

WORK-LIFE BALANCE IN POLAND BEFORE AND AFTER THE IMPLEMENTATION OF DIRECTIVE 2019/1158. COULD WE HAVE DONE MORE?

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Abstract: *The article aims to briefly highlight the historical background of the evolution of work-life balance regulations in Poland and outline recent legislative changes to the Labour Code in response to the implementation of Directive (EU) 2019/1158. This directive, in particular, seeks to improve employment conditions for women, who often spend significantly more time on unpaid caregiving responsibilities than on paid work, making it extremely challenging to balance work and family duties. Some of the new provisions, such as those concerning flexible working arrangements and the use of parental leave after maternity leave, should be assessed positively. However, there are drawbacks, including the relatively low maternity allowance for the non-transferable portion of parental leave, the unpaid nature of carers' leave, and the setting of annual limits for carers' leave, detaching this right from a specific case or person in need. Additionally, the lack of a clear definition of "force majeure" in relation to time off may create difficulties in applying the regulation and could potentially lead to abuses by both employees and employers. The authors attempt to assess the Directive's impact on improving the reconciliation of professional and family life for employees, concluding that the Polish legislator could undoubtedly take further steps to ensure that working parents can more easily balance their professional and personal lives.*

Keywords: *parental rights, carers' leave, protection of the parent's employee, Polish labour law, work-life balance concept*

INTRODUCTION

The EU legislator prioritizes achieving both equality of opportunity for women and men in the labor market and facilitating work-life balance for working parents and carers, regardless of gender. Gender should not be a deciding factor in the performance of parental and caring functions. To this end, the aim is to realize the horizontal principle of equal treatment between men and women in all spheres of life – economic, social, cultural, and family.¹ One of the instruments for its implementation is Directive (EU) 2019/1158 of the European Parliament and of the Council² on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, hereinafter referred to as Directive 2019/1158, which was implemented into the Polish legal order by the Act of 9 March 2023 amending the Labour Code and certain other acts and entered into force on 26 April 2023.³ The objectives of Directive 2019/1158 (also known as the *work-life balance*

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¹ GLISKMAN A. *Równe traktowanie w zatrudnieniu*. Kraków: Gliksman Quality Systems, 2006, p.7; BORUTA I. *Równość kobiet i mężczyzn w świetle prawa wspólnoty europejskiej, Implikacje dla Polski*. Łódź: Uniwersytet Łódzki, 1996, p. 102.

² OJEU.L.2019.188/79 of 2019.07.12.

³ Dz.U. 2023 item 641 of 2023.04.04.

Directive) focus in particular on the employment of women, who spend much more time fulfilling unpaid caring responsibilities than on professional work, with the result that it is extremely difficult for them to reconcile their professional and family responsibilities. This, in turn, leads to difficulties for working parents to maintain a work-life balance, especially in conditions of increasing prevalence of extended working hours and changing work schedules. Similarly, having a sick or dependent relative has a negative impact on women's employment, as women are the primary caregivers, which is often the reason for their withdrawal from the labour market (recital 10 of Directive 2019/1158). The *work-life balance directive* aims to enhance the role of men in the performance of caring responsibilities towards children, to grant working parents or carers additional rights, and to enable working parents to benefit from flexible forms of work organization.⁴ It should be noted, however, that regulation at the EU level does not prevent Member States from offering a higher level of protection. Such a situation is undoubtedly, to a certain extent, present in Poland, although we have not been entirely beyond the influence of the solutions contained in the Directive 2019/1158. The Directive, in accordance with Article 288 TFEU, is binding as the result to be achieved, but leaves the choice of form and means to the national authorities. The adoption of this act is therefore inextricably linked to the need to implement it, i.e. to take all measures ensuring the effective application of the provisions.⁵ The implementation of the provisions into the national legal order is governed by the principle of effectiveness, deriving from Article 4 TEU.⁶ The implementation, therefore, required an amendment of the provisions of the Labour Code, which led to a change of the applicable regulations in the area of special protection of the employment relationship in relation to parenthood, leave related to parenthood (maternal, parental, paternity) and flexible organization of work in connection with parenthood as well as to the introduction of completely new institutions, i.e.: carers' leave or time off from work on grounds of force majeure. Have the objectives of the Directive 2019/1158 also been achieved by the Polish legislator? Probably only over time, based on the results of statistical surveys, it will be possible to assess this by analyzing the situation in the labour market. At this point, the authors will conduct a theoretical legal analysis, trying to answer the question of whether could we have done more?

I. FROM WOMEN'S WORK PROTECTION TO PARENTHOOD RIGHTS - A PARADIGM SHIFT IN THE POLISH LABOR CODE

While parenthood is currently protected under the Polish Labour Code, in the original version of the Act, the legislator's sole focus was on protecting women's employment

⁴ CZERNIAK-SWĘDZIOŁ, J., KUMOR-JEZIERSKA E. Rozważania o równowadze między życiem zawodowym a prywatnym rodziców i opiekunów w świetle Dyrektywy Parlamentu Europejskiego i Rady (UE) 2019/1158. *Roczniki Administracji i Prawa*. 2021, Vol. 2, pp. 189 et seq.

⁵ KURCZ, B. *Dyrektywy Wspólnoty Europejskiej i ich implementacja do prawa krajowego*. Warszawa: Wolters Kluwer, 2004, p. 49.

⁶ MIK, C. Metodologia implementacji europejskiego prawa wspólnotowego w krajowych porządkach prawnych. In: Cezary Mik (ed.). *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych*. Toruń: TNOiK, 1998, p. 33.

and, by extension, maternity protection, in line with the traditional perception of women's role as mothers.⁷ Only 25 years after the adoption of the Labour Code – in Polish realities – the assignment of caring roles to women has changed. First, in May 2001,⁸ it referred to 'the protection of women and men raising a child', after which, in January 2002, the code provided for 'employee rights related to parenthood'.⁹ It should be noted that the mere change of the title of a section of any legal act is a rare legislative procedure, but in this case, it shows a change in the paradigm that was imposed on the legislator in connection with the process of adapting Polish legislation to the legislation of the European Union.¹⁰ Legal structures concerning women's rights such as maternity leave or protection against termination of an employment contract have not been fundamentally altered since they were first established in Polish legislation in 1924. Some, like breastfeeding breaks, have not changed to this day. It should also be mentioned that Poland is among the five countries guaranteeing mothers the longest full-fledged maternity leave in the EU. However, it was only in 2009 and 2013, respectively, that entitlements were extended not only to women/mothers but also to working parents/carers, with the introduction of paternity and parental leave. In the Polish legal system, matters related to care provided by employees regulated by the Labour Code and other social security laws. Various forms of care support can also be provided for in the workplace-level sources of labour law,¹¹ although in Poland this is not often the case, as opposed to customs in other Member States of the European Union. The protection of parental rights can also be inferred from Article 71 point 2 of the Constitution of the Republic of Poland, which states that a mother before and after the birth of a child has the right to special assistance from public authorities. Undoubtedly, motherhood and parenthood are protected and cared for by the Republic of Poland, but this protection cannot be considered without taking into account the mechanisms related to working life, since then it would be only partial protection.

According to the latest research¹² conducted in Poland, the professional activity of women has been increasing in recent years, although it is still lower than men. The slightest differences in employment rates are visible among people aged 40–54, while the greatest occur for both younger people (20–39 years), i.e. at a time when women are more likely not to work for the care of young children – as well as among those aged around retirement (55–64 years). For women under the age of 40 (especially those with lower levels of education, residing in smaller towns, and mothers of young children) several factors

⁷ This was a continuation of the tradition initiated in the Act of 2 July 1924 on the work of juveniles and women (Dz.U. No 65, item. 636).

⁸ Act of 25 April 2001 amending the Labour Code Act, Dz.U. No 52, item. 538.

⁹ Act of 24 August 2001 amending the Labour Code Act and amending certain other acts, Dz.U. No 128, item. 1405.

¹⁰ GODLEWSKA-BUJOK, B. Ochrona pracy kobiet i rodzicielstwa we współczesnym prawie pracy. In: Krzysztof W. Baran – Małgorzata Gersdorf – Krzysztof Rączka (eds.). *System Prawa Pracy. Tom III. Indywidualne prawo pracy. Część szczegółowa*. Warszawa: Wolters Kluwer, 2021.

¹¹ WALCZAK, K., GODLEWSKA-BUJOK, B. Opiekunowie dzieci w zakładowych źródłach prawa pracy. *Praca i Zabezpieczenie Społeczne*. 2019, No. 12, pp. 14 et seq.

¹² HAUSNER J. (ed.). Sytuacja kobiet na rynku pracy-punkt widzenia pracodawców RP. In: *gazetaSGH* [online]. [2024-09-13] Available at: <https://gazeta.sgh.waw.pl/sites/gazeta.sgh.waw.pl/files/zalaczniki-2023/Punkt-widzenia-PRP_sytuacja-kobiet_www.pdf>.

hinder participation in the workforce. These barriers include inflexible working time, financially unattractive workplace, burden of household and care responsibilities and lack of institutions providing care services for children under 3. The 2013 time budget survey also shows that women aged 25-60 on average spend around 30 hours per week on unpaid work at home, although this figure is slightly lower for women with tertiary education. Regardless of their education in each age group, women spend more time on domestic work than professional work, unlike men under the age of 60. Moreover, the functioning of the entire global economy is largely based on unpaid work provided by women, i.e. domestic, caring, educational, and educational work.¹³ Therefore, support for women's professional activity is necessary, but this must be done while activating and encouraging men to become more involved in family life. However, the question is not that the legislature interferes with the division of responsibilities between parents (spouses), but rather facilitates the reconciliation of work and family life, taking into account the different structures in the family and the principle of non-discrimination on grounds of sex.¹⁴

II. A NEW DIMENSION OF THE WORK-LIFE BALANCE CONCEPT

The *concept of work-life balance* focuses on separating the professional and private spheres clearly enough that these spheres do not permeate each other. However, maintaining such a work-life balance for all active people remains extremely difficult. Furthermore, the very notion of equal involvement in family and professional life remains controversial due to the fact that the amount of time dedicated to these spheres of life is variable and dependent on age, gender, education, family situation, and stage of life. Equilibrium will occur when work does not take precedence for non-professional life and when non-professional life does not take place at the expense of work.¹⁵ But *balance* does not mean equal commitment to family and professional life. There is no universal model of balance, and matching the requirements for work and family can rather mean reducing mismatches.¹⁶ In turn, leisure time includes the personal life of an individual and belongs to the private sphere (rest, social contacts, family life). However, it should be noted that in the *life zone*, a person also performs work, although it is unpaid, but it is related to raising children or running a household. But then the *life zone* ceases to concern only the private sphere of an individual. *Work*, in turn, includes activities performed profession-

¹³ LAWSON, M. et al. Time to care. Unpaid and underpaid care work and the global inequality crisis. In: *oxfam.org* [online]. [2024-09-13]. Available at: <<https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620928/bp-time-to-care-inequality-200120-en.pdf>>.

¹⁴ SZCZERBA-ZAWADA, A. Zasada równego traktowania kobiet i mężczyzn w zakresie dostępu do zatrudnienia oraz warunków pracy w świetle orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej. *Studia Iuridica Toruniensia*. 2011, No. 2, pp. 230-252.

¹⁵ ZALEWSKA, A. M. Konflikt praca - rodzina - ich uwarunkowania i konsekwencje. Pomiar konfliktów. In: Bohdan Dudek (ed.). *Rodzina i praca z perspektywy wyzwań i zagrożeń*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2008, pp. 28 et seq.

¹⁶ SIEMIENIAK, P., REMBIASZ, M. Work life balance w życiu kobiet- obecnych i potencjalnych przedsiębiorców. *Zeszyty Naukowe Politechniki Poznańskiej, Organizacja i Zarządzanie*. 2018, No. 76. In: yadda.icm.edu.pl [online]. [2024-09-13]. Available at: <http://yadda.icm.edu.pl/yadda/element/bwmeta1.element.baztech-b1973638-50fd-4b73-9b18-98ed4a91e313/c/siemieniak_paulina_work_76_2018.pdf>.

ally for earning, as opposed to those undertaken in private life (voluntary and unpaid).¹⁷ However, the balance between the indicated spaces may be disturbed, and in the case of a conflict based – as indicated in sociology – on time (*time-based conflict*), the time spent on activities in one role (e.g. a parent) makes it difficult to carry out activities in another role (e.g. employee) or in the case of a conflict based on effort (*strain-based conflict*), then stress or fatigue from one sphere (e.g. family) extends to another (e.g. professional).¹⁸ Work-life conflict is defined as the negative or unbalanced outcomes of combining paid work with non-work related activities.¹⁹ Therefore, finding a balance undoubtedly requires making a choice. However, during the COVID-19 pandemic, workers were deprived of this choice. By adopting remote work from home, work-life integration was achieved,²⁰ and this situation – in the era of modern technologies that are changing the dimension and nature of work – still remains valid. Therefore, in the current state – especially post-pandemic – it is no longer possible to define a clear boundary between the professional and the private sphere. Flexible forms of employment, and flexible working hours remain necessary to integrate both of these spheres, as they should not be competitive to each other. More and more often, there is a shift away from a clear division, and the aim is to combine the private and professional spheres so that they can interpenetrate and mix (*work-life blending*).

III. BENEFICIAL CHANGES IN PARENTAL AND PATERNITY LEAVE

The existing solutions that were in force in the European Union until the entry into force of Directive 2019/1158 contained only limited measures encouraging men to share childcare and other caregiving responsibilities equally.²¹ There were no specific arrangements for paternity leave, or carers' leave, but there were those concerning time off from work on grounds of force majeure related to urgent family matters, such as illness or accident, requiring the immediate presence of the worker. Solutions that introduced the requirement to use at least one of the four months of parental leave without the possibility of transferring this entitlement to the other parent proved ineffective. The Work-Life Balance Directive therefore grants each worker an individual right to parental leave of four months to be taken before the child reaches a certain age. The age

¹⁷ PIETRAS, A. O zakresie podmiotowym prawa pracy z perspektywy koncepcji work-life-balance. *Acta Universitatis Lodzianis, Folia Iuridica*. 2019, No. 88, pp. 59-60. In: *ACTA UNIVERSITATIS LODZIENSIS* [online]. [2024-09-13]. Available at: <<https://czasopisma.uni.lodz.pl/iuridica/article/view/5794/5467>>.

¹⁸ MIROSLAW, J. Polityka Unii Europejskiej w zakresie równowagi praca – życie. Przykłady dobrych praktyk. In: Cecylia Sadowska-Snarska (ed.). *Godzenie życia zawodowego i rodzinnego w Polsce*. Białystok: WSE Białystok, 2011, pp. 173 et. seq.

¹⁹ GODLEWSKA-BUJOK, B. Work -life balance czy work-life conflict w kontekście prywatności pracowników sprawujących opiekę. In: Barbara Godlewska-Bujok – Krzysztof Walczak (eds.). *Różnorodność w jedności; studia z zakresu prawa pracy, zabezpieczenia społecznego i polityki społecznej. Księga pamiątkowa dedykowana profesorowi Wojciechowi Muszalskiemu*. Warszawa: C. H. Beck, 2019, p. 234

²⁰ GODLEWSKA-BUJOK, B. Work-life balance i koronakryzys. Kilka uwag o procesach i ich konsekwencjach. *Praca i Zabezpieczenie Społeczne*. 2020, No. 5, pp. 3–8.

²¹ See LEWANDOWICZ-MACHNIKOWSKA, M., GÓRNICZ-MULCAH, Y. A. Dyrektywa 2010/18/UE. In: Krzysztof Wojciech Barak (ed.). *System Prawa Pracy. Tom X. Międzynarodowe publiczne prawo pracy. Standardy europejskie*. Warszawa: Wolters Kluwer, 2020.

of the child – within the maximum limit of eight years – will be determined by individual Member States or by collective agreements. A key innovation introduced by Directive 2019/1158 is the right for working parents to take two months of non-transferable parental leave. This entitlement is forfeited if not used by the entitled parent. Since 2013, the Polish Labour Code has included relevant regulations on parental leave, which is paid and optional. This right empowers working parents to balance their professional and family obligations by allowing them to temporarily interrupt their employment with the guarantee of returning to the same or a similar position.²² Following the implementation of Directive 2019/1158, Poland has removed the mandatory requirement for parental leave to immediately follow maternity leave (or maternity allowance for the period corresponding to the period of maternity leave). Parents now have greater flexibility, as parental leave can be taken at a separate time, although the option for immediate continuation remains. Poland has retained the option to split parental leave into a maximum of five parts, and extended its overall duration (41 weeks in the case of giving birth to one child in one delivery, 43 weeks in the case of giving birth to more children in one delivery). Additionally, in line with Directive 2019/1158, a new requirement mandates that at least 9 weeks of this leave must be taken by the other parent. Both parents are entitled to parental leave under the same conditions from the moment the child is born until the end of the calendar year in which the child turns 6. It is dedicated not only to a parent employee but also to an employee – a close family member, an employee – a foster parent, and an adoptive parent. Polish law allows employees to utilize parental leave while working part-time for their employer, up to half of full-time work. In such a case, parental leave is granted for the remaining part of the working time, and the leave period is proportionally extended. The employee shall be entitled to protection against notice and termination of the employment contract throughout the period of parental leave.

The amendments to the Polish Labour Code regarding parental leave offer positive developments, particularly by removing the requirement for immediate leave use and introducing a dedicated portion for second parent, specifically encouraging fathers' participation. Data collected in Poland in 2023 show – compared to the same earlier period – that the number of men taking parental leave has increased by up to four times. In percentage terms, however, these are not impressive results, as financial issues remain a barrier to the exercise of such entitlements (in particular due to the fact that the other parent, when taking the non-transferable part of parental leave, is always entitled only to 70 % of the maternity allowance base, whereas in the remaining period it may be 81.5 % depending on whether it is used in the first year of the child's life),²³ concerns about loss of work and salary and reduced opportunities for promotion. Moreover, employee fathers explain that, in their opinion, a man taking parental leave will be unwelcome in their workplace, and besides, not everyone receives consent for such leave from his partner (the child's mother).

²² CZERNIĄK-SWĘDZIOŁ, J. Urlop rodzicielski jako okres (nie)zaliczany do wymiaru urlopu wypoczynkowego na gruncie wyroku TSUE C-12/17. *Monitor Prawa Pracy*. 2020, No. 5, p. 39.

²³ Article 31 of the Act of 25 June 1999 on allowances from social insurance in the event of sickness and maternity, *Journal of Laws* 2023, item. 2780.

Directive 2019/1158 introduced regulations on paternity leave, but in the Polish Labor Code, changes in this respect were basically not necessary, because since 2009, more favorable solutions have been in force than the minimum assumptions of the work-life balance Directive.²⁴ The right to paternity leave is not dependent either on the type of employment contract or on the length of service or working time. It is in no way related to the maternity, parental, or childcare (unpaid) leave of the child's mother, nor it is affected by marital or family status. Furthermore, it also does not depend on whether the child's mother has the status of an employee, an insured person or a person not covered by insurance. The right to paternity leave may also be exercised by an employee whose child was born at a time when he did not yet have the status of an employee, as well as by an employee who adopted the child. During paternity leave, the employee is entitled to maternity allowance. Even prior to implementing Directive 2019/1158, Polish regulations concerning paternity leave largely aligned with its principles. However, the Directive emphasizes that paternity leave should be used on the occasion of the birth of the employee's child for the purposes of providing care. Reflecting this intent, Poland shortened the permissible timeframe for taking paternity leave. Employee – the father raising the child has the right to take paternity leave of up to two weeks until the child reaches 12 months of age (previously 24 months of age). In the case of an employee – a father raising an adopted child, the right to paternity leave of two weeks is currently available until the expiry of 12 months from the date on which the decision adjudicating on the adoption of the child becomes final and no longer than until the child turns fourteen. The Polish legislator has not decided to introduce the possibility of partial use of paternity leave before the birth of the child, although this possibility is provided for in the Directive 2019/1158. The duration of paternity leave laid down in the Labour Code does not depend on the number of children born at one birth. The Polish legislation also provides for flexibility in granting it, as it allows an employee – a father raising a child – to use it at once or in no more than two parts, none of which may last less than a week, which corresponds to seven calendar days. During the period of paternity leave, father-employees are, as a general rule, entitled to special employment protection. Paternity leave is granted only at the request of the employee. Under no circumstances can the father's entitlement be transferred to the mother. If the father of the child does not exercise the right, the leave shall be forfeited after the expiry of the timeframe in which it can be taken.

IV. CARER'S LEAVE - REGULATION TO BE IMPROVED

As stated in recital 27 of the preamble to the work-life balance Directive, in order to provide men and women with caring responsibilities with greater opportunities to remain in the workforce, each worker should have the right to carers' leave of five working days per year. It is a new institution both under EU and Polish law. As defined in the Directive

²⁴ Paternity leave was introduced into the Polish legal system by Article 1 point 2 of the Act of 6 December 2008 amending the Labour Code Act and certain other acts as of 1 January 2009, Journal of Laws no 237, item 1654. On the basis of this law, from 2012 onwards, the duration of paternity leave has been extended to 2 weeks for the first 24 months of the child's life. SERAFIN, K. Prawo do urlopu ojcowskiego w polskiej regulacji prawnej. *Zeszyty Prawnicze UKSW*. 2010, No. 1, pp. 221–232.

2019/1158, this is leave from work for workers so as to provide personal care or support to a relative, or to a person who lives in the same household as the worker, and who is in need of significant care or support for a serious medical reason, (Article 3). At the same time, Article 6 of the Directive indicates that Member States may specify additional details regarding the scope and conditions of this leave and require appropriate substantiation. The implementation of this regulation took place in Article 173¹ of the Polish Labour Code. The Polish legislator transferred the definition contained in the Directive 2019/1158 to Polish law, although slightly mitigating its conditions, as it is not necessary for the person to require “significant” care or support. At the same time by setting the contents for a leave application the requirement to provide a reason for the need for the employee to provide personal care or support was stipulated. It should be however stressed that the employer is not able to verify the veracity of the cause, in the sense that the application is based solely on the employee’s statement. Although the work-life balance Directive indicates that the Member States may require the prior presentation of a medical certificate confirming the need for significant care or support for serious medical reasons (recital 27 of the preamble), according to the explanatory memorandum of the draft Polish act, this option was deliberately omitted as it would lead to an excessive bureaucratic burden, especially for primary care physicians.²⁵ The application for carers’ leave should be submitted in paper or electronic form not less than 1 day before taking that leave. The application shall indicate the name of the person who needs care or support for serious medical reasons and, in the case of a family member, the degree of relationship to the employee or, in the case of a non-family member, the address of the person’s residence. It is worth noting here that, according to Directive 2019/1158, the circle of relatives includes a son, daughter, mother, father, spouse, or partner in a civil partnership, where national law recognizes such partnerships. Due to the lack of recognition of civil partnerships under Polish law, the scope of application of this provision in relation to the family is narrower in this respect. It should be emphasized that, therefore, the group of persons whose care or support is entitled to carers’ leave is mixed in nature. On one hand, it is based on blood ties, and, on the other, on shared residence (which does not have to be permanent), so it may be another person who is a family member but not mentioned in the regulation, or even not related to the employee at all.²⁶ Undoubtedly, the disadvantage of the leave in question is that it is unpaid. Although the work-life balance Directive encourages the introduction of payment in the form of retention of the right to remuneration or the grant of an allowance in order to guarantee the effective exercise of the right to such leave by carers, in particular by men, the Polish legislator has not opted for such a step. In the authors’ opinion, this circumstance will effectively discourage the use of the leave in question. Moreover, as stated in Art. 6 point 2 of the Directive 2019/1158, Member States may decide that such leave may be granted on the basis of a reference period other than one year, per person in need of care or support, or

²⁵ Justification of the draft act amending the Labour Code Act and amending certain other acts. In: *legislacja.rcl.gov.pl* [online]. [2024-09-13]. Available at: <<https://legislacja.rcl.gov.pl/projekt/12356556/katalog/12855403#12855403>>.

²⁶ See further CZERNIAK-SWĘDZIOŁ, J. Urlop opiekuńczy i zwolnienie od pracy z powodu działania siły wyższej – (nie) trafione uprawnienia pracownicze? *Monitor Prawa Pracy*. 2024, No. 1, p. 15.

on a specific case basis, which would mean that it may be granted more than once a year depending on the circumstances. However, the Labor Code provides for a rigid period of carers' leave per year. Detaching this right from a specific case or person in need may, in practice, prove to be insufficient.

V. TIME OFF FROM WORK ON GROUNDS OF FORCE MAJEURE - WHAT IS FORCE MAJEURE?

Another new regulation in the Polish Labour Code, related to the implementation of the Directive 2019/1158, is time off from work on grounds of force majeure. However, it should be emphasized that this institution has already existed in Directive 2010/18/EU and has never been implemented under Polish law.²⁷ Though it should be noted that the employer could have justified the employee's absence from work in the event of force majeure already before the implementation, since in accordance with the regulation of the Minister of Labor and Social Policy of March 15, 1996, on the method of justifying absence from work and granting employees leave from work, the justification of the absence could take place in cases of inability to perform work indicated by the employee and considered by the employer as justifying.²⁸ This time off from work was introduced in Article 148¹ of the Labour Code and is of a general nature, i.e. all employees, regardless of the basis of employment, are entitled to it. The exercise of this right is not related to having or raising children.²⁹ It is granted to a full-time employee of 2 days or 16 hours, for which the employee retains the right to half of the remuneration. Thus, the employee can either use the full two days of time off or spread the duration of it over different days, several hours each. The Polish legislator did not make use of the possibility to grant this right per a specific case. The regulation provides for two conditions for exercising this right, which must be fulfilled together, i.e. force majeure in urgent family matters caused by illness or accident and the necessity of immediate presence of the employee. That provision is, in principle, in line with Article 7 of the work-life balance Directive, which specifically refers to the time off in question. However, the EU legislature did not regulate the duration of the time off, leaving this issue entirely to the discretion of the Member States. An important problem arising from this type of time off from work is the concept of force majeure. It should be stressed that this notion is not defined either in EU law or in the Polish Labour Code. At the same time, both in civil law and labor law, force majeure is considered, based on objective theory, to be an external phenomenon that was inevitable, extraordinary, which could not be predicted, and which could not be resisted or prevented, even with the utmost efforts.³⁰ However, in the context of the discussed institution, it is postulated that the concept of force majeure should be understood slightly differently, as the occurrence of urgent family matters in the event of illness or accident (understood broadly, i.e. also as climatic events or phenomena), if the

²⁷ STEFAŃSKI, K. Zwolnienie od pracy z powodu działania siły wyższej. *Praca i Zabezpieczenie Społeczne*. 2023, No. 8, p. 9.

²⁸ CZERNIAK-SWĘDZIOŁ, J. *Urlop opiekuńczy i zwolnienie od pracy*, p. 17.

²⁹ STEFAŃSKI, K. *Zwolnienie od pracy*, p. 10.

³⁰ See Supreme Court judgment of 18 December 2002, I PKN 12/02, OSNP, 2004, No 12, item. 206.

immediate presence of the employee is necessary, regardless of whether these situations could have been prevented or not.³¹ Force majeure must be linked to the occurrence of urgent family matters caused by illness or accident.³² The situation is not directly related to the employee but with regard to his or her family.³³ The fact that that concept is not unambiguous may lead to problems in the application of the time off at issue. Similarly to the fact that it is not clear whether the employer should grant the employee leave before using it, or whether submitting an application by the employee is sufficient to take advantage of the leave. The doctrine presents different views on this issue.³⁴

VI. FLEXIBLE WORKING ARRANGEMENTS AS A FACILITATION FOR WORKING PARENTS

The last of the changes of Polish Labour Code connected to the implementation of Directive 2019/1158 is the introduction of regulation of flexible working arrangements. The aim of which, in accordance with recital 34 of the preamble to the Directive, is to encourage parents and carers to remain in the labour market by ensuring that their work schedules can be adapted to personal needs and preferences. It is worth noting that although the social partners' agreement implemented by Directive 2010/18/EU already stressed the importance of flexible working arrangements, which, as emphasized, facilitates the combination of work and parental responsibilities for parents and facilitates professional reintegration, especially after returning from parental leave, it did not provide for any specific solutions in this regard. The definition contained in Art. 3 section 1 letter e of Directive 2019/1158 indicates that it may take the form of remote work, flexible working time schedules, or reduced working hours. Detailed regulation included in Article 9 of the Directive assumes the introduction of the necessary measures by the Member States, according to which employees with children up to a certain age – at least 8 years old – and carers are to have the right to request flexible work arrangement in order to provide care. It is possible to limit the time of such work organization. The employer is obliged to examine the employee's application within a reasonable time, based on the needs of both himself and the employee. The employer has the right to deny or postpone the employee's application, with justification provided. At the same time, national regulations should take into account the protection of workers returning to their previous work organization both after the period for which it was established or earlier, at the request of the employee - when this is justified by a change of circumstances. The examination of such an application is carried out on the basis of the same criteria as the application for flexible working arrangements, i.e. taking into account the interests of both parties to the

³¹ SOBCZYK, A. Commentary on Article 148¹. In: Arkadiusz Sobczyk (ed.). *Labour Code. Commentary*. Warsaw: Legalis el., 2023.

³² STEFAŃSKI, K. *Zwolnienie od pracy*, p. 10.

³³ CZERNIAK-SWĘDZIOŁ, J. Vis maior jako powód zwolnienia od pracy. *Studia z Zakresu Prawa Pracy i Polityki Społecznej*. 2023, pp. 353 et seq.; SOBCZYK, A., Commentary on Article 148¹. In: Arkadiusz Sobczyk (ed.). *Labour Code. Commentary*.

³⁴ The need to grant the time off is supported by STEFAŃSKI, K. *Zwolnienie od pracy z powodu działania siły wyższej* and JASKÓLSKA, J. *Zwolnienie od pracy z powodu siły wyższej*, Lex/el. 2023, against CZERNIAK-SWĘDZIOŁ J., *Urlop opiekuńczy i zwolnienie od pracy*, p. 18, SOBCZYK, A. Commentary on Article 148¹.

employment relationship. At the same time, Member States were given the opportunity to create the right to apply for flexible work organization conditional on a previous period of work or length of service, which may be a maximum of 6 months. This regulation was implemented in Art. 188¹ of the Labour Code. There, an employee raising a child, up to the age of 8, was granted the right to submit an application for flexible working arrangements, no later than 21 days before the planned start of using it. In its subjective scope, it refers to employees who are parents or carers, it does not require the existence of a legal bond between the carer and the child, but the actual upbringing of the child,³⁵ which means providing permanent care for the child, and not only auxiliary upbringing (e.g. performed by grandparents).³⁶ This regulation does not introduce a new way of organizing work, but it makes existing opportunities for an employee to use a convenient time or place of work become more accessible.³⁷ Flexible work organization is, within the meaning of the Polish Labour Code, remote work, a system of work split up over the day (interrupted working time system - assuming no more than one break in work per day, lasting no more than 5 hours, not counted to working time), a shortened working week system (based on the employee's performance of work for less than 5 days per week, while extending the daily working time), weekend work (according to which work is performed only on Fridays, Saturdays, Sundays and public holidays), flexible working time schedule (which provides for different starting hours of work on days which according to this schedule are working days for employees or the time interval during which the employee decides on the starting time of work on the day which, according to that schedule, is a working day), individual working time (determined at the worker's request) and a reduction of working hours. The range of options available to take advantage of flexible working arrangements is therefore quite wide. When submitting an application, the employee is obliged to indicate the reason for the need for flexible working arrangement, which is in line with the objective of introducing that institution according to the Directive 2019/1158. At the same time, in view of the fact that it is permissible under the Directive to limit the duration of the use of the work organization in question, the employee must indicate the starting and end dates for which it should be used. When examining an employee's application, the employer should take into account the needs of the employee, including the time limit and the reason for the need to use flexible working arrangements, as well as the needs and capabilities of the employer, including the need to ensure the normal course of work, the organization of work or the type of work performed by the employee. The employer may accept the employee's application, refuse to accept it, or inform him/her of a different possible date to apply for flexible working arrangements than those resulting from the application. The employee has the right to submit a request for a return to the previous organization of work before the expiry of the deadline specified in the application. The Polish legislator also guaranteed protection against termination of the employment contract for the worker submitting the application.

³⁵ MANIEWSKA, E. In: Kazimierz Jaśkowski – Eliza Maniewska (eds.). *Kodeks pracy. Komentarz aktualizowany*. Warsaw: LEX/el. 2024, art. 188(1).

³⁶ NOWAK, P. Commentary on Article 188¹. In: Arkadiusz Sobczyk (ed.). *Labour Code. Commentary*. Warsaw: Legalis el., 2023.

³⁷ MANIEWSKA, E. In: Kazimierz Jaśkowski – Eliza Maniewska (eds.). *Kodeks pracy. Komentarz aktualizowany*.

CONCLUSION

After discussing the method of implementing Directive 2019/1158 into the Labor Code, we must return to the question asked at the beginning of this article: could we have done more? The answer should be positive. First, while positive aspects include the flexibility to take parental leave after maternity leave and the individualization of the entitlement, the low paternity allowance during this period may discourage fathers from using the non-transferable portion of parental leave. Secondly, the unpaid nature of carers' leave should be assessed as a major obstacle to its use, likely leading to women taking it more frequently. Additionally, some may find it inflexible: separating it from a specific care need and setting annual limits might not be suitable in every situation. Thirdly, the absence of a clear definition for “force majeure” in relation to the time off can create difficulties in applying the regulation and potentially lead to misuse by both employees and employers. Additionally, one can also criticize its detachment from a specific case. On the other hand, the provisions on paternity leave (although the Polish legislator has not made significant changes) and flexible working arrangements can be assessed positively in the context of Directive 2019/1158.

To summarize the allegations regarding the method of implementing the work-life balance Directive, it should be emphasized that the concept of work-life balance must also take into account the social security of employees and the actual needs of employees. Moreover, the regulations must be clear and unambiguous about the extent of the rights granted, as these measures are meant to help employees achieve a healthy balance between work and personal life

While Directive 2019/1158 is undoubtedly a step in the right direction, its minimal nature should be considered as a disadvantage. This is significant because it offers Member States broad leeway in regulating certain rights. This may result in failure to achieve a satisfactory, strong legal frameworks, and specifically in the inability to achieve a real work-life balance. Work-life balance is a complex issue and the subject of research in many scientific disciplines, but in the context of labor law it should be understood primarily as a tool for equalizing opportunities and treated as a long-term investment, profitable also from the perspective of the broadly understood social interest, but also as a win-win relationship, because the benefits resulting from balancing the private and professional spheres are felt by both parties to the employment relationship, and also by their surroundings.³⁸

³⁸ PÓŁTORAK, M., LEKSTON, M. Work-life balance jako przestrzeń do dialogu pomiędzy pracownikiem a (odpowiedzialnym) pracodawcą. In: *Jak możliwy jest dialog? Księga jubileuszowa dedykowana prof. wsh dr Jerzemu Koplowi JM Rektorowi Wyższej Szkoły Humanitas w Sosnowcu w 70. rocznicę urodzin*. Sosnowiec: Oficyna Wydawnicza „Humanitas”, 2014, p. 262.