Childcare vouchers during maternity leave
- a guide for employers

Call us free on 0800 612 4395
www.kiddivouchers.com
Introduction

The legislation which protects women during maternity leave was amended in 2008. This change prompted HMRC to issue guidance on the provision of childcare vouchers during maternity leave.

HMRC believes that, in certain circumstances, employers should provide free childcare vouchers to employees who are on maternity leave.

This leaflet is for information only - it is not legal advice. We recommend that you consult your own legal advisors to help you decide on your maternity policy.

HMRC’s guidance

Most childcare voucher schemes operate by “salary sacrifice”, which means employees receive childcare vouchers in exchange for a reduction in their pay.

However, employees who are on maternity leave may not be receiving enough pay to fund their childcare vouchers through salary sacrifice.

The question is: if an employee on maternity leave has insufficient pay to fund their vouchers, should the vouchers be provided at their employer’s expense?

What does HMRC’s guidance say?

HMRC is advising that employees who belong to a childcare voucher scheme are entitled to continue receiving their childcare vouchers throughout both Ordinary Maternity Leave (the first 26 weeks of leave) and Additional Maternity Leave (the following 26 weeks).

Employees are not allowed to sacrifice their Statutory Maternity Pay (“SMP”) in order to fund their childcare vouchers. However, they are allowed to sacrifice any non-statutory maternity pay.

If an employee has insufficient non-statutory pay to cover their voucher order, HMRC believes their employer should make up the balance. If an employee is not receiving any non-statutory maternity pay, then HMRC believes their employer should fund their full voucher order.

What does the law say?

There are two sets of legislation which protect women on maternity leave:

Firstly, the Employment Rights Act and the Maternity and Parental Leave Regulations define how a woman’s contractual rights continue to apply during maternity leave. In particular, this legislation governs how women retain their entitlement to contractual “non-cash” benefits, such as a company car or private medical insurance. It also prevents employers from “subjecting an employee to a detriment” as a result of pregnancy or maternity.

Secondly, the Equality Act prevents employers from treating women less favourably as a result of them being pregnant or on maternity leave.

We’ll look at both of these in more detail in a moment, but first let’s look at how the law has changed.
The legal background

How the legislation changed

Both the Sex Discrimination Act and the Maternity and Parental Leave Regulations were amended in 2008, with the changes effective for women who expected to give birth on or after 5th October 2008.

As a result, the protection which used to apply to women during Ordinary Maternity Leave now also applies during Additional Maternity Leave.

In 2010, the Sex Discrimination Act, along with other Acts of Parliament prohibiting discrimination, was replaced by the Equality Act 2010. In respect of the rights of women on maternity leave, the Equality Act largely replicates the Sex Discrimination Act. We have been advised that it is unlikely that this replacement of the Sex Discrimination Act will have any bearing on the provision of childcare vouchers during maternity leave.

Impact of the 2008 amendments

HMRC is advising that, as a result of the 2008 amendments, employers may be obliged to provide childcare vouchers during both Ordinary and Additional Maternity Leave. As the 2008 amendments simply extended protection from Ordinary Maternity Leave to Additional Maternity Leave, HMRC’s underlying assumption is that employers should already have been funding childcare vouchers during Ordinary Maternity Leave.

However, in practice, employers were not historically in the habit of funding childcare vouchers during any period of maternity leave, so HMRC’s guidance suggested a significant change of approach.

Are employers obliged to follow HMRC’s guidance?

HMRC has no direct remit to interpret employment law – in fact their guidance advises employers to seek independent legal advice. However, if HMRC is correct, employers who fail to follow their guidance may be at risk of a sex discrimination claim.
Understanding the law: The Employment Rights Act

The Employment Rights Act and the Maternity and Parental Leave Regulations require employers to preserve their employees’ terms and conditions of employment during maternity leave.

Salary sacrifice agreements are covered by this legislation, because they form part of an employee’s terms and conditions.

HMRC’s guidance and the Employment Rights Act

HMRC’s guidance considers the effect of the ERA on a very simple salary sacrifice arrangement. This arrangement consists of an employee agreeing to a reduction in their salary in exchange for an unconditional entitlement to their chosen amount of childcare vouchers.

With this type of arrangement, the Employment Rights Act preserves a woman’s unconditional entitlement to childcare vouchers when she goes on maternity leave. If she has insufficient pay to fund her own vouchers, then the vouchers must be provided at her employer’s expense.

So, HMRC’s guidance is based on the employee having an unconditional right to receive her vouchers ... but not all salary sacrifice agreements take this form. Now let’s look at what happens when employers adopt a more sophisticated salary sacrifice agreement.

Applying the Employment Rights Act to KiddiVouchers

Our standard salary sacrifice agreements differ from HMRC’s simple example, by explicitly linking an employee’s entitlement to vouchers with the amount of pay they sacrifice. This means that our salary sacrifice agreements don’t give employees an unconditional right to receive their childcare vouchers.

Instead, if an employee has insufficient pay to fund their vouchers, the salary sacrifice agreement gives their employer the right to override their voucher order.

The Employment Rights Act preserves the whole salary sacrifice agreement during maternity leave, including the employer’s right to override a voucher order. In other words, employers can probably exercise this right during maternity leave without contravening the requirement to preserve the employee’s terms and conditions of employment.

In addition, we have been advised that the override is not likely to be viewed as “subjecting the employee to a detriment,” since it is the lack of salary rather than the maternity leave which is the underlying reason for the override.

So if the Employment Rights Act doesn’t require our clients to provide employer-funded vouchers during maternity leave, we now just need to check what the Equality Act says about the issue.

The Equality Act

The Equality Act protects women against discrimination in their terms and conditions of employment and in the way in which they are given access to employee benefits.

There is a risk that a salary sacrifice agreement which allows employers to override a voucher order during maternity leave may be seen as discriminatory.

Two types of discrimination

The Equality Act is wide-ranging, protecting employees from both deliberate and accidental discrimination. The Act covers the following two categories of discrimination:

Direct discrimination which occurs if an employer discriminates against an employee because of a ‘protected characteristic’, including gender, pregnancy and maternity.

Indirect discrimination which occurs if an employer applies a policy equally to all of their employees, but the policy places female employees at a particular disadvantage when compared to male employees.

Is sex discrimination always unlawful?

Perhaps surprisingly, sex discrimination is not always unlawful. In other words, in some circumstances an employee might not win a case even if they can prove they have been discriminated against.

There are two key cases where discrimination is not unlawful:

1. The Equality Act does not prohibit employers from discriminating against women on maternity leave in respect of terms and conditions which relate to pay (for example, in order to prevent employees from claiming a right to their normal pay whilst on maternity leave).

2. Indirect discrimination is not unlawful if the employer can demonstrate that they have a legitimate aim and that the discrimination is a proportionate means of achieving their aim.

We’ll look at these exemptions in more detail in a moment, as they are fundamental to the question of whether employers should apply a voucher override during maternity leave.

First, let’s take another look at what HMRC says about sex discrimination.
Did HMRC’s guidance properly consider the Sex Discrimination Act?

HMRC says that employers who override an employee’s voucher order during maternity leave may face a sex discrimination claim.

As we’ve seen, if there really is a risk of a sex discrimination claim, then this would apply to all employees on maternity leave, not just to those who were already receiving childcare vouchers.

However, HMRC’s guidance only considers the rights of employees who were receiving childcare vouchers before their maternity leave – it is silent on whether employers should provide free vouchers to first-time mums.

HMRC has separately advised voucher providers that:

“A requirement to continue the provision of childcare vouchers does not arise where maternity leave is taken in respect of a first child and there is no pre-existing agreement to provide childcare vouchers at the time the maternity leave commences.”

This suggests that HMRC’s view was based on the Employment Rights Act rather than the Sex Discrimination Act.

Do we still need to consider the risk of a sex discrimination claim?

Even though HMRC’s guidance does not appear to have fully considered the Sex Discrimination Act, we still need to consider how an employment tribunal would react to a sex discrimination claim (which would now be brought under the Equality Act rather than the Sex Discrimination Act).

It is possible that HMRC’s failure to extend their policy to first-time mums is an oversight. In fact, since publishing the guidance, HMRC has issued the following caveat:

“We are unable to advise on whether an employee who is prevented from joining the scheme during maternity leave would have grounds to proceed with a discrimination case. We strongly advise employers to obtain advice in cases where they are seeking to restrict access to non-cash benefits to women on maternity leave.”

So now let’s look at whether applying a voucher override during maternity leave really does expose employers to a sex discrimination claim ...
A closer look at sex discrimination

If applying a voucher override during maternity leave falls within the scope of the Equality Act, then we need to understand what kind of discrimination it could constitute. Remember, indirect discrimination is not necessarily unlawful.

The difference between direct and indirect discrimination can be quite subtle. Here are some examples:

**An example of direct discrimination**

Sally has never received childcare vouchers from her employer, but during maternity leave she applies to join the childcare voucher scheme. Sally is receiving occupational maternity pay as well as SMP, so she could fund her own vouchers through salary sacrifice.

However, Sally’s employer is concerned that when her pay falls to SMP later in her maternity leave, they may be required to provide employer-funded childcare vouchers. To avoid this, they decide to implement a policy of not allowing any employees to register for childcare vouchers while they are on maternity leave.

In this example, Sally could claim she is being directly discriminated against as a result of being on maternity leave.

**An example of indirect discrimination**

Helen’s employer overrides a childcare voucher order whenever an employee has insufficient non-statutory pay to fund their vouchers. This policy applies to employees who are on sick leave or maternity leave, and also to those who earn the National Minimum Wage.

Although both male and female employees could face an override, clearly only female employees go on maternity leave. This means that overall females are more likely to have an override applied to their voucher order.

When Helen goes on maternity leave, she has her voucher order overridden. The override is applied because she has insufficient pay to fund her vouchers – not because she is female or because she is on maternity leave. However, since Helen is more likely than her male colleague to have a voucher override applied, she could claim to be a victim of indirect discrimination.

The question of whether this type of indirect discrimination is unlawful can ultimately only be decided by a tribunal. However, we’ve been advised that employers would have a reasonable chance of defending this policy.

The first line of defence...

Discrimination in respect of terms and conditions which relate to “pay” on maternity leave is excluded from the Equality Act.

When childcare vouchers are provided through salary sacrifice, they may fall within this exemption.

**Are childcare vouchers exempt?**

Under the Equality Act, employers are not prohibited from discriminating against women on maternity leave in respect of terms and conditions which relate to pay.

Pay is quite narrowly defined and childcare vouchers are not regarded as pay. However, rather obviously, salary is considered to be pay.

So, could the terms and conditions which allow an employer to override a voucher order be said to relate to salary?

Let’s see:

An employee enters into a salary sacrifice agreement, through which they agree to sacrifice part of their salary in exchange for childcare vouchers. It is a condition of the agreement that the employer may override the employee’s voucher order if they have insufficient salary to sacrifice.

Could this potentially discriminatory override be said to relate to salary? In the end, only a tribunal can decide.

If the override is considered to be sufficiently closely related to salary, then it will be exempt from a sex discrimination claim.

**Direct discrimination**

We have been advised that it is unlikely that the override clause in our standard salary sacrifice agreements would be viewed as being direct discrimination.

**Two possible defences have been suggested:**

1) The reason for the override is not that the employee is on maternity leave, but rather that she has insufficient salary available to sacrifice. Therefore the override is not directly related to the maternity leave.

2) In applying the override, the employer is not treating the employee on maternity leave unfavourably compared to any other employee who has insufficient salary to sacrifice. Indeed, if they were not to apply the override, then they would be treating the employee on maternity leave more favourably than other employees, which is specifically not a requirement of the law.
If a tribunal decides that childcare vouchers are not sufficiently related to salary to be exempt from sex discrimination claims, there is another defence open to employers:

Indirect discrimination is not unlawful if (a) an employer has a legitimate aim and (b) their actions are a proportionate means of achieving their aim.

A legitimate aim ...

It helps to go back to basics and ask “What is the point of running a childcare voucher scheme?”

When childcare vouchers are provided through salary sacrifice, the primary purpose is to allow employees to take advantage of tax and National Insurance savings. If these savings didn't exist, parents would be unlikely to join the scheme.

The benefits for employers, such as employer NI savings and advantages in staff retention, are all dependent on employees being attracted by the savings which childcare vouchers provide.

Clearly, employees can only benefit from the tax and NI savings if they have salary available to sacrifice. By making scheme membership conditional on employees having sufficient salary to sacrifice, employers can ensure that the scheme only operates where the benefit of the tax and NI savings is available. This is arguably a legitimate aim.

A proportionate response...

Is it a proportionate response to override an employee's voucher order during maternity leave if the employee has insufficient salary available to sacrifice? Let's see:

Firstly, the override avoids the employer having to fund a benefit during maternity leave which they would not fund at any other time. Applying an override avoids a woman being better off on maternity leave than they would have been if they had been at work.

Secondly, the override avoids inequalities arising between different groups of employees. For example, it avoids employees on long-term sick leave from feeling disadvantaged relative to those on maternity leave.

And finally, the policy of applying an override avoids a host of practical issues, such as how to prevent employees from manipulating the system.

A good defence?

We've been advised that employers have a reasonable chance of successfully contesting a sex discrimination claim using these arguments. However, the arguments remain untested and tribunals are unpredictable.
Options for employers

Is it necessary to provide employer-funded vouchers during maternity leave?

Unfortunately this remains a grey area and ultimately only a tribunal can give a definitive answer. If a sex discrimination claim is successful, the cost to the employer could be far higher than the cost of providing ‘free’ childcare vouchers during maternity leave. The ‘right’ approach will vary between employers, depending on factors such as scheme demographics, attitude to risk and ability to contest a sex discrimination claim.

**Option 1 – Continue to apply voucher overrides**

Employers who are willing to accept the risk of a sex discrimination claim can continue to override voucher orders whenever an employee has insufficient salary to sacrifice. If an employee claims an entitlement to free vouchers, employers may wish to highlight (a) the protection in our salary sacrifice agreements and (b) the uncertainty about whether a sex discrimination claim would succeed.

**Option 2 – Provide a limited amount of employer-funded vouchers**

When a basic-rate taxpayer orders £243pm of childcare vouchers, they typically enjoy tax and NI savings of around £75pm. If they are unable to take part in the scheme during maternity leave, then it is this £75 that they are losing out on.

Rather than providing £243pm of free vouchers, the employer could just provide compensation for the ‘lost’ £75. Since childcare vouchers are free of tax and NI, simply providing £75pm of free vouchers protects the employee from any financial loss.

Employers should be able to present this as a generous policy which protects employees on maternity leave. For some employees, the £75pm saving generated by childcare vouchers may have been a factor in deciding which childcare provider to use. By preserving this saving, employers are arguably preserving that employee’s access to childcare.

However, if employees believe they are entitled to their original voucher amount, then they may still pursue a sex discrimination claim. Employers would have a stronger defence than with Option 1, but the outcome is still unpredictable.

**Option 3 – Provide employer-funded vouchers of up to £243pm**

The **safest** option is to provide employer-funded childcare vouchers whenever an employee has insufficient salary to sacrifice as a result of being on maternity leave. For maximum protection, this policy should be applied equally to existing scheme members and to employees who wish to join the scheme during their maternity leave.

We recommend that you carefully consider these options and decide which is most appropriate for your organisation. However, before you make up your mind, read on to find out how we can help you manage your costs.
Minimising your risk

We recognise that the cost of providing employer-funded childcare vouchers during maternity leave (or the risk of not doing so) is an unwelcome burden for many employers. However, there are steps which you can take to minimise both your costs and your exposure to sex discrimination claims.

Scheme demographics

Many childcare voucher schemes experience high take-up from mothers of young children, with lower take-up amongst fathers and parents of school-age children. Tactical marketing can ensure take-up in these categories better reflects your workforce demographics, while simultaneously reducing the proportion of your scheme members who are likely to require employer-funded vouchers.

We offer a wide range of marketing materials, designed for a variety of audiences. Examples include traditional poster or payslip campaigns and electronic marketing via email or intranet. We can also provide bespoke editorial content (such as case studies for a staff newsletter or global email) which can attract a broader cross-section of parents.

Longer salary sacrifice agreements

Traditionally parents used to sign up for childcare vouchers for a year or more, but it’s increasingly common for employers to allow parents to sign up for six months, a quarter or even a month at a time. Even where parents are tied in, most employers allow them to change their voucher order in the event of a significant lifestyle change.

“Lifestyle changes” vary between employers, depending on how flexible the employer wants to be. Most employers include pregnancy, going on maternity leave and returning to work after maternity leave in their list of allowable lifestyle changes.

Employers are understandably concerned that employees could alter their voucher order purely in order to maximise their entitlement to employer-funded vouchers. For example, an existing scheme member who normally orders £100pm in childcare vouchers could increase their voucher order to £243pm just before maternity leave.

Clearly a scheme which allows employees to opt in and out at will is most vulnerable to manipulation. For this reason, we recommend moving to annual or even open-ended salary sacrifice agreements, rather than using monthly, quarterly or half-yearly agreements.

The best of both worlds ... flexibility without risk

Adopting longer salary sacrifice agreements should prevent existing scheme members from artificially increasing their voucher order before maternity leave.

It should also deter employees on a first maternity leave from seeking an artificially high amount of employer-funded vouchers, since they would be committed to funding the same amount themselves when they return to work.

However, as employees would still be allowed to change their voucher order if they have a genuine change in childcare costs, this approach maintains flexibility.

Employees can increase their voucher order if:
• They return to work from a long-term absence, such as maternity leave
• Their average childcare costs increase by a significant amount (routine price rises and short-term increases in childcare use are excluded)

Employees can reduce or cancel their voucher order if:
• They have a long-term absence, including long-term sick leave, maternity leave, adoption leave, paternity leave or sabbatical
• A dependent dies or has a prolonged illness
• They have a significant reduction in their average childcare costs, for example when their child starts school (short-term reductions in childcare use are excluded)

Employees can also change your voucher order to reflect:
• A significant change to their contractual hours
• A significant change in the amount of childcare which is paid for by a third party, including child maintenance, Government funding and tax credits

By combining long salary sacrifice agreements with simple lifestyle changes, you can maintain your scheme's flexibility while minimising your risk.

Simpler lifestyle changes

Instead of the conventional list of lifestyle changes, we recommend adopting a shorter list of carefully defined lifestyle changes, as follows:
Minimising your risk continued

Your maternity policy

Statutory maternity pay is 90% of earnings for the first 6 weeks of leave (this is called higher-rate SMP), followed by a flat rate for a further 33 weeks. Employees are not permitted to sacrifice either type of SMP.

Some employers pay non-statutory maternity pay in addition to SMP, for example topping up SMP to full pay or half pay. Employees can sacrifice non-statutory maternity pay, so the risk of employer-funded vouchers only occurs when non-statutory pay is insufficient to cover the vouchers.

If employees are entitled to non-statutory pay of at least £243pm throughout their whole maternity leave, the issue of employer-funded vouchers never arises. However, most maternity policies are weighted towards the beginning of maternity leave, with earnings often falling to SMP after a number of weeks. Changing your maternity policy so that any non-statutory pay is spread over a longer period could cut the cost of employer-funded childcare vouchers.

A couple of things to bear in mind:

- You should not change your maternity policy for existing employees without appropriate consultation, possibly involving unions. We recommend that you seek professional advice before you introduce any changes.

- You should not require existing employees to agree to a new maternity policy before they join the scheme, as this could be deemed to be discrimination.

However...

- If you decide not to offer employer-funded vouchers (eg if you choose Option 1), employees could be offered a choice between your existing maternity policy and a new policy which spreads their maternity pay. Employees may prefer the new policy, as it will allow them to continue enjoying the tax and NI savings from childcare vouchers during their maternity leave.

- Also, you can introduce a new maternity policy for new employees, while maintaining your original policy for existing employees. As today’s new employees are tomorrow’s scheme members, we believe all employers should consider this way of minimising future costs.

Making tax credits work to your advantage

The “childcare element” of working tax credit covers up to 70% of a parent's childcare costs. However, parents can’t claim this benefit on any childcare which is paid for with childcare vouchers. This means that some parents experience a reduction in their tax credits when they sign up for childcare vouchers.

The effect of childcare vouchers on tax credits is linked to income – people on a low income are more likely to be adversely affected. Women often find that their income falls during maternity leave, meaning it may be in their interest to claim tax credits instead of receiving childcare vouchers through salary sacrifice.

A woman's entitlement to tax credits can increase as soon as her income falls, even if this is partway through a tax year. Her entitlement will often stay at an increased level until the tax year after her income has returned to pre-maternity levels. This means that some first-time mums choose to delay signing up for childcare vouchers until well after their child's first birthday. Similarly, some existing scheme members choose to opt out of the scheme before maternity leave.

We can provide you with leaflets to give to employees when you first learn that they are pregnant, to help them understand their potential entitlement to tax credits.

Whether or not you decide to provide childcare vouchers during maternity leave, we can help you develop a sensible response to the legislative change.
Childcare vouchers during maternity leave - an overview

**HMRC’s guidance**

Employees are not allowed to sacrifice SMP in order to receive childcare vouchers. However, non-statutory maternity pay can be sacrificed.

According to HMRC, employers should provide free childcare vouchers during maternity leave to any existing scheme members who are unable to fund their own vouchers.

Employers might not need to provide free childcare vouchers to employees who want to join the scheme after their maternity leave has started. This potentially excludes all first-time mums.

**The Employment Rights Act**

The rights described in an employee’s salary sacrifice agreement continue to apply during maternity leave. This only affects employees who were already receiving childcare vouchers before their maternity leave.

If the salary sacrifice agreement gives employees an unconditional right to receive childcare vouchers, then HMRC’s conclusion is valid.

Our salary sacrifice agreements allow employers to override a voucher order whenever an employee has insufficient pay to sacrifice. Employers can probably exercise this right during maternity leave without contravening the ERA.

**The Equality Act**

Employers who restrict an employee’s access to childcare vouchers during maternity leave may face a sex discrimination claim. This applies equally to existing scheme members and to employees who try to join the scheme during maternity leave.

Although indirect sex discrimination is not necessarily unlawful, employers may choose to provide employer-funded childcare vouchers in order to avoid the risk of a tribunal ruling against them.

**Options for employers**

1. Continue to override childcare voucher orders whenever an employee has insufficient pay to fund their vouchers through salary sacrifice.

2. Provide employer-funded childcare vouchers to a limited extent, so that employees on maternity leave are compensated for lost tax and NI savings.

3. Provide childcare vouchers of up to £243pm whenever employees are unable to fund their own vouchers due to being on maternity leave.

Options 1 and 2 leave employers exposed to potential sex discrimination claims. While it may be possible to defend these claims, option 3 is a safer approach and therefore the one we would recommend.

**Managing your scheme**

We recommend that you reduce your risk by:
- Using targeted marketing
- Reviewing your maternity policy
- Taking a fresh approach to lifestyle changes
- Making employees aware of tax credits

**Maintaining a cost-neutral scheme**

Childcare vouchers can provide a win-win option for parents and employers, even where employers choose to provide ‘free’ vouchers during maternity leave.

Most employers find that their National Insurance savings outweigh both the scheme administration fees and the cost of funding childcare vouchers during maternity leave.
Your questions

Should employees be allowed to opt out of the scheme during the maternity pay reference period?

The “maternity pay reference period” is an eight week period ending 15 weeks before the baby is due. During the first six weeks of maternity leave, employees receive higher-rate SMP, which is based on earnings received in the reference period. If employees belong to the childcare voucher scheme during the reference period, their higher-rate SMP will be based on post-sacrifice pay. This means childcare vouchers are likely to have a detrimental effect on their entitlement to SMP.

The impact of this will depend on your maternity policy. For example, if your maternity policy entitles employees to full pre-sacrifice pay for the first six weeks of leave, then a reduction in their SMP entitlement would not normally affect the total amount of maternity pay that you provide (although it would affect the amount of SMP that you can reclaim from HMRC).

However, if your employees are only entitled to receive SMP, they may wish to maximise this by opting out of childcare vouchers during the reference period. If you do allow employees to opt out during this period, we recommend that you do not prevent them from rejoining the scheme before their maternity leave, as this could be discrimination.

Depending on your choice of allowable lifestyle changes, there is no requirement for you to allow employees to opt out of your scheme during the reference period.

Our employees receive 90% of pay for the first six weeks of maternity leave. Can this be used to fund their childcare vouchers?

Employees are not allowed to sacrifice either higher-rate SMP (which they receive in the first six weeks of leave) or flat-rate SMP (which they receive for the next 33 weeks). Higher-rate SMP is based on 90% of earnings. During the first six weeks of maternity leave, a salary sacrifice can only be applied to any non-statutory pay which employees receive on top of their higher-rate SMP.

Should employer-funded childcare vouchers be available to employees on long-term sick leave?

Whether or not you decide to provide employer-funded childcare vouchers during maternity leave, there is normally no need to apply the same policy during long-term sick leave.

Providing you include suitable wording in your salary sacrifice agreements, you can override a childcare voucher order whenever an employee on long-term sick leave has insufficient non-statutory pay available to sacrifice. As long as this policy is expected to apply equally to male and female employees, there are normally no grounds for a sex discrimination claim.

However, if an employee is on long-term sick leave as a result of pregnancy, maternity or disability then a discrimination argument may apply and it would be sensible to seek advice.

What about disability discrimination claims?

An employee on long-term sick leave would not be regarded as having the “protected characteristic” of disability unless it can be established that they meet the definition of disability which is detailed in the Equality Act.

If a disabled employee is on long-term sick leave and has their voucher order overridden as a result of having insufficient salary available to sacrifice, there is a risk that they could claim discrimination.

A claim of direct discrimination is unlikely to be successful as long as the employer can show that they would have applied the override in the same way to a non-disabled employee on long-term sick leave. However, if the employee’s absence is the result of their employer failing to take appropriate measures to enable them to return to work, they may make a claim for employer-funded vouchers on this basis.

A claim of indirect discrimination and/or discrimination arising from disability may also arise but, as with maternity claims, this indirect discrimination is not necessarily unlawful. We have been advised that employers could use the same type of defence as for maternity leave, by justifying the override as being a proportionate means of achieving a legitimate aim.
Should employer-funded childcare vouchers be available to employees whose earnings are close to the National Minimum Wage?

Employees may not be able to take part in your childcare voucher scheme if their earnings are close to the National Minimum Wage, since salary sacrifice cannot reduce pay below the NMW. We recommend that your salary sacrifice agreements should give you the right to override a voucher order whenever the NMW restriction applies. As long as this policy is expected to apply equally to male and female employees, there are no grounds for a sex discrimination claim.

Of course some employers may happen to have more female than male employees on low pay, which may mean that more female employees are subject to a voucher override. However, we have been advised that, even in these circumstances, a sex discrimination claim would still be unlikely to succeed.

The tax credit system means that many low earners are better off without childcare vouchers, so in practice it is rare for employers to have to apply a voucher override for NMW reasons.

If a woman would normally have her childcare voucher order restricted due to the NMW, then her entitlement to employer-funded vouchers during maternity leave can legitimately be restricted to the same extent. This means that employers should not be exposed to claims for employer-funded childcare vouchers from employees who would normally be ineligible for the scheme.

What should be done about employees who have already had a voucher override applied during maternity leave?

Employers may be concerned about retrospective claims arising from employees who have been on maternity leave.

However, employees only have three months from the time of the discrimination to submit a sex discrimination claim to an employment tribunal. Where an employee has their voucher order overridden during maternity leave, this means they would need to submit a claim within three months of the last payday on which an override was applied. If an employee has been back at work for three months without submitting a claim then the employer should face minimal risk.

If employers decide to provide employer-funded childcare vouchers, do they need to publicise this to their employees?

If you decide to provide employer-funded vouchers during maternity leave, we recommend that you review your salary sacrifice wording, employee handbook, intranet, maternity policy and childcare voucher scheme rules, to ensure that none of these documents imply that women on maternity leave may be ineligible for your scheme.

You should not attempt to conceal benefits from employees who are on maternity leave. However, there is no requirement for you to actively inform employees who go on maternity leave that they may be entitled to employer-funded vouchers. Existing scheme members may voluntarily opt out of the scheme before or during their maternity leave. Employees on a first maternity leave may not consider joining the childcare voucher scheme until they start to think about returning to work. In both cases, there is no requirement for employers to actively offer employer-funded childcare vouchers to these employees.

Employers may be tempted to continue overriding childcare voucher orders during maternity leave and to only provide employer-funded vouchers if an employee complains. However, the complainant could still claim discrimination in these circumstances, even if they are subsequently provided with employer-funded vouchers.
Can employers decide to provide employer-funded childcare vouchers just to existing scheme members, rather than also making them available to employees on a first maternity leave?

It is up to each employer to decide the extent to which they will provide employer-funded vouchers. However, our recommendation is that employers should apply a single policy both to existing members and to employees who want to join the scheme during maternity leave. Both categories of employees would be treated the same under the Equality Act.

Employers who provide employer-funded vouchers to existing scheme members are implicitly acknowledging the potential discrimination issue, making it hard for them to justify not extending their policy to women on a first maternity leave. Ironically, it may be more difficult for these employers to defend a sex discrimination case than it would be for employers who override voucher orders for both categories of employees.

Although HMRC’s guidance only considers existing scheme members, employers who fail to extend their policy to all employees on maternity leave should not rely on this as a defence.

Is there a cap on the amount of employer-funded childcare vouchers which an employee could claim?

If you normally only allow employees to order up to £243pm of childcare vouchers, then it would be reasonable to apply the same limit during maternity leave. However, if you allow employees to order a higher amount of vouchers, with the excess being reported on their P11d, then there is a risk that employees on maternity leave could believe they are entitled to more than £243pm. We recommend that all employers should cap childcare voucher orders at the tax-exempt amount of £243pm (or £124pm for higher-rate taxpayers).

Are employees allowed to back-date childcare vouchers?

Although it isn't possible to back-date salary sacrifice agreements, childcare voucher legislation does allow employees to catch up on any 'missed' childcare vouchers within a tax year. For example, an employee who joins the scheme half-way through a tax year could (subject to certain conditions) order more than £243pm, tax-free, to catch up on the months when they didn't order vouchers. It is up to each employer to decide whether they will allow employees to take advantage of this concession.

If you choose not to provide employer-funded childcare vouchers, or to provide them to a limited extent, you could allow employees to order any missed vouchers on their return to work. This may help to avoid employees missing out on any tax and NI savings due to being on maternity leave. The value of this policy will vary between employees, depending on which month they return to work.

If you decide to provide employer-funded childcare vouchers during maternity leave, we recommend that you do not allow employees to catch up on missed vouchers in any circumstances. If you do allow employees to catch up on missed vouchers, an employee on maternity leave could manipulate this concession in order to receive a higher amount of employer-funded vouchers.
Can employers force an employee to leave the scheme when they become pregnant or go on maternity leave?

No, but employees may choose to leave the scheme at these times, depending on the terms of their salary sacrifice agreement and their employer’s stance on lifestyle changes.

Applying a voucher override whenever an employee has insufficient pay available to sacrifice is not the same as forcing an employee to leave the scheme. The override doesn’t cause the salary sacrifice agreement to end. Instead, the override should be reviewed at each payday covered by the salary sacrifice agreement. If the employee has pay available to sacrifice at any of these paydays, their voucher order for that payday should be processed.

If employees choose to leave the scheme, must they be allowed to rejoin?

Employees who opt out of the scheme during pregnancy or maternity leave should be allowed to rejoin in the same way as an employee who opts out for any other reason. If you impose any restrictions on when employees can join (or rejoin) your scheme, you should ensure the restrictions do not have a disproportionately adverse effect on female employees.

What about paternity leave?

If you provide employer-funded vouchers during maternity leave then you should also provide employer-funded vouchers during paternity leave. The same applies to adoption leave and parental leave, unless you expect these types of absence to affect an equal proportion of male and female employees.

If employees are provided with childcare vouchers as a benefit in addition to their salary, rather than through salary sacrifice, do the same issues apply?

Where childcare vouchers are normally provided in addition to salary, employees on maternity leave should be offered childcare vouchers in the same way as any other employees.

If an employee contacts KiddiVouchers for maternity advice, what will they be told?

As we consider ourselves to have a duty of care both to our clients and to the parents who use our vouchers, this is clearly an area where a conflict of interest could arise.

When an employer asks us for guidance, we will recommend that the safest route is to provide employer-funded childcare vouchers whenever employees are unable to fund their own vouchers due to being on maternity leave. However, since we have been advised that employers who continue to override voucher orders have a reasonable chance of defending a sex discrimination claim, we will also stand by any clients who take this approach.

When a parent asks us for guidance, if their employer has informed us of their policy decision, we will pass that information on. If we have not been informed of the employer’s policy decision, we will refer employees to their HR department.

If a parent complains to us after having their voucher order overridden, we will explain that HMRC’s guidance does not directly apply to our style of salary sacrifice agreements. If they still believe they have a case for sex discrimination, we will make them aware of the uncertainty surrounding whether such a claim would succeed.

What about HMRC approval for the childcare voucher scheme?

Employers often ask HMRC to ‘approve’ their childcare voucher scheme, in order to confirm that it qualifies for the tax and National Insurance exemption. Failing to provide childcare vouchers during maternity leave will not lead to this approval being withdrawn, but it may leave you exposed to a sex discrimination claim.
Can employers have confidence in this guide?

This leaflet is based on advice from a barrister at 11KBW (www.11kbw.com), working in conjunction with Sydney Mitchell Solicitors (www.sydneymitchell.co.uk). Between them, these organisations have won a host of accolades.

KiddiVouchers is committed to offering employers an excellent service. We hope that by appointing such a high quality legal team, we will have made this complicated issue a little easier for our clients.

We would like to remind employers that this leaflet is not legal advice. Employers are advised to seek professional assistance as necessary, since neither we nor our legal advisors can accept liability for decisions based on this guide.

Any questions?

We will do our best to help if you have any questions. You can phone us on 0800 612 4395, or email maternity@kiddivouchers.com.

Please remember that we are unable to offer legal advice, so you may also wish to seek professional legal assistance.