

## The Agenda | New Wave: family leave in the future

Thursday 31 October

**Sarah McWhinney:** Hello everybody and thank you so much for joining us today. You're listening to a podcast from the Employment team at Lewis Silkin. I'm Sarah McWhinney and I'm lucky enough to be joined today by Lewis Silkin's very own in-house employment lawyer, Rebecca Peedell. Hello Becs!

**Becs Peedell:** Hi Sarah! Hello to all our listeners! I'm really looking forward to this. It's always a pleasure to chat to you and we have a topic which I think really captures the zeitgeist.

**Sarah McWhinney:** I think so too. So, we're going to be chatting today about family leave. Our listeners are probably aware that there were some changes set out in the recent Employment Rights Bill, but I think what's so interesting about this area is not so much the legislative changes, but that it feels like there's been a deeper cultural shift. We're seeing employers beginning to think about these issues in a much more holistic way and take steps that go well beyond what they're strictly required to do by the law. So to me, it almost seems as though there's this new wave of family leave rights that are coming into existence independently of what the government is actively requiring employers to do. And this is a topic that I know both you and I are really interested in.

I'm a member of the gender strand in Lewis Silkin's Diversity, Equity and Inclusion Board, and family leave is a topic that we've been giving a lot of thought to in recent times. We've recently introduced a very far-reaching new policy on family leave, which you of course know all about because you were absolutely pivotal in drafting it.

**Becs Peedell:** Yes, it's certainly a topic I've been immersed in recently. But before we get stuck into discussing employer support for new parents, I thought we could start by taking a bit of a step back and looking at the overall strides we're seeing employers taking in the DE&I space. I think that really helps to put into context what's driving some of the changes we'll be talking about.

**Sarah McWhinney:** Yeah, absolutely. I mean, we are seeing a definite trend of employers wanting to support their employees through every life stage. I'm seeing that right from young adults starting out on their career path, right through to older workers who are approaching retirement. And it feels to me like employers are really starting to focus on the additional support that they can provide to employees in each part of their lives and are recognising that that's becoming increasingly important as well in terms of both attracting and retaining new talent. And just to set this in context, we obviously did see some new family rights introduced under the last Tory government. But I don't think that's the real cause of these changes. I think as is often the way, employees are wanting and expecting more from their employers.

**Becs Peedell:** Yeah, absolutely. So for example, we did see the relatively-new right to five days of unpaid carers leave each year introduced. But I think, more and more, we're seeing especially bigger employers going further than that by either offering to pay for carers leave or offering additional time off or on an unpaid basis or both.

**Sarah McWhinney:** Absolutely, we are seeing that. And another example is neonatal leave. Statutory neonatal leave and pay isn't due to come into force until April 2025, but we've seen lots of employers jumping ahead and already introducing neonatal leave and pay now, even though they're actually not required to do that for another few months.

**Becs Peedell:** Yeah, and that's something we have introduced at Lewis Silkin as part of our new parent policy. I think businesses are generally starting to be more creative with what benefits they can offer. We know more businesses have policies for things like fertility treatment, pregnancy loss, sabbaticals, bereavement leave, menopausal leave, I could go on, and a few are even looking at benefits to support

grandparents. So they're really addressing all major life events and changes in a way that the law hasn't and probably to a great extent can't keep up with.

At Lewis Silkin we're looking at moving away from policies which are based on the groups which legislation identifies as needing rights and protection and moving towards overarching policies which benefit everyone. So, for example, a time off policy which would cater for anyone needing time off to care and support others, not just parents. And that's all very much in the pipeline at the moment, but I think it will be the direction of travel for us and for lots of other businesses in the future.

**Sarah McWhinney:** Yeah, I completely agree. And that's why I talked about a new wave in our introduction, because it seems to me that there's this DEI drive which is currently buoying up rights for new parents, and we're beginning to see employers introduce a suite of benefits that are aimed at new parents, including enhanced family leave.

**Becs Peedell:** Absolutely. I think there's a lot of frustration with the statutory schemes often, and their failure to reflect modern day parenting where one parent doing it all isn't necessarily the default option anymore.

**Sarah McWhinney:** Absolutely and I think most of our listeners will be familiar with the UK's family leave regime. There were some minor tweaks to the paternity leave system earlier this year, but entitlement remains really low. It's only two weeks of leave which is so brief, and the pay isn't great either, so it's only paid at around £184 a week. In practice we're often seeing partners adding annual leave onto that entitlement.

There is of course also shared parental leave which allows parents to share almost a year of leave when their child is either born or adopted. But I think although SPL is a step towards equality in family leave, there are so many limitations to that regime and it can be quite rigid, so often not really fit for purpose to meet a family's needs.

**Becs Peedell:** Absolutely, I think, probably, many of our listeners will be thinking what I'm about to say, it's both rigid and confusing. It takes us employment lawyers a long time to get to grips with how it operates and what notices are needed, for example. So I think it really is a difficult concept for many employees.

**Sarah McWhinney:** Oh completely. And I think the other really big downside is that using SPL means that it cuts short the amount of maternity leave and pay that a mother can get. Lots of women still need their full year of maternity leave for lots of different reasons, and I think it's very understandable that they don't particularly want to split that leave with the other parent.

**Becs Peedell:** Yeah, that's absolutely right in my experience and so, no matter how novel SPL felt when it was introduced, the uptake is still really low. The stats I've seen suggest only about 5% of eligible fathers or partners have used the regime. And it's quite revealing that when we get queries on SPL from clients, often it's not about the detail, it's actually about how does the whole thing work because it's only the first or second time that it will ever have come up for them, and it was introduced nearly 10 years ago. So, you know, that was our experience at Lewis Silkin too. You know, we could see that our new fathers and partners weren't taking significant periods of leave. And that was something we really wanted to change for everyone's benefit. As a mother of three children myself, the difficulty of that first year after a child is born is something that I don't think will ever leave me.

**Sarah McWhinney:** I'm sure. And I don't think it's just that first year either. I really believe that allowing both parents to have a proper chunk of time off at the start sets the trend for more equal parenting for the whole of a child's life. Because if you have both parents able to devote themselves to caring for their little ones right at the outset, it breaks down the idea of only one of them being a quote unquote primary caregiver, and you can see that that really does create deep benefits for equality going forward.

**Becs Peedell:** Yep, and that is really why Lewis Silkin wanted to take matters into our own hands and we wanted to do better for our people and try to achieve real change where the law has failed.

**Sarah McWhinney:** And we've definitely seen our clients grapple with that too. I think in general, they've been wanting to offer something more generous to promote equality and to be fair to both parents, and lots of them are wanting to be more practical and imaginative than the statutory regime really allows. So I quite regularly see more generous paternity leave being offered, anything from say four weeks fully paid right up to 12 or 16 weeks off.

And I know the team have been seeing lots of innovative thinking on this. For example, some employers are offering things like parental support loans or what's being called baby bonding bucks, which cover services like cleaning or shopping so that parents can focus on being with the family. And some clients are also offering equal enhanced company leave and pay regardless of the way an employee becomes a parent, so whether they're a mum, a dad, a partner, whether they've adopted.

**Becs Peedell:** Yep. And that is exactly what Lewis Silkin have done. So in April this year, we introduced our new parent policy, which gives new parents, regardless of gender, the ability to take 52 weeks leave without the constraints of the complicated shared parental leave system. All parents can take this leave within the first year of birth or adoption, and if they meet our eligibility criteria, so the main one is having a year's service, they can take 26 weeks of the leave fully paid. And this applies to both our employees and our partners within the firm. And if we have people who don't meet the eligibility criteria for fully paid leave, they are still entitled to six weeks fully paid leave. So, we really wanted to help everyone as much as we could.

**Sarah McWhinney:** That's brilliant.

**Becs Peedell:** The aspects of the scheme I think we're most proud of though, and I think what genuinely makes it quite groundbreaking, is the flexibility within it around when the leave can be taken. So, the leave and pay can be taken in an unlimited number of discontinuous blocks within the 12 months following birth or adoption, and it doesn't require any leave to be shared. So our people can benefit from a full 12 months leave and six months' pay, regardless of the leave and pay choices of their other halves. And the great news is it's working! We've already got lots of dads who've chosen to take time off under the scheme. For example, taking off the first three coming back for six months, and then planning to go off for another three months and other permutations.

**Sarah McWhinney:** It is so wonderful to see it having such an effect. I mean, obviously we are employment lawyers and so we are all super interested to understand how this works from an employment law perspective, so tell us more about that, Becs.

**Becs Peedell:** I will! I mean, it was genuinely really interesting working all of that through. We were quite bold actually and we just said to ourselves that if we wanted a scheme that applied in the same way to all parents, we weren't going to embed the enhancements in the gender-based statutory schemes in the way that many enhanced schemes work now. Instead, what we wanted was one type of leave and one type of policy which applies to everyone. Now, of course, in the real world, it's impossible for any discretionary policy to completely divorce itself from the statutory schemes, and there had to be some dovetailing. We wanted to make sure, for example, that as far as possible, when someone takes leave under our scheme, they benefit from statutory rights at the same time.

And of course, there were lots of little tricky issues to think about around how the statutory regimes do fit with the scheme. For example, making sure that somebody couldn't perhaps tag a period of more than 13 weeks paid SPL onto the end of a period of 26 enhanced leave, because then they'd be better off than those who are eligible for statutory maternity and statutory adoption leave. And again, our overarching idea here was that we wanted everybody to be treated the same. So I tried my best to write that part of the policy succinctly, but it did entail a couple of footnotes in the end, which I'm still slightly annoyed at myself about.

**Sarah McWhinney:** I actually can't imagine how difficult it must have been to work through that all in practice. So how does the policy sit with the shared parental leave regime then? Because as we've discussed, the notices you need to give under that regime and the need to bring your maternity leave to an

end, it's all just so confusing. So, can you tell us a bit about how we've made that easier for people in our policy?

**Becs Peedell:** Of course. So, we do require employees to give us notice. and provide certain bits of evidence because some of this is of course essential to trigger the statutory rights sitting underneath. But we've tried to simplify this as far as possible and tried really hard to make it uniform across the type of parent and I think it's actually quite straightforward in our policy now. You know, our policy isn't shared parental leave by another name, and it isn't based on shared parental leave. We did have to think about the interplay as we've said, you know, for example, making it clear in the policy that if a parent who's not our employee wants to participate in shared parental leave with their employer, our employer can curtail their statutory maternity leave but remain on our enhanced leave and pay.

**Sarah McWhinney:** I see. That is really interesting. So, if employees are sometimes ending their statutory leave, can you tell us then how that impacts things like priority status for redundancy redeployment? Because presumably, if an employee isn't technically on statutory leave, then they might not get any legal protection in a redundancy situation. And of course, maternity leave protection runs from the date of birth so I think they would absolutely need to be prioritised for redeployment opportunities for 18 months after the birth.

**Becs Peedell:** Yes.

**Sarah McWhinney:** But what about a techie issue like a claim for automatically unfair dismissal in connection with the fact that the employee has given birth which actually only crystallises where the termination brings her maternity leave to an end.

**Becs Peedell:** Yes - tricky. Our philosophy in developing the policy was very much in for a penny, in for a pound. So when drafting it, I really did have the luxury of knowing that if there were respects in which technically an employee might be less well-off under a statutory scheme, we would say that in practice, you are not going to be less well off. But you're absolutely right. It's going to be really important for all businesses to think through how any enhanced family schemes interplay with existing and future statutory rights and I think it's only going to get trickier as well, because one thing the Employment Rights Bill introduces is powers to extend the redundancy protections to dismissal for other reasons and the suggestion has been that there would be a ban on dismissals of pregnant women, or those on or recently returned from statutory maternity leave.

**Sarah McWhinney:** Watch this space! And I also think it's really important to recognise that the first year after birth or adoption is actually just the start of the story for new parents, and I mentioned that earlier. And one of the things I'm really impressed by is that we've also reduced targets for our returners. So obviously, it's really specific to the legal industry and our work, but family-friendly businesses will probably want to consider how support can continue once parents return to work. And I know from client intel that some of them are offering a ramp back period where employees have a couple of weeks where they're paid full pay, but they're only required to work half their hours,

**Becs Peedell:** I think it all really helps. We're really proud of what we've achieved with the new policy. And if any of our listeners would like to see a copy of the policy, please don't hesitate to get in touch with us - we'd love to share it with you. We're happy to discuss it too, as Sarah and I have already said, there are lots of nuances there which we are happy to chat through, although we don't have time to do that now.

**Sarah McWhinney:** Alas.

**Becs Peedell:** And it's worth saying that while Lewis Silkin opted for 12 months leave and 6 months full pay, that isn't the only way an enhanced scheme can be set up. Employers can of course enhance their policy in their own way.

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**Sarah McWhinney:** Yeah that's absolutely true and I've seen lots of examples but I'd say a common offering seems to be around 12 weeks full pay. Obviously, that needs to be in the context of the particular industry and workplace but that seems to be broadly kind of what we're seeing. And that is all part of this real cultural shift that we're seeing in this area and I suppose it is worth asking to what extent the law is going to catch up with this under the new Labour government. And of course, the new Employment Rights Bill does make paternity leave and parental leave a day one right, which is a step forward, and there are some minor tweaks allowing paternity leave to be taken after shared parental which does add some flexibility. But I think the really significant thing is that Labour has recognised that the parental system isn't currently fit for working parents, and they've promised to do a fuller review of the parental leave system, which I think is needed.

**Becs Peedell:** Yes, this could be a really exciting opportunity for them to start afresh with the UK system. There are examples from other countries of more flexible ways of providing new parents with leave. Sweden springs to mind where all new parents get 480 days of leave at 80% of their normal pay, which parents can split between them however they choose. And that's on top of an additional 18 weeks for mums and 90 paid days for dads or partners, so it's pretty generous.

**Sarah McWhinney:** I mean, that is amazing when you set it against our current regime. And it definitely feels to me like over here, a review of shared parental leave is well overdue, and a lot of people are likely to be hoping for a more flexible, practical approach going forward. I think also that many people are going to be hoping that Labour will look at statutory pay too. This has obviously been more in the spotlight recently with the very controversial comments that were made by Kemi Badenoch. I don't know if you saw these, but she said that maternity pay is excessive, and that people needed to take more personal responsibility for funding their parental leave. I think our statutory leave entitlement is actually quite generous, particularly when you compare it to countries like the US, but the pay is quite low, and there have been commentators like Mother Pucker who have responded to Kemi Badenoch's statements by pointing out that maternity pay is actually just 44% of the national minimum wage. And there are lots of countries where full salary is paid for significantly longer. So I know that Spain, for example, provides 16 weeks of maternity and paternity pay on normal regular base salary.

**Becs Peedell:** Yes. There were also rumours that Labour were going to remove the statutory maternity pay requirement for employees to have been continuously employed for 26 weeks by 15 weeks before the week of their due date. That's never easy to say, that bit. But there was nothing in the Employment Rights Bill on that. And I think it'll also be really interesting to see how family leave is impacted by other labour proposals. At the moment, only employees are entitled to family leave, but Labour are proposing to remove the distinction between employees and workers. It's not in the bill and it's been pushed later into the parliamentary term, but if it does happen, it's possible that this could impact family rights. So, could we see freelancers being entitled to family leave later down the line?

**Sarah McWhinney:** Who knows? And I completely agree. It will be hugely interesting to see what comes out of the government's review. I feel like there's just so much to talk about here and I wish we could carry on discussing this all day, but unfortunately, that's all we have time for today, so we're going to have to leave it there. Thank you all so much for joining us today and thank you, Becs, for all of your insights. It does continue to be a very busy time for HR professionals and employment lawyers and we've got some exciting employment podcasts coming up to keep you all updated. Next time on this topical series we'll be tackling difficult areas where employment law and immigration law cross over, so see you next time!