



CAPITAL LAW

# Employment Law Update For The Rubicon Network, July 2015

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Round up of 2014

What to look out for in  
2015

# Round up of 2014

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1. ACAS  
compulsory  
early  
conciliation  
and new fee  
regime

2. Changes  
to the right to  
request  
flexible  
working

3. Case Law  
Update:  
Holiday Pay  
and others

4. Changes  
to TUPE

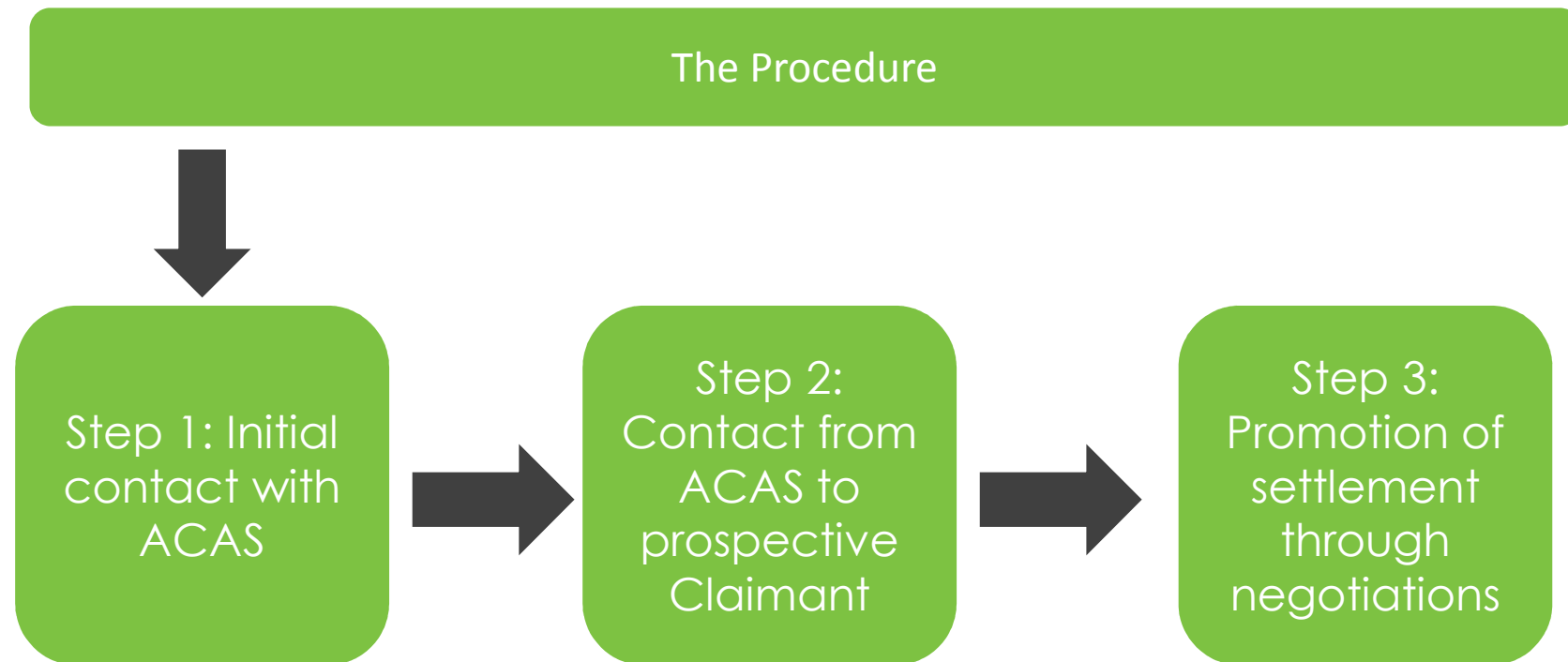
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# 1. ACAS compulsory early conciliation and new fee regime

# ACAS compulsory early conciliation and new fee regime

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- 6 May 2014



# ACAS compulsory early conciliation and new fee regime

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- The two potential outcomes of Early Conciliation:



## Settlement

- ACAS drafts COT3 which sets out the agreed terms
- Both parties will sign this, after which the matter is settled



## No settlement

- ACAS issues Early Conciliation certificate
- Claim must be lodged within 1 month

# ACAS compulsory early conciliation and new fee regime

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- Amount of issue and hearing fees differ depending on what type the claim is.
  - Type A: issue fee = £160, hearing fee = £230
  - Type B: issue fee = £250, hearing fee = £950

Common type A claims	Common type B claims
Unlawful deductions from wages	Unfair dismissal
Breach of contract	Discrimination
TUPE	Whistleblowing
Statutory redundancy	Equal pay

## ACAS compulsory early conciliation and new fee regime

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- Appeals to the EAT now cost the appellant a £400 issue fee and £1,200 hearing fee
- If the parties agree to judicial mediation a fee of £600 will be due from the Respondent.



# ACAS compulsory early conciliation and **new fee regime**

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## ***What has the effect been?***

- Period October-December 2013:
  - Total claims fell by 79%
  - Sex discrimination claims fell by 83% in the same period
  - Equal pay claims fell by 80%

# ACAS compulsory early conciliation and new fee regime

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- ACAS recently published figures for the first 12 months' of early conciliation:
- Of the Early Conciliation notifications received between April 2014 and April 2015:-
  - 63% did not proceed to a tribunal claim;
  - a further 15% resulted in a formal COT3 settlement; and,
  - 22% progressed to a tribunal claim
- of the 22% in which a claim was issued, more than half (51%) subsequently settled by way of Acas COT3.

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## 2. Changes to the right to request flexible working

# Changes to the right to request flexible working

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- 30 June 2014
- Any employee with at least 26 weeks' continuous employment entitled to make a request for flexible working for any reason.

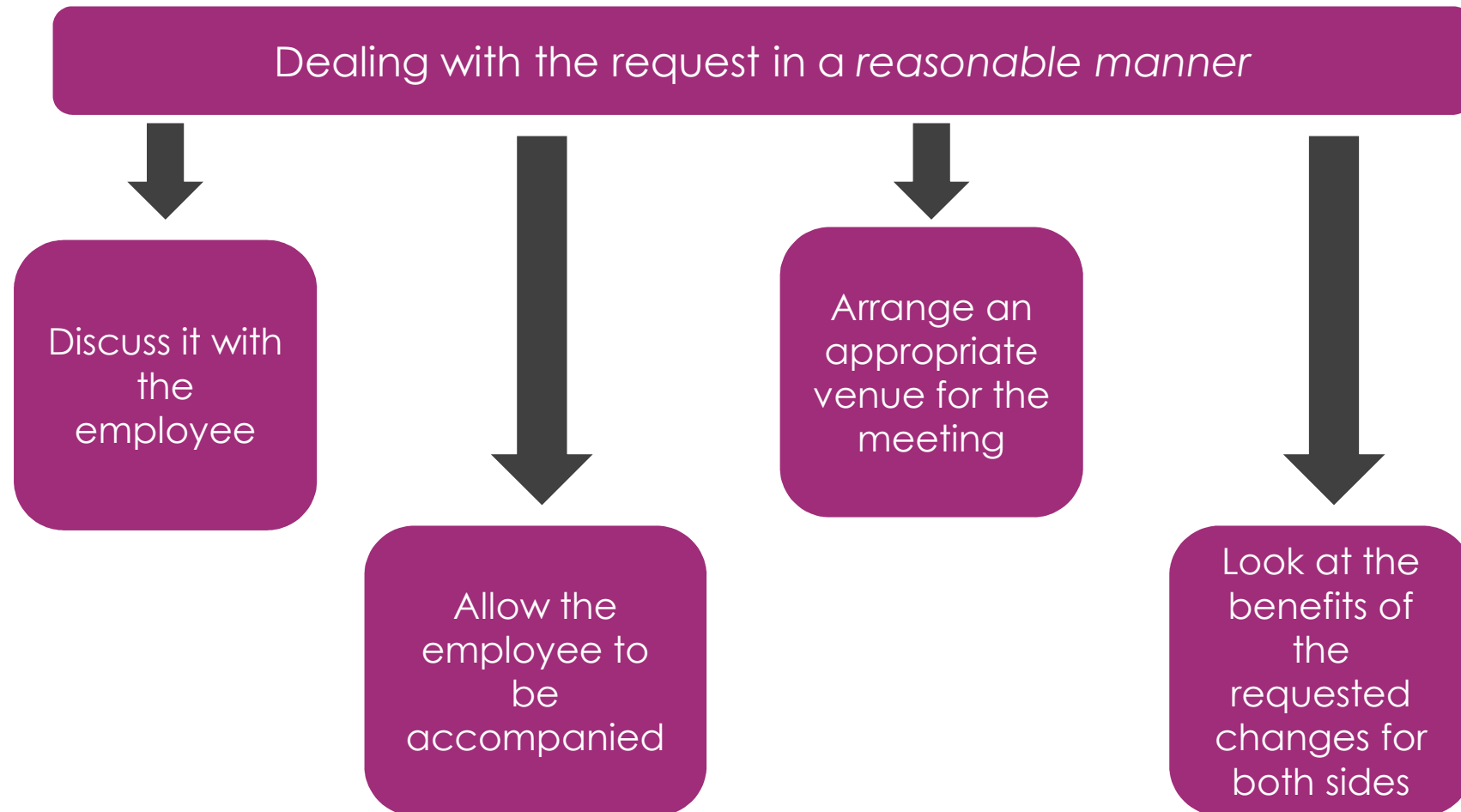
Employee triggers procedure by making written request

Employer has 3 month decision period (can be extended by agreement)

Employer must deal with application in a *reasonable manner*

# Changes to the right to request flexible working

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# Changes to the right to request flexible working

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- **Grounds to refuse the request:**
  1. Burden of additional costs
  2. Detrimental effect on ability to meet customer demand
  3. Inability to reorganise work among staff
  4. Inability to recruit additional staff
  5. Detrimental impact on quality
  6. Detrimental impact on performance
  7. Insufficiency of work during the periods the employee proposes to work; or
  8. Planned structural changes

# Changes to the right to request flexible working

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## ***A couple of things you need to be aware of:***

- informal requests for flexible working
- statutory protections
- example.



# Changes to the right to request flexible working

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- Flexible working policies

- ✓ Explain how to make the request
- ✓ Statement outlining consideration of the request
- ✓ State who can accompany employee to meeting
- ✓ Explain arrangements for appeals
- ✓ Time limits for dealing with request





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## 3. Case Law update: Holiday pay and others

# Case update: Holiday pay

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- *Article 7 Working Time Directive*



- Provides Member States must ensure workers have right to at least 4 weeks' annual leave

- Does not specify how statutory holiday pay should be calculated

- Theoretically left to national legislation



# Case update: Holiday pay

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- *Williams v British Airways*



“Normal  
remuneration”

“Intrinsically  
linked”

# Case update: Holiday pay

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- ECJ's decision in *Lock v British Gas Trading & others*
  - Under Article 7 workers must receive their “normal remuneration” during annual leave
  - Reduction in payments during annual leave likely to deter
  - Mr Lock's commission payments directly and intrinsically linked to performance of tasks.



# Case update: Holiday pay

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## ***How should the amount be calculated?***

- *“On the basis of rules and criteria set out by ECJ case law and in light of the objective pursued by the WTD.”*
- *“Over a reference period which is considered to be representative under national law.”*
- WTR = 12 weeks



# Case update: Holiday pay

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- Key points from “overtime” cases:
  1. Workers entitled to be paid sum of money to reflect “normal” non-guaranteed overtime as part of their annual leave payments
  2. The above only applies to the basic 4 weeks’ leave granted by WTD
  3. Claims out of time if there has been a break of more than 3 months between successive underpayments

# Case update: Holiday pay

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4. Travel time payments should be reflected
  5. Commission not addressed
  6. Permission given to appeal all points to the COA.
- Dealing with this in the meantime



# Case update: Disability

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## **Karsten Kaltoft vs Kommunernes**

- No general principle of EU Law prohibiting discrimination on grounds of obesity
- But obesity may fall within the definition of disability
- Position remains as held by EAT in **Walker vs Sita Information Networking Computing Limited**
- Obesity is not an impairment of itself but effects of obesity may result in Claimant being disabled.
- Practical issues?



# Case update: Disability

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## **First Group PLC vs Doug Paulley**

Bus company did not have to require passenger occupying wheelchair space to give way to a disabled passenger.

- Policy of “first come first served” did place wheelchair users at a substantial disadvantage (compared with non wheelchair users)
- However, duty to make reasonable adjustments did not extend to obliging passengers to vacate the wheelchair space whenever it was wanted by a wheelchair user

# Case update: Dismissal

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## **Game Retail Limited vs Laws**

EAT overturned finding of unfair dismissal based upon employee posting offensive tweets.

- Use of Twitter not entirely private given that employee was followed by 65 of employer's stores
- EAT reconfirmed that “range of reasonable responses” test applies
- Appears to suggest that Twitter has more public nature than Facebook

# Case Update : Dismissal

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**Game Retail Limited vs Laws** can be contrasted with approach adopted in **Smith v Trafford Housing Trust...**

- Claimant dismissed after using personal Facebook page to describe gay marriage as 'equality too far'.
- Claimant demoted because Employers were of the opinion this breached their code of conduct.
- Claimant had restricted privacy settings on his profile (unlike Laws) therefore his page was not generally accessible and thus the court held that a reasonable person would understand the views to be Claimant's own and not those of his employers.

# Case update: Redundancy Consultation

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## **USDAW vs Ethel Austin Limited (in administration) and Others**

Was EAT right to disapply British Law with the result that the 20 employee trigger for collective redundancy consultation applies per employer not per establishment?

Answer - No

# Case Update : Social Media

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## **Mazur v Crediton Dairy Limited**

- Claimant took 'selfie' in an Osama Bin Laden facemask and posted picture on his Facebook profile. The image included a proportion of the employers logo.
- Claimant was dismissed for damaging his employer's reputation.
- ET held dismissal was unfair and disproportionate however reduced any compensatory award by 60% due to the fact the Claimant had contributed to his own downfall.

# Case update : Social Media

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- **Lisa McCance**

- Openly tweeted about her boss using hashtags such as '#sackthebitch', and '#cow'
- Dissented over disciplinary proceedings tweeting '#couldnt'tgiveaf\*\*k'
- Eventually dismissed and banned from working with children

- **Rayhan Qadar**

- Tweeted "think I just hit a cyclist. But I am late for work so I had to drive off LOL"
- Employers dismissed him within hours and found tweet to be totally unacceptable rather than a joke in bad taste as argued by Mr Qadar.

# Case Update : Agency Regulations

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## **Moran v Ideal Cleaning Services Ltd and Celanese Acetate Ltd**

- Claimants were among a group of cleaners who worked for the Respondents for periods between 6- 25 years. Their engagements were open ended
- Made redundant due to a reduction in cleaning budgets
- Claimants brought claim arguing their rights under the AWR 2010 had been breached
- The ET, and later the EAT, dismissed the claim as they interpreted the AWR as being only applicable to 'temporary' agency workers. The open ended nature fell outside the definition of 'agency workers'.

# Case Update : Agency

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## **Smith v Carillion**

- Claimant engaged by respondent via an agency.
- Claimant brought claims of detrimental treatment on grounds of trade union activities and as a health and safety representative.
- ET, and later EAT held claimant could not bring claims as he was not employed by Respondents.
- No contract could be implied between Claimant and end-users. A Contract could only be implied if it was necessary.
- If facts could be equally explicable without a contract, it was not permissible to imply one.



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# 6. Changes to TUPE

# Changes to TUPE

Previous position	Change	Effect
Duty to inform and consult under TUPE and collective redundancies	Consultation which begins before the transfer can count	<ul style="list-style-type: none"><li>•Reduced pressure on Transferor</li><li>•Reduced consultation period</li></ul>
Employee liability information to be provided 14 days before transfer	Employee liability information to be provided 28 days before transfer	<ul style="list-style-type: none"><li>•Allows transferees to receive information earlier in the process and plan ahead</li></ul>

# Changes to TUPE

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Previous position	Change	Effect
Change in location could result in an automatic unfair dismissal claim	Change in location of workforce included within scope of ETO	•Prevents genuine place of work redundancies from being unfair
No changes could be made to terms under collective agreements	Transferees able to make changes to terms derived from collective agreements one year after the transfer	•More flexibility to vary transferring employees' terms

# What to look out for in 2015

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1. Shared parental leave

2. Changes to adoption leave

3. Childcare Payments Bill

4. Small Business, Enterprise and Employment Bill

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# 1. Shared parental leave

# Shared parental leave

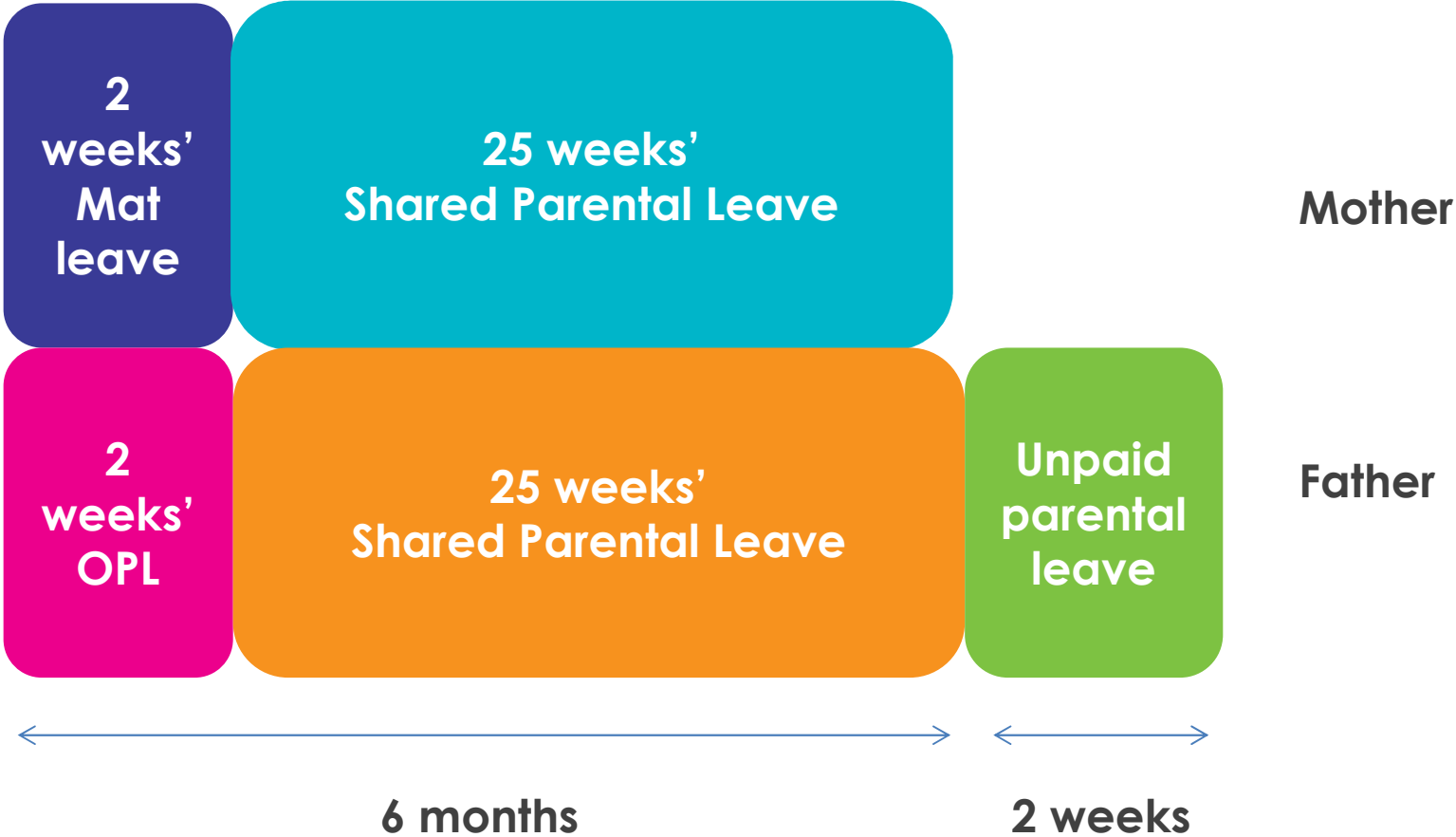
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## ***What is being introduced?***

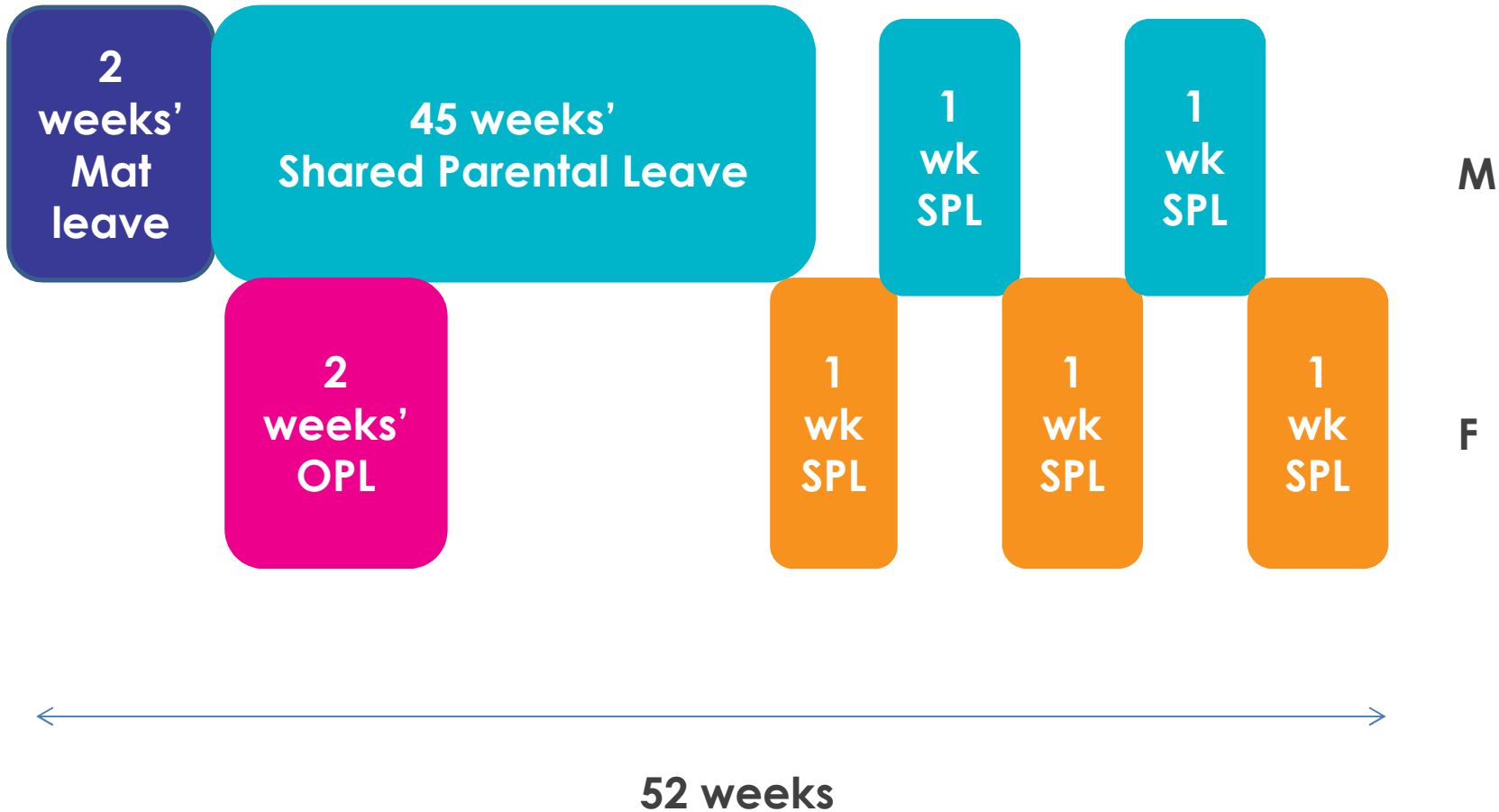
- “Opt-in” system whereby 50 weeks worth of leave is shared between 2
- Share 37 weeks worth of pay between 2
- Mother must end her maternity leave
- Leave can be taken together
- Continuous or discontinuous blocks of leave (no less than 1 week)
- Notification and eligibility requirements

# Shared parental leave

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# Shared parental leave





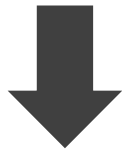
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## 2. Changes to adoption leave

# Adoption leave

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## What will change



**Time off** for adoption appointments



Can enter **Shared Parental Leave** system



**Qualifying period** – to be a day 1 right



**Pay** aligned with maternity leave

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# 3. Small Business, Enterprise and Employment Bill

# Small Business, Enterprise and Employment Bill

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Financial penalties

Zero hours contracts

Key provisions

Postponements of ET hearing

Annual reports of protected disclosures

# Small Business, Enterprise and Employment Bill

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## ***Zero hours contracts***

- Exclusivity clauses in zero hours contracts unenforceable.
- Definition of “zero hours workers” which includes:
  - Employees or other workers who work under zero hours contracts;
  - Individuals who work under “non-contractual zero hours arrangements”; and
  - Individuals who work under worker’s contracts of a kind specified by regulations having regard to the income, rate of pay or working hours of such workers.

# Small Business, Enterprise and Employment Bill

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## ***What does this mean for you?***

- Review any zero hours contracts which affect your company
- Avoid the use of exclusivity clauses

# Small Business, Enterprise and Employment Bill

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- Currently going through legislative process
- Employment provision contained in Part II of the Bill
- Commencement orders needed
- Dissolution of Parliament = 30 March 2015
- New Conservative Government

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Thank you  
Questions?



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