

RECONCILIATION OF WORK AND FAMILY LIFE

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MATERNITY PROTECTION

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From the protection of health and safety at work to the principle of equal treatment between women and men

-Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding

- Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as amended by the Directive 2002/73 of 23 September 2002 and by Directive 2006/54 of 5 July 2006, the “recast” Directive

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Council Directive 92/85 of 19 October 1992

“Whereas Article 15 of **Council Directive 89/391/EEC of 12 June 1989** on the introduction of measures to encourage improvements in the safety and health of workers at work (5) provides that particularly sensitive risk groups must be protected against the dangers which specifically affect them;

Whereas **pregnant workers, workers who have recently given birth or who are breastfeeding must be considered a specific risk group in many respects, and measures must be taken with regard to their safety and health;**

Whereas **the protection of the safety and health of pregnant workers, workers who have recently given birth or workers who are breastfeeding should not treat women on the labour market unfavourably nor work to the detriment of directives concerning equal treatment for men and women;...**”

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Directive 2006/54 of 5 July 2006

Recital 23

“It is clear from the case-law of the Court of Justice that unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. Such treatment should therefore be expressly covered by this Directive.”

Recital 24

“The Court of Justice has consistently recognised the legitimacy, as regards the principle of equal treatment, of protecting a woman's biological condition during pregnancy and maternity and of introducing maternity protection measures as a means to achieve substantive equality. **This Directive should therefore be without prejudice to Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.**”

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BENEFICIARIES OF PROTECTION

Article 2: Definitions

For the purposes of this Directive, the following definitions shall apply:

- (a) pregnant worker shall mean a pregnant worker **who informs her employer of her condition, in accordance with national legislation and/or national practice;**
- (b) worker who has recently given birth shall mean a worker who has recently given birth within the meaning of national legislation and/or national practice and **who informs her employer of her condition, in accordance with that legislation and/or practice;**
- (c) worker who is breastfeeding shall mean a worker who is breastfeeding within the meaning of national legislation and/or national practice and **who informs her employer of her condition, in accordance with that legislation and/or practice.**

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CJEU of 11 November 2010, Danosa, Case C-232/09

Concept of worker: application by analogy with the criteria used for the purposes of freedom of movement (Lawrie Blum, Case C-66/85)

➡ « The fact that Ms Danosa was **a member of the Board of Directors of a capital company** is not enough in itself to rule out the possibility that she was in a relationship of subordination to that company: it is necessary to consider the circumstances in which the Board Member was recruited; the **nature of the duties** entrusted to that person; the **context** in which those duties were performed; the **scope of the person's powers** and the extent to which he or she was **supervised** within the company; and the circumstances under which the person could be **removed**. ».

Concept of pregnant worker: broad interpretation of Article 2(a). Criterion = employer's knowledge of her condition of pregnancy

➡ "If, without having been formally informed by the worker in person, **the employer learns of her pregnancy**, it would be contrary to the spirit and purpose of Directive 92/85 to interpret the provisions of Article 2(a) of that Directive restrictively and to deny the worker concerned the protection against dismissal provided for under Article 10".

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CJEU of 26 February 2008, Mayr, Case C-506/06

Protection of a worker undergoing in vitro fertilisation treatment

Interpretation of Directive 92/85 as excluding "a female worker who is undergoing in vitro fertilisation treatment where, on the date she is given notice of her dismissal, her ova have already been fertilised by her partner's sperm cells, so that in vitro fertilised ova exist, but they have not yet been transferred into her uterus."

But **this worker is protected by the principle of equal treatment for women and men** "where it is established that the dismissal is essentially based on the fact that the woman has undergone such treatment."

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PHYSICAL PROTECTION DURING PREGNANCY AND BREASTFEEDING

Material measures during pregnancy

-The employer is obliged to assess the risks (Art. 4)

-The adoption of measures following a hierarchy set out in Article 5:

Maintaining the worker in her present job by adjusting working conditions and/or working hours



Change of job



Leave from work

-Prohibition of exposure to certain agents (Art. 6) and night work (Art. 7).

-The right to maintenance of a payment and/or entitlement to an adequate allowance (Art. 11, 1)

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CJEU 19 October 2017, Otero Ramos, Case C-531/15

Evaluation of risks for a breastfeeding worker: a specific exam required

➡ *“(…) in order to be in conformity with the requirements of Article 4(1) of Directive 92/85, the risk assessment of the work of a breastfeeding worker must include **a specific assessment** taking into account the individual situation of the worker in question in order to ascertain whether her health or safety or that of her child is exposed to a risk”.*

Deficient assessment: discrimination on grounds of sex

➡ *“(…) **failing to assess the risks presented by a breastfeeding worker’s workstation**, in accordance with the requirements of Article 4, paragraph 1, of the Directive 92/85, must be considered as less favourable treatment of a woman due to pregnancy or maternity leave, pursuant to this Directive, and **constitutes (...) direct discrimination on grounds of sex**”.*

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CJEU 1 July 2010, Parviainen, Case C-471/08

Maintenance of payment and change of job

“ (...) in addition to the basic salary relating to her contract or her employment relationship, a pregnant worker **temporarily transferred to another job**, pursuant to Article 5(2) of Directive 92/85, remains, during that transfer, entitled to the pay components or **supplementary allowances which relate to her professional status** such as, in particular, her seniority, her length of service and her professional qualifications.

However, the Member States and, where appropriate, management and labour are not required pursuant to Article 11(1) of Directive 92/85 to maintain, during the temporary transfer, **the pay components or supplementary allowances which, (...) , are dependent on the performance by the worker concerned of specific functions in particular circumstances and which are intended essentially to compensate for the disadvantages related to that performance.**”

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CJEU 1 July 2010, Gassmayr, Case C-194/08

Maintenance of payment and leave from work

“Where the Member States and, where appropriate, management and labour choose, in accordance with Article 11(1) of Directive 92/85, to ensure that a pregnant worker who is granted leave or is prohibited from working in accordance with Article 5(3) receives an income in the form of a payment, an adequate allowance or a combination of the two, **that income must in any event be made up of that worker’s basic monthly salary and the pay components or supplements relating to her occupational status – which is in not in any way affected by the leave granted – such as allowances relating to the seniority of the worker concerned, her length of service and her professional qualifications (...).**”

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PHYSICAL PROTECTION AROUND CHILDBIRTH

Maternity leave (Art. 8)

1. Member States shall take the necessary measures to ensure that workers within the meaning of Article 2 are entitled to a continuous period of maternity leave of **at least 14 weeks** allocated before and/or after confinement in accordance with national legislation and/or practice.
2. The maternity leave stipulated in paragraph 1 must include **compulsory maternity leave of at least two weeks** allocated before and/or after confinement in accordance with national legislation and/or practice.

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CJEU 12 July 1984, Hoffman, Case C-184/83

Purposes of maternity leave

“First, it is legitimate to ensure the **protection of a woman’s biological condition** during pregnancy and thereafter until such time as her physiological and mental functions have returned to normal after childbirth; secondly, it is legitimate to **protect the special relationship between a woman and her child** over the period which follows pregnancy and childbirth, by preventing that relationship from being disturbed by the multiple burdens which would result from the simultaneous pursuit of employment.”



Where a national measure has this dual purpose, it may be applied to the mother to the exclusion of the father.

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CJEU 20 September 2007, Kiiski, Case C-116/06

Maternity leave entitlement of a worker on parental leave

“ While the Community legislature thereby intended in particular to protect pregnant workers, in a general manner, from the risks which they could face during their employment, by giving them a right to maternity leave which enables them temporarily to leave their jobs, **it is common ground that it did not subject this right to the condition that the pregnant woman who claims enjoyment of that leave must herself be in a situation in which she is exposed to such a risk.**”

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CJEU 18 March 2014, D. Case C-167/12

Right to maternity leave and surrogacy agreement

➡ *“On the basis of Article 8 of this Directive, Member States are not required to grant maternal leave to **a worker who is a commissioning mother who has used a surrogate mother in order to have a child**, even in circumstances where she may breastfeed the baby following the birth or where she does breastfeed the baby.*”

➡ *“(…) **an employer’s refusal to grant maternity leave to a commissioning mother who has used a surrogate mother in order to have a child does not constitute discrimination on grounds of sex.**”*

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CJEU 14 July 2016, Ornano, Case C-335/15

Payment during maternity leave: no right to full remuneration

“(…), workers cannot, however, usefully rely on Article 11(2) and (3) of Directive 92/85 to claim that they should continue to receive full pay while on maternity leave as though they were actually working, like other workers.

It is thus necessary to **distinguish the concepts of ‘payment’** referred to in Article 11(2) and (3) of Directive 92/85 **from the concept of ‘full pay’** received when the person is actually working(…)

(…) the legislature of the European Union wished to ensure that, during her maternity leave, **the worker should receive an income of an amount at least equivalent to that of the allowance provided for by national social security legislation in the event of a break in her activities on health grounds.**

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CJEU 13 February 1996, Gillepsie et al., Case C-342/93

Right to salary increases

“The principle of non-discrimination therefore requires that a woman who is still linked to her employer by a contract of employment or by an employment relationship during maternity leave must, like any other worker, benefit from any pay rise, even if backdated, which is awarded between the beginning of the period covered by reference pay and the end of maternity leave. To deny such an increase to a woman on maternity leave would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise.”



Directive 2006/54 of 5 July 2006 (Art. 15)

A woman on maternity leave shall be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence.

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EMPLOYMENT PROTECTION

Prohibition of dismissal (Art. 10)

In order to guarantee workers, within the meaning of Article 2, the exercise of their health and safety protection rights as recognized under this Article, it shall be provided that:

1. Member States shall take the necessary measures to **prohibit the dismissal** of workers, within the meaning of Article 2, during the period from the beginning of their pregnancy to the end of the maternity leave referred to in Article 8(1), **save in exceptional cases not connected with their condition** which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent;
2. if a worker, within the meaning of Article 2, is dismissed during the period referred to in point 1, **the employer must cite duly substantiated grounds for her dismissal in writing**;
3. Member States shall take the necessary measures to protect workers, within the meaning of Article 2, from consequences of dismissal which is unlawful by virtue of point 1.

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CJEU 4 October 2001 Jiminez Melgar, Case C-438/99 CJEU 4 October 2001, Tele Danmark, Case C-109/00

Protection of workers on fixed-term contracts

“Whilst the prohibition of dismissal laid down in Article 10 of Directive 92/85 applies to both employment contracts for an indefinite period and fixed-term contracts, **non-renewal of such a contract, when it comes to an end as stipulated, cannot be regarded as a dismissal** prohibited by that provision. However, where non-renewal of a fixed-term contract is **motivated by the worker's state of pregnancy**, it constitutes **direct discrimination on grounds of sex**, contrary to Article 2(1) and 3(1) of Council Directive 76/207.” (Case C-438/99).

“By its first question the Højesteret asks essentially whether Article 5(1) of Directive 76/207 and Article 10 of Directive 92/85 must be interpreted as **precluding a worker from being dismissed on the ground of pregnancy where she was recruited for a fixed period**, she failed to inform the employer that she was pregnant even though she was aware of this when the contract of employment was concluded, and because of her pregnancy she was unable to work during a substantial part of the term of that contract.” (Case C-109/00)

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CJEU 11 October 2007, Paquay, Case C-460/06

Prohibition of preparatory steps for dismissal

“Article 10 of Council Directive 92/85/EEC (...) must be interpreted as prohibiting **not only the notification of a decision to dismiss on the grounds of pregnancy and/or of the birth of a child during the period of protection set down in paragraph 1 of that article but also the taking of preparatory steps for such a decision before the end of that period.**”

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CJEU 30 June 1998, Mary Brown, Case C-394/96

Dismissal due to illness arising during pregnancy

“Where a woman is absent owing to illness resulting from pregnancy or childbirth, and that illness arose during pregnancy and persisted during and after maternity leave, **her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken into account for computation of the period justifying her dismissal under national law. As to her absence after maternity leave, this may be taken into account under the same conditions as a man's absence, of the same duration, through incapacity for work.**”

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CJEU 22 February 2018, Guisado, Case C-103/16

Dismissal on the grounds of company reorganisation

➡ “(...) reasons not related to the individual workers concerned, for which **collective redundancies** are made, within the meaning of Article 1(1) of Directive 98/59, **exceptional cases not connected with the worker’s condition**, within the meaning of Article 10(1) of Directive 92/85.

➡ “(...) Article 10(1) of Directive 92/85 must be interpreted as not **precluding national legislation which allows an employer to dismiss a pregnant worker in the context of a collective redundancy**, within the meaning of Article 1(1)(a) of Directive 98/59.”

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DEFENCE OF RIGHTS

Article 12

Member States shall introduce into their national legal systems such measures as are necessary to enable all workers who should themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process (and/or, in accordance with national laws and/or practices) by recourse to other competent authorities..

CJEU 29 October 2009, Pontin, Case C-63/08

“Articles 10 and 12 of Directive 92/85 must be interpreted as not precluding legislation of a Member State which provides a **specific remedy** concerning the prohibition of dismissal of pregnant workers or workers who have recently given birth or are breastfeeding laid down in that Article 10, exercised according to procedural rules specific to that remedy, **provided however that those rules are no less favourable than those governing similar domestic actions (principle of equivalence) and are not framed in such a way as to render practically impossible the exercise of rights conferred by Community law (principle of effectiveness).**”

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THE RECONCILIATION OF PROFESSIONAL AND PRIVATE LIFE

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Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave

- **Legal basis:** Articles 153 and 155 TFEU
- **Unchanged objectives:** to reconcile working and family responsibilities and to promote equal opportunities and treatment for women and men
- **Reasons for revision:**
 - **Ineffectiveness** of measures encouraging men to assume an equal share of family responsibilities
 - **Adaptation** to new family arrangements

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MINIMUM REQUIREMENTS

- An individual right to parental leave (clause 2)
- Measures to protect workers against less favourable treatment or dismissal (clause 5, point 4)
- The right to return to work (clause 5, point 1)
- Rights acquired or in the process of being acquired shall be maintained (clause 5, point 2)
- Time off from work on grounds of force majeure (clause 7)

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INDIVIDUAL RIGHT TO PARENTAL LEAVE

Clause 2: Parental leave

1. This agreement entitles **men and women workers** to an **individual right to parental leave** on the grounds of the birth or adoption of a child to take care of that child until a given age up to eight years to be defined by Member States and/or social partners.
2. The leave shall be granted **for at least a period of four months** and, to promote equal opportunities and equal treatment between men and women, should, in principle, be provided on a non-transferable basis. To encourage a more equal take-up of leave by both parents, **at least one of the four months shall be provided on a non-transferable basis**. The modalities of application of the non-transferable period shall be set down at national level through legislation and/or collective agreements taking into account existing leave arrangements in the Member States.

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CJEU 16 September 2010, Chatzi, Case C-149/10

- ***A right conferred on parents as workers, and not on the child***

“Clause 2.1 of the framework agreement on parental leave concluded on 14 December 1995, which is set out in the annex to Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC as amended by Council Directive 97/75/EC of 15 December 1997, cannot be interpreted as conferring an individual right to parental leave on the child.”

- ***A right unconnected to the number of children born***

“Clause 2.1 of the framework agreement is not to be interpreted as requiring the birth of twins to confer entitlement to a number of periods of parental leave equal to the number of children born.”

- ***The need for differentiated treatment***

“However, read in the light of the principle of equal treatment, this clause obliges the national legislature to establish a parental leave regime which, according to the situation obtaining in the Member State concerned, ensures that the parents of twins receive treatment that takes due account of their particular needs. It is incumbent upon national courts to determine whether the national rules meet that requirement and, if necessary, to interpret those national rules, so far as possible, in conformity with European Union law.”

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CJEU 16 July 2015, Maistrellis, Case C-222/14

An individual right which may not depend on the situation of the spouse

“(…) it follows from the wording of the Framework Agreement and from its objectives and context that each parent is entitled to parental leave, which means that **Member States cannot adopt provisions under which a father exercising the profession of civil servant is not entitled to parental leave in a situation where his wife does not work or exercise any profession.**”

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MODALITIES OF APPLICATION TO BE DEFINED BY THE MEMBER STATES

Clause 3

- Full-time, part-time, in a piecemeal way or in the form of a time-credit system
- Length of service qualification not exceeding one year
- Employer's right to postpone the granting of parental leave
- Notice periods to be given by the worker

Clause 5

- Status of the employment contract or employment relationship for the period of parental leave.
- Matters regarding social security and income in relation to the agreement

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CJEU 16 July 2009, Gómez-Limón Sánchez-Camacho, Case C-537/07

No obligation on Member States in social security matters

“**Clause 2(8)** of the framework agreement on parental leave **does not impose obligations on the Member States**, apart from that of considering and determining social security questions related to that framework agreement in accordance with national legislation. In particular, **it does not require them to ensure that during parental leave employees continue to receive social security benefits**. Clause 2(8) thereof cannot be relied on by individuals before a national court against public authorities.”

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PROTECTION AGAINST LESS FAVOURABLE TREATMENT AND DISMISSAL

Clause 5, Point 4

In order to ensure that workers can exercise their right to parental leave, Member States and/or social partners shall take the **necessary measures to protect workers against less favourable treatment or dismissal on the grounds of an application for, or the taking of, parental leave** in accordance with national law, collective agreements and/or practice.

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RIGHT TO RETURN TO THE SAME JOB AND ACQUIRED RIGHTS

Clause 5, Point 1

At the end of parental leave, workers shall have the right to return to the same job or, if that is not possible, to an equivalent or similar job consistent with their employment contract or employment relationship.

Clause 5, Point 2

Rights acquired or in the process of being acquired by the worker on the date on which parental leave starts shall be maintained as they stand until the end of parental leave. At the end of parental leave, these rights, including any changes arising from national law, collective agreements and/or practice, shall apply.

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CJEU 7 September 2017, H., Case C-174/16

Right to return to the same job

➡ *“the right to return to the post occupied and the maintenance of rights acquired or in the process of being acquired thus guaranteed by Clause 5(1) and (2), of the revised Framework Agreement **must benefit the worker even where the parental leave taken under the applicable national provisions exceeds the minimum period of four months** referred to in Clause 2(2) of the revised Framework Agreement.”*

➡ *The notion of post “cannot be interpreted restrictively” it is sufficient to have been assigned even on a probationary period.*

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CJEU 22 October 2009, Meerts, Case C-116/08

Rights acquired or in the process of being acquired

*“(…) the concept of ‘[r]ights acquired or in the process of being acquired’ within the meaning of Clause 2.6 of the framework agreement **covers all the rights and benefits, whether in cash or in kind, derived directly or indirectly from the employment relationship, which the worker is entitled to claim from the employer at the date on which parental leave starts.***

⇒ includes notice indemnity

Compensation for notice on the basis of previous salary

*“**Clause 2.6 and 2.7** of the framework agreement on parental leave (...) must be interpreted as precluding (...) **the compensation to be paid to the worker from being determined on the basis of the reduced salary being received when the dismissal takes place.**”*

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CJEU 22 April 2010, Zentralbetriebsrat der Landeskrankenhäuser Tirols, Case C-486/08

Right to postpone paid leave

“Clause 2.6 of the framework agreement on parental leave (...) must be interpreted as precluding a national provision such as the last sentence of Paragraph 60 of the Law of the Province of Tyrol on contractual public servants of 8 November 2000, in the version in force up to 1 February 2009, under which workers exercising their right to parental leave of two years lose, following that leave, their right to paid annual leave accumulated during the year preceding the birth of their child.”

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CJEU 4 October 2018, Dicu, Case C-12/17

Absence of the right to paid annual leave during the parental leave period

 **“Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, must be interpreted in that it does not oppose national legislation, such as the one primarily concerned, which, for the purposes of determining entitlement to paid annual leave guaranteed by this Article to a worker for a reference period, does not consider this parental leave taken by the worker during the said period as a period of actual work.”**

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TIME OFF FROM WORK ON GROUNDS OF FORCE MAJEURE

Clause 7

Member States and/or social partners shall take the necessary measures to **entitle workers to time off from work**, in accordance with national legislation, collective agreements and/or practice, **on grounds of force majeure for urgent family reasons in cases of sickness or accident making the immediate presence of the worker indispensable.**

2. Member States and/or social partners may specify the conditions of access and detailed rules for applying clause 7.1 and limit this entitlement to a certain amount of time per year and/or per case.

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AND TOMORROW...

Proposal for a Directive on balancing work and family life for parents and carers and repealing Council Directive 2010/18/EU

- Establishing parental leave and carer leave
- Right to parental leave for a minimum of 4 months which may be taken until the child is 12 months old
- Right to remuneration or adequate allowance during this leave equivalent to at least what the worker would receive on sick leave

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