

Guidance on new rights for surrogate parents

21 NOVEMBER 2014

CATEGORY:
ARTICLE

The current position

Surrogacy is 'the practice whereby one woman carries a child with the intention that the child should be handed over at birth' to one of more persons who intend to bring up the child as their own ('commissioning parents'). Employers may therefore be dealing with employees who are seeking to adopt children via surrogacy arrangements or women (or the partners of women) who put themselves forward to act as surrogate mothers.

The surrogate mother (whether or not genetically related to the baby) is treated as the baby's legal mother unless that state of affairs is altered by the court making either a parental order or an adoption order:

- where at least one of the commissioning parents is genetically related to the baby, whether as a sperm or egg donor the court may make a parental order, under which legal parenthood is transferred to the commissioning parents.
- where neither commissioning parent is genetically related to the baby, they have to apply to court for an adoption order, and a registered adoption agency must be involved in the surrogacy process.

In summary the current entitlements are as follows and are anomalous in that they exclude commissioning parents who are genetically related to the child from any legal right to paid leave:

Surrogate mother – will be entitled to maternity leave and maternity pay in the normal way;

Surrogate's partner – may be entitled to ordinary paternity leave and pay subject to meeting the eligibility requirements;

Commissioning parents with an adoption order – may be entitled to adoption leave and pay subject to meeting the eligibility requirements;

Commissioning parents with a parental order – no current right to maternity, paternity or adoption leave.

What is changing?

The law is changing for babies born on or after 5 April 2015 through a surrogacy arrangement. The regulations introducing the changes are still in draft form. However, they are likely to extend statutory adoption leave and pay and statutory paternity leave and pay to eligible employees who have entered into surrogacy arrangements and intend to apply or have applied for a parental order, thus removing the current anomaly.

Commissioning parents may also choose to opt into the shared parental leave and pay system. This will effectively put surrogate parents in a position akin to adoptive parents.

For employers, one aspect to watch out for is that it is not yet clear what evidence of the surrogacy arrangement will be required when proving eligibility for adoption leave. Commissioning parents may need to provide a copy of the parental order/matching certificate as applicable. However, it is possible that the regime will rely on employees self-certifying as in other areas of parental rights.