

Melanie Hack

Working-life out-of-balance? Legal responses in the EU and Norway to parenthood and caregiving in times of crisis

Contents: **1.** Setting the frame: Digitization and demographic change. **1.1.** Key factors in achieving work-life balance. **2.** The Work-life Balance Directive. **2.1.** From soft to hard law. **2.2.** The Directive's five central instruments. **2.3.** "Implementation" in Norway?! **3.** Legal framework on the right to paternity* leave in Norway. **3.1.** Norway a role model for decades. **3.1.1.** Tripartition of parental leave. **3.1.2.** Rights to leave for the timeframe close to birth/on the occasion of birth. **3.1.3.** Paternal* leave beyond the father's* quota: the activity requirement. **3.1.4.** "Implementation" of the WLB-Directive in Norway. **3.2.** Carer's leave. **3.2.1.** Rights for caregivers in the WLB-Directive. **3.2.2.** Carer's leave rights in Norway. **4.** Protection against discrimination when exercising the right to paternity* and carer's leave. **4.1.** WLB-Directive. **4.2.** Legal situation in Norway. **4.2.1.** Prohibition against discrimination due to care-related tasks. **4.2.2.** Prohibition against discrimination related to leave at birth and adoption. **5.** Focal points of critique. **5.1.** Increasing the length of non-transferable parental leave. **5.2.** Payment and duration of carer's leave. **5.3.** Enhancing protection for self-employed persons and freelancers. **5.4.** Extending the protection against discrimination. **6.** Concluding remarks: Need for a human-centred and a life-cycle-approach.

1. *Setting the frame: Digitization and demographic change*

Digitization, coined as the fourth industrial revolution and described as "a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres"¹, also blurs the boundaries between work and home life, imposing increasing challenges on the individual employee to rec-

¹ See KLAUS SCHWAB, *The Fourth Industrial Revolution: what it means, how to respond*, in *World Economic Forum*, January 14, 2016, available at <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/> (last accessed: 16.09.2022).

oncile conflicting demands². The Covid-19 pandemic has made this abundantly clear as existing inequalities were exacerbated, particularly for female employees³. This was also the case for Norway – despite the country’s status as a frontrunner in gender equality in the workplace⁴ and in digitalization in the working sphere⁵.

In addition, the Covid-19 pandemic hit European societies at a time when Europe was already faced with a massive challenge of demographic transformation⁶. Many countries – including Norway – are confronted with an aging workforce, which also raises the issue of how employees may be able to address the needs not only of their immediate families but also of their extended families⁷. Norway is aging at an increasing pace and “a historic shift” will take place soon; by the year 2030, elderly people will, for the first time, outnumber children, placing the financial sustainability of the Norwegian social security system at risk⁸.

² ILO, *Work-life balance*, available at <https://www.ilo.org/global/topics/working-time/wl-balance/lang-en/index.htm> (last accessed: 16.09.2022).

³ Among others EUROPEAN COMMISSION, *International Women’s Day 2021: COVID-19 pandemic is a major challenge for gender equality*, available at https://ec.europa.eu/commission/press-corner/detail/en/ip_21_1011; REICHEL, MAKOVI, SARGSYANA, *The impact of COVID-19 on gender inequality in the labor market and gender-role attitudes*, in *ES*, 2021, 23, sup1, S228–S245; ADAMS-PRASSL, BONEYA, GOLIN, RAUH, *Inequality in the impact of the coronavirus shock: evidence from real time surveys*, in *IZA Discussion Paper*, 2020, 13183, pp. 1–49. In Norway, see BING, *Koronapandemien har endra arbeidslivet vårt: – Fleksibilitet blir en ny valuta, tror arbeidslivsforsker*, 2021, available at: <https://frifagbevegelse.no/podkast/koronapandemien-har-endra-arbeidslivet-vart-fleksibilitet-blir-en-ny-valuta-tror-arbeidslivsforsker-6.158.757043.10a55fd8cf> (last accessed: 16.09.22).

⁴ *Human Development Index*, available at: <http://hdr.undp.org/en/countries/profiles/NOR> (last accessed: 16.09.22).

⁵ OECD, *Digital Government Review of Norway*, 2017, p. 4 with further references, available at: <https://www.oecd.org/gov/digital-government/digital-government-review-norway-recommendations.pdf> (last accessed: 16.09.22).

⁶ In general, European Commission, *Report on the Impact of Demographic Change*, 2020, p. 7 ff.

⁷ See e.g. ILO, *cit.*

⁸ FOLKMAN GLEDITSCH, *Nasjonale Befolkningsfremskrivinger, 2020–2100, Et historisk skifte: Snart flere eldre enn barn og unge*, 2020, available at: <https://www.ssb.no/befolkning/artikler-og-publikasjoner/et-historisk-skifte-flere-eldre-enn> (last accessed: 25.05.2023); NORWEGIAN MINISTRY OF FINANCE, *Long-term Perspectives on the Norwegian Economy 2021*, in *Meld. St. 14 (2020–2021) Report to the Storting* (white paper), available at: <https://www.regjeringen.no/contentassets/91bdfca9231d45408e8107a703fee790/en-gb/pdfs/stm202020210014000engpdfs.pdf> (last accessed: 16.09.2022).

1.1. Key factors in achieving work-life balance

Two factors play a decisive role in the ability to achieve work-life balance⁹: 1. working time and 2. the availability of various forms of paid leave¹⁰. This article focuses on the second key factor and analyses the right to paternity¹¹ and carer's leave in the recently enacted European Union's (EU) Work-life Balance Directive¹² (WLB-Directive) and Norwegian law.

2. The Work-life Balance Directive

2.1. From soft to hard law

The WLB-Directive is the most recent piece of EU gender equality legislation, and the first legal instrument to emerge from the European Pillar of Social Rights (EPSR)¹³. Both the principle of gender equality and the principle of work-life balance are clearly reaffirmed in the EPSR's principles 2 and 9¹⁴. The WLB-Directive builds on the parental leave regulations in Dir. 2010/18/EU and complements it both by strengthening existing rights and by introducing new rights¹⁵. It lays down minimum requirements related to

⁹ For definition and overview of scientific literature, including meta-analyses and systematic reviews: WÖHRMANN, DILCHERT, MICHEL, *Working time flexibility and work-life balance*, in *ZA*, 2021, 75, pp. 74–85 and p. 77 with further references.

¹⁰ ILO, *cit.*

¹¹ ★ is used to illustrate the variety and diversity of family life and clearly mark that not only fathers but also co-mothers are encompassed.

¹² Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

¹³ Official Journal of the European Union, Interinstitutional Proclamation on the European Pillar of Social Rights, (2017/C 428/09), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2017:428:FULL&from=DE> (last accessed 16.09.2022); see also ARABADJEVA, *Reshaping the Work-Life Balance Directive with Covid 19 lessons in mind*, in *etui Working Paper*, 2022.01, available at: <https://www.etui.org/sites/default/files/2021-12/Reshaping%20the%20Work%E2%80%93Life%20Balance%20Directive%20with%20Covid-19%20lessons%20in%20mind-2022.pdf> (last accessed: 16.09.2022); in detail to the EPSR: LÖRCHER, SCHÖMANN, *The European pillar of social rights: critical legal analysis and proposal*, report 139, ETUI, The European Trade Union Institute, 2016, available at: <https://www.etui.org/publications/reports/the-european-pillar-of-social-rights-critical-legal-analysis-and-proposals> (last accessed: 16.09.2022).

¹⁴ WLB-Directive, preamble, para. 9.

¹⁵ *Ibid.*, para. 15.

parental, paternity*, and carer’s leave and to flexible work arrangements¹⁶. All of these entitlements are designed to “achieve equality between men and women with regard to labour market opportunities and treatment at work, by facilitating the reconciliation of work and family life for workers who are parents, or carers”¹⁷.

Although the Directive has been criticized for being a somewhat diluted version of the original Commission’s proposal and may thus lose its legal clout, the preamble at least acknowledges that work–life balance remains a significant challenge for many parents and workers with care responsibilities¹⁸. This challenge has a particularly negative impact on women, who often end up spending more time on unpaid caring responsibilities and less time on paid work¹⁹. In contrast to the gender equality directives²⁰ already in force, the WLB Directive therefore pursues a new approach as it specifically aims to not only enhance the conditions for women but also establish incentives for men to engage in family and care work²¹. The establishment of paternity* leave on the occasion of birth constitutes an essential instrument. While “paternity* leave” has become a reality in many EU states, men still often refrain from taking parental leave in the period immediately after birth, which, as critics have argued, defeats the purpose of involving fathers* in childcare and caring responsibilities right from the beginning²².

¹⁶ Art. 1 WLB-Directive, see also Art. 16 No. 1 and preamble, para. 16 and ARABADJIEVA, *cit.*, p. 5.

¹⁷ *Ibid.*

¹⁸ *Ibid.*, para. 10.

¹⁹ *Ibid.*

²⁰ In particular: Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006; Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC and finally Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; particularly the latter is somewhat outdated as stressed by FLOCKERMANN, WIENFORT, *Die neue Work-Life-Balance-Richtlinie - Fortschritt und Stillstand zugleich*, in *djbZ*, 2020, 3, pp. 107–108 and p. 107 who rightly note that a reform of this Directive has been blocked for years by some EU member states.

²¹ WLB-Directive, preamble para. 11; FLOCKERMANN, WIENFORT, *cit.*, p. 107.

²² *Ibid.*, p. 107.

2.2. *The Directive's five central instruments*

The WLB-Directive introduces five central instruments to achieve work-life balance: first, the autonomous non-transferable right to father's* leave is strengthened as the four months of parental leave for each parent introduced by Dir. 2010/18/EU are to be continued, but the non-transferable, *i.e.*, autonomous, part is to be increased from one to two months for each parent²³. These two months must be paid, and the level of pay should stimulate both parents to take parental leave²⁴. Second, on the occasion of birth, the right to ten days of paid leave is introduced and the payment of this leave must at least be at the level of the national sick leave benefit²⁵. Third, the right to five days of carer's leave per employee is introduced every year. As opposed to the European Commission's original proposal, there is no requirement that the leave must be paid²⁶. Fourth, the right to flexible work arrangements is strengthened as employees may for example request flexible work schedules or reduced working hours²⁷. Finally, the Directive requires protection against discrimination for employees who claim or apply for such rights²⁸.

2.3. *"Implementation" in Norway?!*

As manifested in Art. 20 No. 1, EU-member states had to implement the Directive by August 2, 2022, but it opens for an extended timeframe up to August 2, 2024 when it comes to the payment or allowance corresponding to the last two weeks of the non-transferable parental leave²⁹.

Norway is not a member of the EU, and as a result, would only be legally obliged to transpose such a directive if it were incorporated into the EEA agreement³⁰. The WLB-Directive has been marked as EEA relevant by

²³ See clause 2 Dir. 2010/18/EU; Art. 5 no. 1, 2 WLB-Directive; Art. 3 no. 1 a) WLB-Directive.

²⁴ WLB-Directive, preamble, para. 31f, Art. 8 no. 3.

²⁵ WLB-Directive Art. 4 no. 1.

²⁶ See to the critics among others: ARABADJIEVA, *cit.*

²⁷ Art. 3 (1) f. and Art. 9 WLB-Directive.

²⁸ Art. 11 WLB-Directive.

²⁹ Art. 20 no. 2, Art. 8(3) in conjunction with Art. 5 (2) WLB-Directive.

³⁰ For an overview of the impact of EU and EEA law on Norwegian non-discrimination law: HELLUM, STRAND, *Likestillings- og diskrimineringsrett*, Gyldendal Forlag, 2022, p. 73 ff. and in

the EU and is now under consideration by the Joint Committee with a decision pending³¹. *De lege lata*, Norway is thus not obliged to implement the WLB-Directive. The Norwegian Government has, however, emphasized that “There is nothing to prevent Norway from introducing the changes in question before we are committed to it”³². Not surprisingly, the Norwegian legislator recently amended the existing parental leave provisions in the National Insurance Act (*folketrygdlov – ftrl*)³³ by strengthening *inter alia* fathers’* individual right to parental benefits³⁴.

3. *Legal framework on the right to paternity* leave in Norway*

3.1. *Norway a role model for decades*

Norway has long been considered a role model when it comes to paternity* leave, being the first country to introduce an earmarked father’s* quota of four weeks as early as 1993³⁵. However, it took more than two

general for implementation of EU and EEA law into Norwegian law: FINSTAD, *Norway and the EEA*, p. 66 ff. and p. 70 ff. and to the current challenges concerning the diverging development in the EU and the EEA ARNESEN ET AL., *Introduction*, p. 11, both contributions in ARNESEN ET AL. (eds.), *Agreement on the European Economic Area, A Commentary*, C.H.Beck, Hart, Nomos publishers, 2018.

³¹ The incorporation would be in EEA Agreement, Annex XVIII Health and Safety at Work, Labour Law, and Equal Treatment for Men and Women. See <https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2017/juni/europakommisjonens-work-life-balance-directive/id2556738/>; for actual *status quo* on incorporation: <https://-www.efta.int/-eea-lex/32019L1158>.

³² Author’s translation, available at: <https://www.regjeringen.no/no/sub/eos-notatbasen/notatene/2017/juni/europakommisjonens-work-life-balance-directive/id2556738/> (last accessed: 16.09.2022).

³³ Lov om folketrygd (folketrygdloven), LOV-1997-02-28-19. No official translation available.

³⁴ Prop. 15 L (2021-2022) Proposisjon til Stortinget, Endringer i folketrygdloven mv. (styrking av fedres rett til foreldrepenger mv.) and Innst. 149 L (2021-2022), Innstilling fra familie- og kulturkomiteen om Endringer i folketrygdloven mv. (styrking av fedres rett til foreldrepenger mv.); Lovvedtak 40 (2021-2022).

³⁵ ELLINSÆTER, *Conflicting Policy Feedback: Enduring Tensions over Father Quotas in Norway*, in *SP*, 2021, 28, 4, pp. 999-1024 and p. 1000; see to the role-model function CHEMIN, *Norway the fatherland*, in *The Guardian*, July 19, 2011, available at: <https://www.theguardian.com/money/2011/jul/19/norway-dads-paternity-leave-chemin> (last accessed: 16.09.2022); for a legal

decades to increase the quota to about three months³⁶. The new parental leave scheme emphasised three key considerations: first, the child's need for contact with one of the parents throughout the first year of life; second, the health of both mother and child; and third, gender equality³⁷. By anchoring the latter in the leave scheme, the key aim was to ensure that female employees would not have to resign from their jobs when they had children, and to contribute to a more equal care responsibility between parents³⁸.

After the father's* quota had first been introduced, its duration was amended six times, with a steady increase³⁹. If the father* does not use the leave, it is withdrawn. In 2013, the duration reached a peak of 14 weeks and was considerably reduced in 2014 to 10 weeks⁴⁰. The rationale behind the reduction was *inter alia* to increase the parents' freedom of choice when allocating the parental leave weeks, and correspondingly, the available common part increased by four weeks⁴¹. In 2018, it was finally extended again to 15 weeks⁴².

historical overview: SYSE, *Værdens beste foreldrepengeordning?*, in BUGGE, INDREBERG, SYSE, *Loi, liv og lære - Festskrift til Inge Lorange Backer*, Universitetsforlaget, 2016, pp. 513–532 and p. 522 ff.

³⁶ ELLINSÆTER, *cit.*, p. 1.

³⁷ See preparatory work: NOU 1996: 13, *Offentlige Overføringer til barnefamilier* p. 215; In Norway fathers* have in principle had the opportunity to take parental leave since the late 1970s, however, utilisation was still low in the early 1990s. This increased considerably after the father's quota was introduced, see KITTERØ, HALRYNJO, *Mer likestilling med fedrekvote?*, in *K.no*, 2019, 2, pp. 71–89 and p. 74 with further references.

³⁸ NOU 1996: 13, p. 215 ff.; for an overview: HAMRE, *Fedrekvotens historiske utvikling, Fedrekvoten – mer populær enn noen gang*, in *Samfunnspeilet*, 2017, 1, available at: <https://www.ssb.no/befolkning/artikler-og-publikasjoner/fedrekvoten-mer-populaer-enn-noen-gang>—298200 (last accessed: 16.09.2022).

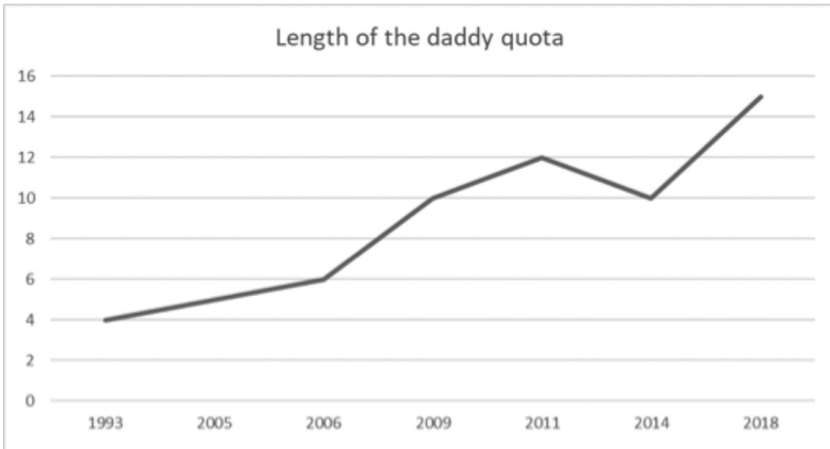
³⁹ In detail HAMRE, *cit.*; SYSE, *cit.*

⁴⁰ See table 1 on the development on the duration of the father's* quota in Norway.

⁴¹ In-depth: SYSE, *cit.*, p. 529 ff.

⁴² To the development of the father's* quota: KITTERØ, HALRYNJO, *cit.*

Table 1 on the development of the duration of the father's* quota in Norway



3.1.1. Tripartition of parental leave

De lege lata, the parental benefit scheme consists of three parts: Provided that the parents choose the full rate – 100 % payment for a total of 49 weeks⁴³ – one part of 15 weeks is reserved for the father* (father's* quota). The second part of 15 weeks is reserved for the mother (mother's quota). Three of the total leave weeks must be taken at the latest before the maternity leave, *i.e.*, prior to birth⁴⁴. The leave period may be claimed as early as 12 weeks before birth⁴⁵. The third part of 16 weeks can be freely distributed between the parents⁴⁶. Exempted from the division are the quota weeks⁴⁷. Moreover, both parents are also entitled to one year of unpaid leave in the extension of the parental benefit period⁴⁸.

⁴³ Similarly, 19 weeks are reserved for each of the parents choosing a reduced rate, corresponding to 80 % of the sickness benefit allowance for 59 weeks.

⁴⁴ Ftrl. § 14-12 and § 14-10.

⁴⁵ Ftrl. § 14-10.

⁴⁶ Ftrl. § 14-9 (s) and ftrl. § 14-6.

⁴⁷ Ftrl. § 14-12.

⁴⁸ For an overview: HAIDER, KJØNSTAD, *Innføring i trygderett*, Universitetsforlaget, 2018, chap. 4.3, p. 102 ff.

Excluded from the division are, moreover, the last 15 benefit days (three weeks) before and the first 30 benefit days (six weeks) after the birth, which are reserved for the mother. These six weeks are included in the maternity quota. The maternal quota cannot be utilised before birth.

Provisions on parental leave that are applicable to fathers[★] apply correspondingly to co-mothers as manifested in the Children Act (*barneloven*) in § 4a (3)⁴⁹.

Both the mother and the father[★] need to have been professionally active prior to claiming the leave⁵⁰. The mother must have been in income-generating work for six out of the last 10 months prior to birth⁵¹. The income may be generated via employment, work as a freelancer, or self-employment. The amount of parental benefit will be 100 % of their calculation basis, which follows the sickness benefit rules⁵².

Receiving parental benefit presupposes that the member is not working during the leave, with an exception for so-called graduated solutions, which can be used to combine parental benefits with part-time work⁵³.

3.1.2. Rights to leave for the timeframe close to birth/on the occasion of birth

The father[★] cannot receive parental benefit for the first 30 benefit days (six weeks) after the birth but may apply for up to two weeks of unpaid care leave as manifested in the Working Environment Act (*arbeidsmiljøloven – aml.*)⁵⁴. To capture the lack of pay, both collective agreements and individual employment contracts often have special paid leave rights for fathers[★] to be taken on the occasion of birth. The payment is thus made by the employer and not by the National Social security scheme⁵⁵.

⁴⁹ Lov om barn og foreldre (LOV-1981-04-08-7); See Prop. 15 L, p. 17 and commentary to bl § 4 a by KVALØ, available at Juridika.no stressing the applicability of the ftrl.

⁵⁰ Ftrl. § 14-6 (1); in-depth overview: HAIDER, KJØNSTAD, *cit.*, chap. 4.3.5.

⁵¹ See for the special regulations for adoption ftrl. §§ 14-5 (1), 14-10; for a critical evaluation: HAIDER, KJØNSTAD, *cit.*, chap. 4.3.3.

⁵² Ftrl. § 14-7.

⁵³ In detail HAIDER, KJØNSTAD, *cit.*, chap. 4.3.4, p. 106.

⁵⁴ Ftrl § 14-10 (1) s. 3, aml § 12-3. Official EN translation available at <https://lovdata.no/dokument/NLE/lov/2005-06-17-62> (last accessed: 16.09.2022).

⁵⁵ Prop. 15 L (2021-2022), Endringer i folketrygdloven mv. (styrking av fedres rett til foreldrepenger mv.), chap. 5.1.

3.1.3. Paternal★ leave beyond the father's★ quota: the activity requirement

The father's★ quota can be utilised even if the mother is at home with the child (ftrl. § 14-12 (2)). The father's★ right to parental leave beyond the father's★ quota, however, requires the mother to be in certain forms of activity (ftrl. § 14-13), such as: going back to work (lit. a), and studying on a full-time basis (lit. b) or in combination with work that in total amounts to full-time (lit. c)⁵⁶. The father's★ quota may also be taken if the mother due to illness or injury is completely dependent on help to take care of the child (lit. d) or where she is admitted to a health institution (lit. e).

The father's★ leave's dependence on the mother's activity has been subject to vigorous legal debate, and critics have argued that it constitutes gender discrimination⁵⁷. The question was thoroughly considered in the National Insurance Court's appeal case TRR-2015-1542⁵⁸, which assessed the role and impact of EU law, specifically the European Court of Justice's (ECJ) decision C-222/14 (*Maïstrellis*⁵⁹), the Gender Equality Directive on Norwegian law, that is, the Gender Equality Act of 2013 (*likestillingslov*) and the prohibition against discrimination as manifested in § 98 of the Norwegian Constitution (*grunnlov - Grt*). The Court clarified that it did not fall under its jurisdictional scope of competence to rule whether a breach of the Norwegian Equality Act could be established in the first instance. However, the court emphasized that it appeared doubtful whether the activity requirement ftrl § 14-13 was compatible with the Gender Equality Act and the Gender Equality Directive and, interestingly, noted that "there is reason to believe that the EFTA Court will be able to reach the same result as the EU Court in case C-222/14 if it is presented with the question of whether section 14-13 of the National Insurance Act is in conflict with the Equality Directive". The National Insur-

⁵⁶ Further examples: full-time participation in an introductory program (ftl. § 14-13 lit. f) and full-time participation in qualification programs (ftl. § 14-13 lit. g).

⁵⁷ Criticism of the compatibility with EU/EEA law SYSE, *cit.*, p. 527 stressing that "It is probably only a matter of time before this gender difference must be abolished in Norwegian law" (author's translation).

⁵⁸ The National Insurance Court constitutes an independent national appellate body dealing with social security and pension disputes, see Lov om anke til Trygderetten (trygderettsloven), LOV-2021-06-18-127.

⁵⁹ Judgment of the Court of 16 July 2015, ECLI identifier: ECLI:EU:C:2015:473.

ance Court finally concluded that although the view of the father's* caring role and gender equality protection have subsequently been strengthened, the latter not the least through the adoption of § 98 in the Constitution, it was a conscious choice by the legislature to establish and maintain the activity requirement in ffl. § 14-13, “although this appears unfortunate from a gender perspective”⁶⁰. Finally, the Court's judgement concluded that in view of these considerations, Article § 98 of the Constitution does not provide a basis for overriding or interpreting the activity requirement in ffl. § 14-13 away⁶¹. Two years later, the EFTA's Surveillance Authority (ESA), brought an infringement case against Norway, claiming that the controversial activity requirement violated Dir. 2006/54/EC as the father's right to parental benefits is dependent on the mother's situation, but not *vice versa*. The EFTA Court ruled in case E-1/18 that the rules on parental benefits in ffl. §§ 14-13 and 14-14 could not be subsumed under “employment and working conditions” of Art. 14 (1) c of the Gender Equality Directive, thus dismissing ESA's application for a declaration that Norway had failed to fulfil its obligations pursuant to the Equal Treatment Directive by keeping the controversial provisions in the ffl⁶². By declaring the material scope of Dir. 2006/54/EC not fulfilled – as opposed to C-222/14 (*Maistrellis*) – the chance was lost to assess a potential violation of the Directive's prohibition against discrimination on grounds of gender and thus a potential breach of the EEA Agreement (where the Directive is incorporated in Annex XVIII)⁶³. Or to put it simply: the litmus test for the compatibility with EU law here was a matter of defining the very legal nature of parental benefits, which were classified as mere income support, not necessarily linked to employment⁶⁴.

3.1.4. “Implementation” of the WLB-Directive in Norway

While the rights under the Directive apply to workers, it is important to note that the Norwegian parental benefit scheme has a wider scope of

⁶⁰ Author's translation.

⁶¹ The same legal opinion is repeated in other rulings, see e.g. TRR-2016-809.

⁶² EFTA Court Judgement E-1/18 of 13.12.2019, 62018EJ0001, para. 65 ff., 71, 72.

⁶³ EEA Agreement - Annex XVIII Health and Safety at Work, Labour Law and Equal Treatment for Men and Women.

⁶⁴ See to the lacking link E-1/18, *cit.*, para. 66, 67; Critical to the judgement also HANSEN, *Fedre kan få styrkede rettigheter*, Aftenposten 25.12.2019.

application as both employees and others who meet the requirements of generating a pension-relevant income are eligible for parental benefits⁶⁵. The new law regime applies to all fathers* who have earned the right to parental benefits⁶⁶.

According to the recent law reform, eligible fathers* are entitled to eight weeks of parental benefits. With effect from August 22, 2024, the total period will be 10 weeks, including two additional weeks on the occasion of birth⁶⁷. Prior to the reform, the activity requirement in ftrl. §§ 14–13 and 14–14 set a legal limitation here⁶⁸. With the new law, no such conditions will be set for the father’s* eight weeks, and the controversial activity requirement will be suspended for this period, establishing an autonomous opportunity to utilise parental benefits⁶⁹.

3.2. Carer’s leave

3.2.1. Rights for caregivers in the WLB-directive

Art. 6 is the Directive’s instrument to address demographic change as it secures employees five days of leave per year to care for “relatives”. “Carer’s leave” means leave from work for employees who as “carers” need to provide personal care or support to a relative or a household member in need of significant care or support due to a serious medical reason⁷⁰. The term “relative” encompasses a “worker’s son, daughter, mother, father, spouse or, where such partnerships are recognised by national law, partner in civil partnership”⁷¹.

The underlying aim is to promote participation in the workforce while taking on an additional burden of caring⁷². The impact of demographic change on society at large and working-life in particular, is explicitly referred to in the preamble, emphasizing a predicted “continued rise in care needs”⁷³,

⁶⁵ Ftrl § 14–6, 14–7.

⁶⁶ Prop. 15 L (2021–2022), p. 18; Lovvedtak 40 (2021–2022).

⁶⁷ *Ibid.*, p. 8.

⁶⁸ *Ibid.*, p. 12, 18.

⁶⁹ *Ibid.*, p. 18.

⁷⁰ Art. 3 lit. c, d WLB-Directive. In addition to carer’s leave, the Directive lays down in its Art. 7 so-called Time off from work on grounds of *force majeure*.

⁷¹ Art. 3 no. 1 lit. e WLB-Directive.

⁷² Preamble, para 27, WLB-Directive.

⁷³ *Ibid.*

which calls for new care policies, including expanding the right to carer's leave for "additional relatives, such as grandparents and siblings"⁷⁴.

While the European Commission suggested a carer's leave of 5 days per year to be paid at least at the level of sick pay, the WLB-Directive finally refrained from requiring paid leave, leaving the question of payment to the discretion of member states⁷⁵. As rightly stressed by critics, implementing compulsory payment would have been more effective than mere recommendations⁷⁶. What has remained from the Commission's promising intention is that the Directive at least, in its preamble, stresses the importance that the leave is paid, and that it explicitly encourages member states to introduce paid carer's leave "in order to guarantee the effective take-up of the right by carers, in particular by men"⁷⁷. This is of particular importance as men are often first earners⁷⁸.

3.2.2. Carer's leave rights in Norway

The central provision when it comes to carer's leave is aml. § 12-10 on "care and nursing of related parties"⁷⁹. As for carer's leave, Norwegian law basically distinguishes between six scenarios – in addition to situations of general leave related to a sick child⁸⁰: 1) End-of-life care for a close relative where the employee is entitled to leave for 60 days⁸¹. 2) Leave for up to 10 days per calendar year to provide necessary care to parents, spouse, cohabitant, or a registered partner⁸². 3) Necessary care for a disabled or chronically ill child from and including the calendar year after the child turned 18⁸³. 4) Necessary care for a child that has a chronic illness, long-term illness, or dis-

⁷⁴ *Ibid.*

⁷⁵ See for critical comparison ARABADJIEVA, *cit.*, p. 10.

⁷⁶ FLOCKERMANN, WIENFORT, *cit.*, p. 108.

⁷⁷ Preamble, WLB-Directive, para. 32.

⁷⁸ FLOCKERMANN, WIENFORT, *cit.*, p. 108.

⁷⁹ Author's translation. See to term Prop. 118 L (2011-2012), pp. 2-3; commentary by LØKKEN SUNDET to aml § 12-10, online commentary Karnov, available via lovdata.no.

⁸⁰ Aml. § 12-9 (1), (2).

⁸¹ Aml. § 12-10 (1); see also overview by SKJØNBERG, HOGNESTAD, HOTVEDT, *Arbeidsrett*, Gyldendal Forlag, 2022, 3. Edition, p. 507; see also commentary by FOUIGNER, HOLO, SUNDET, THORKILDSEN to aml. § 12-10, online commentary Juridika, available via lovdata.no.

⁸² Aml. § 12-10 (2) s. 1.

⁸³ Aml. §§ 12-10 (1) s. 2, 12-9 (3).

ability and where there is a considerably increased risk of absence from work⁸⁴. The employee is entitled to leave for up to 20 days per calendar year. In addition, the employee has the right to leave to participate in training at an approved health institution or public competence centre in order to be able to take care of and treat the child⁸⁵. 5) Care for a child with life-threatening or other very serious illness or injury⁸⁶. 6) Special leave in cases where the employee's child is in a hospital or have been recently discharged⁸⁷.

Special care allowances for care related to “end-of-life care for close relatives”⁸⁸, “children with a chronic illness, long-term illness or disability”⁸⁹, “hospital stay for child”⁹⁰ and in cases of “child with serious illness or injury”⁹¹ are further regulated in chapter 9 ftrl. As for the “essential care for parent, spouse, cohabiting partner or registered partner”⁹² and as for “essential care for disabled child over 18 years of age”⁹³, there is no such statutory requirement for pay. When it comes to these two scenarios, Norwegian law does thus not go beyond the Directive's requirements. Carer's leave was not subject to the recent amendments of the Norwegian law.

4. *Protection against discrimination when exercising the right to paternity* and carer's leave*

4.1. *WLB-Directive*

Workers who exercise their right to leave, which includes paternity* or carer's leave “should be protected against discrimination or any less favourable treatment on that ground”⁹⁴. According to Art. 11, EU member states “shall take the necessary measures to prohibit less favourable treatment

⁸⁴ Aml. § 12-10 (2) s. 2.

⁸⁵ Aml. § 12-9 (3).

⁸⁶ Aml. § 12-9 (4) lit. c.

⁸⁷ Aml. § 12-9 (4) lit. a, b.

⁸⁸ Aml. § 12-10, ftrl. § 9-13.

⁸⁹ Aml. § 12-09, ftrl. §§ 9-5, 9-9.

⁹⁰ Aml. § 12-09, ftrl. § 9-10.

⁹¹ Aml. § 12-09, ftrl. § 9-10.

⁹² Aml. § 12-10.

⁹³ Aml. § 12-09.

⁹⁴ WLB-Directive, preamble, para. 40, Art. 11.

of workers” *inter alia* provided that they have applied for, or already have taken paternity*, parental or carer’s leave.

4.2. Legal situation in Norway

4.2.1. Prohibition against discrimination due to care-related tasks

In 2018, the Norwegian anti-discrimination law regime, which was rather fragmented at that time, was harmonized and consolidated with the enactment of the Equality and Anti-Discrimination Act (*likestillings- og diskrimineringsloven* – 1dl)⁹⁵. The scope of application was widened to encompass discrimination both in and beyond the employment sphere. Care-related discrimination is explicitly mentioned in the catalogue of protected grounds of discrimination in the Act’s § 6. In contrast, the Constitution’s prohibition against discrimination in § 98 is not limited to specific grounds⁹⁶. In the employment context, the provisions in chapter 13 of the Working Environment Act are *lex specialis*. Prior to the latest reform, care-related tasks were considered indirect gender discrimination⁹⁷. The underlying rationale was that responsibility for care was a “typical situation for women”⁹⁸, and it was argued that men who perform care tasks were correspondingly in a woman-typical situation⁹⁹. With the enactment of the new law, the legislator wanted to separate care-related tasks from the prohibition against gender discrimination to make it clear that it also applies to men¹⁰⁰. As specified in the preparatory work: “Today, it is an expectation and a goal that men and women are equal caregivers”¹⁰¹.

⁹⁵ Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven, LOV-2017-06-16-51. Official EN translation: <https://lovdata.no/dokument/NLE/lov/2017-06-16-51> (last accessed: 16.09.2022).

⁹⁶ For further details: Prop. 19 L, (2016-2017), Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven), chap. 4.3.

⁹⁷ SVERRE, § 6, in *Karnov-online-kommentar*, available via lovdata.no.

⁹⁸ BALLANGRUD, SØBSTAD, § 6. *Forbud mot å diskriminere*, in BALLANGRUD, SØBSTAD (eds.) *Likestillings- og diskrimineringsloven. Lovkommentar*, Universitetsforlaget, 2023, in particular chap. 6.2.2 and chap. 6.2.5, available via juridika.no.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*; SVERRE, *cit.*

¹⁰¹ Author’s translation, see Prop. 81 L (2016-2017), Lov om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven), chap. 11.9.2.2 p. 92; quoted also by BALLANGRUD, SØBSTAD, *cit.*

The prohibition against discrimination includes care for close relatives, *i.e.* the closest family members¹⁰². “Care tasks” primarily refers to care for young children¹⁰³. Care for older children, elderly parents, and spouse, partner, and cohabitant may also be regarded as care tasks¹⁰⁴. The decisive criteria are, again, whether the person who is exposed to the differential treatment is actually responsible for or provides care to a person in need of care, typically due to illness or disability¹⁰⁵. The prohibition also encompasses the assumption that a person has care-related tasks. Remarkably, the example of differential treatment in the preparatory work assumes a person having elderly parents in need of care¹⁰⁶. For situations concerning care of small children, the assumption is typically an overlap between gender and age discrimination¹⁰⁷. Also, future care tasks are encompassed¹⁰⁸. With the creation of a separate ground of discrimination related to caregiving, cases that have previously been assessed as discrimination based on association with a person with disabilities may now constitute discrimination related to care tasks¹⁰⁹. A further debated issue is whether the prohibition against discrimination related to care tasks also implies a duty on behalf of the employer to facilitate for such tasks and, if so, how far this duty extends¹¹⁰.

4.2.2. Prohibition against discrimination related to leave at birth and adoption

Among the prohibited grounds of discrimination in ldl. § 6 is discrimination related to leave due to birth and adoption. Again, the Norwegian legislator included a specific ground of discrimination. Previously, such discrimination was considered as gender discrimination. Employees’ rights in

¹⁰² SVERRE, *cit.* referring to Prop. 81 L (2016–2017), chap. 30, p. 312.

¹⁰³ Where exactly to draw the line between small and older children has neither in the preparatory work, nor in the case-law been further specified, for further references, see e.g. case 14/1013 of the Anti-discrimination Tribunal BALLANGRUD, SØBSTAD, *cit.*, chap. 6.2.5; Prop. 81 L (2016–2017), chap. 11.9.2.3, p. 92.

¹⁰⁴ Prop. 81 L (2016–2017), chap. 11.9.2.3, p. 92; BALLANGRUD, SØBSTAD, *cit.*; SVERRE, *cit.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, p. 93; BALLANGRUD, SØBSTAD, *cit.*; SVERRE, *cit.*

¹⁰⁷ BALLANGRUD, SØBSTAD, *cit.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Prop. 81 L (2016–2017) chap. 11.9.2.4, p. 93; in-depth: BALLANGRUD, SØBSTAD, *cit.*

case of parental leave are further specified in ldl. § 33¹¹¹. “Leave at birth and adoption” includes leave (six weeks) for mothers close to birth (aml. § 12-4, ftrl. § 14-12), care leave for fathers* after birth (WEA section 12-3), and the father’s* quota (aml. § 12-5, ftrl. § 14-12). Both men and women are protected, which has also been stressed in a recent case decided by the Anti-Discrimination Tribunal where a male jobseeker had been rejected during an interview with a staffing agency due to impending parental leave¹¹². The tribunal concluded that the complainant was exposed to a breach of the discrimination regulations¹¹³.

Section 10 specifies that the scope of protection is graduated according to which leave rights are exercised. The highest level of protection concerns – with very limited options for justification – leave for prenatal medical visits, pregnancy leave, carer’s leave on the occasion of birth, leave for the mother for the first six weeks after birth, time to breastfeed aml. §§ 12-1, 12-2, 12-3 (1), 12-4, and 12-8 and when claiming the mother and father’s* quota ftrl. § 14-12 (1)¹¹⁴. As for differential treatment based on other parental leave rights, such as the common part that can be shared between the parents (aml. § 12-5), the justification requirements are less restrictive¹¹⁵. As clarified in the Act’s § 10 (3), differential treatment based on these reasons will never be allowed in case of hiring or termination of employment.

5. *Focal points of critique*

Recent critics have argued that the WLB-Directive is already outdated and needs to be critically revisited and various aspects of the framework strengthened, particularly to meet the new demands that arose during the Covid-19 pandemic and to specifically address unpaid care work¹¹⁶.

Also, the comparative analysis indicates that the Directive falls short of

¹¹¹ BALLANGRUD, SOBSTAD, *cit.*, chap. 6.2.4.

¹¹² Case 21/39, decided on 22.03.2022, available at: <https://www.diskrimineringsnemnda.no/showcase/2021000039> (last accessed 16.09.2022).

¹¹³ See press release: *Diskriminering av foreldre i arbeidslivet – et vedvarende problem*, <https://www.diskrimineringsnemnda.no/artikkel/3332> (last accessed 16.09.22).

¹¹⁴ Ldl. § 10 (1) and commentary to § 10 by BALLANGRUD, SOBSTAD, *cit.*

¹¹⁵ Ldl. § 10 (1), § 9 (1).

¹¹⁶ ARABADJIEVA, *cit.*

expectations, particularly on four areas: first the duration of the non-transferable paternity* leave period, second, that carer's leave is unpaid and rather short, and third, the limited personal scope of the Directive, e.g. not encompassing the situation of freelancers, and, finally, fourth, the protection against discrimination when claiming and exercising the right to paternity* and carer's leave.

5.1. Increasing the length of non-transferable parental leave

The rather ambitious aim of the European Commission's proposal could only be partly realized. Among those ambitions was the proposal of four months of non-transferable leave, which in the end was diluted to two months. Considering that fathers* still take fewer parental leave weeks than mothers and often no more than the compulsory part, extending the paternal* leave would be a clear signal and move towards a more sustainable and equal sharing of parental leave and care work between parents¹¹⁷. A recent survey by Statistics Norway clearly revealed that in the years 2009–2017, the willingness of fathers* to use of their quota largely corresponded to the quota manifested in law¹¹⁸. In a nutshell: “As long as the mother takes out far more weeks than the mother quota, the rules on mother quota only seem to have cosmetic significance”¹¹⁹. Also, even after the upcoming amendments, father's* leave beyond the non-transferable week of eight weeks will still be subject to the controversial activity requirement, which also deserves critical scrutiny. Keeping this requirement is more than questionable considering EU and EEA law – particularly in view of the CJEU's *Maistrellis* Judgment¹²⁰. It should be kept in mind that parental leave constitutes a fundamental right in the EU, explicitly enshrined in Art. 33 (2) of the Charter of Fundamental Rights¹²¹.

¹¹⁷ Similar and in view of the German situation: FLOCKERMANN, WIENFORT, *cit.*, p. 108 with further references.

¹¹⁸ ENGVIK, PETTERSEN, *Lengst pappaperm blant lærere, men langt fra en likedeling*, in *SSB analyser*, 2021, 14, available at: <https://www.ssb.no/befolkning/likestilling/artikler/lengst-pappaperm-blant-laerere-men-langt-fra-en-likedeling> (last accessed: 16.09.22).

¹¹⁹ Author's translation, see SYSE, *cit.*, p. 532.

¹²⁰ See to the judgement e.g.: BORELLI, *Article 33 CFREU Family and professional life*, in BELL, ALES, DEINERT, *International and European Labour Law, Article-by-Article Commentary*, Nomos Verlag, 2018, para. 30.

¹²¹ See also RIESENHUBER, *European Employment Law*, Intersentia, 2022, p. 676, para. 3.

One additional decisive parameter towards a more equal share of available parental leave is the payment of such leave.

5.2. *Payment and duration of carer's leave*

The WLB-Directive's preamble refers to studies that indicate that EU member states providing a significant portion of parental leave to fathers*, with a relatively high replacement rate, experienced a higher take-up rate by fathers* and in consequence an increase in the employment rate of mothers¹²². The adequacy of the allowance to increase incentives particularly for men is explicitly emphasized¹²³. As for the determination of the level of the payment or allowance provided for the minimum non-transferable period of parental leave, member states shall take into consideration that the ability to take parental leave relies heavily on remuneration, particularly on behalf of the first earner¹²⁴. As women are often secondary earners, it is important to create incentives for men and to avoid leaving care work to women for economic reasons. In line with the European Commission's proposal, some have argued for introducing paid carer's leave, where wages are replaced based on the rates of sick leave and maternity leave¹²⁵. Then, the decision of who would perform care work would hopefully no longer be immediately tied to economic factors¹²⁶. If one in addition worked progressively on reducing the pay gap between men and women, the question of who takes the leave might in the future finally become a gender-neutral one.

Moreover, extending the period of paid carer's leave is necessary to meet the demands of an ageing population and to tackle the dissolution of the intergenerational contract¹²⁷. A decrease in the working force also leads to a shortage of people working in the caring sector, which in turn affects the generation in need of care. The gap in caring may then need to be covered by relatives. Achieving a balance here is not only beneficial for the working individual but also, from a utilitarian perspective, for society at large. An increase in workforce participation – be it by extending the working life or

¹²² WLB-Directive, preamble, para. 26.

¹²³ *Ibid.*, para. 29 ff.

¹²⁴ *Ibid.*, para. 31.

¹²⁵ FLOCKERMANN, WIENFORT, *cit.*, p. 108 with further references.

¹²⁶ *Ibid.*

¹²⁷ See also WLB-Directive, preamble, para. 27.

by increasing participation of employees with family and care responsibilities through more flexible work arrangements – is essential for the sustainability of social security systems.

5.3. *Enhancing protection for self-employed persons and freelancers*

Self-employed persons and freelancers are exempt from the WLB-Directive's personal scope, which is limited to employees, so this group is not protected by the highlighted work-life balance instruments¹²⁸. To close this gap, *Flockermann* and *Wienfort* suggest reviewing Dir. 2010/41/EU on the application of the principle of equal treatment in order to protect self-employed men and women¹²⁹. This is particularly opportune considering the emergence of atypical work forms in a digitized world and the rise of self-employment in the platform economy. Norway, which explicitly does not limit paternity* and carer's leave to employees only, might function as a role model here.

5.4. *Extending the protection against discrimination*

Drawing special attention to the vulnerable situation of parents and caregivers in working life, *de lege ferenda*, the catalogue of grounds of discrimination in working life on the national level should be amended by a specific category addressing parenthood and caring responsibilities. Extending protection against discrimination to cases of carer's leave for employees with caring responsibilities for elderly parents, responds to the changing demographic reality of life and work. Norway, having established two specific discrimination grounds, might function as a role model here. Additionally, not only direct and indirect discrimination should be addressed. As emphasized in the Norwegian preparatory work: legislation should encompass discrimination based on the assumption that the individual, currently or in the future, might claim parental and carer's leave. *De lege ferenda*, both on EU and national level, the legislator will need to specifically address different forms of discrimination, including multiple discrimination scenarios – for example cases where age, disability, and discrimination due to parental and

¹²⁸ Art. 2 WLB-Directive, and preamble, para. 17.

¹²⁹ FLOCKERMANN, WIENFORT, *cit.*, p. 108 with further references.

carer's leave interact – and harassment related to claiming leave rights, and harmonize the different applicable non-discrimination law regimes¹³⁰.

6. Concluding remarks: Need for a human-centred and a life-cycle-approach

To balance working and private life in a post-pandemic world which is furthermore confronted with digitization and demographic change, a “human-centred” approach is needed. Additionally, employing a lifecycle perspective is quintessential¹³¹. If one focuses on employees' needs, work-life balance in all phases of working life takes centre stage.

From a gender perspective, it should be acknowledged that women still shoulder the main caring responsibilities throughout the life course¹³². The pandemic considerably deteriorated the progress that had been made thus far. This is also the case for an equalized country like Norway. A stronger focus on men and their *de facto* engagement in balancing work and private life is also fundamental. This entails legally enabling both genders to actually use the different available work-life balance instruments. If one in addition takes the bonding between a new-born and parent more seriously, it is to be hoped that the legal frameworks will facilitate for fathers* becoming more involved in child-care and to actively demanding their leave rights. For legal scholarship, it might be worth thinking outside of the box and acknowledge findings in psychology on the interrelation between paternity* leave and father*-infant bonding and subsequent family engagement of fathers*.

Finally, the time will hopefully come when both the EU and national legislators acknowledge the diverse and multifaceted family life in the 21st century also in their legal wording¹³³.

¹³⁰ See e.g. possible scenarios of discrimination by association and harassment BELL, WADDINGTON, *Similar, Yet different: The Work-Life Balance Directive and the expanding frontiers of EU Non-Discrimination Law*, in *CMLR*, 2021, 58, p. 1413 ff. and 1419 ff.

¹³¹ Similar European Trade Union Confederation, *Rebalance, Trade unions' strategies and good practices to promote work-life balance*, 2019, p. 13, available at: <https://www.etuc.org/en/publication/rebalance-trade-unions-strategies-and-good-practices-promote-work-life-balance> (last accessed: 16.09.2022).

¹³² *Ibid.*, p. 13 with further references.

¹³³ The particular needs of diverse family situations are *inter alia* emphasized in WLB-Directive, preamble, para. 37.

Abstract

In view of the current societal challenges related to digitization and demographic change, this article analyses, the European Union's Work-life Balance Directive 2019/1158. The key focus rests on parental and carer's leave and what legal protection this essential factor is granted. As Norway is not an EU member and was a global forerunner in introducing the right to paternity* leave and includes extensive protection against discrimination, the article discusses the WLB-Directive against Norwegian legislation.

Keywords

Work-life balance, digitization, demographic change, paternity leave, carer's leave, non-discrimination.