

# MUM'S THE WORD

THINK YOU UNDERSTAND MATERNITY RIGHTS? FIND OUT HOW THEY HAVE CHANGED, EXPLAINS **ROB WASHINGTON**

The rights and benefits extended to new parents by their employers have been on an increasingly complex path. Just this week the government has said it will introduce a six months' paternity leave package from 2011. Although recent changes to maternity leave have attempted to clarify the area and provide for equal rights of maternity leave for all employees, regardless of length of service, some tricky issues remain. Of particular interest for professional employers are non-cash benefits provided by way of a salary sacrifice scheme.

Over recent years rights to maternity pay and maternity leave have changed considerably (see box). Possibly the most important change for many women and their employers is the right to take a full year of maternity leave. Until this amendment, only employees with more than one year's employment could take a full year's leave. Women are entitled to receive all contractual benefits during maternity leave, the only exception being their "remuneration", which is defined as "wages or salary".

## MAKING A SACRIFICE

"Salary sacrifice" or "salary exchange" is where an employee agrees to a reduction in salary, in return for a non-cash benefit (see box). One of the main non-cash benefits provided by employers are childcare vouchers. An estimated 20% of employers provide childcare vouchers to employees, often through a salary sacrifice arrangement. Other non-cash benefits include cycle to work schemes and private medical insurance.

As all women are now entitled to retain benefits for a full year's maternity leave, the cost to employers of providing non-cash benefits through maternity leave has increased.

The issue arises as to whether employers can cease to provide salary sacrifice benefits during maternity leave, or otherwise recover the cost of these benefits from employees. As yet there have been no test cases on this issue, so it is not known what view tribunals will take on how non-cash benefits provided by way of salary sacrifice should be treated under the Maternity and Parental Leave regulations.

HM Revenue & Customs' position is that non-cash benefits are benefits rather than "remuneration", even if they have been

provided by way of salary sacrifice. Guidance produced by the taxman says that while an employee may agree to a reduction in salary to receive the benefit, there is no legal connection between the two.

The fact that the employer and employee have entered into a contractual variation of the contract to reduce the employee's salary is seen to be a completely separate issue from the fact that the employer has agreed to provide the employee with certain benefits, even if the cost of those benefits equals the reduction in salary. The result is that the value of the benefit should not be included for the purpose of calculating Statutory Maternity Pay, and the employee is entitled to continue to receive the benefit during her leave.

HMRC's advice confirms that an employee may voluntarily opt out of receiving their non-cash benefit (subject to the terms of the contract) during any period of maternity leave, but the employer cannot compel her to do so. If the employee's earnings increase following withdrawal from the salary sacrifice scheme, then her SMP will increase.

## OPTIONS FOR EMPLOYERS

On the basis of HMRC's advice, non-cash benefits cannot be considered wages or salary, and thus any attempt to discontinue provision of the benefit during maternity leave will constitute a breach of the MPL regulations. Some companies administering non-cash salary sacrifice benefits take a different view from that of HMRC, and consider such benefits to be merely an alternative way of paying salary. It has been suggested that in these circumstances, the employer might include appropriate contractual wording to provide that the employee is only entitled to the benefit during weeks in which she is in receipt of sufficient salary to cover them. However, if the taxman's view is correct, such wording could be an unlawful attempt to contract out of the MPL Regulations.

Another approach may be to offset the cost of continuing the benefit against any enhanced maternity pay. Many professional employers provide enhanced maternity pay which goes above SMP levels. As enhanced pay is a contractual arrangement, it may be possible to agree a reduction in this enhanced pay to cover the cost of continued non-cash benefits, although HMRC has made clear that no deductions may be made from SMP. If enhanced pay is provided for only part of the maternity leave, it may also be possible to deduct sufficient amounts from the enhanced pay to offset continued provision of non-cash benefits during the unpaid remainder of maternity leave, although this has yet to be tested.

However, employers should be aware that any amendment to female employees' contractual entitlement to benefits to deal with this issue would give rise to a potential sex discrimination claim. Amending the entitlement to benefits of all employees to try to address this issue would be less likely to constitute less favourable treatment of women, although if such a variation were to put female employees at more of a disadvantage than male employees, claims for indirect sex discrimination may arise.

Without clear guidance from the tribunals, and on the basis of HMRC's position, there is a clear risk of discrimination claims arising if employers do not continue to provide non-cash benefits during periods of maternity leave, even if they are provided as part of a salary sacrifice scheme. Hopefully the position will become clearer once the tribunals have been asked to consider this issue.

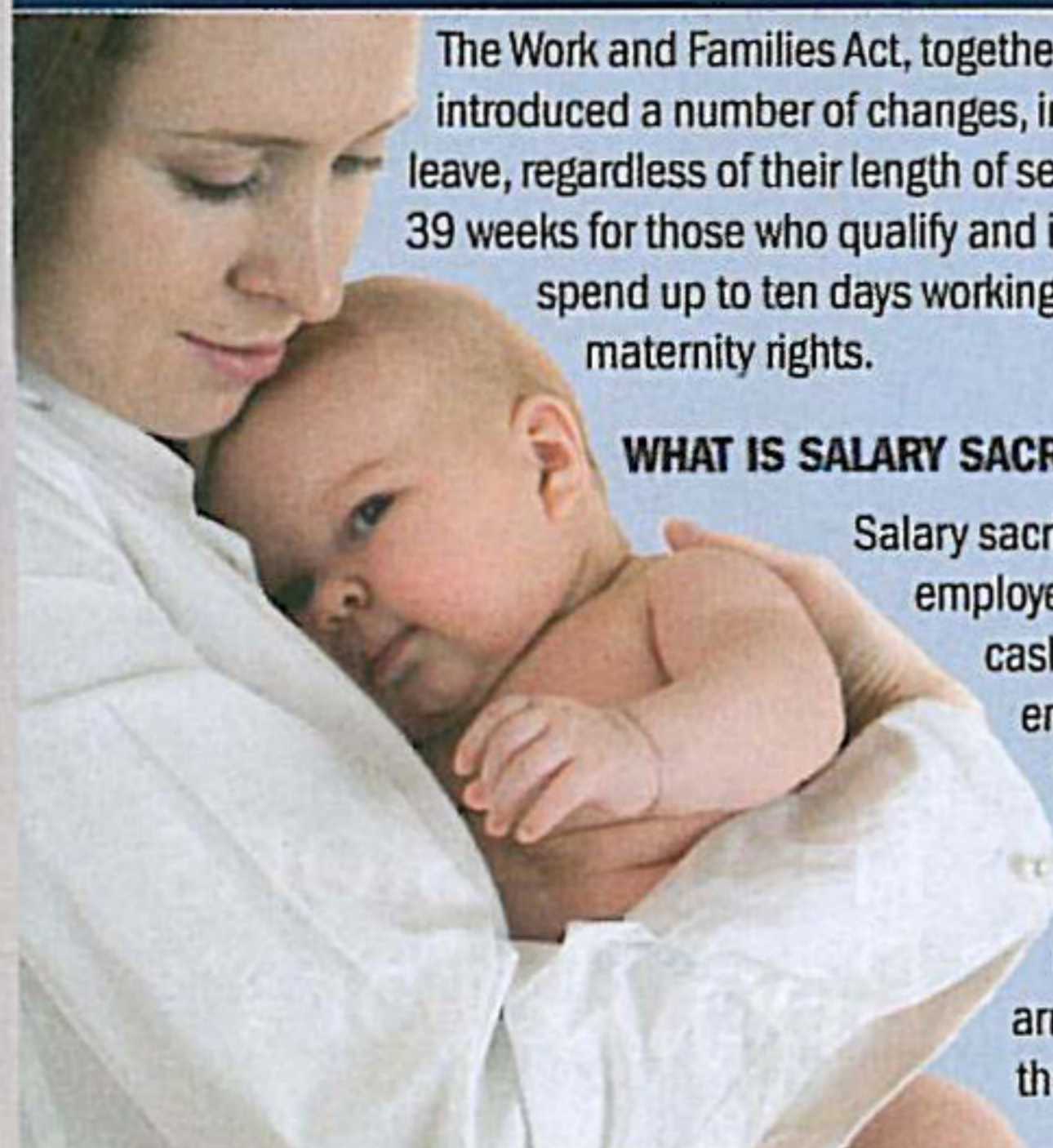
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## TAXING DECISIONS

The Work and Families Act, together with the Maternity and Parental Leave, etc Regulations introduced a number of changes, including: enabling women to take a full year's maternity leave, regardless of their length of service, increasing statutory maternity pay pay period to 39 weeks for those who qualify and introducing keeping in touch days allowing mothers to spend up to ten days working during their maternity leave, without losing their maternity rights.

### WHAT IS SALARY SACRIFICE?

Salary sacrifice is a contractual arrangement in which the employee agrees to a reduction in salary, in return for a non-cash benefit of the same value. While the total benefit to the employee and cost to the employer remain unchanged, there will be tax advantages for both, as the employee will only pay tax and employee's National Insurance Contributions on the reduced salary and the employer will only pay employer's NICs on the reduced salary. The arrangement must be recorded in an agreed variation to the employee's contract of employment.



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