

*These notes refer to the Parental Bereavement (Leave and Pay) Act (Northern Ireland) 2022 (c.5) which received Royal Assent on 21 March 2022*

# Parental Bereavement (Leave and Pay) Act (Northern Ireland) 2022

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *Section 1 Parental Bereavement Leave*

Section 1 of the Act amends Part 9 of the Employment Rights (Northern Ireland) Order 1996 by inserting a new Chapter 4, consisting of Articles 112EA to 112EF, which will result in the provision of entitlement to parental bereavement leave and miscarriage leave.

#### Article 112EA - Parental Bereavement Leave

Article 112EA requires the Department to make regulations to give an entitlement to employed parents to time off work following the death of a child. It provides for the conditions of entitlement 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.

Regulations must set the duration of leave and when the leave can be taken. The leave entitlement must be a period of 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.

In addition, regulations can make provision for how the leave is to be taken.

A child is defined as being under the age of 18 years and a week is any 7 day period.

#### Article 112EB - Rights during and after Parental Bereavement Leave

Article 112EB requires the regulations made under Article 112EA 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;

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- 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.

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.

#### Article 112EC - Special Cases

Article 112EC 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.

#### Article 112ED - Chapter 4: Supplemental

Article 112ED allows the regulations made under Article 112EA 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.

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).

Regulations can also modify the way in which a week's pay is calculated in Chapter 4 of Part 1 of the Employment Rights (Northern Ireland) Order 1996 to take account of periods of parental bereavement leave. The concept of 'a week's pay' is widely used in that Order, for example in Article 153 which sets out how the basic Industrial Tribunal award for unfair dismissal should be calculated.

#### Article 112EE - Power to extend Chapter to stillbirths

The entitlement to parental bereavement leave under Articles 112EA to 112ED will apply on the death of a child under 18. Article 112EE ensures that this entitlement will be extended to parents of children stillborn after 24 weeks of pregnancy.

#### Article 112EF – Application in relation to miscarriage

Article 112EF requires the Department, by regulations, to provide that regulations under Chapter 4 apply in relation to a person who has experienced a miscarriage as they apply in relation to a bereaved parent, with such modifications, if any, as specified in regulations. The Department may also provide that regulations extend to a person who satisfies conditions as to their relationship with the person who has experienced a miscarriage. This enables the right to be extended to, for example, the father or the person's partner.

## **Section 2 - Parental Bereavement Pay**

Section 2 of the Act adds Part 12ZD (containing sections 167ZZ9 to 167ZZ19) to the Social Security Contributions and Benefits (Northern Ireland) Act 1992. The Part creates an entitlement to parental bereavement pay and will result in the provision of an entitlement to miscarriage pay.

### **Section 167ZZ9 - Entitlement**

Section 167ZZ9 provides that a person who is a bereaved parent (because they meet the conditions to be set in regulations as to their relationship with the child) and who meets the weekly earnings threshold will be eligible for parental bereavement pay.

The weekly earnings threshold is met if the person's normal weekly earnings for any continuous 8 weeks, falling within the relevant 16 week window which precedes and follows the death of the child, is not less than the lower earnings limit in force at the end of the relevant week. Section 167ZZ17 allows provision to be made by regulations for assumed earnings for the weeks following the death of the child.

Section 167ZZ9 specifies that the pay entitlement is applicable for each deceased child in the event of the death of more than one child.

### **Section 167ZZ10 - Entitlement: Supplementary**

Section 167ZZ10 specifies that, in order to receive payments, a person 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.

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.

Under subsection (4)(a) the Department may, by regulations, provide that section 167ZZ9(2)(b) or (c) and (5) to (7) have effect subject to prescribed modifications in certain prescribed cases.

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.

### **Section 167ZZ11 - Liability to make payments**

Section 167ZZ11 sets out certain conditions under which an employer is liable to pay a person parental bereavement pay.

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.

Regulations may also specify conditions where this liability will shift to HM Revenue and Customs.

#### Section 167ZZ12 - Rate and period of pay

Section 167ZZ12 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.

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.

Statutory parental bereavement pay is not payable if, during the week for which the statutory pay is claimed, the employee works for the employer who is liable to pay the 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 in respect of a statutory pay week if, during that week, the employee has worked for another employer who is not liable to pay statutory pay, but regulations can prescribe situations where this does not apply.

Regulations may specify further circumstances in which an employer is not required to pay statutory parental bereavement pay.

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.

#### Section 167ZZ13 - Restrictions on contracting out

Section 167ZZ13 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).

#### Section 167ZZ14 - Relationship with contractual remuneration

Section 167ZZ14 states that the entitlement to statutory parental bereavement pay does not affect an employee's rights to payments associated with their contract of service.

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.

Regulations can specify particular types of payments which are to be regarded (or not regarded) as contractual remuneration.

#### Section 167ZZ15 - Crown employment

Section 167ZZ15 provides that bereaved parents employed by the Crown will have the same entitlements to parental bereavement pay as those who work for other employers.

#### Section 167ZZ16 - Special classes of person

Section 167ZZ16 allows the Department, with the agreement of HM Treasury, to modify, by regulations, how the right to parental bereavement pay applies to bereaved parents who are, have been or will be outside Northern Ireland; employed on board any ship, vessel, hovercraft or aircraft; or in prescribed employment in connection with continental shelf operations.

#### Section 167ZZ17 - Supplementary

Section 167ZZ17 provides definitions for Part 12ZZD and other supplementary provisions. This includes the definition of an employer as someone who is paying secondary Class 1 National Insurance contributions in relation to any of the earnings of the bereaved parent (or who would be paying such contributions but for the condition in section 6(1)(b) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 or the fact that the employee is under 16).

An employee is defined as someone who is gainfully employed in Northern Ireland, either under a contract of service or in an office with earnings.

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.

Regulations may set out when two or more employers, or two or more employment contracts, should be treated as a single employer or contract.

A week is defined as a calendar week, except in relation to section 167ZZ12 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.

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 may provide for assumed future earnings and can also set a different method for calculating normal weekly earnings in designated circumstances.

Regulations will also specify what is meant by ‘earnings’.

Regulations can make provisions for employees working for certain National Health Service bodies whose contracts of employment have been treated as ‘divided’ into more than one contract, following the establishment of Health and Social Care trusts, to elect for all their contracts to be considered as one for the purposes of provision concerning parental bereavement pay.

Regulations may also set the conditions that must be satisfied in order for an employee to be entitled to make this decision. Regulations may also 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.

Regulations can also specify which one of the person’s employers, under these circumstances, is liable to pay their employee parental bereavement pay.

#### Section 167ZZ18 - Application in relation to stillbirths

The entitlement to parental bereavement pay under sections 167ZZ9 to 167ZZ17 will apply on the death of a child under 18. Section 167ZZ18 ensures that this entitlement will extend to parents of children stillborn after 24 weeks of pregnancy.

#### Section 167ZZ19 – Application in relation to miscarriage

Section 167ZZ19 requires the Department, by regulations, to provide that Part 12ZD and regulations under it apply in relation to a person who has experienced a miscarriage as they apply in relation to a bereaved parent, with such modifications, if any, as specified in regulations. The Department may also provide that regulations extend to a person who satisfies conditions as to their relationship with the person who has experienced the miscarriage. This enables the right to be extended to, for example, the father or the person’s partner.

### ***Section 3 – Temporary provision: qualifying employment period for parental pay***

Section 3 provides that the provisions inserted by section 2 (provisions concerning parental bereavement pay) have effect with modifications and that these modifications will remain in place until no later than 5 April 2026 and that they must cease to have effect upon the introduction of miscarriage regulations. The modifications are that, in order to be entitled to statutory parental bereavement pay, the person 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, that the person is still employed by this employer at the time of their child’s death and that the person’s normal weekly earnings

for the period of 8 weeks ending with the relevant week are not less than the lower earnings limit in place at the end of the relevant week.

#### ***Section 4 – Further amendments to do with parental bereavement leave and pay***

Section 4 refers to the Schedule as containing amendments that are related to the statutory entitlements created by sections 1 and 2.

#### ***Section 5 – Commencement***

Section 5 specifies that parental bereavement leave and pay regulations under the provisions inserted by Sections 1 and 2 must come into operation by no later than, and apply in respect of children who die on or after, 6 April 2023. Regulations providing for miscarriage leave and pay must come into operation by no later than, and apply in respect of miscarriages on or after, 6 April 2026.

Section 5 provides that commencement powers (for Part 2 of the Schedule (and section 4 in so far as it relates to that Part)) are also conferred upon the Department for Communities. This is to allow for the fact that there are provisions (Article 68) within the Welfare Reform (NI) Order 2015 that make reference to a person's entitlement to work, as it relates to family related statutory payments, that have yet to be commenced. Responsibility for commencing these provisions rest with the Department for Communities. Through giving the commencement powers for Part 2 of the Schedule (and section 4 in so far as it relates to that Part) to the Department for Communities, this enables the Department for Communities to commence this condition for the full range of family related statutory payments simultaneously, including parental bereavement leave and pay.

The Department that makes a commencement Order (under section 5(1) the Department for the Economy, and under section 5(2) the Department for Communities), may make transitory or transitional provisions, or savings.

#### ***Schedule***

12. The Schedule makes consequential amendments to other legislation, including the insertion of references to parental bereavement leave and pay where relevant.

It includes amendments to the following Orders and Acts:

- Social Security (Northern Ireland) Order 1989
- Social Security Contributions and Benefits (Northern Ireland) Act 1992
- Social Security Administration (Northern Ireland) Act 1992
- Pensions (Northern Ireland) Order 1995
- Employment Rights (Northern Ireland) Order 1996

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- Social Security Contributions (Transfer of Functions, etc.) (Northern Ireland) Order 1999
- Employment (Northern Ireland) Order 2002
- Pensions (No.2) Act (Northern Ireland) 2008