

*These notes refer to the Work and Families Act (Northern Ireland)  
2015 (c.1) which received Royal Assent on 8th January 2015*

# Work and Families Act (Northern Ireland) 2015

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2: Shared Rights to Leave and Pay**

##### ***Section 2: Shared parental leave***

*Section 2* inserts a new Chapter 1B into Part 9 of the Employment Rights (Northern Ireland) Order 1996 (“ERO”). This creates a new entitlement for employees to be absent from work on shared parental leave for the purposes of caring for a child.

##### **Article 107E: Entitlement to shared parental leave: birth**

*Paragraphs (1) and (4)* confer powers on the Department to make regulations entitling employees to be absent from work on leave for the purpose of caring for a child if they satisfy certain specified conditions.

*Paragraphs (1) to (3)* are about the conditions for eligibility of the mother of the child. The conditions that may be specified include conditions as to duration of employment, the mother's relationship with the child and as to caring with another person (“P”) for the child. *Paragraph (1)(f)* includes a condition relating to the giving of notice of intention to take shared parental leave; and *paragraph (3)* specifies what this notice may be required to be about. It may be about the amount of leave available to the mother; the amount of leave the mother intends to take; and whether and to what extent P will take leave or statutory shared parental pay. *Paragraph (1)(g)* specifies a condition relating to the consent of P to the amount of leave that the mother intends to take.

*Paragraph (2)* provides that the conditions of entitlement of the mother can include P meeting conditions in respect of P's employment or self-employment, P's earnings, P's relationship to the mother or the child and P's intention to care, with the mother, for the child. The effect of this provision is that one of the conditions of entitlement to shared parental leave for the mother can relate to the mother's sharing the care of the child with P and P satisfying conditions as to economic activity and relationship with the child or the mother.

*Paragraph (4)* specifies conditions that may be included in regulations to give entitlement to shared parental leave for another employee (the father or the mother's partner). These include certain conditions as to duration of employment, the employee's relationship with the child or with the child's mother and as to the employee caring, with the child's mother, for the child. *Paragraph (4)(d)* includes a condition relating to the giving of a notice of intention to take shared parental leave. *Paragraph (4)(e)* specifies a condition relating to the child's mother's consent to the amount of shared parental leave the employee intends to take.

*Paragraph (5)* provides that the conditions of entitlement for the employee can include the mother meeting conditions as to her employment or self-employment, her earnings, her caring, with the employee, for the child and her entitlement (or otherwise) to statutory maternity pay or maternity allowance and the exercise of these entitlements. The effect of this provision is that one of the conditions of entitlement to shared parental leave for an employee (the father or the mother's partner) can relate to the employee sharing care of the child with the mother and to the mother satisfying conditions as to economic activity.

*Paragraph (6)* specifies what the notice the employee is required to give under *paragraph (4)* is about. It may be required to be about the amount of leave available to the employee, the amount of leave the employee intends to take, and whether and to what extent the mother will take leave or shared parental pay.

#### **Article 107F: Entitlement to leave under Article 107E: further provision**

*Article 107F* is about the making of regulations to calculate the amount of shared parental leave available to an employee, to limit the amount of leave, to limit when it may be taken, to require the leave to be taken as a single period and to provide for the varying of the amount of shared parental leave that an employee may take and the times at which an employee takes this leave.

*Paragraph (1)* provides for regulations to determine the amount of shared parental leave and when it may be taken. In accordance with *paragraph (8)*, provision must be made for the taking of shared parental leave in a single period or in non-consecutive periods. The effect of this is to allow the leave to be taken more flexibly than in a single consecutive block.

*Paragraph (2)* deals with the maximum amount of shared parental leave as it relates to maternity leave and pay. This will be specified by regulations and is expected to be the total length of maternity leave (52 weeks) less the amount of maternity leave taken by the mother (where she returns to work without taking specified action to reduce her maternity leave period) or the amount by which the maternity leave period has been reduced. Where a mother is entitled to statutory maternity pay or maternity allowance only, the maximum amount of shared parental leave is again to be specified by regulations, and is expected to be 52 weeks less the number of weeks of statutory maternity pay or maternity allowance payable to the child's mother, or the number of weeks by which the maternity allowance period or maternity pay period has been reduced.

In accordance with *paragraph (4)*, the amount of shared parental leave to which an employee is entitled in respect of a child takes into account the amount of such leave taken by another person in respect of that child or the number of weeks of statutory shared parental pay received by another person in respect of that child (in the case where the other person is entitled to statutory shared parental pay in respect of the child but not to shared parental leave).

*Paragraph (7)* ensures that shared parental leave must be taken before the end of a period that may be specified.

*Paragraph (9)* provides that the regulations may enable an employer, in a case where an employee has proposed to take non-consecutive periods of shared parental leave, to require the employee to take that amount of leave as a single period of leave. This single period may start with a day proposed by the employee or, if no day is proposed, with the first day of the first period of leave proposed by the employee. This establishes a default position for when the shared parental leave can be taken if agreement cannot be reached between employer and employee.

*Paragraph (10)* provides that regulations made under *Article 107E* may enable an employee, subject to prescribed restrictions, to vary the period or periods of shared parental leave to be taken without varying the amount of leave, and to vary the amount of leave which the employee has notified an intention to exercise.

*Paragraph (11)* provides that variations to the period or periods may require the employer's consent in circumstances specified by regulations.

*Paragraph (12)* establishes that varying the amount of leave may require specified conditions to be met as to the giving of notice and securing the consent of the child's mother or P.

*Paragraph (13)* specifies that notifications of variation of the amount of leave may need to include notice about the amount of shared parental leave the employee has taken or plans to take. Notifications may also be required to include the amount of shared parental leave or statutory shared parental pay that the other person, who may be entitled to such leave or pay in respect of the child has taken, or intends to take.

*Paragraph (14)* provides that regulations may specify the things which are and are not to be taken as done for the purpose of caring for the child; the minimum amount of shared parental leave that may be taken and provision about how this leave may be taken; the circumstances in which an employee may work for an employer during a period of shared parental leave without bringing the leave or entitlement to an end (comparable to "keeping in touch days" under existing provisions) and the circumstances in which the employee may be absent on shared parental leave other than for the purpose of caring for a child without bringing entitlement to an end. The latter provision might be relevant to situations where an employee has an entitlement to shared parental leave but whose child subsequently dies. The regulations may also make provision to

exclude the right to be absent on shared parental leave in respect of a child where more than one child is born as a result of the same pregnancy.

*Paragraph (16)* allows regulations to provide for situations where a mother dies before entitlement to shared parental leave has arisen for herself or her partner.

### **Article 107G: Entitlement to shared parental leave: adoption**

*Paragraphs (1) and (4)* confer powers on the Department to make regulations entitling employees who are adopters to be absent from work for the purpose of caring for a child if they satisfy certain conditions.

*Paragraphs (1) to (3)* are about the conditions of eligibility of the person with whom a child is to be, or is expected to be, placed for adoption (the “primary adopter”). These include certain conditions as to the primary adopter’s duration of employment, relationship with the child and as to caring with another person (“P”) for the child. *Paragraph (1)(g)* specifies a condition relating to the consent of P to the amount of leave the primary adopter intends to take. *Paragraph (1)(f)* includes a condition relating to the giving of notice of intention to take shared parental leave; and *paragraph (3)* specifies what this notice may be about, such as the maximum amount of leave available to the primary adopter, the amount of leave the primary adopter intends to take and the extent to which P intends to exercise entitlement to the leave or to statutory shared parental pay.

*Paragraph (2)* provides that the conditions of entitlement of the primary adopter can include P meeting certain conditions in respect of employment or self-employment, earnings, relationship to the primary adopter or the child and having caring responsibility for the child. The effect of this provision is that one of the conditions of entitlement to shared parental leave for the primary adopter can relate to the primary adopter sharing the care of the child with P and P satisfying conditions as to economic activity and relation with the child or the primary adopter.

*Paragraphs (4) to (6)* specify conditions that may be included in regulations to give entitlement to shared parental leave to another employee (other than the primary adopter). These include certain conditions as to duration of employment, the employee’s relationship with the child and with the primary adopter and as to the employee caring with the primary adopter for the child. *Paragraph (4)(d)* includes a condition relating to the giving of a notice to the employer of intention to take shared parental leave. *Paragraph (4)(e)* specifies a condition relating to the consent of the primary adopter to the amount of leave that the other employee intends to take.

*Paragraph (5)* provides that the conditions for entitlement for the employee can include the primary adopter meeting conditions as to employment or self-employment and earnings; the primary adopter caring with the employee for the child; the primary adopter’s entitlement (or otherwise) to adoption leave or statutory adoption pay, and the extent of the primary adopter’s exercise of such entitlement.

*Paragraph (6)* specifies what the notice the employee is required to give under *paragraph (4)* is about. It may be about the maximum possible extent of their entitlement to leave, the amount of leave the employee intends to take, and whether and to what extent the primary adopter will exercise an entitlement to shared parental leave or statutory shared parental pay.

**Article 107H: Entitlement to shared parental leave: prospective adopters with whom looked after children are placed**

*Article 107H* concerns entitlement to shared parental leave for prospective adopters in fostering for adoption (“FFA”) situations. These are situations where a child is placed with a foster parent where there is a significant likelihood that the placement will result in that foster parent adopting the child.

*Paragraph (1)* specifies that regulations will include provision, in set circumstances, for shared parental leave entitlement where a child is placed by a competent authority (a Health and Social Care Trust) with an approved foster parent who is also an approved prospective adopter.

In accordance with *paragraph (2)*, these circumstances are where either a decision is pending or has already been taken that adoption is in the child’s best interests. Regulations may specify that certain conditions must also be satisfied in order for shared parental leave to be available. It is anticipated that this will allow the regulations to set a specific point at which entitlement will be triggered.

*Paragraph (3)* provides for regulations to include adaptations to appropriate references in relevant provision to placements for adoption made under the law of any part of the United Kingdom; this will convert references in relevant provisions to fit FFA cases.

**Article 107I: Entitlement to leave under Article 107G: further provision**

*Article 107I* is about the making of regulations to calculate the amount of shared parental leave available to the employee, to limit the amount of leave, to limit when it may be taken, to require the leave to be taken as a single period and to provide for the varying of the amount of shared parental leave that an employee may take and the times at which an employee takes this leave.

*Paragraph (1)* provides for regulations to determine the amount of shared parental leave and when this leave may be taken. In accordance with *paragraph (8)*, provision must be made for the taking of shared parental leave in a single period or in non-consecutive periods. The effect of this is to allow the leave to be taken more flexibly than in a single consecutive block.

*Paragraph (2)* deals with the maximum amount of shared parental leave as it relates to adoption leave and pay. This will be specified by regulations and is expected to be 52 weeks less the amount of adoption leave taken by the primary adopter (where the primary adopter returns to work without taking specified action to reduce the adoption leave period) or the amount by which the adoption leave period has been reduced. Where a primary adopter is entitled to statutory

adoption pay only, the maximum amount of shared parental leave is again to be specified by regulations, and is expected to be 52 weeks less the number of weeks of statutory adoption pay payable to the primary adopter, or the number of weeks by which the adoption pay period has been reduced.

In accordance with *paragraph (4)*, the amount of shared parental leave to which the employee is entitled in respect of a child takes into account the amount of such leave taken by another person in respect of that child or the number of weeks of statutory shared parental pay received by another person in respect of that child (in the case where the other person is entitled to statutory shared parental pay in respect of the child but not to shared parental leave).

*Paragraph (7)* ensures that shared parental leave must be taken before the end a period that may be specified.

*Paragraph (9)* provides that the regulations may enable an employer, in a case where an employee has proposed to take non-consecutive periods of shared parental leave, to require the employee to take that amount of leave as a single period of leave. This single period may start with a day proposed by the employee or, if no day is proposed, with the first day of the first period of leave proposed by the employee. This establishes a default position for when the shared parental leave can be taken if agreement cannot be reached between employer and employee.

*Paragraph (10)* provides that regulations made under *Article 107G* may enable an employee, subject to prescribed restrictions, to vary the period or periods of shared parental leave to be taken without varying the amount of leave, and to vary the amount of leave which the employee has notified an intention to exercise.

*Paragraph (11)* provides that variations to the period or periods may require the employer's consent in circumstances specified by regulations.

*Paragraph (12)* establishes that varying the amount of leave may require specified conditions to be met as to the giving of notice and securing the consent of the primary adopter or P.

*Paragraph (13)* specifies that notifications of variation of the amount of leave may need to include notice about the amount of shared parental leave the employee has taken or plans to take. Notifications may also be required to include the amount of shared parental leave or statutory shared parental pay that the other person, who may be entitled to such leave or pay in respect of the child, has taken or intends to take.

*Paragraph (14)* provides that regulations may specify the things which are and are not to be taken as done for the purpose of caring for the child; the minimum amount of shared parental leave that may be taken and provision about how this leave may be taken; the circumstances in which keeping in touch days may be taken; and the circumstances in which the employee may be absent on shared parental leave other than for the purpose of caring for a child

without bringing entitlement to an end. The latter provision might be relevant to situations where an employee has an entitlement to shared parental leave but whose child subsequently dies. The regulations may also make provision to ensure that an employee cannot take more than one period of shared parental leave in circumstances where more than one child is placed for adoption as part of the same arrangement.

*Paragraph (16)* enables regulations to make provision in a case where the person who is taking adoption leave or is entitled to be paid statutory adoption pay dies before another person has become entitled to shared parental leave in respect of the relevant child. This is to enable the other person to be able to become entitled to shared parental leave after the death of the primary adopter.

#### **Article 107J: Power to apply Articles 107G and 107I to other cases**

*Paragraph (1)* allows the regulations under *Articles 107G and 107I* to provide for cases where a child has been adopted under the laws of a jurisdiction outside the United Kingdom.

*Paragraph (2)* makes similar provision in relation to cases involving an employee who has applied, or intends to apply, with another person, under section 54 of the Human Fertilisation and Embryology Act 2008 for a parental order in respect of a child. This will allow some parents in surrogacy arrangements to be entitled to shared parental leave in the same way as certain adoptive parents. *Paragraph (3)* provides that the Department can prescribe that eligible intended parents in surrogacy arrangements who wish to take shared parental leave must make a statutory declaration as to their eligibility and intention to apply for a parental order.

#### **Article 107K: Rights during and after shared parental leave**

*Paragraph (1)* provides for regulations to specify the rights and responsibilities of employees whilst on and after shared parental leave.

*Paragraph (1)(a)* states that employees who are absent on shared parental leave will be entitled, as far as prescribed, to the benefit of the same terms and conditions of employment which would have applied if the employee had not been absent. *Paragraph (2)(b)* specifies that “terms and conditions of employment” as referenced in *paragraph (1)(a)* does not include remuneration.

*Paragraph (1)(b)* further stipulates that whilst on shared parental leave the employee will continue to be bound, as far as prescribed, by the obligations that would arise from those terms and conditions, whilst they are compatible with the taking of shared parental leave.

*Paragraph (1)(c)* provides for an employee who has been absent on shared parental leave to have the right to return to a kind of job as specified in regulations. *Paragraph (5)* provides for regulations to make provision about seniority, pension and other similar rights and terms and conditions of employment on return. *Paragraph (3)* stipulates that, where appropriate, the type

of absence that gives rise to the right to return referenced in *paragraph (1)(c)* may be a continuous period of absence attributable to a combination of shared parental leave, maternity leave, paternity leave, adoption leave and parental leave.

*Paragraph (4)* provides that regulations may specify matters which are or are not to be treated as remuneration for the purpose of entitlement to shared parental leave (for birth and adoption).

#### **Article 107L: Redundancy and dismissal**

*Article 107L* provides that regulations under *Article 107E* or *107G* may make provisions about redundancy or dismissal during a period of shared parental leave.

*Paragraph (2)* states that such provisions may include a requirement for an employer to offer alternative employment, and provision for the consequences of failure to comply with the regulations.

#### **Article 107M: Chapter 1B: supplemental**

*Article 107M* allows regulations to be made about notices, evidence, procedures to be followed and other supplementary matters.

*Paragraph (1)(a)* provides for regulations to make provision for notices to be given, evidence to be produced and other procedures to be followed by employers, employees and relevant persons. *Paragraph (2)* defines “relevant person”. *Paragraph (1)(b)* makes provision requiring such persons to keep records. *Paragraph (1)(c)* provides for the consequences of failure to give notices, produce evidence, keep records or comply with other procedural requirements. *Paragraph (1)(d)* provides for the consequences of failure to act in accordance with such a notice. *Paragraph (1)(e)* makes special provision for cases where an employee has a right which corresponds to a right to shared parental leave and which arises under the employee’s contract of employment or otherwise. *Paragraph (1)(f)* and *(g)* allow for regulations to modify provision in the ERO relating to the calculation of a week’s pay and to modify, apply or exclude statutory provisions in relation to a person entitled to shared parental leave.

*Paragraphs (3) to (5)* ensure that the conditions of economic activity which may be specified under *Articles 107E(2) or (5) and 107G(2) or (5)* in relation to the person with whom care of the child is shared can include conditions relating to that person being an employed earner or a self-employed earner. They also ensure that the power to make provision about procedures to be followed by an employer of this other person includes, as far as this concerns an employed earner, the secondary contributor (in relation to secondary Class I National Insurance contributions).