

as a result of an early return would be construed as a payment in lieu of leave has yet to be decided.

No offence has been created in respect of a contravention of this section.

[15C.03] ‘Maternity leave’

Because the term ‘maternity leave’ is defined in s 2 by reference to maternity leave granted under the Ordinance, it does not include maternity leave in excess of the statutory minimum granted under an employee’s contract of employment.

[15C.04] ‘Maternity leave pay’

Because the term ‘maternity leave pay’ is defined in s 2 by reference to maternity leave pay payable under the Ordinance, it does not include maternity leave pay in excess of the statutory minimum granted under an employee’s contract of employment. See however, s 14(1).

PART IIIA

PATERNITY LEAVE

(Part IIIA added 21 of 2014 s 6)

15D. Interpretation of Part IIIA

In this Part—

child (嬰兒) means a new-born child.

[15D.01]

For the purposes of Part IIIA of this Ordinance, a ‘child’ means a new-born child (as opposed to s 2 which defines a ‘child’ as any person under the age of 15 years) and is defined by reference to a child born on or after the date on which the Employment (Amendment) Ordinance 2014 came into operation (27 February 2015) and the term does not apply to a miscarriage. Multiple births in one pregnancy are taken to be one confinement. See s 15E(3)–(5).

15E. Entitlement to paternity leave

- (1) A male employee is entitled to paternity leave in respect of the birth of a child if—
- (a) he is the child’s father;
 - (b) he has been employed under a continuous contract immediately before taking leave; and

- (c) he has complied with all the requirements in section 15F.
- (2) For subsection (1), the employee—
- (a) subject to section 15G, is entitled to take leave during the period specified in subsection (3) on the date or dates notified to the employer under section 15F(1); and
- (b) is entitled to take leave for not more than—
- (i) for a child born on or after 27 February 2015 but before the commencement date* of the Employment (Amendment) (No 3) Ordinance 2018 (30 of 2018)—3 days; or
- (ii) for a child born on or after that commencement date*—5 days, whether consecutive or not, for each confinement.
- (3) For subsection (2)(a), the period—
- (a) begins 4 weeks before the expected date of the delivery of the child; and
- (b) ends 10 weeks beginning on the actual date of the delivery of the child.
- (4) For subsection (2)(b), multiple births in one pregnancy are taken to be one confinement.
- (5) Subsection (1) does not apply in relation to—
- (a) a miscarriage; or
- (b) a child born before 27 February 2015.

(Replaced 30 of 2018 s 3)

(Replaced 30 of 2018 s 3)

Editorial Note:

*Commencement date: 18 January 2019.

[15E.01] Definitions

For, ‘confinement’, ‘employee’, ‘employer’, ‘paternity leave’, ‘paternity leave pay’, ‘miscarriage’, see s 2; for ‘continuous contract’, see s 3 and the First Schedule.

[15E.02] s 15E(1)

A male employee will only be entitled to take paternity leave if he is the child’s father, has been employed under a continuous contract immediately before taking

leave and has complied with the notification requirements set out in s 15I. Whether a contract of employment is a continuous contract must be considered by reference to s 3 and the First Schedule.

[15E.03] s 15E(2)–(4)

An employee is entitled to take 3 days' paternity leave on consecutive days or separate days in the period beginning 4 weeks before the expected date of the delivery of the child and ending 10 weeks after the actual date of the delivery of the child if his child is born on or after 27 February but before 18 January 2019. Multiple births in one pregnancy are taken to be one confinement.

Pursuant to the Employment (Amendment) (No 3) Ordinance 2018 which came into effect on 18 January 2019, a male employee is entitled to 5 days' paternity leave for each confinement of his spouse or partner if his child is born on or after 18 January 2019 (ie the commencement date).

[15E.04] s 15E(5)

The entitlement to paternity leave only applies to a male employee if the child is born on or after the date on which the Employment (Amendment) Ordinance 2014 comes into force (27 February 2015) and does not apply to cases of miscarriage.

[15E.05] 'Contract of employment'

By virtue of s 2, 'contract of employment' is defined as meaning any agreement, whether in writing or oral, express or implied, whereby an employer agrees to employ an individual as an employee and the employee agrees to serve the employer as an employee. The term is also defined to include a contract of apprenticeship. The term 'employment contract' does not include any contract for personal services that are provided by an independent contractor on behalf of an employer. For cases and commentary, see paras [2.10], [2.14] and [2.15].

[15E.06] 'Employee'

Although s 4 defines 'employee' explicitly by reference to employees currently engaged under a contract of employment, the provisions of the Ordinance also include prospective and former employees (with a limited number of exceptions; see ss 21A and 21C).

For cases and commentary, see paras [2.10], [2.14] and [2.15].

[15E.07] ‘Employer’

The term ‘employer’ covers both the actual employer of an employee as well as authorised persons acting on behalf of such an employer. In this regard, human resources and other staff acting in a management capacity are regarded as employers for the purposes of the Employment Ordinance.

As the term ‘employer’ is defined by reference to any person, special regard should be made to s 3 of the Interpretation and General Clauses Ordinance (Cap 1), which defines a person to include corporate and unincorporated bodies.

For cases and commentary, see paras [2.10], [2.14] and [2.15].

[15E.08] ‘Paternity leave’

Because the term ‘paternity leave’ is defined in s 2 by reference to paternity leave granted under the Employment Ordinance, it does not include paternity leave in excess of the statutory minimum granted under an employee’s contract of employment.

[15E.09] ‘Paternity leave pay’

Because the term ‘paternity leave pay’ is defined in s 2 by reference to paternity leave pay payable under the Employment Ordinance, it does not include paternity leave pay in excess of the statutory minimum granted under an employee’s contract of employment.

[15E.10] Paternity leave entitlement

A male employee who is the father of a child born on or after 27 February 2015 and who has been employed by the same employer under a continuous contract is entitled to statutory paternity leave. An employee who works for a minimum of 18 hours for not less than four weeks is regarded as being in continuous employment.

Paternity leave is awardable under the Employment Ordinance regardless of whether an employee is legally married. The provisions of the Employment Ordinance, which regulate paternity entitlements, do not apply to contractual paternity provisions which exceed the statutory minimum.
