

# PARENTAL BEREAVEMENT (LEAVE AND PAY) BILL [HC]

## EXPLANATORY NOTES

### What these notes do

These Explanatory Notes relate to the Parental Bereavement (Leave and Pay) Bill as introduced in the House of Commons on 19 July 2017 (Bill 14).

- These Explanatory Notes have been prepared by the Department for Business, Energy and Industrial Strategy with the consent of Kevin Hollinrake, the Member in charge of the Bill in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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## Overview of the Bill

- 1 The Bill amends or inserts a number of provisions into the Employment Rights Act 1996 and the Social Security Contributions and Benefits Act 1992, providing powers to make regulations in relation to Parental Bereavement Leave and Pay for eligible parents.
- 2 The Bill's powers allow provision to be made for the following:
  - Parental Bereavement Leave – a right for employed parents to be absent from work for a prescribed period (to be set at a minimum of two weeks) following the death of a child. All employed bereaved parents who meet the eligibility conditions, regardless of how long they have worked for their employer, will be entitled to this leave.
  - Parental Bereavement Pay – a right for those eligible parents who meet minimum requirements relating to continuity of employment (at least 26 weeks with their current employer) and earnings to be paid during that leave at the statutory flat rate (currently £140.98 a week) or 90% of average earnings (whichever is lower). In line with other entitlements to paid statutory leave, the Bill allows provision to be made for employers to reclaim payments from the Government.
  - Employment protections – parents taking Parental Bereavement Leave will have the same employment protections as those associated with other forms of family related leave (i.e. Maternity, Paternity, Adoption and Shared Parental Leave). This includes protection from dismissal or detriment as a result of having taken leave.

## Policy background

- 3 Although there is an (unpaid) entitlement to time off to deal with an emergency involving a dependent, there is currently no specific parental entitlement to time off work (paid or otherwise) following the death of a child. Some employers allow parents to take compassionate leave. This is at the discretion of the employer and there is therefore no minimum standard across the board.
- 4 Employed parents who lose a child from 24 weeks' gestation or whilst already accessing an existing family related leave and pay right, for example Maternity or Paternity Leave, are entitled to take/remain on that leave for its duration.
- 5 The Bill would not change this entitlement but would give employed parents an additional right to time away from work following the death of a child aged under 18.
- 6 It requires Regulations to give employed parents a 'day 1' right to a minimum of 2 weeks of leave away from work to help them to come to terms with the loss of a child, should they wish to take it. This means that an employee would be eligible regardless of their length of service with their current employer.
- 7 Employed parents would also be entitled to a statutory flat rate of pay (currently £140.98 a week) or 90% of their average weekly earnings per week (whichever is lower), in respect of the two weeks' leave, subject to a requirement that the employee has worked for their employer continuously for at least 26 weeks by the end of the week before the week of the child's death.
- 8 The introduction of a specific, statutory entitlement to parental bereavement leave and pay will set a minimum standard for employees and employers. The intention of the policy is to provide certainty for employed parents and employers in relation to parents' right to time off from work following the death of a child.

## Legal background

- 9 The relevant legal background is explained in the policy background section of these Notes.

## Territorial extent and application

- 10 All measures in this Bill apply to England, Wales and Scotland as employment matters are not devolved in relation to Wales and Scotland.
- 11 Employment matters are devolved in Northern Ireland. It will be for the Northern Ireland Assembly to decide whether similar provisions should apply in Northern Ireland.
- 12 The matters to which the provisions of the Bill relate are not within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly, and no legislative consent motion is being sought in relation to any provision of the Bill. If there are amendments relating to matters within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly, the consent of the relevant devolved legislature(s) will be sought for the amendments.
- 13 See the table in Annex A for a summary of the position regarding territorial extent and application in the United Kingdom. The table also summarises the position regarding legislative consent motions.

## Commentary on provisions of Bill Parental Bereavement (Leave and Pay) Bill

- 14 Clause [j001] of the Bill introduces the Schedule, which sets out the amendments to existing legislation to establish an entitlement to Parental Bereavement Leave and Pay.
- 15 Clause [j002] sets out the extent and short title of the Bill and makes provision for commencement.
- 16 The Schedule consists of three Parts which are explained in more detail below:
  - Part 1 creates a statutory entitlement to Parental Bereavement Leave;
  - Part 2 creates a statutory entitlement to Parental Bereavement Pay; and
  - Part 3 contains related amendments.

### Part 1: Parental Bereavement Leave

- 17 Part 1 of the Schedule amends Part 8 of the Employment Rights Act 1996 by inserting a new Chapter 4, consisting of sections 80EA to 80EE, to provide for an entitlement to Parental Bereavement Leave.

## 80EA: Parental Bereavement Leave

- 18 Section 80EA requires the Secretary of State to make regulations to give an entitlement to employed parents to time off work following the death of a child. It provides for conditions for that entitlement – determining exactly who is a ‘parent’ for these purposes – to be defined in regulations by reference to the employee’s relationship with the child who has died, including by reference to caring for the child prior to the child’s death.
- 19 Regulations must set the duration of leave and when the leave can be taken. The duration of leave must be at least 2 weeks; and the Regulations must establish a period within which the leave may be taken, which must extend to at least 56 days after the child’s death. The Regulations must also specify that, where more than one child dies, the employee is entitled to leave in respect of each child.
- 20 In addition, Regulations can make provision for how the leave is to be taken.
- 21 A child is defined as being under the age of 18 years and a week is any 7 day period.

## 80EB: Rights during and after bereavement leave

- 22 80EB requires the Regulations made under 80EA to set out:
  - The employee’s rights in relation to retaining their existing terms and conditions of employment, whilst taking Parental Bereavement Leave;
  - The employee’s obligations in relation to those terms and conditions;
  - The employee’s right to return to work once their leave period has concluded and the nature of the job to which they are entitled to return, as well as the terms and conditions applicable on return, and matters such as seniority, pension and similar rights.
- 23 The reference to ‘terms and conditions’ in this context is not limited to contractual terms and conditions, but does not include remuneration. Regulations can specify what things should, or should not be, seen as ‘remuneration’ for this purpose.

## 80EC: Special Cases

- 24 Section 80EC allows the Regulations to make special provision for the redundancy and dismissal of employees during a period of Parental Bereavement Leave, including whether an employer is required to offer alternative employment, and the consequences of failing to comply with the regulations.

## 80ED Chapter 4: Supplemental

- 25 Section 80ED allows the Regulations made under 80EA to set out what notices and evidence must be given by an employee to their employer and what procedures are to be followed, in order to take Parental Bereavement Leave as well as any requirements for record keeping. They can also set out the consequences of not complying with any of these requirements or procedures.
- 26 The Regulations can also make provision for situations where an employee also has a non-statutory right to take Parental Bereavement Leave (for example, a right arising under their contract of employment).

27 Regulations can also modify the way in which a week's pay is calculated in Chapter 2 of Part 14 of the Employment Rights Act 1996 to take account of periods of parental bereavement leave. The concept of 'a week's pay' is widely used in that Act, for example in section 119 which sets out how the basic Employment Tribunal award for unfair dismissal should be calculated.

### 80EE Power to extend Chapter to stillbirths

28 The entitlement to Parental Bereavement Leave under sections 80EA to 80ED applies on the death of a child under 18. Section 80EE enables Regulations to extend this provision to include parents of children stillborn after 24 weeks of pregnancy.

### Parliamentary procedure applying to Regulations

29 Paragraph 3 of Part 1 of the Schedule adds sections 80EA and 80EE to the list of powers in section 236 of the Employment Rights Act 1996 which are subject to the affirmative parliamentary procedure. That means that any Regulations made under these new powers would need to be debated in both Houses of Parliament before becoming law.

## Part 2: Parental Bereavement Pay

- 30 Part 2 of the Schedule adds Part 12ZD (containing sections 171ZZ6 to 171ZZ15) to the Social Security, Contributions and Benefits Act 1992 to create an entitlement to Parental Bereavement Pay.

### 171ZZ6: Entitlement

- 31 Section 171ZZ6 provides that an employee will be eligible for Parental Bereavement Pay subject to meeting certain conditions.
- 32 These conditions include:
- That the employee is a bereaved parent, because they meet the conditions to be set in Regulations as to their relationship with the child;
  - That the employee must have been continuously working for their employer for at least 26 weeks by the end of the week immediately before the one in which the child dies (this is known as the 'relevant week'), and was legally entitled to be in that employment;
  - That the employee is still employed by this employer at the time of their child's death and;
  - That, over an 8 week period ending with the end of the relevant week, the employee's normal weekly earnings are not less than the Lower Earnings Limit (whatever this is at the end of the relevant week).
- 33 Section 171ZZ6 specifies that the pay entitlement is applicable per deceased child.
- 34 This section also ensures that the condition requiring someone to be legally entitled to be in the employment in relation to which they are claiming statutory pay will only apply when Section 63(3) of the Welfare Reform Act 2012 (which makes similar provision for Statutory Maternity Pay, Statutory Adoption Pay and Statutory Paternity Pay) comes into force.

### 171ZZ7 Entitlement: Supplementary

- 35 Section 171ZZ7 specifies that, in order to receive payments, an employee must give notice to their employer of the week or weeks they are intending to take leave. This must be in writing if the employer requires it.
- 36 Regulations may provide for when that notice must be given, and can disapply or modify the requirement for notice in specified circumstances. They can also set out requirements for evidence relating to proof of entitlement.
- 37 Regulations may specify that someone employed by the same employer for at least 26 weeks, but under different contracts of service which were not continuous, will nevertheless meet the test for continuous employment. They can also prescribe circumstances for other employees in which employment is to be treated as continuous.
- 38 The Regulations can specify how earnings are to be calculated or estimated for the purposes of deciding whether an employee meets the earnings threshold. This includes being able to identify particular types of payments which are to be excluded from the calculation. The Regulations may also provide for amounts earned from the same employer under two

separate contracts to be aggregated for this purpose.

### 171ZZ8: Liability to make payments

- 39 Section 171ZZ8 states that an employer is liable to pay their employee Parental Bereavement Pay, conditional on that employee having at least 26 weeks' continuous service with them by the end of the 'relevant week', and continuing to be employed by them at the time the child dies.
- 40 Regulations must make provision for liability for Parental Bereavement Pay in the event that the employer terminates their employee's contract to avoid making this payment.
- 41 Regulations may also specify conditions where this liability will shift to HM Revenue and Customs.

### 171ZZ9: Rate and period of Pay

- 42 Section 171ZZ9 states that the weekly statutory rate of Parental Bereavement Pay will be set in Regulations, which may include provisions for different rates for different situations.
- 43 Regulations will specify the number of weeks' entitlement (which must be a minimum of two weeks), and the 'qualifying period' within which the pay must be claimed (which must be a minimum of 56 days starting from the child's death). The employee will be able to choose the week or weeks for which pay is claimed, in accordance with the Regulations, and the Regulations may allow pay to be claimed for non-consecutive periods, which must be blocks of a week or weeks.
- 44 Statutory pay is not payable if the employee is working for the employer who is liable to pay statutory pay. This is regardless of whether or not the work is performed under an existing contract of service, or a new one. It is also not payable if the employee is working for another employer who is not liable to pay statutory pay, but Regulations can prescribe situations where this does not apply for weeks taken as leave.
- 45 Regulations may specify further circumstances in which an employer is not required to pay statutory Parental Bereavement Pay.
- 46 Employees may choose the start and end point of their statutory pay week. A week is any period of 7 days. If it is necessary to calculate a daily rate of statutory Parental Bereavement Pay (for the purposes of these provisions, or any Regulations), this should equal one seventh of the weekly rate.

### 171ZZ10: Restrictions on contracting out

- 47 Section 171ZZ10 specifies that Parental Bereavement Pay rights cannot be diluted or denied in an employee's contract, nor can an employee be required to contribute to the costs. This does not affect the validity of any agreement allowing the employer to make deductions from statutory pay, if the employer is also authorised to make the same deductions from any contractual remuneration which the employer is obliged to pay during the period (or would be authorised to make those deductions if there was an obligation to pay contractual remuneration).

### 171ZZ711: Relationship with Contractual Remuneration

- 48 Section 171ZZ11 states that the entitlement to statutory Parental Bereavement Pay does not affect an employee's rights to payments associated with their contract of employment.
- 49 However, it allows an employer to set off any contractual remuneration paid to an employee during a period in which they are entitled to statutory pay, against the liability to make statutory payments to that employee, and vice versa.
- 50 Regulations can specify particular types of payments which are to be regarded (or not regarded) as contractual remuneration.

### 171ZZ12: Crown Employment

- 51 Section 171ZZ12 provides that bereaved parents employed by the Crown will have the same entitlements to Parental Bereavement Pay as those who work for other employers.

### 171ZZ13: Special Classes of Person

- 52 Section 171ZZ13 allows Regulations to set, with the agreement of HM Treasury, how the right to Parental Bereavement Pay applies to bereaved parents who are, have been or will be outside Great Britain, employed on board any ship, vessel, hovercraft or aircraft, or employed in continental shelf operations.

### 171ZZ14: Supplementary

- 53 Section 171ZZ14 defines an employer as someone who is paying secondary Class 1 National Insurance contributions in relation to any of the earnings of the bereaved parent.
- 54 An employee is defined as someone who is employed in Great Britain, either under a contract of employment or in an office with earnings.
- 55 Regulations can set out exceptions to this, and also circumstances where individuals who would not be classed as employees according to this definition are nevertheless to be treated as employees for the purposes of Parental Bereavement Pay.
- 56 Regulations may set out when two or more employers, or two or more employment contracts, should be treated as a single employer or contract.
- 57 A week is defined as a calendar week, except for in relation to section 171ZZ9 which deals with the weeks in which statutory pay can be claimed; in that case a 'week' can start or end on any day of the week.
- 58 An employee's normal weekly earnings are calculated as the average weekly earnings that have been paid to them over a set period (to be specified in Regulations) under their employment contract with the employer liable for Parental Bereavement Pay. Regulations can set a different method for calculating normal weekly earnings in designated circumstances.
- 59 Regulations will also specify what is meant by 'earnings'.
- 60 Regulations can make provisions for employees working for certain National Health Service (NHS) bodies whose contracts of employment have been treated as 'divided' into more than one contract, following the establishment of NHS trusts, to elect for all their contracts to be considered as one for the purposes of Parental Bereavement Pay e.g. determining eligibility and pay rate.

- 61 Regulations may also set the conditions that must be satisfied in order for an employee to be entitled to make this decision. These include the time within which an employee must make this decision, how notice of this choice must be given and to whom, as well as how the information that must be provided alongside the notice should be given.
- 62 Regulations can also specify which one of the person's employer, under these circumstances, is liable to pay their employee Parental Bereavement Pay

### 171ZZ15: Power to extend Part to stillbirths

- 63 The entitlement to Parental Bereavement Pay under sections 171ZZ6 to 171ZZ14 applies on the death of a child under 18. Section 171ZZ15 enables regulations to extend this provision to include the parents of children stillborn after twenty-four weeks of pregnancy.

### Parliamentary procedure applying to Regulations

- 64 Paragraph 6 of the Schedule specifies which of the powers to make Regulations are subject to the affirmative procedure, meaning that Regulations made under these powers would need to be debated in both Houses of Parliament before becoming law.

## Part 3: Further Amendments to do with Parental Bereavement Leave and Pay

- 65 Part 3 makes consequential amendments to other legislation, including references to Parental Bereavement Leave and Pay where relevant.
- 66 It includes amendments to the following Acts:
- Social Security Act 1989
  - Finance Act 1989 Social Security Contributions and Benefits Act 1992
  - Social Security Administration Act 1992
  - Employment Rights Act 1996
  - Social Security Contributions (Transfer Functions, etc.) Act 1999
  - Finance Act 1999
  - Finance Act 2000
  - Employment Act 2002
  - Proceeds of Crime Act 2002
  - Income Tax (Earnings and Pensions) Act 2003
  - Commissioners for Revenue and Customs Act 2005
  - Income Tax Act 2007
  - Pensions Act 2008
  - Finance Act 2013

## Commencement

- 67 HM Revenue & Customs and commercial payroll providers usually require around 18 months' lead-in time to implement the changes which enable employers to administer new statutory payments.
- 68 For this reason, implementation is likely in 2020 if the Bill successfully completes all of its Parliamentary stages in 2018.

## Financial implications of the Bill

- 69 The estimated cost to the Exchequer of 2 weeks' leave paid at the statutory flat rate (currently £140.98 a week) or 90% of average weekly earnings where that is lower, is £1.77m per year. In addition, there will be a one-off cost estimated at £1.25m to amend HM Revenue & Customs' systems so that employers can reclaim a percentage of the statutory pay. They do this by reducing their National Insurance payments to HM Revenue & Customs.
- 70 The one off cost to business of familiarising themselves with the new legislation, and for example to amend their HR policies, is estimated at £4.8m. The annual cost to business resulting from greater staff absence, and in some cases a contribution towards the statutory

pay, is estimated at £1.45m.

## Parliamentary approval for financial costs or for charges imposed

- 71 A money resolution is needed because the Bill increases the potential sums that will be payable out money provided by Parliament. The liability to pay statutory Parental Bereavement Pay is imposed on employers, but their liabilities will be funded to a large extent by HMRC (under section 7 of the Employment Act 2002, as amended).
- 72 The ultimate source of this funding will be out of money provided by Parliament (by virtue of section 1(5) of the Social Security Contributions and Benefits Act 1992 and section 163(1)(d) of the Social Security Administration Act 1992).

## Compatibility with the European Convention on Human Rights

- 73 The Bill is considered to be compatible with the European Convention on Human Rights.

## Related documents

- 74 The following documents are relevant to the Bill:

- Impact Assessment

## Annex A - Territorial extent and application in the United Kingdom

Provision	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Extends and applies to Scotland?	Extends and applies to Northern Ireland?	Would corresponding provision be within the competence of the National Assembly for Wales?	Would corresponding provision be within the competence of the Scottish Parliament?	Would corresponding provision be within the competence of the Northern Ireland Assembly?	Legislative Consent Motion needed?
Clause 1	Yes	Yes	Yes	No	No	No	Yes	No
Clause 2	Yes	Yes	Yes	No	No	No	Yes	
Schedule								
Part 1	Yes	Yes	Yes	No	No	No	Yes	No
Part 2	Yes	Yes	Yes	No	No	No	Yes	No
Part 3	Yes	Yes	Yes	No	No	No	Yes	No

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