

# **CBI RESPONSE TO “CHOICE AND FLEXIBILITY”**

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INVESTOR IN PEOPLE

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## **ABOUT THE CBI**

The CBI is the UK's leading business organisation, speaking for some 240,000 businesses that together employ around a third of the private sector workforce.

CBI's member companies, who decide all policy positions, include:

- 80 of the FTSE 100
- some 200,000 small and medium-size firms
- more than 20,000 manufacturers
- over 150 sectoral associations.

No other UK organisation represents as many major employers, small and medium-size firms or companies in the manufacturing or service sectors.

The organisation is also the UK's official business representative in the European Union, which generates more than 50 per cent of regulation affecting British firms.

With offices across the UK as well as in London, Brussels and Washington, the CBI co-ordinates British business representation around the world.

## **EXECUTIVE SUMMARY**

1. The CBI welcomes the opportunity to respond to the Government's consultation and to represent our members' views on the proposed changes to family-friendly and flexible working employment rights.
2. In recent years there have been a number of changes to parental rights in the UK and the CBI has always sought to ensure that these are implemented in a business-friendly manner and that the cost to employers, and the administrative burden, are minimised. For many firms, especially larger companies, some of this new legislation has put into law policies which they already use. Many employers' family-friendly and work-life balance policies continue to go well beyond the statutory minimum standards. However, for many other firms and the majority of small employers new legislation in this area has imposed a considerable additional burden.
3. CBI members accept in principle the Government's desire to extend family-friendly rights further but believe there should be compensating changes to reflect the increased burden on employers. The CBI accepts some of the proposals outlined in the consultation document so long as there are clear boundaries to the scope of these new rights. The CBI accepts:
  - the extension of paid maternity leave to nine months by April 2007 with a goal of 12 months by the end of this Parliament – so long as the right to return to the same job is not extended beyond the current six months
  - allowing mothers to transfer part of their leave and pay to fathers – but only after six months and if employers receive three months' notice of a transfer
  - extending the number of employees who are eligible for the right to request flexible working – so long as it is extended one group at a time and there is no change to the structure of the right. Members would prefer to extend it to carers, provided this group is clearly defined.
4. Employers have welcomed the Government's commitment to reduce burdens on employers, particularly with regard to the administration of maternity pay. In particular CBI members believe that:
  - the Government should pay maternity pay directly and should enrol employers into a new state-run direct payment system. However those employers which wish to retain responsibility for the administration of maternity pay and should have the option of continuing to make payments themselves
  - the notice required for mothers to return early from maternity leave should be increased to three months and it should be made clear that employers can make contact with women during maternity leave
  - the Government should explore other ways of supporting employers, particularly SMEs, through the simplification of administration and an increase in the level of financial compensation.
5. CBI members feel very strongly that the Government must not consider any changes beyond the scope of this current consultation. In particular they believe that the introduction of paid paternity leave in 2003, the right to request flexible

working offered to parents of young children, and the new policy to allow maternity leave and pay to be transferred to fathers, means that no changes to paternity or parental leave are necessary.

6. Given the large number of changes to family-friendly legislation in recent years, the CBI also believes that the Government must streamline the implementation of new rights to minimise the burden on employers. The Government has committed to implementing some of the proposed changes, such as extending paid maternity leave to nine months and implementing transferable maternity leave, in April 2007. CBI members accept this suggested implementation date for these proposals.
7. However, members also believe that if the Government decides to make any further changes to the law as a result of this consultation exercise – such as extending paid maternity leave to 12 months – changes must be limited to one further occasion – for example April 2009.
8. After this date, any changes should be given time to bed in fully, and to assess the impact of them, and the Government must make a firm commitment not to make any further changes in the family-friendly and work-life balance arena for the remainder of this Parliament.

## **Chapter 1: Employers support measures to improve work-life balance but Government must provide more support for firms**

### **The UK now has some of the most generous family-friendly legislation in the EU**

9. Recent years have seen the introduction of new rights designed to support working parents, arising both from EU directives and the UK Government's domestic priorities. The largest number of changes, and the biggest advancement in terms of parental rights, occurred in 2003 when paid maternity leave was extended and the rate of pay increased, paid paternity leave was introduced for the first time and parents of young children were given the right to have a request for flexible working seriously considered.
10. Employers recognise the positive impact that family-friendly policies can have in terms of recruitment and retention and many already have positive practices in this area. However CBI members have expressed concern about the cumulative impact of employment regulation, and have urged the Government to seek to reduce the overall administrative burden on employers.
11. Recent changes to family-friendly rights have left the UK with some of the most generous statutory policies in the EU, particularly with regard to the length of leave available. An example is maternity leave, for which a minimum of 14 weeks' maternity leave is required under the 1992 Maternity Directive. The UK is one of only a handful of countries which offers at least 24 weeks' leave<sup>1</sup>. Germany and France have 14 and 16 weeks' paid maternity leave respectively. The UK also has one of the longest periods of statutory paternity leave.
12. Given this, CBI members believe the Government must proceed with caution when introducing any further employment rights, in order to avoid undermining the flexibility of the UK labour market. The UK is fortunate that a stable economy and strong employment growth has allowed the Government to push forward with its employment agenda. The Government should seek at all times to ensure that its policies allow the growth in employment to continue – in all parts of the labour market.

### **The Government must recognise that the voluntary approach is the best way to achieve outcomes that are best for the employee and employer**

13. CBI members believe that the purpose of regulation is to provide an agreed minimum standard. It should not specify the standard at which all employers should operate. In this area of employment policy in particular, many employers go considerably beyond the statutory minimum. More than half of employers (55%) operate policies that go beyond the statutory minimum for maternity leave, 50% go beyond the minimum for paternity leave and 38% for the right to request flexible working<sup>2</sup>. Employers may choose to offer a range of benefits tailored to

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<sup>1</sup> The others are Hungary, Ireland and Slovakia. Sweden and Norway have parental leave which serves as maternity leave in effect.

<sup>2</sup> Flexible working: impact and implementation (CIPD 2005)

their workforce and employees themselves may wish to take advantage of different kinds of support. Going beyond the statutory minimum, particularly with regard to maternity leave and flexible working, is also a source of competitive advantage for many large and small employers.

14. Given the novelty and complexity of some of the Government's proposals, CBI members believe much further consultation will be required to ensure effective procedures. This is particularly the case for making leave and pay transferable and deciding the scope of any extension to the right to request flexible working. The CBI is willing to work with the Government on these policies to ensure that secondary regulations and guidance reflect employers' concerns. Regulations should be clear and simple, and should be supported by easy to understand guidance. This means that both employers and employees are clear about their rights and responsibilities and confusion is less likely to occur.

**The Government must not make any further changes outside the scope of this consultation**

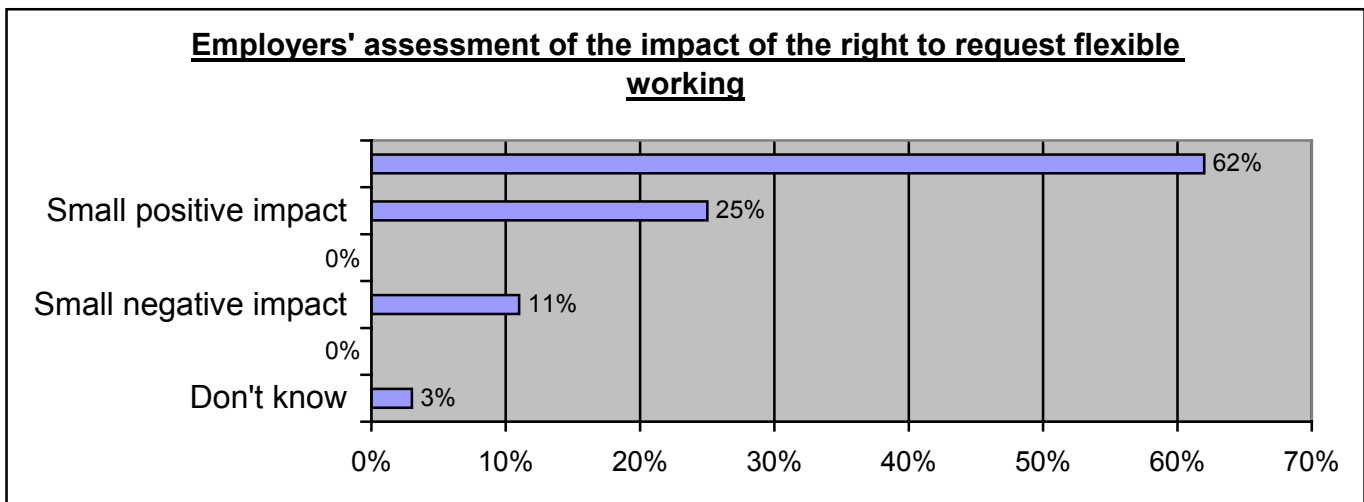
15. The Government has committed to implementing specific proposals by certain dates; to extend paid maternity leave to nine months by April 2007 and to make maternity leave and pay transferable by the end of this parliament. Given this, CBI members believe the Government should limit the implementation of any changes to two specific dates. In particular – subject to the Government's existing commitments and the DTI's agreed common commencement dates – CBI members believe these dates should be April 2007 and April 2009. This would allow enough time for employers to receive information about any changes, make adjustments to policies and literature, and inform employees of their new rights.
16. CBI members have welcomed the opportunity to respond to this consultation, and have accepted that the Government wishes to extend paid maternity leave and make it transferable. However they would very strongly oppose any change to parental or paternity leave at this time and welcome the Government's decision not to propose any changes to these rights.
17. The CBI notes that at the time of the Work and Parents Taskforce in 2001 it was agreed that the right to request flexible working should be reviewed to consider its impact. Given the amount of evidence that is already available about the impact of the right, and the fact that the Government is already consulting on extending the right, the CBI believes that a formal review in 2006 is unnecessary.

**Chapter 2: The right to request flexible working has been a success to date – its future success rests on extending it to new groups gradually**

18. CBI members support flexible working practices where they are compatible with business needs and the new right to request has been very successful in helping employees to balance their work and family lives without imposing undue burdens on employers. The Government has stated its intention to ‘build on the success’ of the right to request flexible working for parents of children under six by extending it to other groups of employees. The two groups which it is considering are parents of older children and those with other caring responsibilities.

**The vast majority of requests to work flexibly have been accepted by employers and they accept the extension of the right to those with caring responsibilities**

19. The right to request working, introduced in 2003, has worked well to date. The CBI’s Employment Trends Survey 2004, carried out 12 months after the introduction of the right, showed that the majority of employers believed that the introduction of the right had no negative impact on their organisation. Sixty-two percent reported that it had no impact compared with 25% who believed it had a small positive impact and 11% who believed it had a small negative impact. No respondents believed it had had a large positive or negative impact.



*CBI Employment Trends Survey 2004*

20. The CBI’s Employment Trends Survey 2004 also shows that the vast majority of requests are accepted by employers. In total 77% of requests were accepted, a further 16% were discussed and a compromised reached. Just 8% of requests were declined. These findings, which are consistent with DTI findings that 81% of requests for flexible working are accepted<sup>3</sup>, clearly show that employers are willing to accommodate flexible working requests and that the new right is working well.

<sup>3</sup> Results of the second flexible working employee survey, DTI 2005

21. Crucially, the success of the right is due to the way it balances employers' and employees' needs. Employers are willing to give requests due consideration and to accommodate flexible working where practical, but they must be able to decide whether accepting a request would damage the business or impose excessive burdens on other employees. The fact that employees may only make one request per year, and that any change is a permanent one, means that employees must give sufficient thought to their request and the impact it will have on the working relationship.
22. In light of the success of this new right, CBI members welcome the Government's commitment not to change the structure of the right. The current right acknowledges that employers are best placed to decide what works in their organisation but it also ensures that they have to give each request serious consideration by sitting down with their employees and discussing any request. The CBI believes that requiring employers to objectively justify any refusal would create legal and operational uncertainty for employers and allow Employment Tribunals to substitute the employer's decision with a decision not related to the needs of the business.
23. The aim of the Work and Parents Taskforce was to design a mechanism which would enable large numbers of parents to work flexibly. The right to request has been remarkably successful in achieving this, with the vast majority of parents having their requests accepted. There should be no change to the business reasons for which a request may be refused. Members believe that the reasons have worked well to date, but accept that they may be reviewed in the future to ensure they capture all of the obstacles that employers might face when considering requests to work flexibly.

**The right to request should only be extended to one new group of employees at a time**

24. Given the success of the right to request to date, CBI members could accept a gradual extension of the right to further groups of employees. However, members feel strongly that the Government should only extend it to one group of employees at a time. This is for two reasons. Firstly, to avoid a large and sudden increase in the number of requests which may lead to capacity difficulties and secondly to allow employers time to get used to accommodating the needs of different groups of employees.
25. There has been concern among members that as the number of employees eligible to request flexible working increases, and the number of employees working flexibly increases, employers' ability to accommodate new requests will fall. For example a team may be able to function with a certain number of people working only afternoons, say, but not the whole team. Workplaces with 24-hour production, or with extremely busy peak periods, might face particular difficulties. An extension to the number of employees eligible to exercise the right could lead to a reduction in the number of requests accepted and the Government should not see this as employer resistance to flexible working, but rather a reflection of the difficulties employers may face in accommodating many and diverse requests for flexibility.

26. Aside from capacity concerns, the second reason that the Government should only extend the scope of the right gradually is that the needs of parents of older children, and of those with other caring responsibilities, are likely to be very different to those with children under six. Giving these employees a formal right to request flexible working may mean that employers receive requests which are different to those which they have faced previously. For example, parents of older children might be more likely to request term-time working than those whose children are at nursery. Carers may want more day-to-day flexibility and might be expected to submit more frequent requests (although no more than one per year) as their caring responsibilities change.

**CBI members would prefer the right to be extended to carers rather than parents of older children – but want carers to be carefully defined**

27. During consultation over which group of employees the Government should next give the right to request flexible working, a majority of CBI members said that as a first priority the Government should extend the right to those with other caring responsibilities, rather than parents of older children.

28. CBI members recognise that carers are a large and important group of employees and one which will become more so in coming years as the population ages. Finding ways to help these people stay in employment – or return to employment if they are not currently working – is an important challenge for Government, employers and groups working with carers. Many employers have reported a growing degree of discontentment among employees without children about the rights given to parents – these firms in particular have welcomed proposals to support those with caring responsibilities other than children.

29. Extending the right to request to carers is likely to pose greater challenges, both in drafting legislation and in practical implementation, than extending it to parents of older children. CBI members believe that further and more detailed consultation will be required to ensure that the extension to carers does not cause excessive disruption to businesses.

30. In defining carers, there are two separate matters which need to be addressed. Firstly, the level of care which someone carries out – this might be defined according to the health of the person cared for, or the amount of time spent caring. Secondly the relationship of the carer to the person cared for. The CBI believes that any definition should be set out in the legislation, rather than leaving it to guidance. This would provide the most clarity for employers and avoid any potential confusion. Eligibility should be clear and simple for both employers and employees – to avoid confusion and potential abuse of the right and employers should not have to seek out information which both they – and employees consider private and potentially invasive.

31. The Government has previously said it was considering extending the right to those caring for 'sick or disabled relatives'<sup>4</sup>. Members have suggested that they would prefer a right restricted to relatives, including partners, rather than one extended to all adults. The existing right to time off for dependants covers a spouse, child or parent of the employee, those living in the same house as the employee and those who 'reasonably depend' on the employee for assistance when ill or injured. In effect this means any friend or neighbour for whom the employee is the first point of call. Given that a permanent change in the employee's contract is a larger undertaking for the employer than a short period of time off to deal with an emergency, CBI members believe the definition of carer should be narrower than that for emergency time off. Other matters, such as the nature of the incapacity of the dependent, will require further examination.
32. CBI members have indicated that in the majority of cases they would not require evidence of someone's caring responsibility – just as they do not require evidence that someone is a parent at present. However, there should be some mechanism in place whereby employers can ask for evidence should they wish to. Whilst in most cases employers will have good knowledge of whether someone has children, this is less likely for other caring responsibilities. It is also more important if employers are going to receive more requests which might be more difficult to accommodate. The CBI would therefore like the Government to explore ways of ensuring that employees can provide evidence of their caring status if required.
33. The Government has also asked whether the right to request flexible working should be extended to parents of older children. The CBI believes that many parents who would become eligible if the age limit of the child were raised would have already been eligible since 2003 when their child was younger. As we know, many of them have already taken advantage of this right and agreed a change to their working patterns with their employer. Many employees with children aged over six will also have a second child under six and so will continue to be eligible. The Government's own figures show that extending the right to those with children under nine would lead to significantly fewer parents becoming eligible than extending it to those under 12 or under 17. However, since it is those with very young children that are most likely to want to work flexibly<sup>5</sup>, some members have suggested it is unnecessary to extend the right to those with older children as a priority. However, if the Government did decide to extend the right to parents of older children, CBI members would prefer that the cut-off age was no higher than 12 in the first instance. Members have expressed a doubt that parents of children in their teens are in need of the same level of flexibility than those with younger children and so should not be a priority for action in any immediate extension of the scope of the flexible working rules.

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<sup>4</sup> For example the Chancellor in his Pre-Budget report in December 2004

<sup>5</sup> The Second Work-life Balance Study: Results from the Employees' Survey (DTI, 2004) shows that for every type of flexible working, demand was greater for those with children under six than those with children aged six or over.

### **Chapter 3: The Government should take back responsibility for administering maternity pay – but employers should be able to opt-out and make payments themselves**

34. The administration of maternity leave and pay is a considerable burden on many employers, particularly small employers, and the CBI welcomes the Government's suggestion to introduce a direct payments system. However, many larger employers have said that they want to retain responsibility for making payments themselves. To overcome this, the CBI believes that the Government should set up a direct payments system and transfer all payments to the Inland Revenue, but should give employers the choice to opt out and make payments themselves.

#### **Small employers face few pregnancies and the rules change so frequently and are complex – they want the Government to take responsibility for payments**

35. The typical small employer experiences a pregnant employee very rarely – once every ten years for those with ten employees or fewer<sup>6</sup>. Since regulations in this area have changed so frequently, many employers are forced to look afresh at the maternity regulations each time an employee is pregnant. Although they still face the same complicated regulations, larger employers with a dedicated HR function find it easier to keep up to date with the relevant regulations. This means that small employers suffer from a larger burden of administration and every effort should be made to support SMEs and reduce the amount of administration they face. The idea of direct payments has been strongly welcomed by many of the CBI's smaller members.

36. Small employers are also likely to have simple payroll systems and are less likely to pay occupational benefits. This means that each time the employer must pay SMP they must set up a new system for dealing with the payment for the duration of the pregnancy. A system of direct payments would remove this need. In addition, SMEs wishing to claim their SMP payments from the Inland Revenue in advance for cash-flow reasons face a complex process – one which direct payments would avoid.

#### **Larger employers wish to retain responsibility for payments**

37. Larger employers find the cost and complexity of administering statutory payments less burdensome than smaller employers do. They experience many more pregnancies and so have systems in place which automatically deal with each new case. Large employers are also more likely to pay enhanced occupational maternity pay and so would still keep women on maternity leave on the payroll during their maternity leave. The prospect of two income streams for employees, and the potential confusion arising from this, has caused significant concern among larger members.

38. Large employers have stressed that they welcome the Government's efforts to support employers with the administration of maternity pay. However, if payment

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<sup>6</sup> Employers' survey on support for working parents, DTI, 2000

were handed back to the state, employers would be required to provide the information required by the Inland Revenue and would still have to administer their occupational schemes, so their overall burden would rise. Any requirement to hand payments back to the Government would lead to an increase in the overall administrative burden rather than simplification. For smaller employers, these concerns do not outweigh the potential benefits of direct payments.

**All payments should be transferred to the Inland Revenue – but employers should be able to opt-out and make payments themselves**

39. Given the different experiences of large and small employers (although there may be exceptions within each group), CBI members believe that all employers should be enrolled into a direct payments system run by the Inland Revenue, but those that wish to should have the opportunity to opt out. In practice, the MAT B1 form that pregnant employees give their employer could not only be used to give the employer an overview of the employee's rights<sup>7</sup>, but could also inform the employer that the Inland Revenue will administer payment unless the employer opts out. The employer would tell the employee whether they have opted out and would either pass the required information to the Inland Revenue or would make payments themselves through the payroll.
40. It must be stressed that the decision to opt-out will be entirely one for individual employers and it must be an administratively simple process. Employers should not be required to provide evidence of their ability to make payments nor be required to make any changes to their internal payment processes – those firms that wish to continue making payments as they do at present should be free to do so.
41. The CBI believes that even if some employers retained responsibility for payments, the number being administered by the Inland Revenue would still make it a worthwhile and viable option for the Government. As a rough estimation, if only those employers with more than 100 employees chose to retain payments, this would still mean that 98.5% of employers and 35% of employees would be part of the direct payment system. Given that around 300,000 women receive SMP each year in 70,000 organisations, this would mean the Inland Revenue was responsible for making payments to 100,000 women in 69,000 organisations. Some organisations choosing to opt-out would reduce the capacity needed and so ensure that the required changes to the Inland Revenue systems could be achieved more quickly.
42. Furthermore, CBI members believe that given that the Inland Revenue is already responsible for making Maternity Allowance payments (including those in work, but not eligible for statutory maternity pay), it should be possible for the Inland Revenue to use the basis of this system to take over the payment of statutory maternity pay more broadly.

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<sup>7</sup> CBI members have suggested that this would be a way of helping both employers and employees understand their right and responsibilities more easily.

43. CBI members believe that a system of automatic enrolment for direct payments – with a discretionary opt-out for those employers who wish to retain responsibility for payments – should also apply where leave and pay is transferred to the father. Although there were those who were keen to take responsibility for making payments, more CBI members employers have expressed a wish to hand over payments for transferred pay than for all pay, because of the potential complexity of administering transferred pay and leave. In an automatic opt-in system those employers who wished to make payments when leave and pay is transferred would be able to do so. However if the Inland Revenue made payments when maternity leave is transferred from the mother to the father, this would allow a father's employer to have very little involvement in administering his transferred leave and therefore minimise the overall burden to the employer. The option for direct payments could therefore remove many of the concerns CBI members have expressed about shared leave and pay.
44. The Inland Revenue should set up systems as soon as possible and certainly before any entitlement to shared leave and pay begins. The CBI believes that requiring employers to administer shared leave and pay without giving the option of payments via the Inland Revenue would be unacceptable.

**The Government should consider other ways to simplify the administration of maternity leave and pay – and consider proper compensation for employers**

45. CBI members believe that the administration of maternity leave and pay is an extremely complex area and have welcomed indications from Government that they are looking at ways to simplify it. As well as giving employers the option of handing over responsibility for payments, members believe the Government should seek to find other ways to simplify the rules which would benefit all employers whether they hand over payments or not. Given recent developments (for example, the Alabaster ruling), calculating maternity pay has become extremely complex and is one of the most challenging aspects of administration for employers. Efforts to simplify this calculation by say, simplifying the reference period for calculating 90% of earnings for the first six weeks' of maternity leave or basing the calculation on contractual rather than actual earnings, would be strongly welcomed by CBI members.
46. As maternity rights are extended further – and in particular the right to a full 12 months' paid maternity leave is introduced – employers will be faced with significant increased costs in managing extended absences from the workplace of employees. The Government currently reimburses large employers 92% of the cost of maternity pay. For small employers there is a small employer relief scheme, providing 104.5% reimbursement of maternity pay costs. However, CBI members do not believe that the small employer relief scheme provides 'compensation' for absent employees and believe that the Government should seriously consider introducing a full compensation scheme – especially for small employers. Reimbursing small employers at least 125% of the relevant maternity pay costs for example, would deliver real support for small employers struggling to administer and manage the absence of employees on maternity leave.

#### **Chapter 4: Employers need more certainty over when a mother intends to return to work – increased communication is crucial**

47. One of the most challenging aspects for employers of dealing with pregnancy and maternity leave is planning for the mother's absence. In order to plan effectively, employers need to have adequate notice of employees' intentions – and an early awareness of any changes as to the timing of the woman's return to work. Many employers recognise that the key to planning is for the employee and employer to have continuous two-way communication throughout the pregnancy and period of maternity leave.
48. CBI members have welcomed the Government's commitment to look at the issue of contact and how to support employers and encourage good practice. This is a critical issue for employers and key to ensuring that any negative impact of increased maternity rights is minimised for employers.

#### **Certainty about when women will return is crucial for employers – to enable them to plan work and to make decisions about training and development**

49. Certainty about when a woman will return from maternity leave is vital for employers. It enables them to plan for the woman's return and consider any support she might need to reintegrate herself into the workplace – for example through training or flexible working options. It also helps them bring to a close any arrangements made to cover for her absence – such as the hiring of a temporary employee or changed shift patterns among remaining employees.
50. One of the biggest concerns among CBI members is the difficulty of not knowing whether a mother intends to return to work after her maternity leave. If an employer knew that a woman was not intending to return or had changed her mind after the birth of her child, not only would they be able to plan work better, but they would also be able to offer any temporary employee more certainty as to their future. At present, a mother who does not intend to return to work after maternity leave must give notice to her employer as specified in her employment contract (typically one month). There is no obligation for her to tell her employer in advance of this time, nor in practice is there any way for the Government to increase this notice period without falling foul of the sex discrimination act.
51. Given that there is no way to increase formally the notice that women must give if they are not intending to return to work, efforts should be made to increase the likelihood that women will tell their employer informally that they will not be returning. This would allow the employer more time to make arrangements in advance of her formally handing in her notice.

#### **Legislation and guidance should make clear that employers can and should keep in contact with women on leave**

52. One way to improve the likelihood that women on maternity leave will keep their employer informed about their intention to return is to improve communication throughout the period of leave. However, many CBI members have expressed concern that the position surrounding contacting mothers on leave is unclear and

that they are nervous about contacting women for fear of intruding or perceptions that they are harassing employees on maternity leave. Furthermore, at present employers are required to inform women on maternity leave of any changes in the workplace that affect them, and must make any internal job opportunities available to them, but it is not specified when or how they must do this.

53. By clarifying the position around contact, there is the potential to improve communication to the benefit of employees and employers. For example changes to the workplace may well be communicated by letter, but employers may wish to arrange more informal methods of communication – telephone or email for example – when issues or concerns can be raised. It might also be appropriate for contact to come from the line manager rather than the HR department.

### **Employers would like a specific date at which they can make contact with a mother**

54. Prior to the changes made to maternity leave in 2003, the regulations contained a specific contact date when an employer contacted a mother and asked when she intended to return to work. This requirement was removed in 2003 and it is now expected that once a mother informs her employer of when she wished her leave to start, the employer calculates how much leave she is entitled to and informs her when she is expected to return to work. It is assumed that a mother will take her full entitlement and if she wishes to return to work early she must currently give 28 days notice. Previously, mothers' total leave entitlement varied according to how much leave she took prior to the birth and so the return date was not so easily calculated.
55. CBI members have said that they would like a specific contact date to be reintroduced. This would provide certainty for both the employer and the employee. Employers would still calculate the expected return to work date before the woman begins her maternity leave and mothers would still be expected to communicate any changes with the relevant notice, but a recommended contact point would provide additional certainty for both parties and exist as a basis for more frequent communication should they wish. Guidance could explain what is reasonable and suggest a date when the employer contacts the mother to ask her to clarify her intentions. CBI members have suggested that three months prior to the date she is expected to return would be an appropriate time.
56. As well as a recommended contact date, CBI members would like it clarified in the regulations that a woman on maternity leave is still an employee of the organisation and that an employer can make reasonable contact with her during this time.

### **Increasing the length of notice required to return early will help employers with planning and communication**

57. Another specific proposal which would help employers to plan more effectively would be to increase the notice required for women to return early from maternity

leave. This would help employers better manage their use of employees recruited to cover maternity leave. Employers would be able to better plan the transfer of work and give the replacement employee more time to adjust their plans.

58. Increasing the notice period for early return will also encourage employees to consider carefully when they intend to return – and to communicate their intentions to the employer at an earlier stage than at present. Given this, CBI members believe increasing the current 28-day notice period to **three months** would provide employers with the maximum certainty and planning time. This three months notice should also be the required time for parents to give notice to transfer leave and pay (See chapter 6).
59. The CBI also welcomes the Government's intention to apply the same notice period to the situation where a mother gives notice of her intention to return early but then changes her mind and returns on a later date. Currently the mother is only required to give 28 days notice of the new return date 28 days before that date. This means that the employer might receive no notice that the woman is not planning to return on the date previously agreed. CBI members would like the three months notice date to apply to any change to the previously agreed date of return.

## **Chapter 5: Mothers returning after more than six months of maternity leave should not gain the right to return to the same job**

60. The Government has stated its intention to increase the period for which maternity leave is paid from the current six months to nine months by April 2007, with a goal of 12 months by the end of this Parliament. Whilst CBI members are not opposed in principle to this proposed extension of maternity rights there is significant concern among the employer community that the Government should make every effort to reduce the associated costs and administrative burden for employers in other areas.
61. CBI members have recognised that without leave being paid, the number of women taking up their full maternity leave rights is likely to be reduced. Employers also recognise that there could be benefits to employers of women being able to take a longer amount of paid leave – they are less likely to return to work before they are ready and could be more prepared for their subsequent return to work. However, the Government must recognise that there are also costs to employers.
62. The Regulatory Impact Assessment estimates that the additional cost to employers of increasing paid leave to nine months will be £35-46m per year, arising from large employers' contributions to the cost of SMP and the cost to all employers of providing cover for women on leave. This contrasts with an expected benefit of £12.5m per year. Given that employers have accepted some increase in costs, the CBI believes that the Government should do all that it can to minimise additional costs and administrative burden.

### **Extending ordinary maternity leave (including the right to return to the same job) to more than six months would undermine business flexibility**

63. CBI members accept that all employees will in future be entitled to 12 months' leave without a qualifying period (currently 6 months). However the Government must seek to limit the overall impact of this change – and be aware that significantly increasing the rights of all women on maternity leave could impose costs on employers, particularly SMEs, and reduce their ability to operate effectively.
64. In particular, CBI members believe that extending the right to return to the same job, rather than a similar job on no worse terms and conditions, should not be extended beyond the current six months. This would be the biggest single consequence of abolishing additional maternity leave (AML) and increasing ordinary maternity leave (OML) to 12 months. Both large and small member companies have expressed concern that having to keep a specific job available for 12 months would seriously undermine their freedom to develop the company and change operations as required. They see this option not as a simplification, but as a serious and unjustified additional extension of employees' rights.
65. Members are concerned about the cost of extending other contractual rights, which women are entitled to during OML, from six to 12 months. This might include the use of a company car, mobile phone, childcare vouchers and

bonuses, but also pension contributions and holiday entitlements. Since employers are more likely to bring in a replacement if leave extends for more than six months, and this replacement will also be eligible for contractual benefits, so the cost to employers is higher in the second six months of leave than the first.

**CBI members accept that the “small employers exemption” must be removed but feel strongly that the change must be made along with these other changes**

66. The CBI accepts the Government’s proposal to remove the small employers’ exemption, both to comply with case law and to implement the amended Equal Treatment Directive. As stated in the CBI’s response to the DTI’s consultation on the Equal Treatment Directive, CBI members strongly believe that the Government should delay the removal of the small employers’ exemption until April 2007. This will avoid the need for multiple changes in the regulations and will ensure that all employers are aware of the change and any impact it may have on them.

**In the longer term the Government should aim to increase compensation for employers**

67. The Government has asked for views on what should be the guiding principles for setting the level of flat rate statutory maternity pay. As the level of SMP increases, so take-up of leave is likely to increase, and therefore the cost of replacing absent employees increases, as well as the cost of SMP for the vast majority of employers who receive only 92% compensation. If the Government wishes to increase the level of SMP, CBI members believe the Government should give greater recognition of the administration and replacement costs that employers face.

## **Chapter 6: Transferable leave must be easy to administer and employers should have sufficient notice of any transfer**

68. The Government has stated that it intends to legislate to allow mothers to transfer some of their leave and pay to fathers. The Government has suggested that the earliest this policy could be implemented is April 2007. CBI members have responded positively to the proposal but this new entitlement must be implemented in a way that minimises the administrative burdens on employers. Members have also indicated that, while they might be able to provide for transferred leave by 2007, to meet this deadline the Government must design the right and communicate it to business with enough time for them to prepare. They would like twelve months notice of the regulations with guidance available a minimum of six months before implementation date.

### **CBI members support the transferable leave in principle but are concerned about how it will work in practice**

69. Most CBI members accept that transferable leave could allow fathers to play a greater role in child care without imposing undue burdens on employers. Whilst take-up is expected to be low at first, as it has been for statutory paternity leave, members believe that it is right that Government enables parents to share leave. By taking a light-touch approach, Government can support choice without overwhelming employers with massive change. Allowing parents to share leave could help to change cultural attitudes so that childcare starts to be divided between parents more equally than it is at present.
70. Designing a policy for shared maternity leave and pay takes the UK towards the position of many European countries which currently have provisions for parents to choose who stays at home after the birth of a baby. The closest examples appear to be Denmark and Finland which both have periods of paid parental leave which is shared between parents and must be taken directly after maternity leave. These models contrast with Sweden and Norway which have virtually no defined period of maternity leave, but have a single period of paid parental leave, with time reserved for both the father and the mother.
71. In Finland, mothers have around 18 months' paid maternity leave and fathers three weeks' paid paternity leave followed by around 26 weeks' to be shared between the parents. In the Danish system, mothers have 18 weeks' paid maternity leave and fathers two weeks' paid paternity leave, followed by 32 weeks' paid parental leave. In these countries, parental leave is analogous to the shared part of maternity leave in the UK, rather than parental leave as it is in UK legislation (13 weeks' unpaid leave to be taken before the child's fifth birthday).
72. The move to allow maternity leave and pay to be shared means that the UK will have a system of shared paid parental leave, even if the labelling is different to that of other countries. Many EU countries comply with the EU Directive on parental leave because their family leave is based on parental leave, rather than maternity and paternity leave. In the UK they have been kept separate, and parents are entitled to maternity/paternity leave *and* parental leave. This means

that parents in the UK are actually entitled to more leave in total than those in some other countries.

73. While employers are generally supportive in principle, there has been some concern about the practicalities of transferable leave and pay, and in particular the nature of employers' involvement in the process and the degree of administration involved. The Government has already addressed some concerns which CBI members have raised.
74. Members strongly welcome the Government's acceptance that the period of leave may only be taken in two blocks, one for each parent. This means that when the mother returns to work the father begins his period of leave so that the total period of leave is continuous. If a father decides to return to work early then any remaining leave will be lost. This mirrors the current rules for mothers on maternity leave. Members also welcome the Government's pledge that fathers should take at least two weeks' leave, rather than a few days. This will help employers to plan for a father's absence by arranging cover.
75. In summary, for transferable leave to be acceptable to employers, the CBI strongly believes that:
- mothers should be able to transfer any leave and pay remaining from six months after her maternity leave begins
  - it should be taken in two blocks only, one for each parent, making a single continuous period of leave
  - fathers taking transferred leave should take at least two weeks' leave
  - employers should have sufficient notice of parents' intention to transfer leave – members have suggested that three months is required.

### **Allowing leave and pay to be transferred after six months balances parental choice with employer certainty**

76. The Government is seeking views on the point at which a mother may choose to transfer any of her remaining leave and pay to the father. CBI members believe that mothers should be able to transfer a proportion of their leave and pay **six months** after her maternity leave has started. This option means that parents have the option of sharing the twelve months of leave equally between them should they wish.
77. Members believe that allowing leave to be transferred after six months will provide employers with the most certainty about when a mother transferring leave and pay can be expected to return to work. Likewise for her partner's employer, they will be able to receive sufficient notice of his intention to take transferred leave. Members believe that parents should give three months notice of their intention to transfer leave. If leave and pay could be transferred after six weeks' or three months this would lead to some parents deciding to transfer before the birth of the child. Employers are concerned that in these situations there is a high likelihood that parents would wish to change their minds.

78. In addition, given that maternity leave may start some time before the birth of a child, this option allows mothers to have the maximum opportunity to spend time with their child without being put under pressure to return to work.
79. Allowing leave and pay to be transferred after six months means no change will be required to the rules regarding statutory paternity leave. This leave should still be taken within eight weeks of the birth of the child, in blocks of at least one week and paid at the current flat rate. Fathers should also only be eligible for statutory paternity leave after 26 weeks' service.

**Employers require sufficient months notice of parents' intention to transfer leave and pay**

80. The Government has said that it wishes to make notice periods consistent across the various elements of leave. Members believe that the notice required for women wishing to return to work early should be three months – given this, members believe that the notice required of both parents of their intention to transfer leave should be three months. This allows the mother's employer time to plan her return to work, and discuss any flexible working arrangements she may request. Also it gives the father's employer time to plan his absence and arrange any replacement staff.

**CBI members believe that fathers taking transferred leave and pay should fulfil the same eligibility requirements as mothers receiving SMP**

81. CBI members believe that fathers should have to meet the same requirements that mothers do for SMP – namely that they should have 26 weeks' service before gaining eligibility. Mothers must also have given evidence of the pregnancy in the form of the MAT B1 certificate, although certification of fathers' eligibility is likely to be different. If a mother is not eligible for SMP the employer must provide her with SMP1 form which employee completes and sends to social security office in order to claim maternity allowance which is paid directly by Government. CBI members believe that fathers should also be required to meet these criteria. This would ensure that employers do not have to make payments for very new, or temporary, employees.
82. The Government intends that when leave and pay is transferred to the father the terms and conditions associated with it which would mirror that would apply if the mother had taken it herself. Given that CBI members believe that the Government should keep the distinction between OML and AML, the second six months of leave would be AML, regardless of which parent is taking it. This means that fathers taking transferred leave and pay would not be entitled to return to the same job nor be entitled to all of their terms and conditions of employment. CBI members have indicated that they would not object to fathers being entitled to return to the same job if they took a maximum of 26 weeks' leave and the Government might therefore consider ways to apply different rights of return for mothers and fathers taking AML.
83. The regulations must also be clear about who will be eligible for transferred leave, in terms of their relationship with the mother. If eligibility is to be the same

as for statutory paternity leave, then it will include: a biological father, the mother's partner or a female partner in a same sex couple. It will also apply to adopters who are able to choose which partner will take adoption leave.

**CBI members want certainty and simplicity when determining who is eligible for transferred leave and pay and how much pay they are entitled to**

84. Most employers would be happy for employees to self-certify their plans to take shared leave and pay. In most circumstances employers will know individual employees' family circumstances well enough to know about the birth of a child and will trust their employees to declare their eligibility truthfully. However some employers will want more security and the possibility of fraud should not be underestimated. It is in everyone's interests – employers, employees and Government – that provisions designed to support working families are not abused. Given this, there should be some way of employers verifying eligibility should they wish to.
85. Whatever system of verification is chosen, employers should not be liable for any payments made on the basis of mistakes (by the parents) or fraudulent information and if this situation should occur, employers should be compensated for any payments they have made. We understand that the Government does intend to underwrite any payments made in good faith but members would like a firm commitment from the Government that this is the case.
86. A potential mechanism suggested for verification is that parents sign for eligibility with the mother's employer confirming that the information provided is accurate. The mother would certify that she is eligible for leave and that she wishes to transfer some to her partner starting on a certain date. This might also include details of her eligibility for pay, depending on whether the father's eligibility for pay depends on his or his partner's earnings. If it depends on the mother's earnings then the certificate would have to include whether she is entitled to full flat rate, reduced rate (if she earns less than £106) or is not eligible for SMP (if she earns less than the lower earnings limit). The mother could be responsible for getting this form signed and sent on to her partner's employer or it could be up to her employer to do this. If she did it herself there would be less for employer to do but more opportunity for fraud.
87. Whatever mechanism is decided on, the mother's employer will have to be involved at some point. They are responsible for saying what leave the mother has taken and what pay she is entitled to. It should not be excessively burdensome for employers to pass this information on. There should be no further obligation on the mother's employer than to complete a single form (once the mother had requested to transfer some of her leave) and pass it to the relevant person. The mother's employer has an incentive to manage this process efficiently, since the mother transferring part of her leave means she will return to work sooner.
88. Given that some form of certification is needed, there needs to be sufficient time for all involved to gather the relevant information and pass it on. This is why CBI members would like parents to give three months notice of their intention to

transfer leave and pay. The process might also specify stages within this three month period for certain milestones to be achieved, for example the mother's employer passing the completed form to the relevant party.

**CBI members are concerned about the implications of transferred leave on occupational schemes**

89. The consultation document states that the Government supports occupational maternity schemes and wishes to encourage them. It also states that it does not intend that the transfer of statutory leave and pay will mean that contractual rights must also be increased.
90. The implication of transferred leave and pay on occupational schemes has caused considerable concern among CBI members. Many members have very generous schemes and spend considerable amounts of both time and money supporting new mothers. Many of them also provide benefits for fathers that go beyond the statutory minimum. Employers would like a guarantee from Government that they will not fall foul of the sex discrimination act by offering benefits to mothers during leave which they do not offer to fathers.
91. Employers are also concerned about the presentational implications of this policy. The difficulties of denying fathers on leave the benefits that mothers have may lead employers to adjust their policies. This would undoubtedly lead to a levelling down of provision in order to offer it to all staff, male or female.

**Human Resources Directorate  
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