

NEONATAL CARE (LEAVE AND PAY) BILL

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Neonatal Care (Leave and Pay) Bill as introduced in the House of Lords on 23 January 2023 (HL Bill 90).

- These Explanatory Notes have been prepared by the Department for Business, Energy and Industrial Strategy with the consent of Baroness Wyld, the member in charge of the Private Member's Bill in order to assist the reader in understanding the Bill. 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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These Explanatory Notes relate to the Neonatal Care (Leave and Pay) Bill as introduced in the House of Lords on 23 January 2023 (HL Bill 90)

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 to create an entitlement to Neonatal Care Leave and Pay for eligible employees with parental or other personal relationship (these are referred to as parents for the remainder of this document for brevity) with a child who is receiving, or has received, neonatal care.
- 2 The Bill's powers allow provision to be made for the following:
 - Neonatal Care Leave - a right for employed parents to be absent from work for a prescribed period (to be set at a minimum of one week) in respect of a child who is receiving, or has received, neonatal care. All employees who meet the eligibility conditions will be entitled to this leave, regardless of how long they have worked for their employer. The leave must be taken before the end of a period of at least 68 weeks beginning with the date of the child's birth.
 - Neonatal Care 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 a prescribed rate. 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 Neonatal Care Leave will have the same employment protections as those associated with other forms of family related leave (i.e. Maternity, Paternity, Adoption, Parental Bereavement and Shared Parental Leave). This includes protection from dismissal or detriment as a result of having taken leave.

Policy background

- 3 Whilst parents who have a child in neonatal care may be able to make use of other rights to family-related leave and pay (including maternity leave and pay, paternity leave and pay, adoption leave and pay, shared parental leave and pay and unpaid parental leave), there is currently no specific statutory entitlement to leave and/or pay for parents of children who require neonatal care.
- 4 This has the result that parents of children who go into neonatal care currently have to spend a proportion of their existing family leave rights caring for the baby in the hospital. Some mothers report that they have had to leave work because they were not ready to return at the end of their maternity leave.
- 5 As paternity leave is available for two weeks (and only to those fathers and partners who meet tests concerning continuity of service and minimum earnings), some fathers and partners have had to rely on statutory unpaid parental leave or compassionate leave in order to take time off work when their child was in hospital.
- 6 Some fathers and partners have also taken sickness absence as a result of their child being admitted to neonatal care. In 2018, Bliss (a charity for premature and sick babies) conducted a survey which showed that, in circumstances where a baby is kept in neonatal care for longer than two weeks, around 35% of fathers and partners were signed off sick.
- 7 The Conservative Party Manifesto in 2019 stated: “We will legislate to allow parents to take extended leave for neonatal care, to support those new mothers and fathers who need it during the most vulnerable and stressful days of their lives”.
- 8 The Scottish National Party Manifesto in 2019 stated: “In addition, because we know the extra pressures that a baby in neonatal care creates for families, parents would receive an extra statutory paid week of leave for every week their baby is in neonatal care”.
- 9 The Queen’s Speech in December 2019 committed to introducing a new right to Neonatal Leave. In a section covering the main elements of the Employment Bill, it stated the Bill would include: “Allowing parents to take extended leave for neonatal care...”
- 10 The Government launched a stakeholder consultation on the introduction of Neonatal Leave and Pay on 19 July 2019 and the response was published on 16 March 2020.
- 11 The Bill will give eligible employed parents an additional right to time away from work in respect of their child who is receiving or has received neonatal care.
- 12 It requires Regulations to give employed parents a ‘day one’ right to a minimum of one week of leave away from work, subject to certain criteria being met. This means that an employee would be eligible regardless of their length of service with their current employer.
- 13 Employed parents would also be entitled to statutory pay at a prescribed rate subject to requirements including that the employee has worked for their employer continuously for at least 26 weeks by the end of the week before the child’s admission into neonatal care.
- 14 The introduction of a specific, statutory entitlement to Neonatal Care 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 admission of a child into neonatal care. It also gives parents dedicated and protected time to spend with their baby whilst they are in hospital or other care settings which will be defined in Regulations.

Legal background

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

Territorial extent and application

- 16 Employment law is reserved for Scotland and Wales but devolved to Northern Ireland. It will be for the Northern Ireland Assembly to decide whether similar provisions should apply in Northern Ireland.
- 17 The clauses creating an entitlement to Neonatal Care Leave and Pay will therefore extend and apply to Great Britain, but the Bill itself extends to the whole of the UK owing to some of its consequential amendments.
- 18 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 Neonatal Care (Leave and Pay) Bill

- 19 Clause 1 of the Bill introduces the Schedule, which sets out the amendments to existing legislation to establish an entitlement to Neonatal Care Leave and Pay.
- 20 Clause 2 allows the Secretary of State to make regulations that make consequential amendments to secondary legislation. These regulations will be subject to the negative procedure.
- 21 Clause 3 sets out the extent and short title of the Bill and makes provision for commencement.
- 22 The Schedule consists of three Parts which are explained in more detail below:
 - Part 1 creates a statutory entitlement to Neonatal Care Leave
 - Part 2 creates a statutory entitlement to Neonatal Care Pay; and
 - Part 3 contains related amendments.

Part 1: Neonatal Care Leave

- 23 Part 1 of the Schedule amends Part 8 of the Employment Rights Act 1996 by inserting a new Chapter 5, consisting of sections 80EF to 80EI, to provide for an entitlement to Neonatal Care Leave.

80EF: Neonatal Care Leave

- 24 Section 80EF requires the Secretary of State to make regulations to give an entitlement to time off work to employed parents with responsibility for a child who is receiving, or has received, neonatal care. It provides for conditions for that entitlement to be defined in regulations by reference to the employee having a parental or other personal relationship with the child.
- 25 Regulations must set the duration of leave and how and when the leave can be taken. The duration of leave must be at least one week; and the Regulations must establish a period within which the leave may be taken, which must be a minimum of 68 weeks starting from the date of the child's birth.
- 26 Regulations must provide that an employee is entitled to leave only if the neonatal care continues without interruption for a period of at least seven days beginning with the day after the day on which the care starts
- 27 Neonatal care is defined as care of a medical or palliative kind specified in the regulations and must start before the end of a period of 28 days beginning with the day after the date of the child's birth. A week is any seven-day period.

80EG: Rights during and after neonatal care leave

- 28 80EG requires the Regulations made under 80EF to set out:
- The employee's rights in relation to retaining their existing terms and conditions of employment, whilst taking Neonatal Care 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.
- 29 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 be, or should not be, seen as 'remuneration' for this purpose.

80EH: Special cases

- 30 Section 80EH allows the Regulations to make special provision for the redundancy and dismissal of employees during or after a period of Neonatal Care Leave, including whether an employer is required to offer alternative employment, and the consequences of failing to comply with the regulations.

80EI Chapter 5: Supplemental

- 31 Section 80EI allows the Regulations made under 80EF to specify circumstances where neonatal care can be regarded as continuous despite an interruption, this is relevant for the seven days continuous care condition in paragraph 25 above. Regulations may 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 Neonatal Care 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.

- 32 Regulations can make provision for situations where an employee also has a non-statutory right to take Neonatal Care Leave (for example, a right arising under their contract of employment).
- 33 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 Neonatal Care 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.
- 34 Regulations can set out special provision for different cases or circumstances, including; more than one child (with whom an employee has a parental or other personal relationship), receiving neonatal care in specified circumstances or a child receiving neonatal care on two or more separate occasions. This could include making special provision on the extent and applicability of the entitlement to leave in such circumstances.

Parliamentary procedure applying to Regulations

- 35 Paragraph 3 of Part 1 of the Schedule adds section 80EF 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 and approved in both Houses of Parliament before becoming law.

Part 2: Neonatal Care Pay

- 36 Part 2 of the Schedule adds Part 12ZE (containing sections 171ZZ16 to 171ZZ24) to the Social Security, Contributions and Benefits Act 1992 to create an entitlement to Neonatal Care Pay.

171ZZ16: Entitlement

- 37 Section 171ZZ16 provides that an employee will be eligible for Neonatal Care Pay subject to meeting certain conditions.
- 38 These conditions include:
 - That the employee has a prescribed parental or other personal relationship with the child who is receiving, or has received, neonatal care (because they meet the conditions to be set in Regulations); and that the neonatal care continues without interruption for a period of at least seven days beginning from the day after the day on which the care starts;
 - 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 neonatal care starts (this is known as the end of the 'relevant week'), or if the employee is entitled to statutory maternity, paternity or adoption pay, the 'relevant week' will instead align with the week that is already specified as the 'relevant week' for that entitlement. In both cases, the employee must also be legally entitled to be in that employment.
 - That, over an eight-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).

- 39 Regulations may also add a further condition that a person will not be entitled to pay for a particular week or period unless at the start of that week or period they remain employed by the same employer.
- 40 Neonatal care is defined as care of a medical or palliative kind specified in the regulations and must start before the end of a period of 28 days beginning with the day after the date of the child's birth. A week is any seven- day period.
- 41 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 neonatal 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.

171ZZ17 Entitlement: Supplementary

- 42 Section 171ZZ17 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.
- 43 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.
- 44 Regulations can set out special provision for circumstances where a person meets the criteria set out in paragraph 37 and paragraph 38 above in respect of more than one child (with whom an employee has a parental or other personal relationship) or when a child receives neonatal care on two or more separate occasions. Regulations may also make special provision on the extent to which and how the entitlement to pay is applied in such circumstances.
- 45 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.
- 46 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.

171ZZ18: Liability to make payments

- 47 Section 171ZZ18 states that an employer is liable to pay their employee Neonatal Care Pay, conditional on that employee having at least 26 weeks' continuous service with them by the end of the 'relevant week', and meeting any criteria set out in regulations as described in paragraph 36 above.
- 48 Regulations must make provision for liability for Neonatal Care Pay in the event that the employer terminates their employee's contract to avoid making this payment.
- 49 Regulations may also specify conditions where this liability will shift to HM Revenue and Customs.

171ZZ19: Rate and period of pay

- 50 Section 171ZZ19 states that the weekly statutory rate of Neonatal Care Pay will be set in Regulations, which may include provisions for different rates for different situations.

- 51 Regulations will specify the number of weeks' entitlement (which must be a minimum of one week), and the 'qualifying period' within which the pay must be claimed (which must be a minimum of 68 weeks starting from the child's birth). 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.
- 52 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.
- 53 Regulations may specify further circumstances in which an employer is not required to pay statutory Neonatal Care Pay.
- 54 Employees may choose the start and end point of their statutory pay week. A week is any period of seven days. If it is necessary to calculate a daily rate of statutory Neonatal Care Pay (for the purposes of these provisions, or any Regulations), this should equal one seventh of the weekly rate.

171ZZ20: Restrictions on contracting out

- 55 Section 171ZZ20 specifies that Neonatal Care 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).

171ZZ721: Relationship with Contractual Remuneration

- 56 Section 171ZZ21 states that the entitlement to statutory Neonatal Care Pay does not affect an employee's rights to payments associated with their contract of employment.
- 57 However, it allows an employer to offset 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.
- 58 Regulations can specify particular types of payments which are to be regarded (or not regarded) as contractual remuneration.

171ZZ22: Crown Employment

- 59 Section 171ZZ22 provides that persons employed by the Crown will have the same entitlements to Neonatal Care Pay as those who work for other employers.

171ZZ23: Special Classes of Person

- 60 Section 171ZZ23 allows Regulations to set, with the agreement of HM Treasury, how the right to Neonatal Care Pay applies to persons 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.

171ZZ24: Supplementary

- 61 Section 171ZZ24 defines an employer as someone who is paying secondary Class 1 National Insurance contributions in relation to any of the earnings of the neonatal parent.

- 62 An employee is defined as someone who is employed in Great Britain, either under a contract of employment or in an office with earnings.
- 63 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 Neonatal Care Pay.
- 64 Regulations may set out when two or more employers, or two or more employment contracts, should be treated as a single employer or contract.
- 65 A week is defined as a calendar week, beginning on Sunday, except in relation to section 171ZZ19 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.
- 66 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 Neonatal Care Pay. Regulations can set a different method for calculating normal weekly earnings in designated circumstances.
- 67 Regulations will also specify what is meant by 'earnings' and 'relevant period'.
- 68 Regulations can make provision 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 Neonatal Care Pay e.g. determining eligibility and pay rate.
- 69 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.
- 70 Regulations can also specify which one of the person's employers, under these circumstances, is liable to pay their employee Neonatal Care Pay.

Parliamentary procedure applying to Regulations

- 71 Paragraph 6 of the Schedule specifies that sections 171ZZ16 – 171ZZ19 are subject to the affirmative procedure, meaning that Regulations made under these powers would need to be debated, and agreed to, in both Houses of Parliament before becoming law.

Part 3: Further Amendments to do with Neonatal Care Leave and Pay

72 Part 3 makes consequential amendments to other legislation, including references to Neonatal Care Leave and Pay where relevant.

73 It includes amendments to the following Acts:

- Social Security Act 1989
- Finance Act 1989
- Social Security Administration Act 1992
- Social Security Contributions and Benefits Act 1992
- Employment Rights Act 1996
- Social Security Contributions (Transfer of Functions, etc.) Act 1999
- Finance Act 1999
- 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
- Welfare Reform Act 2007
- Pensions Act 2008
- Corporation Tax Act 2009
- Finance Act 2013

Commencement

- 74 HM Revenue & Customs and commercial payroll providers usually require at least 18 months' lead-in time to implement the changes which enable employers to administer new statutory payments.
- 75 If the Bill successfully completes all of its Parliamentary stages in 2023 it is likely that implementation will take place at least 18 months after that date.

Financial implications of the Bill

- 76 The estimated annual cost to the Exchequer of Neonatal Care Leave paid at the statutory flat rate (currently £156.66 a week), or 90% of average weekly earnings where that is lower, is £14.2m per year on average. In addition, there will be a one-off cost estimated at £5m 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.
- 77 The one-off cost to business of familiarising themselves with the new legislation, for example to amend their HR policies, is estimated at £4.7m. The annual cost to business resulting from greater staff absence, recurring administrative cost, recurring familiarisation cost and in some cases a contribution towards the statutory pay, is estimated at £22.2m.

Parliamentary approval for financial costs or for charges imposed

- 78 A money resolution was necessary and passed in the Commons because the Bill increases the potential sums that will be payable out of money provided by Parliament. The liability to pay statutory Neonatal Care Pay is imposed on employers, but their liabilities will be funded to a large extent by HM Revenue & Customs under section 7 of the Employment Act 2002.
- 79 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

- 80 This Bill makes provision as to which employees will be entitled to neonatal care leave and pay and which will not. This includes drawing distinctions between persons based on the age at which a child enters neonatal care and based on the different relationships which persons have with the child receiving neonatal care.
- 81 These decisions are therefore capable of engaging Article 14 of the ECHR (Prohibition of discrimination), read with Article 8 (Right to respect for private and family life).
- 82 However, the Department considers that these decisions have been taken compatibly with the Convention rights. In deciding which admissions to neonatal care would lead to entitlements to leave and pay, the Department drew on evidence as to the stage at which children are most vulnerable and thus the period in which parents are most likely to require paid time off in order to care for and be with the child. Evidence suggests that children are most vulnerable in

the first 28 days of their lives. In England and Wales in 2020, 54% of total deaths up to the age of 16 occur in the first 28 days of life. Evidence also suggests that majority of admissions into neonatal care units lasted less than one week in England and Wales in 2018.

- 83 As for the relationships with a child which will be required in order for someone to be entitled to Neonatal Care Leave and Pay, this will be determined in regulations.
- 84 However, the Department considers that the power is drafted so as to enable it to be exercised in a manner which is compatible with Convention rights. Modern family structures can be complex, and sometimes fluid, and there are a wide range of legal and factual relationships between an adult and a child which could be said to be parental in nature. The existence of the power recognises that different views are possible as to which of these relationships should qualify for the entitlements created by the Bill, which recognises the particularity of parental arrangements for a child who is receiving, or has received, neonatal care. It is necessary therefore to allow for secondary legislation which can identify those relationships (on the basis of detailed legal and factual criteria) in which adults are likely to be particularly involved in the care (that is, care other than medical care, e.g. changing nappies, feeding, skin-to-skin contact, taking medical decisions, etc.) of a child during its time in neonatal care. In addition, the Department anticipates that the make-up of family units and social attitudes towards different parental relationships will continue to evolve; for example, relationships created by fostering and adoption arrangements are areas in relation to which legislation can be expected to continue to change (and to develop differently across the different jurisdictions of the United Kingdom). The existence of delegated powers to determine eligibility allows provision to be adapted to reflect these changes in the future.

Related documents

- 85 The following documents are relevant to the Bill and can be read on the Parliamentary Bills page:
- 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 Senedd Cymru 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	Yes	No	No	Yes	No
Clause 2	Yes	Yes	Yes	Yes	No	No	Yes	No
Clause 3	Yes	Yes	Yes	Yes	No	No	Yes	No
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	Yes	No	No	No	No

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