

EXPLANATORY MEMORANDUM TO

THE PARENTAL BEREAVEMENT (LEAVE) REGULATIONS 2020

2020 No. 249

AND

THE STATUTORY PARENTAL BEREAVEMENT PAY (GENERAL)

REGULATIONS 2020

2020 No. 233

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Business, Energy and Industrial Strategy and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instruments

- 2.1 These instruments make provision to implement a new statutory entitlement to Parental Bereavement Leave and Pay for employed parents who lose a child on or after 6th April 2020. The instruments ensure that bereaved parents who are employees will have at least a right to time off work to grieve. This will also establish a statutory baseline for employers when managing parental bereavement in the workplace.
- 2.2 Specifically:
 - The Parental Bereavement Leave Regulations 2020 implement a new entitlement for bereaved parents who are employees to two weeks' leave from their job, and
 - The Statutory Parental Bereavement Pay (General) Regulations 2020 implement a new entitlement for bereaved parents who meet certain eligibility criteria to receive a statutory payment (paid at either the statutory flat rate of £151.20 per week for 2020/21, or 90% of average earnings calculated over a set reference period, whichever is the lower) whilst absent from work.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 Regulation 1 in both instruments provides for the regulations to enter into force on the day after the day on which they are made. The Committee has previously reported its view that it is objectionable, in the absence of a compelling reason, for a new law which imposes duties significantly more onerous than before, and requires persons to adopt different patterns of behaviour, to be brought into force earlier than appears to be necessary to give those affected a reasonable chance to adapt to the changes required. In those circumstances the Committee stated that a date earlier than 21 days after being made would be unlikely to be reasonable.

- 3.2 The Government has been mindful of this consideration. The new entitlements contained in these regulations apply only to the deaths of children on or after 6 April 2020. There are no legal rights or obligations which arise prior to that date; nor are there any procedures which must (or could) be operated prior to that date. The Government intends for the regulations to be made as soon as possible once both Houses of Parliament have approved the draft instruments, in order to afford as much time as possible for persons affected by the new law to prepare for its application.

Matters relevant to Standing Orders Nos. 83P and 83T of the Standing Orders of the House of Commons relating to Public Business (English Votes for English Laws)

- 3.3 The territorial application of this instrument includes Scotland.
- 3.4 All measures in these instruments apply to England, Wales and Scotland, as employment matters are not devolved in relation to Wales and Scotland. However, 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.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales, and Scotland.
- 4.2 The territorial application of this instrument is Great Britain.

5. European Convention on Human Rights

- 5.1 The Minister for Small Business, Consumers and Corporate Responsibility has made the following statement regarding Human Rights:

“In my view the provisions of the Parental Bereavement (Leave) Regulations 2020 and the Statutory Parental Bereavement Pay (General) Regulations 2020 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 The powers being exercised here were given to the Government in a Private Member’s Bill, which was supported by the Government. This Private Member’s Bill received Royal Assent in 2018 to become the Parental Bereavement (Leave and Pay) Act 2018 (the “2018 Act”).
- 6.2 Part 1 of the Schedule to the 2018 Act inserts a new Chapter 4 into Part VIII of the Employment Rights Act 1996, requiring the Secretary of State to make regulations to implement the new entitlement to parental bereavement leave, which was created by the 2018 Act.
- 6.3 Part 2 of the Schedule to the 2018 Act inserts a new Part 12ZD into the Social Security, Contributions and Benefits Act 1992, giving the Secretary of State the power to prescribe various matters, including eligibility conditions, relating to the new entitlement to statutory parental bereavement pay, which was created by the 2018 Act.
- 6.4 The Parental Bereavement (Leave) Regulations 2020 and the Statutory Parental Bereavement Pay (General) Regulations 2020 are the first use of the new regulation making powers on parental bereavement leave and pay set out in the 2018 Act. These regulations give effect to the policy as set out in the Government Response to the

Parental Bereavement Leave and Pay consultation, which took place during the passage of the 2018 Act. The response was published in November 2018.

- 6.5 The Government will make further regulations to provide for the administration of statutory parental bereavement pay, the entitlement of certain persons abroad and mariners to this payment, and to make amendments to subordinate legislation that are consequential upon the introduction of this new entitlement. These forthcoming regulations will be laid before both Houses under the negative resolution procedure.

7. Policy background

What is being done and why?

- 7.1 The objectives of the Parental Bereavement Leave and Pay policy are to:
- give bereaved employees a statutory right to paid leave to provide space for them to grieve following the death of a child, and
 - to send a signal to employees and employers about the importance and value of recognising bereavement and providing adequate support for parents in such circumstances.
- 7.2 The Parental Bereavement (Leave) Regulations 2020 and the Statutory Parental Bereavement Pay (General) Regulations 2020 set a statutory minimum provision which all bereaved parents who are employees can rely on and, in doing so, will establish a clear baseline of support for employers to adhere to when managing bereavement in the workplace.
- 7.3 The Parental Bereavement (Leave) Regulations 2020 do this by giving all employees a statutory right to a minimum of 2 weeks off work in the event of their child's death or stillbirth, regardless of how long they have worked for their employer. Consistently with other rights to family related leave, the employee will not be able to take leave without giving notice to their employer. Given the circumstances, however, notice need not be in writing, but can be given orally, and there is no requirement to provide evidence of entitlement. The regulations give employees protection from detriment whilst on leave or afterwards such that an employer cannot treat them less favourably as a consequence of their decision to take this leave.
- 7.4 The Statutory Parental Bereavement Pay (General) Regulations 2020 implement a new statutory payment for parents taking time away from work following a child bereavement (subject to eligibility criteria, as for all other statutory family leave payments). The payment will provide a measure of earnings replacement which will support parents to be absent from work to grieve. Notice must be given in writing to the employer in order to claim this payment.
- 7.5 Entitlements to both leave and pay must be exercised within a window of 56 weeks from the death of the child, and bereaved parents can elect to take either a single week, or 2 weeks, which may be taken in blocks of one week at a time.
- 7.6 Using legislation to do this is the only way to guarantee that the policy objectives are realised. The option of doing nothing and relying on employer guidance has not been effective at changing current levels of provision of bereavement leave and has not increased support for bereaved parents. Even with promotion, employers may not engage with the existing guidance.

- 7.7 We estimate that 10,200 parents per year will be eligible for parental bereavement leave, whilst 9,300 of these will be eligible for statutory parental bereavement pay too. Available data suggests that only around two thirds of businesses provide bereavement leave already.¹
- 7.8 The previous Government committed to introduce a new entitlement to parental bereavement leave in the Conservative Party 2017 Manifesto. The powers to implement this new entitlement were given to the Government by the Parental Bereavement (Leave and Pay) Act 2018, which was legislated on by Parliament via a Private Member's Bill. There has been strong public and media interest in the policy.
- 7.9 The Welsh and Scottish Governments have been consulted on the policy.

8. European Union (Withdrawal) Act/Withdrawal of the United Kingdom from the European Union

- 8.1 This instrument does not relate to withdrawal from the European Union.

9. Consolidation

- 9.1 No consolidation is necessary, as this is the first exercise of the powers under the 2018 Act.

10. Consultation outcome

- 10.1 The powers being exercised in these instruments were given to the Government in a Private Member's Bill, which the Government supported, and which became the 2018 Act. In March 2018, during the Act's passage through Parliament, Government undertook a 12-week public consultation seeking views on how these powers should be exercised. In total, the public consultation received 1448 responses – 95% of which were from individuals. In addition, a series of round-table sessions were held with stakeholder groups representing the interests of businesses and bereaved parents. The consultation exercise also took account of views expressed in both Houses of Parliament on the 2018 Act during its passage.
- 10.2 *Definition of a bereaved parent.* Around 40% of responses proposed that individuals outside of the child's biological parents should be entitled to leave and pay, subject to their relationship with the child being 'parental' in nature. Stakeholders representing bereaved parents, and MPs, held this view very strongly. The Regulations reflect this by defining a 'bereaved parent' in broad terms, by reference to the employee's relationship to the child. This will include biological and adoptive parents, as well as certain foster parents and kinship carers.
- 10.3 *How and when the leave and pay can be taken.* Responses to the consultation (and stakeholder views) favoured the ability to take the leave and pay flexibly according to individual circumstances. Of the options put forward, those offering the ability to take the entitlement in blocks of a week attracted 75% of the support. 80% favoured extending the window in which leave and pay can be taken beyond the minimum of 56 days set by the 2018 Act to enable more flexibility. The Regulations reflect this by allowing bereaved parents to decide to take the 2 weeks consecutively or non-

¹ CIPD survey which attracted 679 responses from the organisation's membership of over 145,000 HR and L&D professionals.

consecutively, and by providing a window of 56 *weeks*, beginning with the date of death, in which the entitlement can be exercised.

- 10.4 *Notice requirements.* 85% of overall responses (and 83% of employers who responded) felt that advance notice for leave taken soon after the death would be inappropriate and should therefore be more flexible than what is required for leave taken at a later point in time; stakeholders also held this view. The Regulations reflect this by distinguishing the notice required for leave taken very soon after the death from the requirement for leave taken later in the 56-week window. In both cases, the notice required is minimal and places as little burden on the employee as is reasonably practicable.
- 10.5 *Evidence requirements.* 73% of respondents said that the evidence requirements for leave and pay should mirror that of other parental leave and pay entitlements. A strong theme among responses and stakeholders was that any evidence requirement should be sensitive and practicable for a parent to provide in these circumstances. These Regulations provide that no evidence is required for exercising the right to leave, but in order to be eligible for pay a bereaved parent must provide minimal evidence in the form of a written self-declaration that he/she meets eligibility conditions for pay, together with confirmation of the name of the person claiming, and the date of the child's death. The employer will not be able to request any further evidence.
- 10.6 The full consultation response can be found on GOV.UK. A copy can be obtained from the Department for Business, Energy and Industrial Strategy, Labour Market Directorate, 1 Victoria Street, London, SW1H 0ET.

11. Guidance

- 11.1 Draft guidance will be available on GOV.UK once the legislation is in place, ahead of the instruments coming into force on 6th April 2020. This will comprise of an employer guide and guidance for employees, in the same format as is provided for other similar rights.
- 11.2 The Advisory, Conciliation and Arbitration Service will publish guidance on this new entitlement for employers once the legislation is in place.
- 11.3 We will work with bereavement charities to ensure that their guidance reflects the new entitlement, so that bereaved parents are made aware of it and understand how to access it.

12. Impact

- 12.1 The impact on business is small (approximately £1.2m net per year). There is no quantifiable impact on charities or voluntary bodies and the instrument imposes no new obligations on them, except in their capacity as employers.
- 12.2 The impact on the public sector is limited to the extent to which they may need to administer this entitlement to an employee – and these impacts are proportionate to organisations in the private sector.
- 12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the legislation.gov.uk website. This is the

same Impact Assessment that accompanied the 2018 Act², and the policy set by these regulations has no impact on the costs identified in that Impact Assessment.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No special measures apply to small business.

14. Monitoring & review

- 14.1 The approach to monitoring of this legislation is consistent with other, similar entitlements to family-related leave and pay. Data and information will be monitored post-implementation using administrative data from HM Revenue and Customs and discussions with key stakeholders. We will conduct a non-statutory Post-Implementation Review (PIR) in 2025, once the new entitlement has been established sufficiently.
- 14.2 In line with the requirements of the Small Business, Enterprise and Employment Act 2015, Kelly Tolhurst MP has made the following statement: “Having had regard to sections 28 to 32 of the Small Business, Enterprise and Employment Act 2015 and Statutory Review Guidance for Departments published under section 31(3) of that Act, I have decided that to make provision for a statutory review in these instruments would be disproportionate taking into account the economic impact of the regulatory provision and would, therefore, be inappropriate. The Department for Business, Energy and Industrial Strategy will undertake a non-statutory review of the policy in 2025 using data from HM Revenue and Customs to monitor take-up, as well as qualitative interviews to assess the effectiveness of the legislation and guidance.”

15. Contact

- 15.1 Lucy Birt at the Department for Business, Energy and Industrial Strategy. Telephone: 020 7215 3070 or email: Lucy.Birt@beis.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Helen Martin and Joanna Warner, Deputy Directors for Individual Rights & Migration, at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Kelly Tolhurst, Minister for Small Business, Consumers and Corporate Responsibility at the Department for Business, Energy and Industrial Strategy can confirm that this Explanatory Memorandum meets the required standard.

² A copy of that impact assessment can be obtained from the Department for Business, Energy and Industrial Strategy, Labour Market Directorate, 1 Victoria Street, London, SW1H 0ET