



# HR Bulletin Article In Deep with Darren

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## Carer's Leave Act

There was a delay with Darren Newman's article for the May edition of the HR Bulletin – but here it is! In the article, Darren examines the impact of the Carer's Leave Act on improving entitlements for carers and the implications for employers of this Act alongside other employment law considerations.

The right to take time off for dependents under S.57A of the Employment Rights Act 1996 is often misunderstood. While it allows an employee to take a reasonable amount of unpaid leave to arrange for the care of a dependent – or to respond to one of a number of emergencies that might occur – it does not give any right to take time off to actually provide the care that a dependent may need.

This is the gap that the Carer's Leave Act 2023 is intended to address. It also fulfils a pledge from the 2019 Conservative Party Manifesto. As with a number of other manifesto promises – such as the introduction of neo-natal care leave or additional protection against redundancy for those returning from maternity leave – the Government, rather than introducing its own bill, has supported a back bencher in bringing forward a private member's bill. Traditionally these bills stand no chance of becoming law and are really just a platform for MPs to raise issues that concern them. But with Government backing, a private members bill can go all the way.

Thus the Carer's Leave Act was given Royal Assent on 24 May. The Act does not set out the details of the new right – it simply gives ministers the power to issue regulations which will set out what the right entails. All we know for now is that employees who care for a spouse, civil partner, child or parent will be entitled to at least one week of unpaid leave in every 12-month period to provide that care.



While this is obviously better than nothing, it does seem an incredibly modest right and those welcoming the Act clearly hope that many employers will go further than the law requires. Nevertheless, it is difficult to see how a single week off per year will make very much difference for those who have long-term caring responsibilities for a dependent. It may provide some additional time to cover for the absence of a professional carer – or an opportunity to take five individual days spread over the year at times of particular need.

But it is hardly transformative – and the fact that the leave is unpaid will certainly limit take up. It is not even something that will come into force any time soon. We will need to see the final regulations before knowing how much notice employees need to give of their leave and what rights if any an employer will have to defer leave if the employee proposes taking it at an inconvenient time. Perhaps these Regulations will be in place by the end of the year, but sometime in 2024 seems a more realistic prospect.

More useful in many ways to those with caring responsibilities is the right to request flexible working. A short period of unpaid leave will do little to help employees balance their working and caring responsibilities – but an agreed flexible working pattern can go some way towards being a real solution. The Employment Relations (Flexible Working) Bill is another private members bill with Government backing and it is currently making its way through the House of Lords. It aims to amend the current right to request flexible working in fulfilment of the Government's manifesto promise to "make flexible working the default". It does not quite go that far.

On paper the most significant change is that an employee making a request will no longer need to explain what impact granting the request will have on the employer – although I suspect that not many employers insisted on that point in any event. The bill

also allows two applications for flexible working per year instead of just one, requires the employer to consult directly with the employee before rejecting the application and gives the employer two months to consider the application rather than the current three. Separate from the bill itself, the Government has also pledged to abolish the current 26-week qualifying period for making a request, so that the right to request flexible working becomes a day one right.

But this right too is limited. The employer must handle a request for flexible working in a reasonable way – but it is not required to reach a reasonable decision. As long as its refusal of a request is genuinely made for a business reason and is based on 'correct facts' then that is enough. Even if a claim is successful the Tribunal cannot require the employer to agree to the request and only minimal compensation is available.

The most substantial right lying behind the right to request flexible working has always been the potential for a claim of indirect sex discrimination if a request is refused. In the past such claims have tended to focus on the need to work part-time in order to arrange and provide childcare and it is well established that women are much more likely than men to need to do this.

Research done for the Centre for Care suggests that there is also a gender imbalance in those who take up the role of an unpaid carer for a relative. The difference is not so stark, but that may be accounted for by the fact that many men who care for their spouses are over the age of 65.

When we look at those of traditional working age, the gender imbalance is noticeably greater<sup>1</sup>. So that means that employees who are seeking an accommodation of their caring responsibilities while continuing to work are likely to be protected by the Equality Act.

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<sup>1</sup> <https://centreforcure.ac.uk/wp-content/uploads/2022/11/CUK-Carers-Rights-Day-Research-Report-2022-Web.pdf>



This means that an employer may have to show that any refusal is a proportionate means of achieving a legitimate aim. That is not an easy hurdle for an employer to clear and a tribunal will need to be persuaded that the business case presented by the employer outweighs the discriminatory impact of refusing the flexible working request.

Even when taken together, the Carer's Leave Act and the new Flexible Working Bill do not shift the dial very much in the direction of carers. In legal terms a potential claim for indirect discrimination still carries much more weight.

