This guidance is for information only – it is not legal advice. We recommend that you consult your own legal services to help you decide on your maternity policy.

HMRC guidance on Childcare Vouchers during maternity leave.

In 2008, following the changes to equality legislation, HMRC issued guidance advising that employers may need to fund Childcare Vouchers for employees during maternity leave to avoid discrimination claims.

The issue was tested in March 2016, when the Employment Appeal Tribunal (EAT) overturned the decision that it would be discriminatory to require employees to suspend their Childcare Voucher order during maternity leave.

How was it before?

Prior to the EAT ruling in 2016, it was recommended that employers follow HMRC guidance which stated that “Childcare Vouchers are an employer provided non-cash benefit”.

HMRC stated that “employer provided benefits provided under a contract of employment must continue to be provided whilst an employee is absent from work on maternity leave. This applies even if the employee is getting no pay or only getting SMP”.

The original guidance indicated that employers should provide Childcare Vouchers during periods of Statutory Maternity Pay. As salary sacrifice cannot be applied to SMP, this left employers facing the cost of funding the Childcare Vouchers.

So what’s changed?

In the case of Peninsula Business Services vs Donaldson the EAT found that Childcare Vouchers had been incorrectly assumed to be a non-cash benefit.

They argued that as a salary sacrifice benefit Childcare Vouchers are remuneration, which by law employers are not required to continue to pay.

HMRC has updated its guidance to reflect the result of this landmark case.

The original guidance was published in liaison with the government department sponsoring the relevant legislation at the time. This is now the Department for Business Innovation and Skills (BIS), who accepted the EAT judgement in full.

Reasons to be cautious:

Is the suspension of vouchers during maternity leave already written into the terms of your voucher scheme?

If it isn’t, suspending vouchers could be a breach of the employment contract. Our standard salary sacrifice agreements allow for voucher orders to be overridden whenever there is insufficient pay available for sacrifice.

Are vouchers provided as a benefit without salary sacrifice?

If Childcare Vouchers are provided on top of an employee’s salary (addition to salary), they must continue during maternity leave as they would be classed as a ‘benefit’.

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