

## Neonatal care leave

Transcript prepared for HR & Compliance Centre by Callisto Connect.

**Jo Broadbent:** I'm not sure many employers will want to impose heavy-handed requirements for evidence at such a difficult time. It seems fairly unlikely that many employees are going to lie about their child being in neonatal care.

**Robert Shore:** Hello, and welcome to the Brightmine podcast, formerly known as the XpertHR podcast. Brightmine is a leading provider of people data, analytics and insight, offering employment law expertise, comprehensive HR resources and reward data to meet every HR and organisational challenge and opportunity. You can find us any time of the day or night at <https://www.brightmine.com>.

Hello everyone. My name is Robert Shore, and I am delighted to be welcoming to the podcast today Jo Broadbent, council knowledge lawyer in the employment law team at Hogan Lovells. Many of you will know Jo from her work across Brightmine content, and in particular our family-friendly employment law guides. Jo has just written our two new guides on neonatal care leave and neonatal care pay.

Jo, hello.

**Jo Broadbent:** Hi Robert.

**Robert Shore:** And also joining us is Laura Merrylees, senior legal editor at Brightmine. Laura, great to have you on board.

**Laura Merrylees:** Hi Robert.

**Robert Shore:** So, we are gathered here today to talk about some of the trickier questions arising out of the new neonatal care leave right, in force from 6 April 2025. We've had a webinar on this and we didn't have time to run through all questions that were raised at that, and we'll be picking on many of those today, and others that we know people are very keen to know more about. We'll also be flagging what's in the pipeline on the family-friendly rights front with the forthcoming Employment Rights Bill.

So, the new right to neonatal care leave has been in preparation a long time, got Royal Assent under the last Government and is now coming into effect under the new Government. There are lots of technicalities to talk through, so let's get started.

Jo, to put the rest of our discussion into context, how many parents are likely to benefit from this new right to neonatal care leave?

**Jo Broadbent:**

Well, according to Government estimates, around 60,000 employees a year are going to benefit from neonatal care leave. And I also had a look at some statistics that were published by Bliss, which people will know is the charity for babies who are born premature sick. And they say that about 90,000 babies a year need a period of neonatal care. The average stay is around a week but obviously not all babies will need that long. And I think, for example, the typical stay in neonatal care for a baby that's born at term is four days. Babies that are sick or premature are typically going to need care for a longer period, and it's really parents of those babies that are going to find the new right so helpful.

**Laura Merrylees:**

Yeah, 'cause as we know, neonatal care leave is only going to kick in once a child has spent at least seven days in neonatal care. So Jo, which employees are going to be most affected by that?

**Jo Broadbent:**

I think that's likely to be a particular issue for fathers or for the mother or adopter's partner. And that's because in almost every case a baby's mother is going to be on maternity leave while the baby's receiving neonatal care, and in an adoption situation the primary adopter is generally going to be on adoption leave. As listeners will know, it's very uncommon in practice for a mother or an adopter to have returned to work at that stage, or to have curtailed their maternity or adoption leave at an early stage and be taking shared parental leave during the first weeks of a child's life. Although someone may have curtailed their maternity or adoption leave from a future date so that the second parent can access shared parental leave, typically they won't actually have brought their own leave to an end.

**Laura Merrylees:**

Okay. So what's the position then for fathers or partners? Are they going to be able to take any leave during that first week of neonatal care?

**Jo Broadbent:**

That's really going to depend on how they've chosen to take any paternity leave to which they might be entitled, and also the point at which the baby's admitted to neonatal care.

One thing that's really caught in confusion is the fact that there are such a wide variety of different scenarios that employers may have to deal with. I should also say at this stage I'm going to concentrate on birth situations today because adoptions at birth are relatively uncommon, and that means that employers are much more likely to be dealing with neonatal care leave in the context of birth, I think.

**Laura Merrylees:**

So what happens then if the father or mother's partner has chosen to take a period of paternity leave which starts when the child is born?

**Jo Broadbent:**

So, in that case the paternity leave is going to start at birth as planned, and the parent will then be on paternity leave if the child's admitted into neonatal care at, or shortly after, birth. So they'll be on leave but it's going to be paternity leave, not neonatal care leave. And if the baby then remains in care for that first complete week, they'll be able to take the accrued neonatal care leave after the paternity leave ends.

**Laura Merrylees:**

Okay. So looking then at the other scenario, what happens if the employee has chosen to start their paternity leave on a particular date from birth, so sort of almost an advanced booking of paternity leave so it doesn't coincide with the birth itself? [0:05:29.4]

**Jo Broadbent:**

Yeah, and that's obviously a more complicated situation where the parent's chosen to start their paternity leave at a different time. In that case, they may want to vary the date on which they want their paternity leave to start, in order to bring it forward. That normally requires 28 days' notice but there is an exception if it's not reasonably practicable to give the notice in that timeframe. Employers may therefore find that employees are asking to start their paternity leave earlier than they'd originally planned, so that they can then be present during that initial period of neonatal care.

**Robert Shore:**

Jo, Laura, if I can just come back in here. I've got a couple of scenarios as well. What about a scenario where the parent isn't entitled to paternity leave at all, for example, because they haven't got the necessary length of service? Or – another scenario – where a parent doesn't want to start their paternity leave early for some reason. What happens then?

**Jo Broadbent:**

Yeah, that's a really difficult situation. Although, in relation to the first point you mentioned, Robert, under the Employment Rights Bill the service requirement for paternity leave is obviously being removed, so going forward that will be less of an issue. But in the meantime there are various options that might be available to the employee.

So, thinking about their statutory rights, it might be possible for them to take a period of unpaid leave to care for a dependent, say. Now, the right to time off for dependents covers absence to provide assistance in connection with birth or to make arrangements for the provision of care for a dependent who's ill. The right is to reasonable time off, and most employers in that situation are going to be flexible about what they regard as reasonable time off. And what that might

do is help someone over those first few days before the right to neonatal care leave is triggered.

**Robert Shore:**

Yes. I'm going to ask you a question there about unpaid time off in a second. But actually, just to go back to the Employment Rights Bill there, where you say about the service requirement for paternity leave being removed. Of course, this is going to happen probably at some point in the future because the RB is still being debated, isn't it? So, as of 6 April there is still the service requirement. That's right, isn't it?

**Jo Broadbent:**

That's right. It's only at some point, probably not until later this year at the earliest that that change is going to be made to paternity leave entitlement.

**Robert Shore:**

Yeah. So anyway, we were talking about unpaid time off there. Is there any paid entitlement?

**Jo Broadbent:**

No formal statutory entitlement, but an employee could obviously ask to take a period of holiday with immediate effect in order for the leave to be paid. And again, you'd hope that most employers are going to agree to that even without any advanced notice.

If the employee's in a situation where they haven't got sufficient holiday to cover the absence – for example, they've only recently started work – they're normally going to have to rely on the employer's goodwill. Large employers in particular are often going to have policies that allow someone to take a period of paid time off in that situation. That might be a carers' leave policy, it might be some form of compassionate leave, for example. And most employers are going to want to help an employee while they're supporting their partner and sick child, I would have thought. And even if there's no policy allowing for paid leave, you'd expect that employers are going to be willing to give someone a short period of unpaid leave until the right to neonatal care leave begins to apply.

**Laura Merrylees:**

We've talked about paternity leave and the right to time off for dependents. But one thing we certainly noticed with questions that were coming through in our recent webinar, and that's been causing a bit of confusion, is how the new right interacts with shared parental leave. How does that work?

**Jo Broadbent:**

So, I think the basic principle to hang onto is that they're two completely different types of leave. A parent is entitled to neonatal care leave and they may also be entitled to shared parental leave if they meet the eligibility criteria and either the child's mother has curtailed their maternity leave or the adopter has curtailed their adoption leave. And the fact that the neonatal care leave has got to be taken within 68 weeks of birth means that someone's going to be

able to take the maximum amount of shared parental leave as well as the maximum amount of neonatal care leave, even if the baby in fact spends the full twelve weeks in hospital.

**Laura Merrylees:**

Okay. So that's the basic principle. But one quick point of clarification. Is neonatal care leave a shared entitlement in the same way as shared parental leave, or is it more of an individual right?

**Jo Broadbent:**

No, it's definitely an individual right. Each parent accrues neonatal care leave in relation to the child, and can choose when to use it. It's not a right to a certain number of weeks' leave split between the parents. And as we've mentioned already, the parents may well be taking neonatal care leave at different times. So the father, or the partner of the child's mother or adopter, is more likely to be taking leave while a child's receiving care, while the mother or adopter will typically be taking the leave at a later date once their maternity or adoption leave has finished.

**Laura Merrylees:**

So, just returning then to shared parental leave and how it might interact with neonatal care leave, say that a mother has curtailed her leave so that her partner can take shared parental leave at the end of their paternity leave, and the child needs neonatal care. What happens in that scenario?

**Jo Broadbent:**

Okay. So, as you've said, her partner is going to be on paternity leave for the first couple of weeks usually. And that's because at the moment they're going to lose their paternity leave if they don't take it before any period of shared parental leave. The shared parental leave is then going to start as planned, and it will last for the relevant period. And the neonatal care leave entitlement will be accruing while the individual's on their paternity and shared parental leave, and then they'll be able to take it at any point within 68 weeks of the child's birth. If they take it during the Tier 2 period – that's broadly from a week after the baby leaves neonatal care – they'll have to give notice and take all their neonatal care leave in one go. If the baby is still in neonatal care at that point, they'll have more flexibility about how and when to take the leave, and won't have to give as much notice.

**Laura Merrylees:**

What would be the position then if the partner was planning to take paternity leave, go back to work for a couple of weeks, and then take some shared parental leave?

**Jo Broadbent:**

Well, in that situation the father or partner might be part-way through a week of neonatal care leave when the shared parental leave is due to start. Remember that the leave accrues a week at a time. So in the early stages of a child's life, a parent is probably notifying their employer that they want to take neonatal care leave on a week-by-week basis. So in that example, the father or partner

has had two weeks of paternity leave. They've then chosen to take some neonatal care leave. And while they're part-way through that period of neonatal leave, their shared parental leave is due to start. Effectively, the shared parental leave is going to start as planned, and the period of neonatal care leave that they're on at that point is going to be paused. And the neonatal care leave will then resume automatically at the end of the shared parental leave period if they're still in the Tier 1 period at that point.

If they're in the Tier 2 period by then – as we said, the baby's been out of neonatal care for a week or more – the parent can choose when to take the rest of the neonatal care leave that they were on when the shared parental leave started. But when they take the balance, that's got to be consecutive with any other neonatal care leave that's accrued and that they want to take.

**Robert Shore:**

Can I just say, this is all quite complicated, isn't it?

**Jo Broadbent:**

Yeah, it really is. And I think the complexity stems from the fact that someone's not going to know in advance how long a baby's going to be in care. So fathers and partners in particular are going to be taking leave quite often as it accrues.

The Government also wanted to give employees maximum flexibility to take leave when they need it. But that doesn't sit terribly neatly with other family-friendly rights, which obviously normally require employees to give employers advanced notice of leave and any changes.

It's really easy to get bogged down in the detail. So I think it might help to think about the underlying purpose of the leave. So, first it's to allow a parent time off work while their child is receiving neonatal care. But second, it's also to make sure that a parent can spend as much time at home with the child once it's discharged, as they would have done if the baby had been able to come home shortly after birth. And that's really why the parent can be on a different type of leave – perhaps maternity, adoption, paternity or shared parental leave – while the baby's in neonatal care, but can then still take neonatal care leave at a later date.

**Robert Shore:**

Yeah. So that is a very useful thing, isn't it Jo, that actually for HR to think about, which is, 'What is the underlying purpose of this leave?'

**Jo Broadbent:**

And I think that just helps you put the rest of how the entitlement works in a bit of context.

**Robert Shore:**

Yeah, I think that's great.

**Laura Merrylees:**

If I can then, just sort of finishing off on shared parental leave, could parents who had initially wanted to take advantage of the shared parental leave system in the early stages of a child's life later opt out if a baby needs neonatal care?

**Jo Broadbent:**

Theoretically they could, if the mother gave her leave curtailment notice before the child's birth, because in that case she can revoke her leave curtailment notice within six weeks of birth, as long as she doesn't that before her maternity leave was due to end. She could then opt back into the shared parental leave system at a later date if she wants to do that.

However, it's not quite that simple because the father, or the mother's partner, may still be required to take shared parental leave if their employer has had less than eight weeks' notice of the change. If it's not reasonably practicable for the employer to accommodate the change, it can require the employee to take shared parental leave. So in practice, it may be easier for the employee to take their shared parental leave as planned, and then take their neonatal care leave at a later date. But again, you'd really hope that an employer would be prepared to be as flexible as possible in that situation.

**Laura Merrylees:**

So let's just move onto a different topic, away from shared parental leave. What can employers ask their employees, if indeed anything at all, to provide in the way of evidence that they're entitled to neonatal care leave?

**Jo Broadbent:**

As you would sort of envisage, Laura, not that much. Certainly under the statutory rules an employer can't ask the employee to provide medical evidence that the baby's in neonatal care, for example. All they're entitled to is confirmation of the baby's date of birth, the date that neonatal care started (and ended, if relevant), how much leave the employee is taking, when it's going to begin and confirmation that the employee's taking leave in order to care for the child. The first time an employee takes leave they also have to confirm that they're the child's parent, as defined in the regulations.

**Robert Shore:**

Right. And is that different from other types of leave?

**Jo Broadbent:**

No, not really. Hopefully that gives employers a degree of comfort. For example, if an employee takes carers' leave employers can't ask for evidence that the employee's dependent is disabled or has a long-term care need. In practice that doesn't seem to have caused too many issues, although clearly carers' leave is unpaid, unlike neonatal care leave.

If an employer was going to offer enhanced pay for neonatal care leave in addition to statutory pay, they could in theory make the



entitlement to pay conditional on providing evidence that the child is in neonatal care. In that situation they'd have to think about their obligations when processing special categories of data under the UK GDPR, and I'm not sure many employers will want to impose heavy-handed requirements for evidence at such a difficult time. It seems fairly unlikely that many employees are going to lie about their child being in neonatal care, so in practice I think most employers are probably just going to take it on trust.

**Laura Merrylees:**

Another area that some employers we know are finding difficult to navigate is the enhanced protection against redundancy, and this is applicable to other statutory rights as well. Can you just explain what the rules are here, in relation to enhanced protection against redundancy in neonatal care leave?

**Jo Broadbent:**

What the Government's done here basically reflects the enhanced redundancy protections for employees who have taken a period of maternity, adoption or shared parental leave that were introduced last year, and that recognises that someone could be on neonatal care leave for a relatively extended period, in contrast to the two-week paternity leave period, for example. So a parent who's at risk of redundancy while they're on neonatal care leave is entitled to be offered a suitable alternative vacancy in just the same way as someone who's on maternity, adoption or shared parental leave.

**Laura Merrylees:**

Okay. So that's while they're on neonatal care leave. So what's the position after someone returns to work?

**Jo Broadbent:**

There's further protection for an employee that's taken six or more weeks of neonatal care leave as a single period. So for example, someone whose baby has been born very prematurely, needs six weeks' of care, and the parent's taken all their neonatal care leave in one go. If they're then at risk of redundancy after they return to work but in the 18 months after the child's birth, they're also entitled to be offered a suitable alternative vacancy. And that's the same protection that already applies to parents who've taken at least six consecutive weeks of shared parental leave.

**Laura Merrylees:**

And there's something interesting here, isn't it, which potentially is going to be a bit of a headache for employers, because these recent changes make it more likely, really, that employers are going to face a situation in which several employees in a redundancy situation have this enhanced protection against dismissal. So does the legislation sort of provide any guidance or direction on how employers should sort of prioritise employees if there aren't enough suitable vacancies?

**Jo Broadbent:**

The legislation itself really doesn't cover that point, but there is some quite helpful ACAS guidance on the topic. What that says is that, in



that situation, the employer is going to have to decide who's the most suitable for the roles that are vacant from the group of protected employees. And employers might want to take account of factors such as skills, job knowledge, experience. And the recommendation from ACAS is that they set out in writing which criteria they're going to use in order to take a decision, and also why they've chosen those criteria.

And then the guidance also says you should meet with any employee who's not offered a suitable alternative vacancy to explain why that's the case.

**Laura Merrylees:**

Sorry to interrupt you, Jo. I was just going to say, given that that's the case, what would you suggest employers do in this type of situation to try and sort of protect themselves?

**Jo Broadbent:**

Yeah. I think the sort of key point is going to be making sure that employers keep accurate records of employees who are entitled to the additional protection. That's going to allow an employer to know who's in that priority redeployment pool, and then go on to identify suitable alternative vacancies at an early stage of any redundancy process. They can then implement a fair selection process if that's necessary in order to decide who should be offered those vacancies. And transparency's likely to be the key so that employees really can understand the basis for any decisions, and hopefully that in turn is going to reduce the risk of claims.

**Robert Shore:**

Yes. Talking about the risk of claims, can you remind us of some of the other employment protections that employees who take neonatal care leave will have?

**Jo Broadbent:**

Those really reflect the normal protections for employees taking any form of family leave. So an employee's entitled not to be subjected to a detriment for taking or seeking to take neonatal care leave. Dismissing an employee for taking or seeking to take that leave is also going to be automatically unfair. And normal terms and conditions of employment apply during any period of leave, except for the terms relating to remuneration.

**Laura Merrylees:**

And Jo, what about protection under the Equality Act? Is there anything new that's coming in there?

**Jo Broadbent:**

No, there's nothing specifically relating to neonatal care leave in the Equality Act. But mothers obviously can't be discriminated against because of pregnancy and mustn't be treated unfavourably because they've taken maternity leave. So employers could potentially face a pregnancy and maternity leave claim, although it's fair to say that a detriment claim under the neonatal care regulations are going to be

a more obvious route where a complaint relates specifically to neonatal care leave.

**Laura Merrylees:**

Yeah. And what about fathers or the mother's partner? Is there any discrimination risk there for employers?

**Jo Broadbent:**

It might be possible for a father or a partner to bring a direct sex discrimination claim if a woman whose child needed neonatal care would have been treated differently. But it's going to be difficult to use a woman who's on maternity leave for that point as a comparator for a claim in many cases because they're going to be viewed as being immaterially different circumstances.

If the child that needs care is disabled, it may be possible to bring an associative direct discrimination claim. That would involve arguing that the father or partner has been less favourably treated than someone else would be because their child has got a disability.

Now, there are real practical issues around those claims because it's more likely to be the fact that the father needs time off that results in less favourable treatment, not simply the fact that the baby's disabled. And you can't bring an associative discrimination arising from a disability claim.

We may also see people trying to bring associative indirect discrimination claims. But to succeed in those, an employee's going to need to be able to show that their employer has applied a provision criterion or practice that puts people who share a protected characteristic at a disadvantage, and that the claimant is also put at that disadvantage.

Now, evidentially that might be difficult. It won't necessarily be enough to demonstrate that something an employer did put the claimant at a disadvantage because they were the parent of a disabled child.

**Robert Shore:**

Yes. There's quite a lot to take on board there, isn't there? But Jo, before we finish, can we actually cover even more? So there's even more to take on board! Could you give us a quick recap on what else is on the way on the family-friendly front?

**Jo Broadbent:**

Yeah, of course. And I think these are probably a bit easier to get your head around than some of the very complex things we've just been talking about.

So, the first changes we're likely to see are the ones that are going to be introduced through the Employment Rights Bill. Paternity leave and ordinary parental leave are going to become Day One rights, and that's unlikely to give rise to too many practical difficulties. In addition, in future an employee's going to be able to take a period of

paternity leave after a period of shared parental leave, and that simply corrects what's always looked a bit of an odd restriction that stops paternity leave being taken after shared parental leave. Again, no real issues there.

But proposals around enhanced protection against dismissal for employees taking family leave may be a bit more problematic, and that's not least because we don't know exactly what they're going to look like at the moment. So, the Bill gives the Government a regulation-making power allowing them to introduce the additional protection in due course. What the Government said is that it intends to give employees protection from dismissal while pregnant, on maternity leave and within six months of returning to work. Similar protections are going to apply to employees who are on, or who have returned to work from, adoption, shared parental or neonatal care leave. And it seems likely that an employer's only going to be able to dismiss protected employees in specified situations. That's going to reflect the high levels of protection that are already available to employees taking maternity leave in quite a lot of European jurisdictions, although it's probably worth saying that family leave lasts much longer in the UK than it typically does in Europe. So the protection is likely to last for a longer period.

**Robert Shore:**

And employers should also be watching out for the changes to the flexible working regime.

**Jo Broadbent:**

That's right. That's going to tighten up the existing framework and make it harder for an employer to refuse flexible working requests. In future it's only going to be possible to refuse a request if it's reasonable to do so. And employers are also going to have to tell employees both which statutory reason for refusing they're relying on, and also why they think that their refusal is reasonable.

**Robert Shore:**

Okay. So as you say, that's mostly about sort of tightening up existing things, isn't it?

**Jo Broadbent:**

Indeed.

**Robert Shore:**

So finally, though, employers will need to prepare for an extended right to bereavement leave too?

**Jo Broadbent:**

Yes. That's going to be a Day One right to a week's bereavement leave if any employee loses a close relative. The details once again are going to be confirmed in the regulations in due course, and that includes which relationships are going to be covered by the new right. But we do know that the existing right to two weeks bereaved parental leave is going to remain in place.

**Robert Shore:** Yes. So as you say, the actual relationships that will be covered by this extended right still need to be defined. And then bereavement leave covers, I think, pregnancy loss?

**Jo Broadbent:** Yes. And that's something that's only been confirmed reasonably recently. It's another situation where we don't have the detail as yet, including whether or not any period of leave would be paid. But the Government has confirmed that it accepts the principle of bereavement leave for pregnancy loss, and it's said that it's going to amend the Employment Rights Bill before it becomes law in order to reflect that.

**Robert Shore:** Well, I think that's probably as much as we can cover in a single podcast, I think. Jo, thank you so much for your time today.

**Jo Broadbent:** Nice being with you.

**Robert Shore:** And Laura, thank you so much as well.

**Laura Merrylees:** Thanks Robert.

**Robert Shore:** At Brightmine we have on the website lots of supporting materials on all of these subjects, in large part written by Jo. We're very lucky about that. We also have the webinar which you can watch, where we covered some of this as well. So, if you go to [www.brightmine.com](https://www.brightmine.com) you will find it there. And beyond that, I can just say, until next time.

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