



Family Leave Bill

Draft Heads of Bill to consolidate, with amendments, all family leave legislation

Ibec submission March 2016

Introduction

Ibec welcomes the opportunity afforded by the Department of Justice, Equality and Law Reform¹ to participate and respond to the framing of the proposed legislation which will consolidate, with amendments, the existing provisions of the Maternity Protection Acts 1994 and 2004², the Adoptive Leave Acts 1995 and 2005³, the Parental Leave Acts 1998 and 2006⁴ and the Carer's Leave Act 2001⁵.

Ibec welcomes the Department's approach in consolidating all family leave legislation but is concerned that the proposed amendments constitute fundamental changes to the substance of each Act, changes which go beyond any proposed technical changes, which we understood not to be the intention of the Department. The Department, in drafting the Heads of Bill, has identified what it considers inconsistencies across the four Acts and has proposed changes which will clearly result in significant changes to each of the individual Acts. Any exercise which seeks to streamline four Acts into one should not go beyond the technical changes necessary to consolidate all four Acts.

Ibec is keenly aware of the importance of achieving sustainable economic development while recognising the importance of quality of life issues and the fact that work-life balance is of increasing concern to all. However, a fair balance must be met between the importance of achieving reconciliation of professional and private life and the need to sustain employment and enhance economic competitiveness.

In consolidating all family leave legislation, it is important that the Department takes cognisance of the fact that, although all Acts fall within the field of family leave and provide for better reconciliation of family, professional and private life, each Act is fundamentally different in the leave it provides and the duration, manner and frequency in which any period of leave can be taken. The provisions of the family leave Acts, which are some of the most generous across EU member states, allow employees to avail of extensive leave provisions, thereby ensuring that work-life balance is of

¹ Hereinafter referred to as the "Department"

² Hereinafter referred to as the "Maternity Protection Acts"

³ Hereinafter referred to as the "Adoptive Leave Acts"

⁴ Hereinafter referred to as the "Parental Leave Acts"

⁵ Hereinafter referred to as the "Carer's Leave Act"

fundamental importance. Ireland's extensive maternity leave provisions are certainly one of the most generous across EU member states, as a result of the dramatic increases in maternity leave over the last two decades in Ireland, whereby an employee can avail of up to 42 weeks' maternity leave. Similarly, extensive leave provisions can be availed of under the Adoptive Leave Acts, whereby an employee can avail of up to 40 weeks' adoptive leave. Furthermore, an employee can avail of an extensive period of carer's leave of up to 104 weeks and, as of 8 March 2013, employees can avail of up to 18 weeks' parental leave. Therefore, Ibec submits that, in light of the extensive provisions already in place across all family leave legislation which currently provide for better reconciliation of family, professional and private life, the consolidation exercise should not go beyond what is necessary to consolidate the four individual Acts into one.

Regulatory Impact Analysis

It is imperative that prior to any further drafting of the legislation that a Regulatory Impact Analysis (RIA) is carried out on the impact of the proposed legislation and it is essential that it is carried out without any further delay. The current 'Programme for Government' commits to carrying out a RIA for all important legislation. Ibec submits that a thorough RIA is necessary, and should be carried out before any further legislation is enacted in this area.

A detailed and systematic appraisal of the potential impact of such proposed legislation is necessary in order to determine whether the legislation will have its stated desired objective, or whether the cost to employers will exceed any benefit. This is particularly true in light of the Department's intention, expressed in the draft Heads of Bill, to go further than is required to consolidate all four Acts. It is imperative that a RIA is carried out to highlight the impact of the proposed legislation on both the employer and worker and this should include a full economic impact analysis. Furthermore, it should examine what impact the proposed legislation will have on businesses and, in particular SMEs, from an operational and business perspective and outline ways of reducing any unnecessary burden on businesses. Should no RIA be carried out on the impact of the proposed legislation, it is imperative that the Department does not make any significant changes to the substance of the individual Acts. In relation to labour market reforms, every effort should be made to ensure that every new piece of employment rights legislation has regard to its effect on the creation and retention of jobs. Ibec respectfully submits that it is necessary to apply a 'sustainable employment test' to all employment law and that officials and Ministers should explain how proposals would contribute positively to the sustainability of employment.

Workplace Relations Act 2015

On 30 July 2014, the Department of Jobs, Enterprise and Innovation published the Workplace Relations Bill 2014, stating that the objective of the Bill is to reform workplace relations bodies to deliver a *"world-class workplace relations service which is simple to use, independent, effective, impartial, cost effective and provides for a workable means of redress and enforcement, within a reasonable period of time"*. The Workplace Relations Act 2015⁶ was signed into law on 20 May 2015 and came into effect on 1 October 2015⁷. The Workplace Relations Act introduced a number of key

⁶ Hereinafter referred to as the "Workplace Relations Act"

⁷ Notably, provisions of the Act were commenced at an earlier stage including section 86(1) to allow for accrual of annual leave during certified sick leave effective 1 August 2015

reforms following a substantial revision of the employment law framework which has transformed the manner in which employment law and equality disputes are dealt with within this jurisdiction.

The Department, in Part 8 of the draft Heads of Family Leave Bill, proposes that there may be scope to rationalise the statutory provisions across all four Acts so that there is one set of legislative provisions relating to the resolution of all such complaints rather than parallel provisions in a number of separate Acts.

In particular, Part 8 of the draft heads of Bill proposes to streamline and consolidate, across all four Acts, the time limits within which complaints can be brought to the Rights Commissioner in the first instance and on appeal to the Employment Appeals Tribunal. However, a key reform of the Workplace Relations Act is the introduction of a new two-tier workplace relations structure comprising of the WRC, which will deal with all employment law and equality complaints in the first instance, and an expanded and reconfigured Labour Court which will deal with all cases on appeal from the WRC.

Therefore, effective since 1 October 2015, all complaints arising under the Maternity Protection Acts, Adoptive Leave Acts, Parental Leave Act and under the Carer's Leave Act will be heard by an Adjudication Officer of the WRC in the first instance and on appeal to the Labour Court. Therefore, the proposals in Part 8 of the draft Heads of Bill, published prior to the publication of the Workplace Relations Bill, have been superseded by the Workplace Relations Act.

Part 5 and Part 6

Head 5.3 and 6.4

Reduction of notice period under s8 (1) of the Parental Leave Act 1998, as amended, and s9 (1) of the Carer's Leave Act 2001 from six weeks to four weeks

An employee proposing to take parental or carer's leave must, not later than six weeks before the proposed commencement of leave, provide the employer with notice in writing of his or her intention to take leave. An employee proposing to take maternity or adoptive leave must, not later than four weeks before the commencement of leave, give notice in writing to the employer of the intention to take leave. It is proposed that there be a common notice period of four weeks across all four Acts. The proposed reduction of the notification period, to be given by a worker to his or her employer when exercising the right to parental leave and carer's leave, from six weeks to four weeks raises a number of serious concerns for employers.

i. Parental Leave Acts 1998 and 2006

Importantly, Clause 3.2 of Council Directive 2010/18/EU in providing for the establishment of notice periods to be given by workers to employers when exercising the right to parental leave, specified no minimum period of notice, leaving the matter to be determined by member states at national level. In transposing the Directive on 8 March 2013, the Department did not reduce the notice period from 6 weeks to 4 weeks clearly indicating that a notice period of 6 weeks is still necessary and remains an appropriate notice period. A notice period of 6 weeks had already been established with the transposition of Council Directive 1996/34/EC which was not reduced by the European Union (Parental Leave) Regulations 2013 (S.I. No.81 of 2013) which gave effect to Council Directive

2010/18/EU. Should a 6 week notice period be established as an appropriate notice period where the leave that could have been taken was up to 14 weeks, a reduction of the notice period to 4 weeks would have serious implications for employers where the duration of parental leave available has been increased to 18 weeks.

Ibec strongly advocates that a minimum notice period of 6 weeks is still necessary, particularly in light of the Parental Leave (Amendment) Act 2006 which extended the manner and flexibility in which leave could be taken under the 1998 Act, and the subsequent transposition of Council Directive 2010/18/EU which has not only increased the length of leave available to employees but expands the frequency with which an employee can take parental leave.

Furthermore, the proposed amendment to the notice period raises serious concerns for employers due to the implications it will have on the notice period under section 11 of the Parental Leave Act 1998, as amended, which allows an employer to postpone a period of parental leave not later than 4 weeks before the intended commencement of the leave.

Therefore, on receiving 6 weeks' notice of parental leave, should the employer be satisfied that the taking of parental leave would have a substantial adverse effect on the operation of his or her business due to one of those grounds set out in section 11, an employer may postpone the period of leave by notice given to the employee not later than 4 weeks before the intended commencement. The Department has proposed amending the notice period under section 8(1) by reducing same to 4 weeks. However, Ibec submits that it has grave concerns that the Department has not proposed that the notice period under section 11(1) will be reduced accordingly.

If the legislation is amended, as proposed, so that an employee will be required to give only 4 weeks notice before the commencement of parental leave, and the period before which an employer can postpone cannot be any later than 4 weeks before the commencement of leave that would, therefore, mean that an employer would have no time whatsoever before which he or she could postpone the leave on the basis of one of the grounds provided for in section 11. On receiving notification, it is imperative that an employer has at least two weeks to ensure that temporary cover can be arranged or duties can be re-allocated in such a manner that it has minimum impact on the employer's business. However, should the taking of the leave have a substantial adverse effect on the operation of the business, an employer can postpone that period of leave up to 2 weeks after receiving notice under section 8(1). Therefore, to reduce the 6 week notice of intention to take leave to 4 weeks and retain the 4 week postponement period completely defeats the intention and purpose of section 11 and an employer's right to avail of section 11(1).

Ibec submits that the 6 week notice period should be a minimum period and not be reduced as proposed. Without prejudice to this position, should it be reduced to four weeks, it is imperative that the postponement period as provided for under section 11(1) is reduced accordingly to 2 weeks.

ii. **Carer's Leave Act 2001**

Ibec submits that a notice period of six weeks is necessary where an employee proposes to take carer's leave. An employee proposing to avail of carer's leave must apply to the Department of Social Protection⁸ for a decision by a deciding officer under the Social Welfare (Consolidation) Act

⁸ Hereinafter referred to as "the DSP"

2005 that the person in respect of whom the employee proposes to avail of carer's leave is a 'relevant person' for the purposes of the Act. Along with applying to the DSP, an employee must notify the employer of his or her intention to take carer's leave, including confirmation that an application has been sent to the DSP, not later than six weeks before the intended commencement of the leave. A confirmation document, which sets out the terms of the leave, must be signed by both parties not less than two weeks before the leave is due to commence. Should the notice period be reduced to four weeks, it would mean that the DSP may well have to process and respond to an application within a two week timeframe so that the confirmation document, which can only be signed once an employer has received the decision of the DSP, can be signed two weeks before the leave can commence. This would be a clear administrative burden for the DSP to have to process an application within a two week timeframe, and raises concerns as to the feasibility of same.

Furthermore, there is no requirement to reduce the notice period to four weeks. Section 9(2) provides that where in exceptional or emergency circumstances, it is not reasonably practicable to give six weeks' notice, the employee shall give that notice as soon as is reasonably practicable.

iii. Implications of a reduction of notice period under the Parental Leave Acts and the Carer's Leave Act

The very flexible manner in which carer's and parental leave can be taken imposes predominantly an administrative and cost burden on employers to ensure alternative arrangements are made for the performance of an employee's duties during the period of absence. On giving notice, an employee will have specified the duration and manner in which he or she proposes to take leave and that notice is, therefore, necessary in order for an employer to make alternative arrangements for the performance of that employee's work. Clearly, those alternative arrangements will depend on a number of factors including the skills required to replace those lost during the period of leave, the cost of replacing those skills, the ability to re-allocate the duties within an employer's business, the nature of the role and, most importantly, the duration of the absence. Clearly, it will not be known until notice is given to an individual employer what period of leave an employee is proposing to take and in what manner. Therefore, it is crucial that an employer is given at least 6 weeks notice to ensure that the alternative arrangements made for the performance of the employee's duties have minimum impact on an employer's business.

Where an employee is proposing to take a continuous block of leave, of up to 18 weeks' parental leave or indeed an even greater period of carer's leave of up to 104 weeks, an employer can be left with no alternative but to have to arrange, at short notice, temporary cover on a fixed term basis and having to arrange same with 6 weeks' notice, as currently provided for, is already very challenging for employers. Not only are there significant cost implications, but arranging for temporary cover for an employee with particular skills within a particular industry at short notice is even more challenging.

Should the duties of the employee be re-allocated within the company, the frequent difficulty for companies, in particular SMEs, is the availability of employees to whom the work can be re-allocated to for the period of leave. Furthermore, should that work be re-allocated during a period of parental or carer's leave, for most employers the re-allocation of duties can negatively impact on the business but particularly in terms of service delivery.

Furthermore, the last number of years has seen many companies, across all sectors, having to affect redundancies in order to reduce costs due to the recession, which has impacted significantly on the availability of employees to carry out the duties of those on carer's and parental leave. Undoubtedly, it is the case that within a reduced workforce, with reduced availability of skills, there may be no persons with spare capacity to whom the employee's duties can be re-allocated to for the duration of the leave. The fact that the parental leave available has been increased to 18 weeks and an employee can avail of up to 104 weeks' carer's leave, only heightens the difficulties employers will face in ensuring that alternative arrangements are made for the performance of the employee's duties, a challenge employers already face given the flexible manner in which parental and carer's leave can be taken. Furthermore, the 6 week notice period is required where there are a number of employees on other forms of leave and an employer must ensure that duties are re-allocated without any impact to the business.

Although an employer can postpone a period of parental leave under section 11, the manner in which this section can be exercised is currently very limited whereby the leave can only be postponed on one occasion and for a period not exceeding six months⁹. Therefore, an employer having already postponed a period of leave, although facing the same difficulties as on the postponement, will be left in a position where an employee can take a continuous period of leave, although the taking of the leave will have a substantial adverse effect on an employer's business. Similarly, as an employer can only refuse, on reasonable grounds, a period of carer's leave where that period of leave is less than 13 weeks, it is all the more important that the employer has 6 weeks' notice in order to ensure that alternative arrangements are made for the performance of the employee's duties, and such arrangements do not have an adverse impact on business.

Ibec respectfully submits that proposing to reduce the notice period from 6 weeks to 4 weeks to bring same in line with other family leave legislation, fundamentally fails to take cognisance of the fact that, although the Parental Leave Acts and the Carer's Leave Act come within the field of family leave, they are fundamentally different from other family leave legislation in the leave that they provide. Both maternity leave and adoptive leave are a continuous period of leave which cannot be taken in a fragmented manner, broken down into periods of leave or reduced hours in the same flexible manner in which parental and carer's leave can be taken. Furthermore, unlike parental and indeed carer's leave, an employer will generally have significant advanced notice that an employee will be taking an extensive continuous period of leave and in particular maternity leave.

Ibec submits that 6 weeks, as currently provided for, is the minimum period necessary to ensure that arrangements can be made for the performance of the employee's duties whilst absent on parental or carer's leave, and that those arrangements are such that they will not impact negatively or adversely on the employer's business. Should a common notice period be required, Ibec submits 6 weeks should be the common position adopted across all four Acts.

⁹ Section 11(4) of the Parental Leave Act 1998, as amended, provides that parental leave can be postponed twice on the grounds of seasonal variation in the volume of work concerned

Part 7

Head 7.1

The Department proposes that, in addition to the individual definitions of all the various types of leave provided for under the proposed Bill, that an overall definition of 'family leave' may be required. Although Ibec welcomes the consolidation of all four Acts into the proposed Family Leave Bill, it is not clear for what purpose the Department proposes to define 'family leave', or how 'family leave' will be defined. It is presumed that the Department intends to define 'family leave', for the purposes of the consolidation exercise, as collectively meaning the various individual Acts, rather than any attempt to define 'family' which would give rise to serious concerns and, at the very least, raise fundamental constitutional concerns.

Ibec respectfully submits that the Department should take cognisance of the fact that although all Acts fall within the field of family leave and provide for better reconciliation of family, professional and private life, each Act is fundamentally different in the leave it provides and the duration, manner and frequency in which any period of leave can be taken. Not only is there no statutory basis for an entitlement to 'family leave', but the entitlements that arise within each of the four Acts are individual rights which are not interchangeable and cannot be transferred as if they were a 'family leave' right.

It is clear from section 16 of the Maternity Protection Acts 1994, as amended, that the father's right to leave is entirely dependent on the mother's death and he has no independent right to leave, as that period of leave cannot be transferred to the father as if it were a right to 'family leave'.

Similarly, section 9 of the Adoptive Leave Act 1995, as amended by section 157 of the Adoption Act 2010, entitles an adopting father to adoptive leave where the adopting mother has died, and the adopting father is entitled to the period or remainder of the period of adoptive leave to which the mother, had she been an employed adopting mother, would have been entitled to had she still been alive. Therefore, an adopting father has no independent right to leave, and any such right is entirely dependent on the death of the adopting mother.

Section 6 of the Carer's Leave Act provides that an employee who has been employed for a period of 12 continuous months shall be entitled to leave subject to the criteria set out therein. It is clear that the period of carer's leave cannot be transferred to another, as it is an individual right where an application to the Minister for Social Protection is made by the employee proposing to avail of carer's leave.

Furthermore, parental leave is an individual right which should not be transferred between two relevant parents in respect of a child, and Council Directive 2010/18/EU clearly states that the leave "*should, in principle, be provided on a non-transferable basis*", adding that "*at least one of the four months shall be provided on a non-transferable basis*". Ibec welcomed the fact that the Department in transposing Council Directive 2010/18/EU ensured that parental leave remained an individual right which cannot be transferred other than in accordance with s6A of the Parental Leave Act 1998, as amended.

Ibec awaits clarity on how and for what purpose the Department will define 'family leave', and questions the necessity for a definition, where no such entitlement to 'family leave' arises.

Head 7.2

Accrual of annual leave during maternity, adoptive, parental, force majeure and carer's leave

It is proposed that the Bill deals with anomalies raised by the Chairman of the Labour Court as between the Organisation of Working Time Act 1997 and other legislation, including the Maternity Protection Act 1994, as amended, and the Parental Leave Act 1998, as amended. The issue relates to section 2 of the Organisation of Working Time Act 1997 and the definition of 'working time', which, read literally, provides that any time away from work is not working time. Section 2 defines '*working time*' as meaning "*any time that the employee is (a) at his or her place of work or at his or her employer's disposal, and (b) carrying on or performing the activities or duties of his or her work, and "work" will be construed accordingly*".

It is clear from the provisions of each of the four Acts that where an employee takes a period of absence as provided for under the maternity, adoptive, carer's and parental leave legislation, that the employee is treated as if she or he had not been so absent and would, therefore, accrue the right to annual leave during the period of absence¹⁰. Ibec submits that no such anomaly exists, as all four Acts are clear in terms of what rights are preserved during a period of absence where the employee is treated as if she or he had not been so absent. It is clear that an employee who is working, as he or she is deemed not to have been absent from the workplace, will accrue the right to annual leave as provided for under section 19 of the Organisation of Working Time Act 1997.

Importantly, section 22 of the Maternity Protection Act 1994, as amended, states that during a period of absence while on maternity leave, additional maternity leave, father's leave on the death of the mother, health and safety leave and leave during a period of natal care absence, "*the employee shall be deemed to have been in the employment of the employer and, accordingly, while so absent the employee shall subject to subsection (6) and section 24 be treated as if he or she had not been so absent and such absence does not affect any right (other than, except in the case of natal care absence, the employee's right to remuneration during such absence), whether conferred by statute, contract or otherwise, and related to the employee's employment*"¹¹. "

Therefore, the Maternity Protection Act 1994, as amended, states that the employee will be treated as if she or he had not been so absent and, therefore, no anomaly arises, as the employee is treated as if she or he had been working thereby accruing an entitlement to annual leave in accordance with section 19 of the Organisation of Working Time Act 1997.

Had the Oireachtas not intended annual leave to be accrued, it would have expressly provided for same, as it did in section 13 of the Carer's Leave Act, which expressly states that section 19 and section 21(1) of the Organisation of Working Time Act 1997 shall apply to the first 13 weeks of absence from work on carer's leave for each relevant person, thereby clearly providing that an entitlement to annual leave arises only in the first 13 weeks.

¹⁰ Section 13(3) of the Carer's Leave Act 2001 states that section 21(1) of the Organisation of Working Time Act 1997 shall apply to the first 13 weeks of absence from work on carer's leave for each relevant person and shall not apply to public holidays that occur after such period of absence from work

¹¹ Section 18(4) of the Maternity Protection Act 1994, as amended, states that for the first 21 days of health and safety leave granted to an employee by and employer under section 18 in any relevant period, the employee shall be entitled to receive from the employer remuneration of an amount determined in accordance with the regulations.

Similarly, section 15 of the Adoptive Leave Act 1995, as amended, states that *“while absent from work on adoptive leave an employee shall be deemed to have been in the employment of the employer, and shall subject to subsection 6 and section 17, be treated as if the employee had not been so absent and any such absence shall not affect any right of the employee related to the employment (other than the right to remuneration during the absence), whether conferred or imposed by statute, contract or otherwise”*. As the employee is treated as if he or she had not been so absent during a period of adoptive leave, he or she accrues the right to annual leave in accordance with section 19 of the Organisation of Working Time Act 1997.

Likewise, section 14 of the Parental leave Act 1998 states that an employee shall, while on parental leave, *“be regarded for all purposes relating to his or her employment (other than the his or her right to remuneration or superannuation benefits or any obligation to pay contributions on or in respect of the employment) as still working in the employment and none of his or her rights relating to the employment shall be affected by the leave”*. Furthermore, section 14 further provides that an employee shall, while on force majeure leave, be regarded for all purposes relating to his or her employment as still working in the employment concerned and none of his or her rights relating to the employment shall be affected by the leave. Therefore, any absence on parental and force majeure leave counts as reckonable service for the purposes of annual leave.

Ibec submits that no such anomaly arises in relation to the entitlement to annual leave during a period of maternity, adoptive, carer’s, parental and force majeure leave, as each individual Act clearly states what rights will be preserved during a period of absence.

Provisions regarding periods of probation, training and apprenticeship

Section 25 of the Maternity Protection Act 1994, as amended, provides that during a period of absence from work while on protective leave¹², being an employee who, starting with the commencement of her employment the employee is on probation, undergoing training, or employed under a contract of apprenticeship, the probation, training or apprenticeship shall stand suspended during such absence and shall be completed by the employee on her or his return to work following such absence. Similarly, section 15(6) of the Adoptive Leave Act 1995, as amended, requires that a period of probation, training or apprenticeship be suspended for the period of absence and completed on return from the absence. Therefore, under both the Maternity Protection Acts and the Adoptive Leave Acts, unlike the Parental Leave Acts and Carer’s Leave Act, the period of probation, training and apprenticeship must be suspended.

Section 14(3) of the Parental Leave Act 1998, as amended, provides that where an employee is on probation, training or under a contract of apprenticeship, and the employer considers that the employee’s absence from employment while on parental leave would not be consistent with the continuance of the probation, training or apprenticeship, the employer may require that the probation, training or apprenticeship be suspended during the period of the parental leave and be completed at the end of that period. A similar provision is provided for in section 13(5) of the Carer’s Leave Act 2001.

¹² Notably, section 21(1) of the Maternity Protection Act 1994, as amended, states that “protective leave” means; (a) maternity leave; (b) additional maternity leave; (c) leave to which a father is entitled under subsection (1) or subsection (4) of section 16; or (d) leave granted under section 18.

The Department, in highlighting the difference in the Acts as to the effect of a period of absence on probation, training or apprenticeship has proposed that the provisions that allow an employer the discretion to disregard leave absences if he or she thinks there is not any inconsistency with the continuation of the original timeframe of the probation is a more appropriate approach to regulation on this issue, rather than a provision which provides for mandatory extension both on the employer and employee.

Given the fragmented manner in which parental and carer's leave may be taken, whereby an employee may take a period of leave for a number of days or as reduced hours, a mandatory suspension of a period of probation, training or apprenticeship may not be required, and it is imperative that an employer has the discretion to suspend the probation or training period should same be required. Undoubtedly, it is the case that the duration and frequency of the periods of absence taken are important factors in determining whether such absence is inconsistent with the continuation of the probation, training and apprenticeship and therefore it is important, considering the flexible manner in which periods of parental and carer's leave can be taken, that the employer retains the discretion to determine whether that period of probation, training or apprenticeship should be suspended or not.

It is the case that a period of maternity leave or adoptive leave cannot be taken in the same flexible or fragmented manner as a period of carer's or parental leave can be taken. Where an employee takes a continuous period of up to 42 weeks' maternity leave or 40 weeks' adoptive leave, the length of absence and the implications of same on the period of probation, training or apprenticeship are such that the probation, training or apprenticeship is suspended and completed following the period of absence.

Should one common provision be introduced across all four Acts, Ibec welcomes the Department's proposal that any such provision must give the employer the discretion to determine whether he or she requires that the probation, training or apprenticeship be suspended as a result of a period of leave and completed on the return from a period of absence, where, in the employer's opinion, the employee's absence on a period of leave would not be consistent with the continuation of the probation, training and apprenticeship.

Head 7.3

Voidance of certain purported terminations of employment

Section 23 of the Maternity Protection Act 1994, as amended, provides that any purported termination, notice of termination or suspension of employment while an employee is on a period of maternity leave, additional maternity leave, father's leave, health and safety leave, leave to attend ante-natal classes, leave to attend ante-natal or post-natal care or for breastfeeding will be void. Similarly, section 16 of the Adoptive Leave Act 1995, as amended, provides that any purported termination, notice of termination or suspension of employment while an employee is on adoptive leave, additional adoptive leave or attending pre-adoption classes or meetings will be void.

The Parental Leave Acts and the Carer's Leave Act do not contain a similar provision, but contain a clause prohibiting penalisation, which the Maternity Protection Acts and the Adoptive Leave Acts do not contain. The Department, in the draft Heads of Bill, has stated that there may be scope to

streamline these provisions in consolidating all the four Acts. Should the Department, in streamlining these provisions, propose that the Parental Leave Acts and the Carer's Leave Act be amended to include a avoidance of certain purported terminations clause, any such proposal would have serious implications for businesses.

Any such proposed amendment would mean that an employer could not dismiss an employee not only during a period of maternity and adoptive leave but also during any period of parental or carer's leave, which will have significant implications for businesses. This raises major concerns for employers, in particular SMEs, where, for business and operational reasons, an employer needs to effect redundancies to reduce costs. Should a SME, employing no more than two employees, lose a contract and need to affect redundancies, without delay, it will mean that an employer will not be able to make any employees redundant where one employee is on maternity leave and another employee on an extensive period of parental leave or indeed an even longer period of carer's leave.

Furthermore, there is no requirement to amend the Parental Leave Acts and the Carer's Leave Act in the manner proposed. Undoubtedly, employees taking parental or carer's leave are already sufficiently protected under the respective Acts, the Unfair Dismissals Acts 1977 to 2015,¹³ the Redundancy Payments Acts 1967 to 2015¹⁴, and the Employment Equality Acts 1998 to 2015¹⁵.

i. Parental Leave Acts 1998 and 2006

Section 15 of the Parental Leave Act 1998, as amended, provides an entitlement to return to work on the expiration of a period of parental leave. Section 16(A)(4) of the Parental Leave Act 1998, as amended, provides that an employee who is entitled to return to work in the employment concerned in accordance with section 15 but is not permitted by his or her employer to do so, shall be deemed to have been dismissed on the date on which he or she was entitled to return to work. Furthermore, subsection (4) states that the dismissal shall be deemed, for the purposes of the Unfair Dismissals Acts, to have been an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal.

Therefore, an employee dismissed during a period of leave would, for the purposes of the Unfair Dismissals Acts, be treated as if the date of dismissal was on the date he or she would have returned to work, following the expiry of a period of leave, and not the date he or she was dismissed during the period of leave.

Furthermore, section 16(A)(4)(b) provides that for the purposes of any redundancy payment the employee's employment terminates not on the date the employee is dismissed during a period of leave but the date he or she would have returned to work, had he or she not been dismissed, following the expiry of the period of parental leave. Therefore, employees are sufficiently protected under both the Unfair Dismissal Acts and the Redundancy Payments Acts.

ii. Carer's Leave Act 2001

Similarly, section 16(4) of the Carer's Leave Act 2001, provides that where an employee is entitled to return to work in the employment concerned in accordance with section 14 but is not permitted to

¹³ Hereinafter referred to as the "Unfair Dismissals Acts"

¹⁴ Hereinafter referred to as the "Redundancy Payment Acts"

¹⁵ Hereinafter referred to as the "Employment Equality Acts"

do so by his or her employer, he or she shall be deemed for the purposes of the Unfair Dismissals Acts to have been dismissed on the date on which he or she was entitled to so return to work. Furthermore, subsection 4(a) states that the dismissal shall be deemed, for the purposes of the Unfair Dismissals Acts to have been an unfair dismissal unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal. Importantly, subsection 4(b) makes clear that the employee shall be deemed for the purposes of the Redundancy Payments Acts to have had his or her contract of employment terminated on the date he or she would have returned, had he or she not been dismissed.

This is particularly important where an employee takes an extensive period of carer's leave of up to 2 years during which time an employer can be left with no option but to affect redundancies. Currently, an employee will get the benefit of the continuous service, for the purposes of any redundancy payment or indeed any unfair dismissal claim, as if he or she had returned to work following the period of carer's leave.

Furthermore, section 8(1)(a) provides that an employee can take the leave as one continuous period of 104 weeks for each relevant person. Should the Carer's Leave Act be amended in the manner proposed, it would mean that any notice of termination of employment, for whatever reason, given during carer's leave and to take effect during carer's leave or after the end of carer's leave is void.

Should a business need to restructure, in order to remain viable, employers can be left with no option but to affect redundancies without delay. Therefore, an employer who needs to restructure could not issue notice of redundancy for up to a 2 year period, which would have an adverse impact on an employer's business, particularly where an employer already incurs the cost of an employee's service up to the date of return where an employee has been dismissed during a period of carer's leave. Given the extensive continuous leave provisions available under the Carer's Leave Act and the Parental Leave Acts and given the need to restructure within particular time frames, introducing such a provision completely fails, Ibec respectfully submits, to take account of the commercial realities facing companies and the implications such an amendment would have on businesses.

Importantly, section 7(2) of the Carer's Leave Act provides that an employee may, while on carer's leave in respect of a relevant person, apply for carer's leave for another person if that person resides with the relevant person, whereby the *"total amount of weeks shall not exceed 208 weeks"*¹⁶. Therefore, an employee can avail of leave for the care of a second relevant person while already on leave for the care of a relevant person, where the two persons reside together, thereby allowing an employee take a continuous period of four years carer's leave. Given the fact that an employee can avail of up to four years' carer's leave without returning to the workplace during that period, proposing that no notice of dismissal can be issued during that period gives rise to serious implications for employers.

Whether an extensive period of carer's leave can be taken is predominantly a matter for the Department of Social Protection rather than the employer, who cannot refuse or postpone an extensive period of carer's leave¹⁷. As that Department determines whether a person is a relevant

¹⁶ Section 7(4) of the Carer's Leave Act 2001

¹⁷ Section 8(2) of the Carer's Leave Act 2001, states that an employer may refuse, on reasonable grounds, to permit an employee to take a period of carer's leave which is less than 13 weeks duration.

person for the purposes of the Carer's Leave Act, an extensive period of carer's leave can be taken regardless of an employer's needs and requirements at that time. Furthermore, an employee could apply for and be granted a further two years of carer's leave whilst on carer's leave regardless of the implications this would have on an employer's business.

Furthermore, section 23 of the Maternity Protection Act 1994, as amended, and section 16 of the Adoptive Leave Act 1995, as amended, provide that any notice of termination of employment given during maternity leave and to take effect either during maternity leave or after the end of the maternity leave is void. Importantly, the Act does not refer to notice of dismissal but rather to notice of termination of employment, which includes notice given by both employer and employee. Consequently, any notice of resignation given by an employee during maternity leave or adoptive leave is void and cannot be relied on by an employer. Should the Carer's Leave Act be amended in the manner proposed, it would mean that not only could an employer not issue notice for up to 4 years, but an employee's resignation during that 4 year period would be void.

iii. Employment Equality Acts 1998-2015

An employee treated unfavourably for having exercised her or his right to parental leave could claim that she or he has been treated less favourably on the grounds of family status as provided for under section 6(2)(c) of the Employment Equality Act 1998, as amended, in relation to those matters set out in section 8 of the Act. Likewise, an employee treated less favourably for having exercised his or her right to carer's leave could claim discrimination by association on the ground of disability as provided for in section 6(2)(g) of the Employment Equality Act 1998, as amended. The WRC and Labour Court, on appeal, in finding that an employee has been discriminated against on the grounds of family status or disability can award up to two years' remuneration. Furthermore, where an employee has been dismissed on the grounds alleged, it is open to the WRC or Labour Court, on appeal, to award re-instatement or re-engagement in addition to, or as an alternative to compensation.

Therefore, there is no requirement to amend the Parental Leave Acts and the Carer's Leave Act in the manner proposed, as employees exercising their rights to parental or carer's leave are sufficiently protected under employment legislation. Ibec respectfully submits that the voidance of certain purported terminations clause should be removed from the Maternity Protection Acts and the Adoptive Leave Acts, should the Department seek to streamline across all four Acts.

Section 23 of the Maternity Protection Act 1994, as amended, transposes Article 10 of Council Directive 92/85/EEC on the safety and health of pregnant or breastfeeding workers. However, it is important to note that Article 10 states that "*Member States shall take the necessary measures to prohibit the dismissal of workers...during the period from the beginning of their pregnancy to the end of the maternity leave, save in exceptional cases not connected with their condition which are permitted under national legislation an/or practice...*". Essentially, Article 10 allows an employer to dismiss an employee during a period of maternity leave where there are exceptional reasons for so doing and where, in accordance with Article 10(2), the employer has cited duly substantiated grounds for her dismissal in writing. Should an employer need to effect redundancies due to business and operational reasons, a matter wholly unconnected with an employee's pregnancy, an employer could, as provided for in Article 10, dismiss an employee during a period of maternity leave. Therefore, should the Department find that, in order to consolidate all family leave legislation,

it must streamline across all four Acts, Ibec respectfully submits that the avoidance of certain purported terminations clause should be removed from the Maternity Protection Acts and the Adoptive Leave Acts.

Head 7.4

Extension of certain notices of termination of employment or of certain suspensions

Section 24 of the Maternity Leave Act 1994, as amended, provides that any notice of termination or notice of suspension imposed on an employee which is given before the employer receives notification from the employee as to an entitlement to leave, which is due to expire during that period of protective leave, during a period of natal care absence or during a period of absence from work to attend ante-natal classes or for breastfeeding, shall be extended by the period of the leave. Section 17 of the Adoptive Leave Act 1995, as amended, contains a similar provision providing that a notice of termination or suspension from employment which is given to or imposed on an adopting parent before that adopting parent begins a period of leave and which is due to expire during the adopting parent's absence from work on that leave shall be extended by the period of absence concerned.

The Parental Leave Acts and the Carer's Leave Act do not contain a similar provision. Neither Act states that any such purported termination, or notice of termination or suspension of employment, is void during the period of parental leave or carer's leave. The Department is considering whether there is scope to streamline these provisions having regard to proposals to streamline and consolidate all employment protection legislation. Should both the Parental Leave Acts and the Carer's Leave Act be amended in the manner proposed at Head 7.3 above, it would follow that the Department proposes that the Acts be further amended to provide that any such notice of termination or suspension given prior to an employee giving notice of an intention to take leave which is due to expire during that period of leave, must be extended by that period of absence.

Notably, the Maternity Leave Act 1994, as amended, refers to notice of termination or suspension given before the employer receives notification from the employee as to an entitlement to leave under that Act, whereas the Adoptive Leave Act 1995 refers to notice of termination or suspension which is given before the adopting parent begins a period of leave, rather than gives notification as to an entitlement to take leave. It is unclear what the Department is proposing, but what is clear is that should the Parental Leave Acts and the Carers Leave Act be amended in the manner proposed, it would constitute a fundamental change to the substance of both Acts, giving rise to serious implications for businesses.

Therefore, should an employer issue notice of dismissal, regardless of the reason for dismissal, and subsequently receives notice of an intention to avail of an entitlement to carer's leave or parental leave, where that notice of dismissal is due to expire during the period of leave, the notice must be suspended and extended by that period of absence, which could be for a period of two or, indeed, four years where an employee takes a period of carer's leave and up to 18 weeks where an employee takes parental leave.

Furthermore, the manner in which parental leave and carer's leave can be taken as a continuous period or indeed as shorter periods, or reduced working hours imposes a significant and unnecessary

administrative burden on employers in terms of issuing notice of termination, and having to suspend such notice where that notice is due to expire during a period of parental or carer's leave.

Furthermore, there is no requirement to amend the Acts as proposed. An employee who is dismissed during a period of parental or carer's leave is treated, for the purposes of the Unfair Dismissal Acts and the Redundancy Payments Acts, as if he or she had not been dismissed during the period of leave as he or she is deemed to have been dismissed on the date which he or she would have returned to work.

Should the Department propose a common provision across all four Acts, in order to streamline and consolidate the Acts, Ibec submits that the provisions relating to the extension of certain notices of termination of employment or of certain suspensions should be removed from the Maternity Protection Acts and the Adoptive Leave Acts.

Head 7.5

Protection of employees from penalisation

Section 16A of the Parental Leave Act 1998, as amended, states that an employer shall not penalise an employee for proposing to exercise or having exercised his or her entitlement to parental leave or force majeure leave. Section 16 of the Carer's Leave Act 2001 has a similar provision which prohibits an employer from penalising an employee for proposing to exercise or having exercised his or her right to carer's leave. The Maternity Leave Act 1994, as amended, and the Adoptive Leave Act 1995, as amended, do not contain a similar provision and the Department proposes that such an anomaly be resolved.

It is our clear understanding that the Department, as part of this consolidation exercise, would not be making any changes to the substance of each of the individual Acts, but that the consolidation exercise would result in technical changes only. Proposing to resolve an anomaly by introducing a protection from penalisation clause into two pieces of legislation where it currently does not exist, will result in an unnecessary change to the substance of those Acts, which clearly goes further than any proposed technical changes.

Furthermore, there is no requirement to amend the Acts as proposed, as employees who are dismissed or treated unfavourably for exercising or proposing to exercise their right to maternity leave and/or adoptive leave are already sufficiently protected under Irish legislation, in particular under the Unfair Dismissals Acts and the Employment Equality Acts.

i. Unfair Dismissal Acts 1977-2015

Section 6(2)(g) of the Unfair Dismissals Act 1977, as amended, states that the dismissal of an employee shall be deemed, for the purposes of that Act, to be an unfair dismissal if it results wholly or mainly from the exercise or proposed exercise by the employee of a right under the Maternity Protection Act 1994, as amended, to any form of protective leave or natal care absence, within the meaning of Part IV of that Act, or to time off from work to attend ante-natal classes, time off or reduction in working hours for breastfeeding. In addition, section 6(2)(h) states that the dismissal of an employee shall be deemed, for the purposes of that Act unfair if it results wholly or mainly from the exercise or contemplated exercise by the adoptive parent of the parent's right under the

Adoptive Leave Acts 1995 and 2005 to adoptive leave or additional adoptive leave or a period of time off to attend certain pre-adoption classes or meetings.

Furthermore, section 38(5) of the Maternity Protection Act 1994, as amended, in amending the Unfair Dismissal Act 1977, provides that the one year's service requirement required to take a claim under the Unfair Dismissals Act 1977, as amended, does not apply to employees dismissed due to pregnancy, giving birth or breastfeeding or any matters connected therewith. Subsection (5) also makes clear that employees on probation, training or apprenticeship are not excluded from the provisions of the Unfair Dismissal Acts if they are dismissed due to pregnancy, giving birth or breastfeeding or any matters connected therewith. Similarly, section 25 of the Adoptive Leave Act 1995 amends the Unfair Dismissal Act 1977 so that employees dismissed for exercising their rights to adoptive leave do not require one year's service to take a claim under the Unfair Dismissal Acts.

In finding that an employee has been unfairly dismissed for proposing to exercise or having exercised his or her right to maternity or adoptive leave, it is open to the WRC or the Labour Court, on appeal, under section 7 of the Unfair Dismissals Act 1977, as amended, to award reinstatement, reengagement or up to 2 years' remuneration in respect of the employment from which he or she was dismissed. Importantly, this is the same right of redress that an employee alleged to have been penalised under the Parental Leave Acts and the Carer's Leave Act has, where such penalisation constitutes a dismissal. Section 16A(3) of the Parental Leave Act 1998, as amended, and section 16(3) of the Carer's Leave Act 2001, provide that if penalisation of an employee constitutes a dismissal of the employee, the employee may institute proceedings under the Unfair Dismissals Acts, in respect of that dismissal and such a dismissal may not be referred under Part IV of the Parental Leave Act 1998, as amended, or Part IV of the Carer's Leave Act 2001 respectively.

Therefore, where an employee alleges that he or she has been penalised for proposing or having exercised a right to parental or carer's leave, and such penalisation constitutes a dismissal, he or she must institute proceedings under the Unfair Dismissal Act 1977, as amended, as would an employee who claims that she/he has been dismissed for proposing to exercise or having exercised a right to maternity leave or adoptive leave. Therefore, there is no requirement to amend the Maternity Protection Acts or the Adoptive Leave Acts, as proposed, as employees are already sufficiently protected under the Unfair Dismissals Act 1977, as amended.

ii. Employment Equality Acts 1998-2015

Undoubtedly, the provisions of the Employment Equality Acts offer extensive protection to employees who have been dismissed or suffered unfavourable treatment, which they claim, was on the grounds of their pregnancy and/or maternity leave. The Employment Equality Act 1998, as amended, prohibits less favourable treatment on grounds of, inter alia, gender. Section 6(2A) of the Employment Equality Act 1998, as amended, states that

"discrimination on the gender ground shall be taken to occur where, on a ground related to her pregnancy or maternity leave, a woman employee is treated, contrary to any statutory requirement, less than another employee is, has been or would be treated".

Section 6(A) reflects the jurisprudence of the Court of Justice in *Dekker v Stichting Vormingscentrum voor Jong Volwassen* [1990] ECR I-3941, in finding that less favourable treatment of a woman of

grounds of pregnancy constituted unlawful direct discrimination contrary to the Equal Treatment Directive. Not only has the Court of Justice consistently continued to confer significant protection on pregnant workers, but the Labour Court (and, indeed, the former Equality Tribunal) has taken a proactive approach, with the Court in *Trailer Care Holdings v Healy EDA8/2012*, stating that it was ‘*abundantly clear*’ that women were to be afforded special protection from adverse treatment from the commencement of their pregnancy until the end of their maternity leave. Arguably, the Labour Court has taken too proactive an approach, as it appears from determinations that the very existence of the pregnancy in itself is sufficient to shift the burden of proof to the employer to prove that the dismissal or other less favourable treatment of a pregnant employee was not on grounds of the pregnancy.

Where an employee claims discrimination on the grounds of gender for proposing to or having exercised her right to maternity leave the WRC or Labour Court, in finding that the employee has been discriminated against on grounds of her gender, can award up to 2 years remuneration under the Employment Equality Act 1998, as amended. Furthermore, in the case of a discriminatory dismissal the WRC or Labour Court can order re-instatement or reengagement as an alternative to, or in addition to compensation.

Although a claim for gender discrimination can be brought to the WRC it can, in the alternative, be commenced directly in the Circuit Court, unlike any other form of discrimination, where the Court is not constrained by the normal jurisdictional limits. Where a complaint of gender discrimination is commenced directly in the Circuit Court, that court has the power to grant the same remedies as are available to a claimant in the WRC, with the exception that ;

“no enactment relating to the jurisdiction of the Circuit Court shall be taken to limit the amount of compensation or remuneration which may be ordered by the Circuit Court”.

Furthermore, an employee treated unfavourably for having exercised his or her right to maternity or adoptive leave can take a claim, that she or he has been dismissed or treated less favourably on the grounds of family status as provided for under section 6(2)(c) in relation to those matters set out in section 8 of the Act. The WRC and Labour Court, on finding that an employee has been discriminated against on the grounds of family status can award up to two years’ remuneration, and where an employee has been dismissed, re-instatement or re-engagement can be awarded in addition to, or as an alternative to compensation.

Notably, should an employee suffer unfavourable treatment or an unfavourable change in their conditions of employment for proposing or having exercised her or his right to parental leave, or carer’s leave, an employee may refer a claim to the WRC and in finding that an employee has been penalised in contravention of section 16A(2)(c) of the Parental Leave Acts, as amended, or section 16(2)(c) of the Carer’s Leave Act, an Adjudication Officer can award what is just and equitable. However, any such compensation under the Parental Leave Acts and the Carer’s Leave Act cannot exceed 20 weeks remuneration in any event. Currently an employee who has been treated unfavourably for proposing to exercise or having taken maternity leave or adoptive leave, on the grounds of gender or family status can already bring a claim to the WRC, where an Adjudication Officer, under section 80 of the Employment Equality Act 1998, as amended, can award up to 2 years’ remuneration. That is clearly far in excess of what an Adjudication Officer can award under the section 16A of the Parental Leave Acts and section 16 of the Carer’s Leave Act.

Notably, not only does the Employment Equality Acts provide for punitive sanctions for discrimination on the grounds of gender and family status, but they go further and permit favourable treatment relating to maternity and adoption. In particular, section 26 of the Employment Equality Act 1998, as amended, states that it shall not be unlawful for an employer to arrange for or provide treatment which confers benefits on women in connection with pregnancy and maternity (including breast-feeding) or adoption.

iii. Parental Leave Acts 1998 and 2006 and the Carer's Leave Act 2001

Section 16(A)(4) of the Parental Leave Act 1998, as amended, and section 16 of the Carer's Leave Act 2001, provide that an employee who is entitled to return to work in the employment following a period of parental or carer's leave but is not permitted by his or her employer to do so, shall be deemed to have been dismissed on the date on which he or she was entitled to return to work. Therefore, there is no requirement to amend the Maternity Protection Acts or the Adoptive Leave Acts to provide that the date of dismissal is date you would have returned, as any notice of termination given during the period of maternity leave or adoptive leave is void and, any notice of termination given before an employer receives notification of intention to take leave which is due to expire during his or her absence from work on that leave, shall be extended by the period of absence. Therefore, the date of dismissal cannot be a date earlier than the date of return.

Although Ibec is keenly aware of the importance of protecting employees from penalisation, we respectfully submit that the Department should take cognisance of the legislation currently in place, particularly under the Unfair Dismissals Acts and the Employment Equality Acts. In particular, the Department should take account of the fact that an employee claiming to have been treated unfavourably on the grounds of gender or family status can avail of up to 2 years' remuneration or choose the unlimited jurisdiction of the Circuit Court where discrimination is alleged to have been on the gender ground. However, the jurisdiction of the WRC is limited to 20 weeks' remuneration, where an employee claims to have been penalised in being treated unfavourably in relation to conditions of employment under either the Parental Leave Acts or Carer's Leave Act. Therefore, any amendment to the Maternity Protection Acts and the Adoptive Leave Acts is unnecessary.

Should the Department propose a common provision across all four Acts, Ibec submits that the provision relating to prohibition of penalisation of employees should be removed from the Parental Leave Acts and the Carer's Leave Act.

Head 7.7

Right to alternative employment

The Maternity Protection Acts, Adoptive Leave Acts, Parental Leave Acts and the Carer's Leave Act all provide for a right to alternative employment where, on returning from a period of leave, it is not reasonably practicable for the employer to permit the employee to return to the role held before the commencing of leave. Where such a return is not reasonably practicable, the employee is entitled to be offered suitable alternative work under a new contract of employment. Both section 16 of the Parental Leave Act 1998, as amended, and section 15 of the Carer's Leave Act 2001, specifically state that where an employee is offered suitable alternative employment under a new contract of employment, service is continuous. The Department has highlighted the fact that

neither section 27 of the Maternity Protection Act 1994, as amended, nor section 19 of the Adoptive Leave Act 1995, as amended, expressly state that continuity of employment will be preserved where an employee is offered a suitable alternative role on return from a period of leave.

However, it is clear from the provisions of the Maternity Leave Acts and Adoptive Leave Acts that continuity of service is preserved where an employee is offered a suitable alternative role under a new contract of employment on return from a period of maternity leave or adoptive leave.

Section 27(2) of the Maternity Protection Act 1994, as amended, and section 19(2) of the Adoptive Leave Act 1995, as amended, set out what constitutes suitable alternative employment under a new contract of employment. Although not expressly stating that continuity of service is preserved, it is implicit from section 27(2) of the Maternity Leave Act 1994, as amended, and section 19(2) of the Adoptive Leave Act 1995, as amended, that continuity is preserved. Subsection 2 expressly states that terms or conditions of employment cannot be less favourable to the employee than those of her or his contract of employment immediately before the start of the period of absence from work whilst on protective leave. Clearly, if continuity was not preserved the terms of the contract would be less favourable to the employee than they were prior to the period of protective leave and thus a breach of section 27 and section 19 respectively.

Furthermore, Schedule 1 of the Minimum Notice and Terms of Employment Act 1973, states that the service of an employee in his employment shall be deemed to be continuous unless that service is terminated by the dismissal of the employee by his employer, or the employee voluntarily leaving his employment. When an employee returns to work, to a suitable alternative role, following the expiry of a period of maternity or adoptive leave, the employment will not have been terminated, as certain purported terminations during the period of protective leave will be void, meaning that any dismissal or resignation is void.

Furthermore, section 22 preserves certain rights while on protective leave. That section is clear that an employee shall be deemed to have been in the employment of the employer. Accordingly, while so absent the employee shall, subject to subsection (6) and section 24, be treated as if she or he had not been so absent and such absence shall not affect any right, other than, except in the case of natal care absence, the employee's right to remuneration during such absence. Notably, a similar provision is found in section 15(1) of the Adoptive Leave Act 1995, as amended. Therefore, as the employee is deemed not to have been absent continuity of service is preserved where a suitable alternative position is offered by the employer in the same manner as an employee has a right to return to his or her old job.

Furthermore, both the Maternity Protection Act 1994 and the Adoptive Leave Act 1995 expressly provide that any purported termination or suspension from employment or notice of termination given whilst he or she is absent, as provided for in both Acts, will be void. Furthermore, any notice of termination given before an employer receives notification of intention to take leave¹⁸ which is due to expire during his or her absence from work on that leave, shall be extended by the period of absence.

¹⁸ Section 17 of the Adoptive Leave Act 1995, as amended, refers to a notice of termination of employment, or a suspension from employment which is given to or imposed on an adopting parent before the adopting parent begins a period of leave under the Act which is due to expire during the adopting parent's absence from work on that leave.

Therefore, there is no requirement to amend the provisions of the Maternity Leave Acts or Adoptive Leave Acts, as proposed, to provide for continuity of service where suitable alternative employment is offered as same is provided for and any amendment to the Act is a substantive amendment of the Acts.

Head 7.8

Notification of intention to return to work

Section 26 of the Maternity Leave Act provides for a general right to return to work on expiry of protective leave. However, section 28 states that an entitlement to return to work in accordance with section 26 or to be offered suitable alternative employment shall be subject to the employee having been absent on a period of protective leave having, not later than four weeks before the date on which she or he expects to return, notified the employer of her or his intention to return.

Section 18 of the Adoptive Leave Act 1995, as amended, provides for a general entitlement to return to work after adoptive leave or additional adoptive leave. Section 20 requires an adopting parent to give to her or his employer, not later than 4 weeks before the expected date of return to work, written notification of the intention to return to work. Although section 20 does not expressly state that an entitlement to return to work in accordance with section 18 is subject to notification requirements, section 20 does state that;

“an employee who is entitled to, or is on, adoptive leave shall cause the employer (or, if aware of a change of ownership of the undertaking concerned, the successor) to be notified in writing of the employee’s intention to return to work and of the date on which the employee expects to do so...”

clearly making the right to return to work subject to the notification provisions. Therefore, it is clear that an employer is not expected to treat the employee as having presented for work until the mandatory requirements of section 20 are complied with.

The Department, in the draft Heads of Bill, has stated that the provisions in relation to notification of intention to return to work are found in the Maternity Protection Acts and Adoptive Leave Acts only and no analogous provisions are found in the Parental Leave Acts and those provisions in relation to termination of carer’s leave are only found in section 11 of that Act.

However, it should be noted that section 9(6) of the Carer’s Leave Act 2001 does provide that an employee who is on carer’s leave shall, not less than 4 weeks before the date on which that employee is due to return to his or her employment, give notice in writing to the employer of the intention to return to work. Section 11 provides for circumstances where carer’s leave terminates, where the relevant person ceases to satisfy the conditions for a relevant person. In that case, section 11(3) provides that the employer will give the employee a notice in writing specifying the date the employee is to return and that date shall be a date that is reasonable and practicable having regard to all the circumstances. The notification and termination of carer’s leave provisions take account of the fact that carer’s leave is very different than the leave provided under the other family leave Acts.

The Parental Leave Acts do not provide for a specific notification of an intention to return. Section 8 provides that where an employee proposes to take a period of parental leave, he or she shall give, not later than 6 weeks before the commencement of the leave, notice in writing of the proposal. Subsection 2 provides that the notice must specify the date of commencement of parental leave, its duration and the manner in which it is to be taken, which must be signed by the employee concerned.

Therefore, it is clear to both parties when the employee will take parental leave, its duration and consequently when he or she is due to return. The fact that the Act does not provide for a notice of intention to return is due not only to the very fragmented and flexible manner in which parental leave can be taken including reduced hours, but also the frequency in which parental leave can be taken.

Should the Department seek to streamline the provisions relating to notification of return to work, the Department should amend section 20 of the Adoptive Leave Act 1995, as amended, to expressly state that the right to return is subject to the notification requirements therein.

Conclusion

Ibec welcomes the Department's approach in consolidating all family leave legislation but is concerned that, in consolidating the family leave legislation into the proposed Family Leave Bill, the amendments proposed constitute fundamental changes to the substance of each Act, changes which go beyond any proposed technical changes, which we understood not to be the intention of the Department. In particular, Ibec submits that:

- should a common notice period of intention to take leave be required, Ibec submits 6 weeks should be the common position adopted across all four Acts, and the notice period as provided for in the Parental Leave Acts and the Carer's Leave Act should not be reduced from 6 weeks to 4 weeks as proposed;
- should a common provision be required in relation to periods of probation, training and apprenticeship, such a provision should allow an employer the discretion to suspend an employee's probation, training or apprenticeship during the period of absence to be completed at the end of that period of leave, where the employer considers that the employee's absence from employment while on leave would not be consistent with the continuance of the probation, training or apprenticeship;
- should the Department propose a common provision in relation to avoidance of certain purported terminations, in order to streamline and consolidate all four Acts, Ibec submits that Parental Leave Acts and the Carer's Leave Act should not be amended as proposed. Should a common provision be proposed, Ibec submits that the clause should be removed from the Maternity Protection Acts and the Adoptive Leave Acts;
- in relation to the extension of certain notices of termination of employment or of certain suspensions provisions, should the Department propose a common provision across all four Acts, in order to streamline and consolidate the Acts, the clause should be removed from

the Maternity Protection Acts and the Adoptive Leave Acts, and the Parental Leave Acts and the Carer's Leave Act should not be amended in the manner proposed;

- the Maternity Protection Acts and the Adoptive Leave Acts should not be amended to include a provision prohibiting penalisation of employees. Should a common provision be required, Ibec submits that the clause should be removed from the Parental Leave Acts and the Carer's Leave Act;
- should the Department seek to streamline the provisions relating to notification of return to work, the Department should amend section 20 of the Adoptive Leave Act 1995, as amended, to expressly state that the right to return is subject to the notification requirements therein.

Ibec looks forward to the publication of the Family Leave Bill, but reserves the right to make further submissions prior to the publication of the Bill.