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## Reconciliation of Family and Professional Life: Maternity and Parental Leave in EU Law 28 January 2020, ERA, Trier

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1



### A. Legal Basis

- Directive on Maternity Leave – 92/85/EC  
is the 10<sup>th</sup> individual Directive within the  
meaning of the Occupational Health and Safety  
Directive 89/391/EEC  
→ “Health and safety at work” as a central  
regulatory purpose

2

- Article 33 (2), CFR “Family and Professional Life”
  - In support of the reconciliation of family and professional life: entitlement to paid maternity leave
  - Protection from dismissal for reasons related to maternity

3

- Article 2 (c) Directive 2006/54/EC (Equal treatment for men and women)
  - Prohibition of discrimination on the basis of pregnancy / maternity
  - Important for the burden of proof of Article 19 (1) Directive 2006/54/EC  
ECJ, 19.10.2017, C-531/15 "Otero Ramos";  
19.9.2018, C-41/17 "Gonzales Castro".

4

- Framework agreements on parental leave, Annex, Directive 2010/18/EU
  - Social partnership agreement, implemented in the procedure pursuant to Article 153-155 TFEU
  - Few binding requirements, primarily recommendations
- Consequence: scarce harmonization; clearly different standards in the Member States
- Article 33 (2) CFR “Family and Professional Life”
  - Entitlement to parental leave after birth or adoption of a child.

5

2019: Directive on work-life balance for parents and carers

→ to be implemented by 2022

■ Paternity leave

the second parent is entitled to at least 10 working days' leave on the occasion of the birth of a child, remuneration is to be based on maternity pay

■ Parental leave

two months of parental leave (out of a total of four) are not transferable between parents and must be remunerated

6



## I. Parental leave

Regulatory purposes:

Ensuring the reconciliation  
of family and professional life

Ensuring equal  
opportunities in  
employment

→ Member States should “take into account” that the attainment of the purpose depends on parental leave benefits

9

## C. Personal scope of application

Maternity protection:

Workers within the meaning  
of EU law

- Civil servants
  - Certain board members
- ECJ, 11.11.2010, C- 232/09

“Danosa” (= subjection to directives,  
free dismissal)

→ Not: self-employed,  
ECJ, 19.9.2013,  
C-5/12 “Betriu Montull”.

Parental leave:

Workers within the meaning  
of national law

- Civil servants included
- ECJ, 16.9.2010, C.149/10  
“Chatzi”.

10

## D. Definition

- Pregnant
  - For in-vitro fertilisation extra-corporal insemination does not suffice, ECJ, 26.2.2008, C-506/06 “Mayr”
  - “A pregnant worker” is the worker who has reported her pregnancy to her employer, Article 2a Directive (actual knowledge of the employer suffices, ECJ “Danosa”)
- Birth/ adoption of a child:
  - not: foster parents, etc.
  - actual care of the child required, visiting rights of divorcees does not suffice
  - every parent is personally entitled, irrespective of the gainful activity of the other ECJ, 16.7.2015, C-222/14 “Maistrellis”

11

- Worker shortly after giving birth

→ Obligation to report and restriction of period of time according to national law

- Lactating worker

→ According to national law

12

## E. Maternity protection

### 1. Health protection at work, Article 3-7, Maternity Protection Directive

- Risk assessment on the basis of EU “guidelines”  
→ If lacking or incomplete, direct discrimination on the basis of pregnancy is presumed, ECJ, 19.10.2017, C-531/15 “Otero Ramos”. Legal consequence: shift of the burden of proof, Article 19, Directive 2006/54.

General assessment: specially for protected worker

- Information for all potential stakeholders

13

- Preventive modification of the workplace/working time

→ Insofar as technically possible and reasonable (both?)

- Transfer
- Exemption

→ Classification into different ranks is mandatory, ECJ, 1.7.2010, C-471/08 “Parviainen”

14

## 2. Night work, Article 7, Maternity Protection Directive

- No absolute night work prohibition in the Directive, the worker may only “not be obliged”
- Health protection reasons must be documented by the worker (certificate). In the absence of a risk assessment: reversal of burden of proof (ECJ “Gonzales Castro”).
- Only minimum protection standard
- Phased approach to measures (see above), ECJ, 19.9.2018, C-41/17 “González Castro”.

15

## 3. Maternity leave of at least 14 weeks, Article 8 Maternity Protection Directive

- Purpose: Health protection and strengthening of the relationship between mother and child
- No entitlement of fathers, ECJ, 12.7.1984, C-184/83 “Hofmann”
- Only two weeks thereof are “mandatory” (= “prohibition to work”)
- Applies only to women “before and after giving birth, therefore not to adoptive mothers, ECJ, 18.3.2014, C-167/12 “C. D.”
- Allocation to time before / after giving birth is left up to the national law; the period must not be interrupted. however

16



- Continued payment of salary, Article 11, Maternity Protection Directive
  - For maternity protection periods
  - Scope: basic salary plus extra pay, insofar as linked to qualification / benefit item / period of employment; not: activity-based extra pay (night work/overtime)
  - Upon change of jobs: salary of new job / where applicable, extra pay of old job
- Alternatively, the States can provide a social benefit in a commensurate amount.  
ECJ, 1.7.2010, C-194/08 “Grassmayr”.

17

#### 4. Employment protection, Article 10 Maternity Protection Directive

- Prohibition of redundancy notice from the start of pregnancy to the end of maternity leave
  - Immediate effect in national law, ECJ, 4.10.2001, C-438/99 “Jiménez Melgar”
- Overlapping area with 2006/54/EC  
Termination of employment relationship on account of pregnancy is direct discrimination, ECJ, 11.10.2007, C-460/06 “Paquay”
- Preparatory measures for redundancy notice are also prohibited (ECJ “Paquay”)

18

- Exemptions from the prohibition of giving notice are authorized, provided that the notice “is not related to the conditions of the worker”
- There is no obligation of maintaining the protected person in employment as a matter of priority in case of authorized mass dismissal, ECJ, 22.2.2018, C-103/16 “Porras Guisado”
- Governmental approval required only if so provided in national law
- Written form and obligation to state reasons must be observed

19

- Preservation of contractual rights, Article 11, Maternity Protection Directive
- Contractual rights: Pay or social benefits in lieu thereof / consideration of protection times in entitlements, holiday, promotion  
ECJ, 1.7.2010, C-471/08 “Parviainen”
- Extra pay will depend on the purpose
- In the case of maternity leave and change of jobs

20

## F. Parental leave

### 1. Entitlement to parental leave, § 2 No. 2 Parental Leave Framework Agreement

- Individual right of each parent
- Period of at least 4 months per parent; national law stipulates the age of the child for which the entitlement applies (max. 8th year)
- Non-transferability: mandatory only for 1 month; national law exceptions may be allowed for 3 months
- Full leave and partial leave are possible § 3 No. 1a Parental Leave Framework Agreement
- Notice periods with regard to the employer are not mandatory

21

### 2. Preservation of contractual rights

- Return to former job, § 5 No.1 Parental leave Framework Agreement; if return **not possible** = equivalent job, ECJ 20.6.2013, C-7/12 “Riežnice”
- Direct effect in national law, ECJ 7.9.2017, C-174/16 “H.”
- Preservation of existing rights, § 5 No. 2 Parental Leave Framework Agreement
- Rights to which the worker was already entitled upon commencement of the leave, ECJ, 22.4.2010, C-486/08 “Zentralbetriebsrat LKH Tirol”
- Direct effect in national law, ECJ 7.9.2017, C-174/16 “H.”

22

- The importance of income during parental leave, § 5 No 5 UA2, must be “considered” by the Member States → no regulations
- Temporary change of working time after end of parental leave, § 6 No. 1, must be applied for; term not given
  - No entitlement to change but to negotiation
  - it is not necessary to comply with the employee's wish not to have to work rotating shifts after the end of parental leave in order to be able to look after the children (EJC 18.9.2019 – C-366/18 „Ortiz Mesonero“).
- Prohibition of discrimination on the basis of parental leave, § 5 No 4

23

### 3. Employment protection

- Protection from redundancy notices in connection with parental leave (on account of application or claim)
  - Notice for other reasons remains possible, ECJ 20.6.2013, C-7/12 “Riežniece”
  - Can ensue through correspondingly high compensation for notice , ECJ 27.2.2014, C-588/12 “Lyreco Belgium”
  - Compensation/ allowance for reintegration must not be calculated on the basis of the low remuneration during parental leave, but on the basis of (previous) full-time work, ECJ 8.5.2019 - C-486/18 "Praxair" (correspondingly applicable to social plan compensation?)

24