



EMPLOYMENT  
LAWYERS  
ASSOCIATION

PO Box 1609  
High Wycombe  
HP11 9NG

TELEPHONE 01895 256972  
E-MAIL [ela@elaweb.org.uk](mailto:ela@elaweb.org.uk)  
WEBSITE [www.elaweb.org.uk](http://www.elaweb.org.uk)

## **Carer's Leave Consultation**

**Department for Business, Energy and Industrial Strategy**

**Response from the Employment Lawyers Association**

**31 July 2020**

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### **Introduction:**

The Employment Lawyer's Association ('ELA') is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint.

ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulation.

The Legislative and Policy Committee of ELA set up a working party which was co-chaired by Robert Davies of Walbrook Law LLP and Ivor Adair of Fox and Partners LLP to respond to this consultation. A list of the members of the ELA working party is at the end of this paper.

### **Background:**

Various members of the working group have caring responsibilities for either children or a parent with ASD, ADHD, leukaemia, and Alzheimer's disease.

**1. Have you or your employees used any of the below options to take time out of work to fulfil caring responsibilities? Please select all that apply.**

1.1 Members of the working group have used a mixture of annual leave, set-working patterns with (on occasion very) limited scope for adaptation and flexible working arrangements, and dependant's leave to undertake caring responsibilities. Several opted for informal flexible working arrangements (working remotely from home, morning off, afternoon off) and annual leave in the first instance before electing to use dependant's leave or formal flexible working arrangements. However, it is important to note that using leave in this way often means that carers may be more prone to periods of burn out, fatigue, or illness for the reasons below.

1.2 Practicalities: Type of leave

1.2.1 Annual leave:

Members have used annual leave (in advance or retrospectively) for a mixture of appointments, equipment installations, works/adaptions to properties, longer periods of sickness, emergencies, or rest periods for the person they care for, where for example that person attends a day centre when their carer is at work.

- a) Advantages: The leave is paid and allows the carers the opportunity to focus on the care needs of the individual without having to make up any time.
- b) Disadvantages: Carers may well exhaust annual leave entitlements on caring responsibilities leaving limited or no time to rest and recuperate compared to colleagues without caring responsibilities. Such a practice is inconsistent with the health and safety objective of the Working Time Directive (2003/88/EC). Junior members of staff may feel they need to take annual leave to fulfil caring responsibilities, if they require more supervision at work and making up time outside of working hours or working from home may be less appropriate/feasible.

#### 1.2.2 Informal flexible working arrangements (working from home / time out of the office):

Some members found these arrangements suitable for last minute emergencies and shorter appointments

- a) Advantages: Paid leave (if time made up), no loss of annual leave and the ability to use at shorter notice.
- b) Disadvantages: Unpaid leave if employee is unable to make up the time. If paid, any time spent out of the office (unless working from home) would have to be made up resulting in later finishes / earlier starts and adding to an already potentially (very) long day for carers without assistance at home, or weekend working when carers often have no assistance with care e.g. due to school or day centre closures or lack of social care as they are not at work and are technically available to "care".

#### 1.2.3 Dependant's leave:

Some members found this leave suitable for emergencies for short periods of illness or disruption in care arrangements.

- a) Advantages: No express obligation to make time up any time spent out of the office (unless working from home).
- b) Disadvantages: Unpaid and restricted to emergencies involving illness or injury, a disruption to caring arrangements or incidents at school. It cannot therefore be used for the many pre-arranged appointments that carers have to attend on behalf of, or with the person they care for even where these have been arranged without much notice (which can often arise with local authority appointments, for example) or where they personally have to provide longer term care during working hours due to changes in a person's condition, or a disruption in care arrangements etc.

#### 1.2.4 Flexible working arrangements:

- a) Advantage: allows the carer to adopt a reliable working pattern (for a set period of time) to best suit their caring responsibilities and the needs of their employer. The consensus is that this is more appropriate for instances where there is a lack of alternative care available long term, if care is too costly, or where a change in condition has resulted in an increased demand for care and more complex care needs which exacerbate the burden on the carer and make it more difficult to arrange alternative care. The use of permanent flexible working is considered to be inappropriate as a way to plan for appointments unless recurring on the same day and over a long term period (which is not the case for many conditions).

#### 1.3 Practicalities: Procedure and evidence

- 1.3.1 Members are able to request the above types of leave at short notice (except formal flexible working) however there was consensus that having to think about which leave is most suitable each time a care need arises may be a burden for any carer especially one who is not familiar with their statutory rights or applicable legislation or where an employer does not operate family friendly policies. For example, dependant's leave is more restricted in terms of the permissible reasons for the leave; and parental leave involves a lengthy notice period and the right for the employer to postpone the leave for 6 months.
- 1.3.2 Members have direct experience of employers which supported flexible working arrangements, understood the need to often leave the office at short / no notice, and adopted family friendly policies and procedures. One member was still able to request the above-mentioned types of leave at short notice and without objection after having already adopted formal flexible working arrangements. Similarly, their formal flexible working request took just over a month to implement and the initial meetings and responses were arranged and communicated promptly. Another member commented that that her partner was not able to adopt flexible working arrangements or leave work at short notice at his job due to his seniority and the fact that he was the father (not the mother) meaning the burden fell onto her.
- 1.3.3 One member confirmed that she was required to provide evidence for any period of flexible working or dependant's leave taken, if possible. Although this seems like a simple thing to arrange, when a person's schedule is already very full daily with working and caring responsibilities, and the person they care for has regular appointments due to changing deteriorative symptoms, additional administration regarding evidence / letters can cause carers stress (which might be avoided). Further, written confirmation of appointments / delivery letters are not given automatically (except for hospital appointments) as they are often arranged over the phone, and therefore written evidence (if obtained) would not arrive by the time the leave was taken although the employer in question allowed the provision of evidence retrospectively. Evidence requirements are likely to vary depending on individual employer practices.

1.3.4 For the reasons in section 1.3.3 any request for evidence of why carer's leave is necessary should be qualified by reasonableness and depend on the circumstances surrounding the reason for the leave, for example, if leave is taken due to an unexpected change in condition or symptoms that does not require medical attention, a carer would likely not be in position to provide this. Any abuse of carers leave where necessary can be dealt with under an employer's disciplinary procedure.

1.4 Specific caring needs the leave was taken for

Members confirmed a mixture of reasons for taking leave including:

- a) Person cared for often went missing (wandering) whilst carer was at work (when mobile).
- b) Illness.
- c) Appointments: hospital; doctor; consultant; dentist; occupational health; adult social services; physio team; day centre assessment meetings; district nurse; falls team; incontinence service; and financial / benefit assessments (all recurring and not one-off appointments).
- d) Deliveries: mobility equipment and incontinence service (again recurring).
- e) Installations: wet room installations / works; ramp and handrail installations / works; stair lift installations / works; and other minor adaptations to the house including doorways and stairs.
- f) Carers not turning up (after carer had left for work and before carer returned home).
- g) Transport for the day centre not turning up.
- h) Day centre closure (due to staff shortages; bad weather; pandemic);
- i) Transport day centre not working (due to staff shortages and bad weather).
- j) Key safe jamming.
- k) Carers forgetting to leave the key inside the key safe.
- l) Power cuts.
- m) Sleep deprivation due to person's dementia-related anxiety, confusion, and delirium during the night (early stages of illness).
- n) Attending to Physical falls.
- o) Changes in symptoms of illness or condition in person being cared for and care needs becoming more complex.
- p) Lack of available alternative care in any of above situations.
- q) Attending hospital in emergency situations.
- r) Looking after other children whilst partner attended hospital with child in need of care.
- s) Attending hospital with child in need of care during short periods of admission.

**2. Do you agree that this provides an appropriate definition of caring relationships for the purpose of Carer's Leave?**

2.1 Members of the group had mixed opinions on this question. The majority did not think that the exclusion of employee, tenant, lodger or boarder should apply as these relationships can easily exist between people where caring responsibilities arise. It may lead to a situation where an employee is denied access to carer's leave

because the person they care for has been giving them money to pay for food or utilities and a tribunal finds that they were a lodger or boarder. These exclusions may have the unintended consequence of “punishing” people for their living arrangements / financial circumstances and would see carers leave operate unequally between those with caring responsibilities. If this is to be avoided it would be worth assessing whether this limitation which also applies to time off for dependants is appropriate.

**3. Are there other caring relationships that you think should be considered for inclusion within the scope of Carer’s Leave?**

3.1 Unmarried couples / partners (other than those registered as civil partnerships) should be specifically included to avoid a suggestion that an unmarried partner does not reasonably rely on the other for care when in reality they do. In-laws and parents of unmarried couples should also be included.

3.2 We recommend that married / unmarried couples are included under a separate heading for certainty as they may not always fall into the ‘same household’ section for example:

- a) Due to work location such as doctors who are rotated on placement nationally with minimal choice of location;
- b) Couples where one person lives in a residential home or assisted living unit. The partner / spouse will not live with them but will still have caring responsibilities especially in emergency situations;
- c) Family commitments e.g. one partner has caring responsibilities for a family member e.g. a parent and lives with them and not their partner but their partner then requires care;
- d) Partners may not live together due to financial issues.

3.3 We would recommend that further specific examples are added to the list in order avoid any ambiguity, such as partner, sibling, grandchild and grandparent, and in-laws (including) parents of an unmarried partner. A member’s partner has had to take unpaid leave to assist in emergencies regarding her partner’s mother when she has been unreachable due to work commitments e.g. client meetings.

3.4 Carers who are employed / paid to care for someone should also not be prohibited from benefiting from carer’s leave in respect of that person, for example:

3.4.1 Carers who work for agencies or in assisted living accommodation care for many people, with whom some have pre-existing relationships , and some with whom they develop these relationships over time. The carers often care for people with little to no family support and their “care calls” can be extremely limited in time and specific in terms of the task they are there to help with e.g. eating or preparing meals or personal care.

3.4.2 These carers sometimes assist patients with medical appointments and other tasks from time to time that are outside of the patients care plan. Some care agencies will have rules and policies in place to prohibit their employees from engaging in any

unpaid care for service users during working hours / whilst representing the company etc. for insurance / conflict reasons, and therefore these carers will do so outside of working hours.

- 3.4.3 These carers should not be excluded from benefiting from carer's leave. Employers may wish to place restrictions on whether their employees can assist in these situations, but these can be determined in the workplace between employer and employee as appropriate.. The definition of caring relationships should be as wide as possible so as to not operate unequally.
- 3.4.4 Carers employed through a direct payment scheme. Direct payments are where funds are available from social service trusts for someone assessed as needing care. Families can use these funds from social services to employ someone they know to assist as opposed to hiring unknown third parties (through care agencies). The family or appointed responsible person keeps records and deducts taxes as an employer. The carer is entitled to the usual employee benefits. This is often used by families where the person they care for does not respond well to unknown carers or change, (e.g. cognitive conditions) whereas care agencies may need to change carers regularly due to shift patterns, absence, holiday etc. Families or an appointed person may hire friends or family members instead. It also gives the families the flexibility to arrange the care for times and durations that suit them as opposed to fixed regular calls with agencies. These carers often have primary or full-time jobs and provide this care around their work commitments. It would seem appropriate that they should be able to benefit from carer's leave with their primary employer.
- 3.4.5 A minority opinion was that live-in carers should not be able to benefit from carers leave in respect of the service user they are caring for as they are paid to be with them 24/7 apart from a 13/14 hour break per week and longer breaks every few months and therefore will be available to assist with any issues carer's leave may be required for. However again, this could be dealt with by way of employers' procedures as opposed to specifically mentioned in statute.

#### **4. Which conditions on care need do you believe are appropriate for Carer's Leave?**

- 4.1 Conditions which automatically qualify as a disability under the Equality Act 2010 (Cancer, HIV and MS)
- 4.1.1 One member recommended tying the definition to that of the Equality Act to provide certainty for employers, employees and carers.
- 4.1.2 Other members believe that the condition on care need should not be so restrictive. For example, the person being cared for should merely have a physical or mental impairment or require support e.g. emotional support. Conditions which automatically qualify as a disability under the Equality Act 2010 (Cancer, HIV and MS) and any terminal illness should be covered but instead of listing conditions that qualify, a more general "catch all" definition similar to that relating to eligibility above should be used, or included, along the lines of "any physical or mental impairment or injury that

requires the care and attention of another for that period” or perhaps using the definition of disability in section 6 of the Equality Act 2010 but leaving out the requirement for effect to be ‘long term’ (see below). Alternatively, someone who relies on external support from other people because of medical condition or procedure or due to old age.

#### 4.2 Other, please comment

##### 4.2.1 Pre and post diagnosis.

The time spent and support (including emotional) needed pre and post-diagnosis of any such conditions should not be overlooked. Therefore, it would be prudent to include any suspected cases which can be evidenced (if reasonably required) by a GP referral for example. Many hidden disabilities and cognitive conditions, especially in children take years to diagnose and/or in some instances are not assessed before a particular age. Dementia-related illnesses are similar in this regard and can take years to diagnose.

##### 4.2.2 Accident related injuries.

Accident related injuries with physical and/or mental impairments or injuries should also be considered (whether short or long term) which may need treatment, monitoring, or post injury care e.g. physio, psychiatric or psychology assessment or therapy to prevent any further physical or emotional distress caused as a result.

##### 4.2.3 Anti-social behaviours / addiction

Certain conditions also warrant specific inclusion such as a tendency to set fires, drug and alcohol abuse and any other addictions that can have serious health and safety effects. The focus here being on the carer.

##### 4.2.4 Length of time

There was a general consensus that a condition that an impairment must last or is likely to last for a prescribed length of time will operate arbitrarily. An impairment does not have to be long term for a care need to exist and imposing such a requirement will leave some carers without a suitable alternative leave.

There will be short-term conditions such as broken bones, operations, chronic pain, mobility issues, post-traumatic stress disorder, acute pancreatitis, appendicitis, sepsis, coma, short-term cognitive impairments such as short-term memory loss, miscarriages, ectopic pregnancies, postpartum depression, and many more which are not likely to last long term but may require care from another. Such conditions would not meet the definition under the Equality Act 2010.

If the care need is not an emergency *per se* and the carer will be providing the care personally time off for dependants will not be suitable. Formal flexible working will not be suitable for short-term conditions as any change to a contract of employment is



permanent and is better suited for long term care needs. Where the person in need is a child, parental leave requires 21 days' notice and must be taken in blocks of one week (unless the child is disabled) which does not offer the flexibility needed to provide many unexpected caring needs. Further, the parent may not need one entire week off. Employers can ask employees to postpone applications for parental leave, meaning that annual leave may be their only alternative. For the reasons above using annual leave to care for another will likely mean the employee is not getting adequate rest and recuperation required and therefore carers leave should be available for short term conditions also. Informal flexible working is not a statutory right and must be agreed to by the employer which is barrier to carers obtaining the leave.

Employers may be concerned that employees may take time off if the person they care for has the flu or some other very short term condition however any notice and evidence requirements and the cap on the number of days that the employee may take the leave for should function as a deterrent to employees taking leave for spurious reasons.

**5. If you do not believe that any conditions about care need are appropriate, please explain why and comment on any other conditions which might be appropriate.**

It should be a condition that the employee must be providing the care to the person who requires the care personally.

**6. Which qualifying period do you believe is appropriate for Carer's Leave. Please select one option.**

6.1 The Working Group considers that it should be the third option, namely: A day one right (no qualifying period, but with appropriate notice period). Many carers assume the role as there is no one else to take on the role or share the responsibility. Introducing a qualifying period will not only be a deterrent to any carer committed to staying in work, but is likely to affect their decisions to change jobs, and may impact their physical and mental wellbeing. Exhausting annual leave on caring responsibilities or working longer days / hours to make up for time lost does not promote employee wellbeing for carers.

6.2 Carer's leave should mirror dependants leave in terms of no qualifying period. However, the need for carer's leave to be a day one right is not merely to be consistent with other types of leave, but because there is a need that time off for dependants and other types of leave do not address. Dependant's leave is not appropriate where care must be provided personally (unless it relates to illness or injury) or for non-emergency situations and parental leave requires lengthy notice periods and gives the employer the right to postpone the leave. Informal flexible working may not be suitable if time has to be made up in terms of the employee's wellbeing.

6.3 It is important to remember that the caring role is not one that can be transferred to another easily. Care needs for long term conditions constantly change and symptoms

often vary especially for progressive cognitive conditions. In our experience many if not most unpaid carers do not have alternative assistance available, due to a combination of factors including that the care needs may be so complex that only they have the knowledge required to deal with them and/or if there is limited local authority care assistance. For instance, if the patient has some care support from a local authority this is often limited to certain tasks and at specific times and days where family members are not available to carry out care (e.g. a 20 minute appointment to feed the patient breakfast or watch him/her until another carer / day centre takes over). It is carefully defined by a care plan that has been signed off by agency management, the patient or the unpaid carer on their behalf and approved by the local authority. This means you cannot change the time of appointments or what they are needed for without undertaking a care plan review / assessment with the agency and local authority and justifying the need for the change which is permanent. This means the carer must arrange alternative care when there is a disruption to a care plan already in place, or where there is additional need over and above what is provided for. These arrangements normally take months rather than days and therefore the responsibility to cover the gap will fall onto the unpaid carer.

- 6.4 Many carers cannot rely on friends or family members for assistance due to the complex nature of care needs and the physical risks associated with them for example: where someone has difficulty swallowing or is immobile. The person may also be unable to communicate so someone who is not familiar with their condition will not know how to deal with their needs. For instance, with dementia related illnesses, people require assistance with meals, drinks, toilet and changing, physical rotation and lifting, physio, exercise, medications and these tasks need to be carried out at specific points in the day, in certain ways and, for certain durations. Meals may need to conform to a nutrition plan and cannot be difficult to chew / swallow. Dealing with official financial, administrative issues, assessments or health care appointments likewise cannot be passed onto a paid carer or another as they have little to no knowledge of finances, the day to day care needs, any changes in behaviour / symptoms, and how these may have developed since the start of the illness.
- 6.5 The benefits to employers for having this a day one right are suggested to be increased productivity and workforce resiliency; decreased employee stress, absenteeism and turnover; and making the employer more attractive to recruits. The likelihood of employees abusing this right in some way must be weighed against the very considerable benefit that may be expected to be provided to employee carers. The risk of abuse can be managed via disciplinary action and the requirement to provide evidence. Also, it may be a reasonable expectation that as the leave will be unpaid that may of itself reduce the motivation for abuse.
- 6.6 The appropriate notice period should not be a prescribed length of time but “as soon as is reasonably practicable”. This is because care needs are often unexpected or come with little notice, especially with long term progressive deteriorative illnesses as the condition changes and new symptoms and risks develop and normally require health care or social care assistance / assessments promptly.

- 6.7 Caring needs cannot be put on hold. The rights of disabled employees under the Equality Act 2010 do not have a qualifying period and neither should the rights of carers. As stated, an appropriate notice period and a cap on the number of days should prevent this becoming burdensome on employers. The alternative would be for employees starting a new job to have to use their annual leave until they meet the qualifying period, and this may cause its own issues (including impacting their health and wellbeing). Further, if an employee starts a new job in the middle of the employer's holiday year they may not have sufficient leave available to take or may need to sacrifice taking leave at other times such as school holidays or Christmas to ensure they can meet their caring responsibilities.
- 6.8 It would be counterintuitive to impose a qualifying period for what many would consider is a basic human right. Moreover, if an employee is serving a probation period and may be subject to the inevitable pressures that come from an initial period of assessment as to competence and suitability those may be exacerbated by caring responsibilities and particularly so if an employee is unable to make an application which might help manage and alleviate the overall level of pressure.. Similarly, depending on the circumstances of the individual and the length of the qualifying period it may leave an employee in a situation of where annual leave is no longer an option. The knock-on effect could be substantial and lead the individual to with no other alternative than to resign, call in sick, or suffer from emotional / mental distress and anxiety.
- 6.9 Employers may argue that if the right is immediate it can impact training, on-boarding etc. However as with any other legislative entitlement, such as the right for time off for dependents, those circumstances are unavoidable and necessary contingency plans are vital to avoid any disruption to the business.

## **7. Do you agree with the proposed reasons for taking Carer's Leave**

- 7.1 Disagree. Accompanying someone to an appointment should be included explicitly. With many long-term deteriorative conditions especially cognitive impairments, appointments and care assessments are frequent and continuous. The person may not be able to speak much less understand or acknowledge what someone is saying to them if they lack mental capacity. In our experience it is common that professionals will not see patients without a relative or carer in these situations. Severe physical and mobility issues and or cognitive impairments/ learning disabilities mean travel to appointments is not only difficult but might be a severe risk to the health and safety of individuals who often cannot leave the house or be left unattended at any time. People may also need assistance navigating their way around unfamiliar places and understanding what a professional is saying to them and to remember any advice or follow up needed. Taxi drivers will (understandably) not take passengers with cognitive impairments (unattended). There are also instances when more than one carer is necessary to keep an individual safe, or where several medical professionals need to be consulted in a short period of time, all of which may lead an employee to exhaust their annual leave entitlement.

- 7.2 Formal flexible working is not suitable as a method for arranging appointments as a permanent change to an employee's contract and a revised working pattern is not the method by which disparate, urgent or infrequent appointments would be accommodated. Similarly, as we mention below, the other currently available options are either not suitable as they are often not emergencies per se, or eat into annual leave entitlements. Appointments are not often with one health care professional, social worker etc. but with several, and the appointments change as the condition changes. These professionals often operate on different working days and times making it difficult to be able to arrange an appointment outside a carer's normal working hours and often appointments are urgent and the professional may only have one available slot for weeks/months. Time off for dependants, inflexible working, and annual leave are the most likely to be used, however employers often require employees to make up the time lost for inflexible working which is a deterrent and the appointment will not always be an emergency or relate to care arrangements and therefore time off for dependants will not always be suitable. As mentioned above, annual leave ideally should not be the first or only option for those undertaking any caring responsibilities. Flexible working (reduction in working hours) is often used by carers to balance the demands of their work and caring roles almost as a form of respite for them and the person they care for or provision of personal care if there is a gap rather than used for appointments.
- 7.3 The emotional needs of the person cared for must also not be overlooked. For example, a person may remain susceptible to other conditions during or after recovery of an illness, injury or operation, without being regarded as disabled or having a long-term condition. Time off for dependants leave and parental leave may not be suitable in such an instance.
- 7.4 Placing too many restrictions for a week's unpaid leave is counter-productive and is likely to impact on the relationship of mutual trust and confidence that should exist between employer and employee.

**8. Are there any other reasons that you think should be included?**

The consensus was that the following additional reasons should be added for clarity:

- a) Respite for the caregiver:  
Caring can itself be a full-time job and caring alongside working is a difficult and stressful task for any caregiver. Carers should benefit from additional respite over and above annual leave entitlements due to the wellbeing and health risks associated with being a caregiver. They should be able to use the leave for periods of rest and recuperation;
- b) Travel assistance;
- c) Accompaniment to appointments;
- d) Emotional support;
- e) Support with recovery;

- f) Appointments for the caregiver as opposed to the patient by virtue of their role as a carer e.g. Carer assessment appointments e.g. for financial assistance / respite care;
- g) Deliveries e.g. aids and equipment;
- h) Spending time caring or supporting the person they care for during end of life care;
- i) Childcare, where the person normally providing care to the children e.g. another parent or someone who shares the care giving role, has had to attend an appointment with the person cared for or is otherwise unavailable to provide this.

**9. Do you agree that childcare (other than where the child has a disability or other longer-term caring need) should be out of scope for Carer's Leave?**

- 9.1 Strongly disagree. As mentioned above and below; children may have caring needs properly within the ambit of carer's leave other than for a disability or long-term impairment and other types of leave may not be suitable. In other words, it seems inappropriate to narrow eligibility solely because the recipient of the care is a child.
- 9.2 For example, a child may not have had the opportunity to be diagnosed (and thus not considered disabled) or have a temporary mental or physical impairment, but nevertheless requires specialist care or is susceptible to change. In these situations, emergency childcare cover may either be impractical or even impossible, and time off for dependants and parental leave would not be suitable for the reasons above. The points made below with regard to short-term care needs are perhaps amplified when the individual requiring the care is a child. The point being that being able to secure appropriate care should not be conditional on an element of emergency need. The inability to plan ahead and cover runs the risk of creating an emergency-type scenario in the context of a child.

**10. Do you agree that caring for a person with short-term care needs should be out of scope for Carer's Leave?**

- 10.1 Strongly disagree. Please see 4.2.4 above.
- 10.2 To exclude short-term care needs would seem to defeat the purpose of the proposed legislation. A carer should not be placed at a disadvantage where the person cared for has short-term needs as that does not indicate the time needed to support recovery, prevent relapse or any psychological condition that may ensue. Also, short-term illnesses may in some cases result in a long-term care needs or conditions and it is best to cover such an eventuality. For the reasons above in 4.2.4 other types of leave may not be suitable.

**11. Are there any other circumstances or activities which Carer's Leave should not be taken for?**

- 11.1 There should not be any specifically excluded circumstances. As stated in the Consultation paper, caring needs and responsibilities can be massively varied, and

therefore what might seem unreasonable on paper might actually be an essential duty that someone relies upon. As stated, if any cap on the number of days, evidence, and notification requirements would prevent misuse of the scheme including the potential for disciplinary action.

**12. Do you agree that an employee should in the first instance be able to self-certify their eligibility for Carer's Leave?**

12.1 Agree.

12.2 Demographics suggest that many people will at some stage in their life become a carer, whether on a temporary or permanent basis, and potentially for more than one person.

12.3 If eligibility is required to be ascertained by the employer, this could lead to potentially erroneous enquiries by the employer, and intrusion at a level which is unlawful e.g. breach of data protection legislation and or an unjustified interference with the right to respect for private life, and may also be perceived as the imposition of an unnecessary burden on employers. SMEs will be particularly vulnerable potentially to seeking inappropriate information to support a carer's leave application, which may result in complaints or claims by their employee.

12.4 Self-certification would appear to be the simplest method of assessing eligibility for Carer's Leave. In much the same way that sick pay/SSP currently operates, an employee could be required to complete a pro-forma statement when seeking or notifying of intention to take Carer's Leave. This would have the advantage that both employer and employee will already be familiar with such a process (through sickness procedures), and would avoid the introduction of a more burdensome procedure, such as that of making a flexible working request. Self-certification could also allow for instances where the employee is unable to complete the application in advance, e.g. where the need to request Carer's Leave arises at short notice.

12.5 The self-certification form may readily be prescribed so that it is clear to employers and employees whether the individual is eligible for Carer's Leave.

12.6 For example it might take the form below:

**Employee's statement of requirement for Carer's Leave (unpaid leave)**

1. Dates to be taken off for Carer's Leave (or already taken)
2. Confirmation that the employee is required to provide care/assistance to someone who requires care
3. Relationship of the person requiring care with the employee (eg father/mother/partner etc)
4. If this form is being completed after Carer's Leave has already been taken, confirmation of general nature of emergency

Signed.....

Dated:

- 12.7 If it is considered that it would be preferable that the employer should be entitled to veto the request to take Carer’s Leave, this would ideally be a straightforward process and require as few enquiries from the employer as possible, for example:

**Employer’s Response to request for Carer’s Leave (unpaid leave)**

1. Dates to be granted (or already taken) for Carer’s Leave
2. Whether leave refused (if not already taken)
3. Details of any further information required

Signed.....

Dated:

- 12.8 In this way, the request for Carer’s Leave could be made in advance by the employee, or retrospectively submitted if the need to take Carer’s Leave arose as a matter of urgency. The employer would be at liberty to set down their own rules regarding notification/application for Carer’s Leave, in much the same way as currently works for sick leave, including a “return to work” style interview if required, for example where the Carer’s Leave is taken as an emergency, or the employer has legitimate concerns that the Carer’s Leave request is not genuine.

- 12.9 It may be advisable to allow employees to take a limited number of days without prior request, so that emergencies can be accommodated.

**13. If you strongly agree or agree, how often do you think an employee should self-certify their eligibility for Carer’s Leave?**

- 13.1 Each time they request the leave.

- 13.2 Circumstances may change and develop at varying rates. That would seem to suggest that self-certification for 12 months, or periodically at any other interval, would be arbitrary or susceptible to change.

- 13.3 An employer may feel more confident in the process if able to request from the employee on each occasion basic information as to the request for/notification of Carer’s Leave.

- 13.4 It may also be the case that the employee is seeking Carer’s Leave for a different person who requires care. It is felt that it is important that the employer is aware of the employee’s caring responsibilities and a requirement to self-certify on each occasion will enable the employer to understand this better, and to accommodate the employee.

- 13.5 The employee will know that their application will need to be supported on each occasion by some basic information as to the need for Carer’s Leave.

- 13.6 Employees are already accustomed to making a request for annual leave in advance and with the employer’s permission, and will understand the need to complete a request form on each occasion, and a fresh certificate issued much in the same way as a sickness self-certification/return to work form for each occasion of sick leave. If the employee seeks Carer’s Leave as an emergency, the requirement to complete a form as to their eligibility after the event will be logical and familiar.



13.7 Also, any potential abuses of the system by the employee will be easier to identify.

**14. Do you agree that an employer should be able to request further evidence if they are not satisfied with the self-certification?**

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree
- Don't know

**Please provide reasons for your answers**

14.1 Neither agree nor disagree. There are arguments that can be made on both sides and the right balance needs to be struck.

14.2 *Arguments against an employer being able to request further info if they are not satisfied with the self-certification*

14.3 Much in the same way that an employee can self-certify a sickness absence of seven calendar days or less, the proposed Carer's Leave is for no longer than that period, and therefore it is not appropriate for an employer to request such evidence beyond self-certification. This belief is only further strengthened by the fact that an employee is usually paid for a sick leave (either contractually and/or statutory, where appropriate and eligible), whereas the proposed Carer Leave is unpaid, which may of itself regulate or prevent abuse..

14.4 It would be appropriate for self-certification to cover similar brief facts as sickness self-certification forms, such as dates and a brief description of the care being provided. This should negate the need or want for further evidence.

14.5 There are practical difficulties in providing evidence if it is personal support that is being provided, practical support, and helping with official or financial matters (matters discussed under the 'What the leave can be taken for' section), as well as being intrusive.

14.6 Where an employee is having to take Carer's Leave to provide care to a relative or friend, that need for care is likely to be borne out of that relative or friend being in an unfortunate position, likely causing significant distress and upset to the employee. Requesting evidence in such circumstances may exacerbate what is already a very difficult situation.

14.7 There are also potential difficulties, if evidence is able to be requested, with regard to how an employee will obtain the evidence to satisfy the employer and justify their Carer's Leave. Do they need to obtain the authority of the individual that they are providing care for? What if the individual receiving care refuses to give permission for the employee to provide the requisite evidence? What if the individual requiring care is unconscious or unable to give authority? What data is sufficient (we appreciate that this leads into section 15 below)? If there are significant hurdles in place in an



employee obtaining the required evidence, then that may be a barrier and deterrent to the employee actually requesting/taking Carer Leave in genuine and legitimate circumstances where an individual requires their care and assistance. This can be to the detriment to the health and wellbeing of the individual requiring care as well as the employee (owing to potential distress and upset at not being able to provide the care required due to potentially overly onerous requirements).

- 14.8 *Arguments for an employer being able to request further info if they are not satisfied with the self-certification*
- 14.9 The right to request further information may be practically important to manage the potential for employee abuse of Carer's Leave, and the impact such abuse may cause to the Employer.
- 14.10 An employee, if they wish to take leave when they should not, has the capacity to do this through misuse of sick leave (only having to self-certify a sickness absence of seven calendar days or less). It may therefore be appropriate for Carer's Leave legislation to have evidence provisions that allow an employer to request further evidence.
- 14.11 While the impact on employers of potential employee abuse of Carer's Leave may appear to be mitigated by the fact that Carer Leave is to be unpaid, many employers may choose to pay for Carer's Leave as a matter of policy (in the same way as many employers have contractual sick pay). It therefore should not always be assumed that Carer Leave is to be unpaid in all circumstances.
- 14.12 If an employer's Carer's Leave policy is to make it unpaid, again one should not consider that there is no harm to the employer if an employee abuses Carer Leave and takes it when they should not. The employer, with potentially very short or no notice, will still have to organise cover or risk losses in production/service provision.
- 14.3 It is ultimately a delicate balancing act.
- 15. If agree or strongly agree, please describe what evidence could be provided to demonstrate:**
- The need for care (of the person being cared for)?
  - What activities the leave is used for?
- 15.1 Taking into account the above, if the consensus is that further evidence, if available, is reasonable, the evidence required is very much fact and situation specific. In the majority of cases, a doctor's note of the individual receiving the care should suffice, if the care is likely to be borne out of medical need. If it is a hospital appointment being attended, a copy of the letter confirming the appointment should be sufficient. If the care is moving an individual into a care home, a copy of the care home letter should be sufficient. The evidence would need to relate to the care need (i.e. the condition of the person being cared for). It is difficult, and not helpful, to be too prescriptive here. There is no one form of evidence to fit all potential scenarios, which will vary hugely.
- 15.2 It would also assist if the employee explained the activities that they were carrying out in providing the care.

- 15.3 To operate proportionately and effectively our view is that there is an advantage in not being too prescriptive, and to allow for as much flexibility as possible.
- 15.4 As per the above, it is important to avoid the required evidence being too difficult or onerous to obtain and thereby becoming a bar and deterrent to the employee actually taking the Carer Leave that is needed in their specific circumstances.
- 16. Please comment on the key difficulties or challenges associated with providing and appropriately handling evidence, including data protection issues related to information about a person's health.**
- 16.1 If employers are to be given the right and ability to request evidence, they must set out how they would comply with data protection requirements.
- 16.2 Employers have significant data protection obligations under the GDPR and Data Protection Act 2018, and process data about their employee's health on a regular basis when it comes to sickness absences (whether this is for short-term self-certified leave) or longer term leave requiring more extensive evidence. Employers often hold considerable amounts of medical information. In the current circumstances of COVID-19, this is even more so the case, as employers will have been informed of individuals unable to work due to having COVID-19, being in contact or a household with someone with COVID-19, or being vulnerable and shielding or having disabilities themselves (for example, where they have a long term impairment which due to the consequences of the pandemic, is now a disability), or living in a household with a vulnerable person. They are therefore already processing a huge amount of confidential medical information about their employees and third parties.
- 16.3 There is nothing further in relation to or specific to Carer's Leave and data protection than what an employer should already be doing. It is imperative that the same protections are applied to a third party's data as are granted to an employee, as in Carer's Leave circumstances, it is the third party's confidential medical information which will be the data being shared with the employer.
- 16.4 If an employer does not already have a data protection policy covering third parties then this should be reviewed and updated as a matter of urgency.
- 16.5 This raises the question whether a company's data protection policy would have to be provided to the individual receiving the care? The GDPR gives individuals a right to be informed about the collection and use of their personal data. Does this mean that Privacy Notices need to be amended and individuals provided with privacy information at the time personal data is collected? Should the individual receiving care be provided with privacy information within a reasonable of period of obtaining the personal data and no later than one month to comply with the GDPR? Or can the employer rely (in every case) on Regulation 15 (5) GDPR,

*"Paragraphs 1 to 4 shall not apply where and insofar as:*

- *the data subject already has the information;*
- *the provision of such information proves impossible or would involve a disproportionate effort...."?*

- 16.6 It may be that the data subject would not necessarily already have the information (being a person that is cared for, in particular individuals with learning disabilities or other mental impairments which may affect their capacity). Providing the data subject with that information might not amount to disproportionate effort. Employers may welcome guidance on how they handle this issue.
- 16.7 The usual data protection risks apply, such as the risks of documents being lost or sensitive information falling into the wrong hands, confidential information being misused, how long an employer is retain the data for, and consent. There are issues to consider in both what the consequences for the employer are for any data breach (regardless of the eventual harm or damage done), and consent. Such issues relate to whether or not the person who requires the care is content for their information to be shared with their carer's employer (even if that individual providing the care is the only person able to do so), or if the person receiving the care is incapable of giving consent at all.
17. **Please comment on the pros and cons for employees and employers, if the leave was available to take as:**
- **A week of unpaid leave, available to take as a single block?**
  - **A week of unpaid leave, available to take as individual days?**

17.1 Employees

*Single block of one week*

- 17.2 Pros - The employee may be more inclined to take the full week allowance per year, compared to if they are required to take these as individual days. The employee may feel more able to establish eligibility in advance, rather than relying on time off for family and dependants if it is for a last-minute individual day of leave. Leave in this manner may encourage employees to use the leave for respite purposes, as well as foreseeable appointments or last minute care.
- 17.3 Cons - If required to take one week as a single block this will result in a week of that month being unpaid. This may well affect take up, and may well act as a deterrent. Depending on the type of care required, taking a week may not be suitable: for example, attending hospital appointments with the care receiver may only need a day or half a day as leave. By its nature, a single block of leave does not seem to sit with the realities of being a carer.

*17.4 Individual days*

Pros – we note that the impact assessment suggests a significantly higher uptake if individuals are able to take leave as individual days. Employees may be incentivised as they can spread the unpaid leave throughout the year as necessary: conversely if required to take one week as a single block this will result in a week of that month being unpaid.

- 17.5 This seems to fit with policy in that this manner of taking leave is more flexible. The type of care envisioned under this leave proposal also appears to fit better with the realities of the situation, and taking the days as individual days or half days.

Someone who fits into the category of an individual receiving care is likely to have ongoing needs: if not, then the employee may not be entitled to this leave in any event. Therefore, it seems sensible that this leave can be taken throughout the year to support those needs on an ongoing, rather than one off, basis. This would also allow the employee to spread the leave where they have caring responsibilities for more than one individual.

- 17.6 Cons – employees may feel discouraged from using the full week, depending on what the leave it being used for they may only take the minimum time necessary and not use the leave to its full potential. Employees may prefer to rely on annual leave, as this will be paid.

#### 17.7 Employers

##### *Single block of one week*

- 17.8 Pros – This would arguably be easier to keep track of compared to individual days or half days. It may also be easier to arrange cover in advance for a week, compared to one day/ one half day.

- 17.9 Cons – Conversely, it could potentially be harder in some industries, and particularly SMEs, to arrange a full week's cover compared to a day or half day, at short notice. Depending on the notice requirements to take carer's leave, if no or minimal notice is required this could cause difficulties in arranging last minute cover which may involve expensive agency staff for a longer period of a week.

##### *17.10 Individual days*

- 17.11 Pros – This is still relatively easy to keep track of, and would presumably be easier to arrange cover from the existing bank of staff for a shorter period as necessary. Depending on the notice requirements to take leave, if minimal/ no notice is required it would likely be easier to cover workload for a half day or day at short notice compared to a week. It is also less likely to be open to abuse if leave can be taken in shorter periods. The employee may only take what they actually require, rather than the whole week because that is their entitlement.

- 17.12 Cons – this is potentially more of an administrative burden for SMEs. However, one would hope that this can be overcome using an existing holiday leave and sickness leave recording system.

#### **18. Do you agree that an individual should be required to give their employer notice ahead of taking Carer's Leave?**

- **Strongly agree**
- **Agree**
- **Neither agree nor disagree**
- **Disagree**
- **Strongly disagree**
- **Don't know**

**Please provide reasons for your answers.**

- 18.1 Neither agree nor disagree as to the provision of defined notice being mandatory in all circumstances.
- 18.2 The general consensus within the Working Party was that there is clearly merit in an employer receiving prior notice in order to be able to prepare for and manage absence. However, making it mandatory in all circumstances would seem inconsistent with the policy aim of encouraging use of the leave by carers.
- 18.3 It seems sensible to expect and encourage the provision of notice to be given in order to take the leave, particularly if care is necessary for assistance with foreseeable matters e.g. pre-arranged appointments. This will assist the employer with staff planning and workload.
- 18.4 However, if it is not possible for prior notice to be given, for example because of emergencies or because appointments are arranged by third parties the timing of which the carer is unable to influence then it would seem appropriate for this to be notified as soon as practicable to the employer by the carer. This could be enshrined in company policy in a similar way to sickness absence notification; and although the rights are not directly analogous it would be consistent with the approach regarding time off for dependants. That would hopefully make it manageable for employers.
- 18.5 It may be useful for ACAS to produce guidance on any requirements for notice. This could cover sanctions as necessary for failure to provide notice where it was reasonable for an employee to do so, and what would be considered reasonable in the circumstances – but with the emphasis on explaining why advance notice is being sought and why operationally that will help employers facilitate the effective use of the right.
- 19. If you strongly agree or agree, what do you think a reasonable notice period would be for a block of one week of Carer's Leave? Please select one:**
- **2 weeks**
  - **3 weeks**
  - **Other, please specify**

**Please provide reasons for your answers**

- 19.1 Other.
- 19.2 It does not appear that the employer will be required to consent to leave being taken at a particular time, rather that this just needs to be notified to the employer.
- 19.3 Therefore, in the case of one week's leave, it may be sensible to align the notification requirements with that of an employer requiring an employee to take annual leave, by requiring the employee to give the employer twice as much notice as the length of leave they wish to take. However, with annual leave, the option is there for an employer to reject the leave request. This does not appear to be the case with carer's leave.
- 19.4 We note the different notice periods for statutory leave including paternity leave and unpaid parental leave. Paternity leave has a considerably longer notice requirement

(15 weeks). Given the nature of the leave, it is neither feasible nor appropriate to align carer's leave with paternity leave – generally speaking the caring responsibilities are likely to be very different and less foreseeable. Unpaid parental leave has a notice requirement of 21 days for a request; however the employer can postpone this if the leave is going to be disruptive to work. There does not appear to be a similar right proposed for carer's leave.

- 19.5 Giving consideration to the above, and taking into account that being able to take individual days or half days seems to be more in line with policy than a single block, we would suggest a minimum of two weeks' notice to have to be given for carer's leave to be taken, to avoid an excessive burden on the employer for organising workload and staff cover.
- 19.6 If individuals are able to take individual days, then either a week's notice or a 2:1 notice requirement as a minimum could be considered, provided that there is scope for flexibility as mentioned in response 18 when circumstances prevent or shorten the notice that can be provided.

**20. If you strongly agree or agree, what do you think a reasonable notice period would be for single day of Carer's Leave? Please select one:**

- **Less than 1 week, please specify:**
- **1 week**
- **More than 1 week, please specify:**
- **Other, please specify:**
- **Please provide reasons for your answers:**

- 20.1 Other.
- 20.2 Twice the length of the time requested - i.e. two days' notice for one day's leave in the same way as annual leave.
- 20.3 As stated in the response to Question 19 above, we believe that there may be advantages for the notice provisions to be in line with existing legislation such as those in Regulation 15 of the Working Time Regulations 1998 in order to provide clarity and simplicity to employees and employers alike. This is on the basis that the legislation also provides some room for emergency situations as may be more likely where not the full week's Leave is needed.

**21. Please comment on how employers would manage the process for requesting and recording the leave, and any associated issues, if it was:**

- **A week of unpaid leave, available to take as a single block?**
- **A week of unpaid leave, available to take as individual days?**

Answer: We would anticipate that the majority, if not all, of employers will be able to utilise their existing recording systems for annual leave and / or sickness absence recording as the length of time is not dissimilar or excessive and so those recording systems are likely to suffice. We do not envisage the process or associated issues being different for a single block or individual days. It may be for employers to invest some time, or perhaps modest funds, in making slight changes to their existing systems or upgrading those to allow for the recording and we are mindful that this might not be as easily done for some smaller

businesses including SMEs or OMBs. However, we would anticipate that the costs and / or efforts are likely to be modest and may be expected to be worthwhile in the long run due to the benefits to the business of positive image and morale of the workforce.

### The impact on employers

#### 22. What benefits for employers would arise from introducing a right to unpaid Carer's Leave?

Employers would have a variety of benefits as a result of the introduction of the unpaid Carer's Leave such as increased morale of the workforce as employees will feel more supported and valued. This will be, in particular, for the employees with caring responsibilities who will be notably more supported and should therefore be able to enjoy an increase in their own work-life balance without the burden of worrying about potential issues at work where their caring responsibilities may have otherwise clashed with their working hours. It is common ground that a happier workforce is a more productive one and so the employers should also benefit from prolonged employee loyalty from their workforce which should increase their staff retention and thus decrease their recruitment and training costs. We do foresee a potential downside in the sense that employers will have an additional administrative burden in managing absences in the workplace, but we believe that benefits may outweigh this concern and employers would be seen to have more goodwill and care which will be viewed positively by existing employees, potential employees and even customers and clients of the business.

#### 23. What are the most significant costs for employers which would arise from a right to unpaid Carer's Leave? Please rank 1 – 4; with 1 as the most significant cost.

	5	4	3	2	1
The costs of administering the process (for example employees submitting requests to line managers/HR, asking for additional information, HR recording details of leave taken)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Re-organisation process/costs (reallocating work, costs of an absent employee etc.)	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Familiarisation costs (costs associated with understanding any new legislation)	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
The costs of employers voluntarily opting to pay for the leave	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>



**Please provide reasons for your answers and indicate if there are other significant costs:**

We believe that re-organisation costs are likely to be minimal, at most, because the length of time of the Carer's Leave is not so significant as to cause too much of a burden on fellow employees or line managers in managing a workload. In particular where the leave is planned, allocation could be considered in advance. Further, the familiarisation costs would be contained and are likely to be quite low as we anticipate that the legislation would be relatively straightforward and self-explanatory. Equally, any costs associated with managing the Carer's Leave are not likely to be particularly high on the basis of our proposals above whereby we are of the view that it would be best tied into the recording of annual leave or sickness absence where many businesses have sufficiently sophisticated systems and those smaller businesses who do not have that would have a smaller workforce, thus still rendering the costs low. Therefore, the most significant cost would be where the business elects to pay the employee's salary during this period of Leave despite the proposed right being an unpaid one. We do not believe that there would be other costs to businesses associated with this right.



## **Appendix**

### **List of members of the ELA working party**

Jessica Bass, Curzon Green

William Gubbins, Slater and Gordon

Rhiannon Maddocks, Working Families

Nicole Mendiboure, Sequel Business Solutions Limited

Sorcha Monaghan, Machins Solicitors LLP

Lauren Pullen-Stanley, Norton Rose Fulbright LLP

Inbar Rabinovitz, Gepp & Sons

Jennifer Renney-Butland, Renney & Co

Paul Singh, National Education Union

Mark Noblet, Sky UK Limited

Heather Hanlon, Ogletree Deakins International LLP

### **Co-chairs**

Ivor Adair, Fox and Partners LLP

Robert Davies, Walbrook Law LLP