

# STATES OF JERSEY



## **DRAFT EMPLOYMENT (AMENDMENT No. 11) (JERSEY) LAW 201- (P.17/2019): FIFTH AMENDMENT**

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**Lodged au Greffe on 4th June 2019  
by the Economic and International Affairs Scrutiny Panel**

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**STATES GREFFE**

**1 PAGE 24, ARTICLE 4 –**

In paragraph (3)(g), for the inserted definition “surrogate parent” substitute –

“ “surrogate parent” means a person –

- (a) on whose application under section 54 or 54A of the Human Fertilisation and Embryology Act 2008 of the United Kingdom, an order of court has been made providing for a child to be treated in law as a child of that person, or who is a potential applicant for such an order; and
- (b) with whom the child resides, or will reside, in Jersey;”.

**2 PAGES 28 AND 29, ARTICLE 4 –**

(1) In the draft Article 55F to be inserted by Article 4(7) –

(a) for paragraph (1)(a)(iii) substitute –

“the date on which, subject to paragraphs (1A) and (3), the employee intends each parental leave period to start, and”;

(b) after paragraph (1) insert –

“(1A) The employer must take all reasonable steps to accommodate an employee’s intended second and third parental leave periods, and in determining what steps are reasonable in the circumstances, the matters to be considered include (but are not limited to) –

- (a) the extent of the financial, administrative and other resources available to the employer, including any such resources provided by a third party, for the purpose of taking such steps; and
- (b) the characteristics of the employer such as the nature and size of the employer’s business.”.

(2) In the draft Article 55G to be inserted by Article 4(7) –

(a) for paragraph (1)(b)(iii) substitute –

“the date on which, subject to paragraphs (1A) and (4), the employee intends each parental leave period to start, and”;

(b) after paragraph (1) insert –

“(1A) The employer must take all reasonable steps to accommodate an employee’s intended second and third parental leave periods, and in determining what steps are reasonable in the circumstances, the matters to be considered include (but are not limited to) –

- (a) the extent of the financial, administrative and other resources available to the employer, including any such resources provided by a third party, for the purpose of taking such steps; and

- (b) the characteristics of the employer such as the nature and size of the employer's business.”.

**3 PAGE 31, ARTICLE 4 –**

In the draft Article 55K to be inserted by Article 4(7) –

- (a) in paragraph (1) for “2 weeks’ ” substitute “90 days’ ”;
- (b) after paragraph (1) insert –

“(1A)The employer must take all reasonable steps to accommodate an employee's intended early return to work, and in determining what steps are reasonable in the circumstances, the matters to be considered include (but are not limited to) –

- (a) the extent of the financial, administrative and other resources available to the employer, including any such resources provided by a third party, for the purpose of taking such steps; and
- (b) the characteristics of the employer such as the nature and size of the employer's business.”.

**4 PAGE 32, ARTICLE 4 –**

After the draft Article 55L to be inserted by Article 4(7), and before the closing inverted commas at the end of Article 4(7), insert –

**“55M Offence of making false statements etc.**

- (1) If, for purposes connected with the provisions of this Part, a person –
  - (a) makes, or knowingly causes or allows to be made, a statement; or
  - (b) produces or furnishes, or knowingly causes or allows to be produced or furnished, a document, record or information, which the person knows to be false in a material particular, the person is guilty of an offence.
- (2) A person guilty of an offence under this Article is liable to imprisonment for a term of 12 months and to a fine.”.

ECONOMIC AND INTERNATIONAL AFFAIRS SCRUTINY PANEL

## REPORT

The Minister for Social Security lodged [P.17/2019](#) on 12th February 2019, which seeks to amend the Employment (Jersey) Law 2003 to extend family friendly employment rights. The proposals come as part of the second phase of extensions to the legislation following a [recommendation](#) made by the Employment Forum in 2017.

The Panel agreed to undertake a review of the proposals following initial concerns about the effects the changes may have on employers. In order to explore these concerns further, the Panel invited submissions from key stakeholders and members of the Public, and held several public hearings with Ministers, the Employment Forum, and other interested parties.

The review uncovered a significant number of concerns from a wide variety of stakeholders including (but not limited to) employers and childcare organisations. Along with these concerns, however, it is important to acknowledge the support given for the underlying principles of the legislation. There are many positive proposals contained in the Proposition, such as breastfeeding rights, and the same rights applying to adoptive and surrogate parents. Stakeholders were mainly concerned about parental leave rights and paid leave funded by the employer.

The Panel is publishing its report (S.R.9/2019) alongside these amendments so that Members are able to read in detail the impact and challenges the proposals could create. By way of summary, the main concerns include –

- **The consultation process:** The work undertaken by the Employment Forum was instrumental in the development of the proposals, because the outcome of the consultation was based on the legislative changes put forward by the Minister.

The Panel's review began with an analysis of the consultation process, primarily to ensure that the consultation responses were representative of the range of affected stakeholders. The Panel found that the consultation did not reach a sufficiently broad range of stakeholders. The consultation received 331 written responses in total, 27 of which were from individual employers (191 from employees). In addition, the Panel has found that any assessment of the impact of existing legislation for employers was not as thorough as it could have been, because an insufficient number of employers either were not consulted, or did not respond to the consultation.

- **Disparity between intended policy aims and resultant legislation:** Some of the key policy aims contained in the proposals are that the extensions will improve the position for parents in the workplace, give families more choice and flexibility to help meet their work and family responsibilities, and to encourage gender balance in childcare roles.
  - The importance of a child's early years is cited in the proposals, and research has been quoted in reference to links between periods of maternity leave and health and societal benefits for both the mother and child. The Jersey Early Years Association raised concerns about the continuity of care in nurseries if children were taken out of their placements for a block of parental leave.

The Jersey Opinions and Lifestyle Survey (2016) found that one of the reasons that prevented parents from taking more leave was because of financial reasons (52%). The extensions aim to give parents greater choice relating to caring for their children, but in reality this will not be the case if parents cannot afford to take unpaid leave.

- The proposals effectively replace maternity leave with parental leave, giving equal rights to all parties. Currently, 2 contributory benefits are paid to new mothers; a one-off maternity grant, and a maternity allowance. Contributory benefits should be aligned in order to support the ethos that parental leave includes all parties, and not only the mother.

- **Impact on employers:**

- The 6 weeks' paid element of parental leave funded by the employer will be financially difficult for some, particularly smaller organisations.
- The 46 weeks' unpaid element of parental leave, which can be taken in blocks over 3 years, will cause disruption, staffing issues, and increase costs for employers. This impact will be greater for smaller businesses, where each employee makes up a significant proportion of the overall workforce.
- Although the proposals may provide certain benefits to employers, including enhancing reputation and maximising the workforce, they will also increase the cost of employment in Jersey (as a result of increased recruitment, advertising, training, accommodation, etc., costs).
- The cumulative effect of regulation over the years has created financial and administrative implications for employers which have affected the economy. The continuous additional employment and regulatory legislation has also created disincentives for businesses to employ people. This is evidenced by the rise in the number of single-person undertakings (1,300 in 2001 to 4,300 in 2018).

The Panel has considered all of the concerns received during the review, and believes that the strength of a number of them calls for several changes to be made to the draft Law. In undertaking the review, the Panel also dedicated a number of hours to line-by-line legislative scrutiny. In that regard, the Panel has proposed 2 changes, one in relation to the definition on surrogacy, and the second in relation to making it an offence to provide false statements.

**1. Amending the definition of surrogate parent:**

- **To include a reference to a person who has been granted a parental order under section 54A of the Human Fertilisation and Embryology Act 2008, or who is a potential applicant for an order under that section.**

- **To say explicitly that the relevant child’s home will be with the potential applicant(s) who is/are resident in Jersey.**

The definition of surrogate parent is set by reference to the UK Human Fertilisation and Embryology Act 2008 (the “**2008 Act**”), because at present there is no surrogacy legislation in Jersey.

A person who wishes to acquire parental responsibility for a child carried by a surrogate mother will need to do so by making an application under that Act. At present, the definition of surrogate parent refers to a person who has been granted an order, or who is a potential applicant for an order, under section 54 of the 2008 Act. An application under that section can only be made by 2 persons jointly.

The first amendment proposed above reflects that, in January 2019, the UK amended the 2008 Act to add a new section 54A. Under that section, a person can make an application for a parental order individually.

Section 54A was inserted into the 2008 Act in response to an English Family Court decision (*Re Child Z* [2016] EWHC 1191 (Fam)) that section 54 of the 2008 Act was incompatible with Article 14 of the European Convention on Human Rights (the right not to be subject to discrimination), because it only permitted a couple to obtain a parental order, and discriminated against potential single surrogate parents. The purpose of this amendment is to ensure that the draft Law is aligned with this change in the 2008 Act and is compatible with the Convention.

The second amendment is proposed in order to make it clearer which of the criteria in section 54 or 54A of the 2008 Act should be met before a person must be treated as a potential applicant for an order under those sections and, therefore, as a surrogate parent for the purposes of the draft Law.

**2. Amendment to the Article in respect of the blocks of leave to include an element of conversation for the second and third blocks of leave (as amended by the Minister):**

During the review, concerns were raised, predominantly from small businesses, on the impact of taking blocks of parental leave over a period of time. The Panel has found that this part of the draft Law will create cost and resource implications for businesses in terms of –

- Providing temporary cover for interchangeable leave periods, and managing those periods, for all employees who had become parents.
- Training costs associated with temporary employees, particularly employed to cover specialist roles.
- Recruitment costs, including possible accommodation costs, in employing people on a temporary basis and, if they are unable to recruit, managing any shortfalls within the workforce.

These implications would be even more evident in cases where one employee had 2 children within a 3 year period. The proposals, as drafted, would entitle those

employees to a total of 104 weeks' leave, (12 weeks of which would be paid), plus holiday leave.

In that regard, the Panel supports the Minister's amendment to reduce the number of separate blocks in which parental leave may be taken, from 4 blocks to 3 blocks, but believes that this part of the draft Law will still be too difficult for smaller businesses to manage.

The purpose of this amendment is to provide for an element of conversation between the employer and employee for the second and third blocks of leave, to try and mitigate the potential impact on managing (interchangeable) blocks of leave over a number of years for each employee.

**3. To increase the notice period from 28 days to 90 days, and adding reasonable steps to notification:**

The Panel has lodged an amendment to the Minister's amendment: "*To increase from 14 days to 28 days the notice periods that an employee must give to their employer to vary their parental leave dates*". The Panel has increased from 28 days to 90 days the notice periods that an employee must give to their employer to vary their parental leave dates. This part of the amendment will be considered separately in an amendment to the third amendment.

The Panel has also inserted a paragraph that gives the employer an opportunity for reasonable negotiation with employees who want to change their previously agreed blocks of leave. The proposals, as drafted, offer no element of negotiation for the employer, and are rather a *notification* from the employee that their blocks of leave will change. This could cause difficulties for employers who need to manage busy periods in the year and maximise their workforce capacity.

In this scenario, the employer would have no choice but to manage these changes at relatively short notice. The proposals, as drafted, also create difficulties if the employer had arranged temporary cover for the previously agreed blocks of leave. If the employee decided to go back to work earlier than expected (provided they had given 2 weeks' notice), this could cause cost implications for the employer –

**Advocate Huw Thomas:**

*"It may be that they [the employer] have gone to significant cost to recruit and hire a temporary replacement and if that is going to cost employers time and money that is going to be unacceptable because, again, that puts further cost on employers that are not going to be recoverable from anybody"*<sup>1</sup>.

The Panel accepts that the impact of this part of the draft Law would most likely be greater in small businesses, or in small teams, where each individual makes up a significant proportion of the workforce, and therefore planned (and unplanned) absence management is key. It is clear though, that whatever the size of the business, this part of the proposals will cause significant cost and resource implications for the employer, and the Panel hopes that the reasonable steps element of the amendment will minimise this impact.

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<sup>1</sup> [Public Hearing](#) with Advocate Huw Thomas, 4th April 2019

#### **4. Amendment to include an offence of making false statements:**

The Panel notes that the provision of false information in relation to the birth of a child for the purposes of Part 5A (Maternity, Adoption and Parental Rights) is not a criminal offence under the [Employment \(Jersey\) Law 2003](#). The draft Law would amend Part 5A (under Article 4) to provide entitlements to take parental leave subject to the notification obligations. Due to the fact that parental leave entitlements have been extended to 6 weeks' paid leave, which can be taken over a number of years, the Panel felt that safeguards should be put in place, should a person provide false information.

The amendment, therefore, makes it an offence to intentionally provide false or misleading information to another person, including an employer, for any purposes connected with securing a right under Part 5A of the Employment (Jersey) Law 2003. For example, the offence might be committed by a person who may benefit from a right to parental leave, or to a clinician who provides a false certificate of the expected week of childbirth.

#### **Financial and manpower implications**

There are no additional financial or manpower implications for the States arising from the adoption of this amendment.