific disease or bodily or mental disablement;

then in that case paragraph (2) shall apply as if the words “and returns to work for their employment for their employer after the incapacity for or absence from work” were omitted.

### Continuous employment and unfair dismissal

**35.**—(1) Where in consequence of specified action in relation to a person’s dismissal, the person is reinstated or re-engaged by their employer or by a successor or associated employer of that employer then—

- (a) the continuity of their employment shall be preserved for the purposes of sections 171ZU and 171ZY of the 1992 Act (see also regulations 30 and 31) for the period beginning with the effective date of termination and ending with the date of reinstatement or re-engagement; and
  - (b) any week which falls within the interval beginning with the effective date of termination and ending with the date of reinstatement or re-engagement, as the case may be, shall count in the computation of their period of continuous employment.
- (2) In this regulation—
- (a) “associated employer” shall be construed in accordance with section 231 of the Employment Rights Act 1996;
  - (b) “dismissal procedure agreement” and “successor” have the same meanings as in section 235 of the Employment Rights Act 1996;
  - (c) “specified action in relation to a person’s dismissal” means action which consists of—
    - (i) the presentation by that person of a complaint under section 111(1) (complaints to employment tribunal) of the Employment Rights Act 1996<sup>(10)</sup>;
    - (ii) that person making a claim in accordance with a dismissal procedure agreement designated by an order under section 110 of that Act<sup>(11)</sup>; or
    - (iii) any action taken by a conciliation officer under section 18 (conciliation) of the Employment Tribunals Act 1996<sup>(12)</sup>.

### Continuous employment and stoppages of work

**36.**—(1) Where a person does not work for any week or part of a week because there is a stoppage of work at that person’s place of employment due to a trade dispute within the meaning of section 35(1) of the Jobseekers Act 1995<sup>(13)</sup> then—

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<sup>(10)</sup> 1996 c.18.

<sup>(11)</sup> Section 110 was amended by sections 1(2)(a) and (c) and 12(1) to (3) and (5) of the Employment Rights (Dispute Resolution) Act 1998 c.8.

<sup>(12)</sup> 1996 c.17.

<sup>(13)</sup> 1995 c.18.

- (a) that person's continuity of employment shall be treated as continuing throughout the stoppage (but see paragraph (2) for the purposes of sections 171ZU and 171ZY of the 1992 Act (see also regulations 30 and 31); and
- (b) no such week shall count in the computation of their period of continuous employment (but see paragraph(3)).

(2) Where during the stoppage of work a person is dismissed from their employment, that person's continuity of employment shall not be treated under paragraph (1) as continuing beyond the commencement of the day that person stopped work (but see paragraph (3)).

(3) Paragraph (1)(b) and paragraph (2) do not apply to a person who proves that at no time did they have a direct interest in the trade dispute in question.

### **Change of employer**

**37.**—(1) Where a person's employer changes, a person's employment is to be treated for the purposes of sections 171ZU and 171ZV of the 1992 Act (see also regulations 30 and 31) as continuous employment with the second employer in the following circumstances—

- (a) the employer's trade or business or an undertaking (whether or not it is an undertaking established by or under an Act of Parliament) is transferred from one person to another;
- (b) a contract of employment between any body corporate and the person is modified by or under an Act of Parliament, whether public or local and whenever passed and some other body corporate is substituted as that person's employer;
- (c) on the death of the employer, the person is taken into the employment of the personal representatives or trustees of the deceased;
- (d) the person is employed by partners, personal representatives or trustees and there is a change in the partners, or as the case may be, personal representatives or trustees;
- (e) the person is taken into the employment of an employer who is, at the time the person entered into to the employer's employment, an associated employer of the person's previous employer; or
- (f) on the termination of the person's employment with an employer that person is taken into the employment of another employer and those employers are governors of a school maintained by a local education authority.

(2) In paragraph (1)(e) "associated employer" shall be construed in accordance with section 231 of the Employment Rights Act 1996.

### **Reinstatement after service with the armed forces etc**

**38.** Where a person—

- (a) is entitled to apply to their employer under the Reserve Forces (Safeguard of Employment) Act 1985(14); and
- (b) enters the employment of that employer within the six month period mentioned in section 1(4)(b) (obligation to reinstate) of that Act;

that person's previous period of employment with that employer (or if there was more than one such period, the last of those periods) and the period of employment beginning in that six month period shall be treated as continuous for the purposes of sections 171ZU and 171ZV of the 1992 Act (see also regulations 30 and 31).

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(14) 1985 c.17.

### **Treatment of two or more employers or two or more contracts of service as one**

**39.**—(1) In a case where the earnings paid to a person in respect of two or more employments are aggregated and treated as a single payment of earnings under regulation 15(1) (aggregation of earnings paid in respect of different employed earner’s employments by different persons) of the Social Security (Contributions) Regulations 2001, the employers of that person in respect of those employments shall be treated as one for the purposes of Part 12ZC of the 1992 Act (and these Regulations).

(2) Where two or more employers are treated as one under the provisions of paragraph (1), liability for statutory shared parental pay shall be apportioned between them in such proportions as they may agree, or in default of agreement, in the proportions which the person’s normal weekly earnings from each employment bear to the amount of the aggregated normal weekly earnings over the relevant period as defined in regulation 32(2).

(3) Where two or more contracts of service exist concurrently between one employer and one employee, they shall be treated as one for the purposes of Part 12ZC of the 1992 Act (and these Regulations) except where, by virtue of regulation 14 (aggregation of earnings paid in respect of separate employed earner’s employments under the same employer) of the Social Security (Contributions) Regulations 2001, the earnings from those contracts of service are not aggregated for the purpose of earnings-related contributions.