

# Employment leave for early pregnancy endings: A biopolitical reproductive governance analysis in England and Wales

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## Funding information

The Open University; Economic and Social Research Council

## Abstract

When a pregnancy ends in England and Wales, statutory time away from paid employment is limited to circumstances where there is a live birth or stillbirth. Forms of leave, such as Maternity Leave or Paternity Leave, depend on parental status derived from the civil registration of a new person or a post-viability stillbirth. Other early pregnancy endings, such as miscarriage or abortion, do not provide specific time off work after pregnancy. This paper uses the concept of reproductive governance to analyze current and shifting biopolitical truth discourses, strategies of intervention, and modes of subjectification around post-pregnancy leaves. It shows how different inclusions and exclusions are generated by the classificatory boundaries which act as political technologies in this field. Contributing to an area that is under-researched in the literature, we provide a review of post-pregnancy statutory employment leave entitlements in this context. We then consider proposals for change presented in the United Kingdom political system in relation to more inclusive leave benefits offered by some employers and different pregnancy ending leaves offered in other jurisdictions. We argue that current arrangements and proposals

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do not adequately reflect the complexity and diversity of pregnancy endings. We conclude with a call to policymakers in all contexts to carefully assess the consequences of new ideas around leaves for pregnancy endings and to formulate inclusive and fair proposals for change.

**KEYWORDS**

abortion, biopolitics, employment leave, miscarriage, reproductive governance

## 1 | INTRODUCTION

Many pregnancies end with the birth of a legally recognized living person in relations of kinship to their parents. These subject relations are recognized in employment policy around leave and pay following the end of pregnancy. In such circumstances, legal and bureaucratic processes in many jurisdictions and organizational settings exist to allow parental adults, especially the post-pregnant woman or other gestational parent, to take time away from the workplace. However, pregnancies do not all end in this way with a living person in need of care in recognized relations to others who are granted time off to do this. Some pregnancies end, spontaneously or intentionally, without a living person whose existence entitles others to be absent from their employment for a defined period. There is a range of biomedical and legal classifications of these pregnancy endings, as we examine below, but global estimations of annual prevalence include 2 million events defined as stillbirth (Hug et al., 2021), 23 million defined as miscarriages (The Lancet, 2021), and 73 million defined as abortions (Bearak et al., 2020). These events have different implications in relation to their impact on employment leaves in different jurisdictional and administrative contexts. In this paper, we draw on the governance context of England and Wales within the UK to illuminate biopolitical strategies located in the provision of employment leave related to pregnancy endings, using the analysis of local practices and knowledge to understand specific operations of power (Jørgensen, 2002).

In England and Wales, pregnancies that do not result in a new, ongoing, living person are variously defined as abortion, miscarriage, or stillbirth. Pregnancies may be intentionally terminated under the 1967 Abortion Act for specific legally defined and biomedically diagnosed reasons, including impact on the pregnant woman (the gendered language used in the Act), or anomalies of the fetus. An embryo or fetus may be surgically removed because the pregnancy is ectopic or molar. Or the pregnancy may end spontaneously because of fetal intrauterine death or the spontaneous expulsion of the fetal being. The categories of pregnancy endings are limited by contingent and contextual legislative and regulatory circumstances characterized by the interaction of underpinning classificatory thresholds of 'live birth', necessary in the UK and other jurisdictions for full legal personhood (Herring, 2011), and 'fetal viability', a legal threshold set at 24 weeks of gestation in the UK. Fetal viability is a concept, which enlists scientific and clinical expertise to produce seemingly objective criteria (of the possibility of independent life outside pregnancy), which camouflage political positions in relation to reproduction (Franklin, 2014). This is particularly the case with regard to access to abortion, which is permissible in the context of England and Wales in multiple circumstances before viability, but is only allowed after legal viability in cases of serious fetal anomaly (termination of pregnancy for fetal anomaly, or TOPFA), or threat to the life or health of the pregnant woman. Viability also structures spontaneous pregnancy endings: any non-live birth after viability is defined as a stillbirth, and before viability, a spontaneous pregnancy ending is defined as a miscarriage. These definitions have consequences for access to employment leave, as this paper will show, and we use the concept of viability critically to illustrate its political power.

In the context of the legal definitions outlined above, we analyze secondary data related to England and Wales including legislation, policy, and regulations on employment leave in the range of possible pregnancy endings to

identify the inclusive and exclusive subject positions which they make available. Using the lenses of reproductive governance (Morgan & Roberts, 2012) and biopolitics (Foucault, 1998, 2003b; Rabinow & Rose, 2006), we argue that analyzing the employment leave of normative pregnancies alongside the current and proposed entitlements of pre- and post-viability non-normative pregnancy endings, which we refer to inclusively as 'early pregnancy endings', makes visible specific subject positions, truth discourses, and biopolitical strategies around reproduction (Foucault, 1998, 2002; Rabinow & Rose, 2006). This is achieved when policy inclusion and exclusion is analyzed comparatively to discover the problematization (Foucault, 2003a), which underlies the discourses and practices of post-pregnancy leave. The truth discourses we find in employment leave policies prioritize circumstances, which involve the protection of new biopolitical subjects in the living newborn rather than support for the post-pregnant subject in cases of early pregnancy endings.

## 1.1 | Early pregnancy endings in England and Wales: The analytic context

The incidence of early pregnancy endings in England and Wales is only partially known, because requirements around reporting to the state via the National Health Service or the Department of Health and Social Care are limited. Statistics are not collected in relation to most pre-viability spontaneous pregnancy endings through miscarriage. The prevalence of miscarriage is therefore estimated at approximately 250,000 miscarriages in the whole UK every year (Austin et al., 2021, Miscarriage Association, ND). There are also limitations on the collation of national statistics on ectopic and molar pregnancies. However, the state does surveil in detail those pregnancy endings before and after viability, which come under the 1967 Abortion Act. In England and Wales, there were 214,256 abortions in 2021, of which 3370 were TOPFAs under Ground E of the Abortion Act (Office of Health Improvement and Disparities, 2022). The state also records the death of a fetus before birth but after viability, known as stillbirth. In 2020, there were 2371 stillbirths in England and Wales (Office for National Statistics, 2022a). Putting early pregnancy endings in the context of live births, of which there were 613,936 in England and Wales in 2021 (Office for National Statistics, 2022b), roughly for every 3 live births in England and Wales, there is one abortion or termination and one miscarriage.

Early pregnancy endings—before 24 weeks' viability in England and Wales—affect a significant number of women, other gestational parents, their partners, and families at a time in their lives when they are likely to be in employment. However, they remain relatively invisible to the state, the public, and employers. For example, the economic impact of pregnancy endings through lost productivity is not known though estimates are that a miscarriage in the first trimester costs over £400 in lost productivity and there may be unquantified long-term effects (Quenby et al., 2021). The consequences of such invisibility are that policy responses and support offered in workplaces tend to be piecemeal and derived from different areas of legislation, regulation, and employment practice, rather than systematically planned to meet the needs of all those concerned.

## 1.2 | Changing contexts of employment leaves for early pregnancy endings

Using a reproductive governance framework, which pays attention to changes in the production and control of reproductive behavior (Morgan & Roberts, 2012), in this paper, we identify a shift occurring internationally and in the UK context, at both legislative and organizational levels, in relation to employment leave entitlements around pregnancy endings. Timelines and norms around pregnancy and leave entitlements differ worldwide, but almost all jurisdictions have entitlements around live birth, and many have entitlements for stillbirth (Addati et al., 2014). Some countries have longstanding leave for early pregnancy endings: for example, since 1961, India has had a statutory entitlement for the pregnant woman of up to six weeks' paid leave for a miscarriage on production of medical proof. More recently, several countries around the world including Northern Ireland within the UK have introduced or are proposing new statutory forms of leave in cases of early pregnancy loss or ending, which extend leave entitlements beyond existing leaves for later loss such as stillbirth.

This increased interest in employment leaves for early pregnancy endings is prevalent in nations connected to the UK by virtue of geography, language, or Commonwealth status. Australia amended its 2009 Fair Work Act in 2021 to extend the two-day compassionate leave entitlement to include miscarriage, alongside an existing stillbirth entitlement to 18 weeks paid parental leave and up to 12 months unpaid parental leave (Australian Government, ND; Keep et al., 2021). Australia also has unpaid 'special maternity leave' for miscarriage or termination, which does not have a fixed duration and is delimited by fitness to work (Australian Government, ND). In this context, pregnant women and their partners can become parental or maternal subjects and also bereaved subjects in certain cases of early pregnancy endings. In New Zealand, paid bereavement leave was made applicable to miscarriage or stillbirth in 2021 and entitles people including non-gestational partners who experience miscarriage or stillbirth to take three days of leave without providing proof. It does not include abortion (New Zealand Government, 2022). Miscarriage in New Zealand is of a fetus up to 20 completed weeks of gestation and less than 400 g in weight (Jutel, 2011), exemplifying the sociopolitical specificity of governmental concepts (Lemke, 2001). After these thresholds, a pregnancy ending is defined as a stillbirth, including TOPFA after 20 weeks, entitling parents to paid parental leaves in line with live births (New Zealand Government, ND). Therefore, New Zealand discursively aligns stillbirth with live birth, producing the fetal being as a form of person and couples who experience some early pregnancy endings as bereaved. In the Republic of Ireland, the Organization of Working Time (Reproductive Health Related Leave) Bill put before the Oireachtas in 2021 will offer up to 20 working days of miscarriage leave alongside up to 10 working days of leave to access 'reproductive health services' (Oireachtas, 2021). This could potentially include abortion services, although this is not spelt out in the legislation. In Ireland, therefore, some early pregnancy endings are discursively situated in healthcare and others are given special attention as miscarriage.

Within the UK, the Parental Bereavement (Leave and Pay) Act (Northern Ireland) 2022 (Northern Ireland Assembly, 2022) legislates for two weeks of paid employment leave on the death of a child below 18 years or a post-viability stillbirth in line with the rest of the UK as we explain below. However, it also provides for new entitlements for pre-viability miscarriage leave and pay, which are to be implemented by 2026 through regulations currently being developed. It is important to note that Northern Ireland's reproductive governance already diverges from the rest of the UK in terms of access to abortion, which was recently decriminalized but has a lower limit of 12 weeks or specified instances such as severe fetal anomaly, and where provision is still limited at a practical level (Bloomer and O'Dowd, 2014; Campbell and Bloomer, 2022). Northern Ireland, therefore, discursively positions miscarriage alongside both stillbirth and child death but separates it from abortion.

Non-statutory forms of pregnancy ending leaves are also becoming available in the UK. The Scottish Government offers 3 days of paid miscarriage leave to public sector workers (Powell & Codd, 2022). In the private sector, employment leave policies, which are broader and more inclusive, have been developed. Since 2021, the media company Channel 4 (2021) has offered two weeks of leave for pregnancy loss, including miscarriage, stillbirth, and abortion, to both partners. The bank Monzo and the clothing company ASOS offer 10 days' leave for miscarriage and abortion, again to either partner (ASOS, 2021, Monzo, ND). These changes set the context for interest in early pregnancy ending employment leave in current UK parliamentary politics, which will be discussed later in the paper. Possibilities of novel intervention strategies in relation to pregnancy-related employment leave are therefore opening up in diverse organizational and legislative contexts.

## 2 | THEORETICAL APPROACH: BIOPOLITICS AND REPRODUCTIVE GOVERNANCE IN THE ANALYSIS OF PREGNANCY-RELATED EMPLOYMENT LEAVES

Pregnancy-related employment leaves and the changes, which are occurring, lend itself to analysis through the framework of reproductive governance developed by Morgan and Roberts (2012). Reproductive governance develops Foucauldian biopolitics to trace changes in the operation of power in reproductive behaviors and practices by multiple actors, ranging from institutions of the state, through biomedicine, to non-governmental organizations and other agencies. In the Latin American context, Morgan and Roberts showed how processes which could be analyzed as reproductive governance produced specific rationalities concerning subjectivity, citizenship, individual rights, and

political economic processes in relation to reproductive behaviors and practices, all of which are implicated in employment leave after pregnancy. They built on Foucault's (1998, 2003b) analysis of sex, including reproduction, as the exemplary site for the concept of biopower. Foucauldian biopower is concerned with intersections of power and reproduction at the level of the individual body and also the whole population in terms of interest in health, progeny, vitality, and the optimizing of populations (Foucault, 1998, 2003b; Rabinow & Rose, 2006). Therefore, it connects the individual post-pregnant body, the body of the fetus or baby, the state that legislates in relation to the balance between care of the body and employed work, and the employer who enacts entitlements or creates policies. Biopolitics is characterized by the existence of naturalized truth discourses, systems of knowledge which constrain and produce what can be said by specific authorities (Foucault, 1998, 2002). Discourse invokes bounded concepts, such as types of pregnancy ending, from which are derived strategies for intervention (or lack of intervention) on life and health, such as employment leave entitlements, which can also be understood as political technologies and which result in modes of subjectification (Lemke, 2001; Rabinow & Rose, 2006), such as parent-child relations. Foucauldian approaches have previously been used to examine intersections between organizations and discursively gendered bodies and subjects (Bryant & Garnham, 2014; Knoppers, Haan, et al., 2021). Most pertinently, some of these analyses have focused specifically on reproduction (Cervi & Brewis, 2021; Souza, 2022) although these are far fewer in number.

In this paper, we use these concepts alongside reproductive governance to analyze employment leave after pregnancy as a biopolitical technology, in its current form in England and Wales, and in proposals and possibilities for change. Foucault's (2003a) concept of problematization has been used in the analysis of the roots of employment policies connected to women's bodies as sites of reproductive as well as employment activity (Bryant & Garnham, 2014) and has been developed as a technique of inquiry in the field of organization studies (Alvesson & Sandberg, 2011). Problematization seeks to show how the conditions of possible responses to a set of difficulties are delimited by definitions of 'the elements that will constitute what the different solutions attempt to respond to' (Foucault, 2003a, 24)—in other words, how are discursive fields pre-constrained and how can the assumptions and forms of power within them be made visible? This involves attention to what is said within a discursive field and also what is unsaid (Foucault, 1998, 2002; Knoppers, Spaaij, & Claringbould, 2021)—exclusions also allow discursive truth regimes to be surfaced. In this vein, we analyze inclusions and exclusions in different types of leaves after the end of a pregnancy to identify truth discourses and subjectification in this field of practice and to show how they are the result of problematizations based on biopolitical reproductive governance.

We draw on research carried out for the first author's Sociology PhD, which identified differences in maternity leave entitlements in the specific circumstances of second-trimester pregnancy loss (Middlemiss, 2021b) as well as the ongoing *Early Pregnancy Endings and the Workplace* project, a collaborative multiuniversity project led by The Open University, which investigates experiences of all pregnancy endings in the workplace before 24 weeks' gestation. *Early Pregnancy Endings and the Workplace* includes experiences of miscarriage, ectopic and molar pregnancy, and all forms of abortion. It intends to produce local recommendations for policy about pregnancy endings and employment after survey data are analyzed. For the purposes of this paper, relevant legislation and regulation in relation to each possible ending of pregnancy were identified through examination of existing literature and purposive identification of legislation and regulation relevant to the range of pregnancy endings. This includes the UK government documents and legislation listed in the references, which were analyzed through the lens of reproductive governance to identify inclusions and exclusions that form the theoretical basis of the paper.

## 2.1 | Situating the argument in the literatures on pregnancy endings and civil registration

Much of the extant social science literature on pregnancy loss and early endings, in the UK and further afield, concerns the experiences of women going through miscarriage, stillbirth, or abortion, especially in relation to marginalization in wider society and medical care (see, e.g., Bloomer et al., 2017, Earle et al., 2012, Frost et al., 2007, Hey et al., 1989, Kilshaw, 2020, Layne, 2003, Lovell, 1983, Middlemiss, 2022, Purcell, 2015, Shaw, 2014). The limited research on

pregnancy endings and the workplace takes a similar approach (Boncori & Smith, 2019; Devlin et al., 2017). Experiences of spontaneous pregnancy loss are often framed as bereavements, which Fuller and Kuberska (2022), (p. 3) argue is central to policy making, being the 'primary framework through which baby and pregnancy loss are understood in England during the second decade of the 21st century'. Bereavement as a discursive positioning of the early ending of a pregnancy is embedded in the UK's National Health Service response involving miscarriage and TOPFA through the adoption of the National Bereavement Care Pathway (National Bereavement Care Pathway, 2022), which was written by third sector organizations. A bereavement discourse is also found in the recent Women's Health Strategy for England (Department of Health and Social Care, 2022). Bereavement often frames the social science research about pregnancy ending in the workplace in different national contexts (Hazen, 2003; Keep et al., 2021; Meunier et al., 2021). The widespread prevalence of this truth discourse is an example of reproductive governance, which makes some strategies of intervention more possible than others. We argue that it produces specific modes of subjectification for those experiencing early pregnancy endings.

The role of the state in the UK's four nations has been discussed in relation to access to and provision of abortion services (Beynon-Jones, 2012; Sheldon, 1997; Statham et al., 2006), particularly in Northern Ireland (Roberts et al., 2021). The state also produces truth discourses about pregnancy endings through the bureaucratic and legal classifications with which it administers biopolitics through Lemke's (2001) governmental parameters or 'borders' (p. 191). These classifications entail responsibilities and produce inclusions and exclusions based around parental rights, such as in relation to the dead fetal body (Middlemiss, 2021a). It is therefore helpful to consider pregnancy endings in relation to the biopolitical production of persons and citizens for legal and administrative purposes. Legal personhood is bureaucratically produced in the modern state through civil registration (Breckenridge & Szreter, 2012; Scott et al., 2002), a political technology that allows intervention at multiple levels in relation to rights, entitlements, legal remedies, and welfare eligibility (Higgs, 2004a, 2004b, Szreter, 2007).

However, to date, literature in the field of pregnancy loss and ending, with the exception of Jutel's (2011) work on stillbirth in New Zealand, has not engaged in detail with the consequences of state administration and registration for persons and families experiencing early pregnancy endings. Literature on state registration has considered the late development of stillbirth registration as evidence of the state's lack of interest in non-legal persons (Higgs, 2004a) and the historic role of stillbirth registration in criminal law and public health monitoring (Davis, 2009). It has not looked in detail at the contemporary inclusions and exclusions, which are produced by civil registration, or its absence. This paper considers these in relation to entitlements to employment leave in the context of early pregnancy endings, using the framework of reproductive governance and biopower outlined above. It therefore contributes to literature on pregnancy endings, on the policy implications of pregnancy-related leave, and on civil registration and citizenship.

### 3 | THE STATUS QUO IN RELATION TO EMPLOYMENT LEAVES AND PREGNANCY IN ENGLAND AND WALES

Here, we explain current entitlements to leave around pregnancy in the English and Welsh context, beginning with a pregnancy ending in the birth of a living infant, then discussing the intersecting roles of viability and live birth in relation to entitlement to leave from employment. In each case, we analyze the inclusions and exclusions and the truth discourses and subject positions produced by the bureaucratic and registration requirements of types of pregnancy ending.

#### 3.1 | Live birth pregnancy endings: Employment leave for recovery and infant care

A normative pregnancy ending in England and Wales, in which the gestational period is completed with the birth of a living baby, is considered to require leave from employment for the adults concerned. The state sets out parameters for recognition of processes of pregnancy, kinship formation, and care of the new infant with statutory entitlements to support and time away from employment, such as maternity leave, paternity leave, and the Maternity Pay and Maternity Allowance (UK Government, ND-b, UK Government, n.d.-a, ND-c). Part of the employment leave

entitlement in Statutory Maternity Leave (again the official terms are not gender inclusive) is ring-fenced for the post-pregnant woman in order for her to recover from the physical processes of pregnancy and birth. A 2-week period is mandated for workers, extended to 4 weeks for factory workers. The remaining Statutory Maternity Leave, of up to 50 weeks, can be shared with another parent under the Shared Parental Leave Regulations 2014, subject to restrictions based on duration of employment and pay rate. Shared parental leave produces subject positions of parental adults in relation to a dependent child with a right to care. It suggests that this aspect of the leave relates to caring for the newborn rather than the relevant adult's recovery from pregnancy and birth.

These entitlements and regulations attempt to navigate the intersection of different types of adult labor in the fields of reproduction and paid employment. They focus primarily on the physical and health needs of the post-pregnant person, and on the care needs of the new infant, in addition to smoothing the transition to a new or larger family group for all involved. The state thus intervenes to find a balance between the needs of employers (to have employees present at work), the needs of employees (to recover physically and to perform reproductive and parenting labor), and its own biopolitical aims (to produce a new generation of healthy, cared-for citizens, and to ensure national economic productivity for the welfare of the population). Other actors are also involved in this reproductive governance—for example, some employers offer enhanced maternity and paternity benefits. The statutory status of post-pregnancy employment leave rights in England and Wales is underpinned by a truth discourse based on principles of inclusion and reproductive rights: those who are employed and who produce a living child are mostly entitled to take leave as a matter of right.

Access to these entitlements is bureaucratically administered via the political technology of civil registration of the newborn baby under the 1953 Births and Deaths Registration Act. This technology produces interconnected subject positions of newborn persons and of parents by bureaucratically connecting them on the birth registration form and subsequent certificate. This connection becomes the gateway to entitlements to time away from employment for the parental adults involved. Civil registration has been generally understood to create a relationship between a living individual and the state and to provide a basis for rights claims for that individual (Breckenridge & Szreter, 2012; Caplan & Torpey, 2001; Higgs, 1996; Szreter, 2007). The case of parental leave accessed through birth registration shows that civil registration also creates a mechanism for rights claims for the kin of the registered person who are able to access statutory employment leave using their formally recognized connection to their child. Civil registration as a gateway to employment leave is therefore a technology of power, which acts, at the level of the subject, in the interests of the child and their employed parents but also at a population level in line with the biopolitical strategies of the state.

However, the maternity leave legislation surrounding live births also produces exclusions: those eligible must be employees as well as workers, meaning some types of contract workers, in particular the precariat, are excluded (UK Government, ND-a). The correct form of notice must also be given to the employer (UK Government, n.d.-a). There are restrictions to eligibility for Statutory Maternity Pay during the time of leave, such as employment duration (UK Government, n.d.-a), though there may be access to the alternative Maternity Allowance scheme (UK Government, ND-b). Similarly, paternity leave (also available to same gender partners and surrogate parents) depends on notice and employment duration. Pay is also conditional on an earnings threshold, excluding the very low paid (UK Government, ND-c). Overall, therefore, employment leave related to live birth contains exclusions and conditions, while simultaneously being an entitlement where these conditions are met. The entitlement is mostly predicated on the existence of a state-registered born baby, passing rights to its parents, though part is ring-fenced for the physical recovery of the gestational parent, most often a woman.

### 3.2 | Stillbirth: Extending truth discourses around employment leave from infant care into bereavement

The theoretical and bureaucratic connection between civil registration and the rights of living persons, as described by historians of citizenship (Breckenridge & Szreter, 2012; Higgs, 1996), is further extended by the case of stillbirth and employment leave in the UK. Stillbirth in this context, as a reminder, is a pregnancy ending after viability which

does not end in live birth. This must be registered with the state on the Stillbirth Register, under the 1953 Births and Deaths Registration Act and the 1992 Stillbirth Definition Act. This is not the same register as for the civil registration of living babies, so the UK system is different to some US forms of stillbirth registration which use standard death certificates (Sanger, 2012). For some families, the separation of the Stillbirth Register from the normative registers of births and deaths is a form of exclusion which legally establishes their baby as a lesser form of person to one born alive, because the threshold for full legal personhood in the UK is live birth (Herring, 2011).

However, stillbirth registration is similar to the processes of general civil registration in its form and the way it carries similar entitlements for parents. It is not the occurrence of the event which is registered by the state, as required for abortion under the 1967 Abortion Act, but the individual fetal subject, sometimes named, in relation to its named parents. This specific form of civil registration also entitles eligible parents to the same maternity and paternity leave and pay as a live birth. From a theoretical point of view, the political technology of civil registration aligns the concept of stillbirth with that of live birth through the production of a fetal subject position as a form of person and baby, and parental subject positions in relation to this being. The administrative gateway to this leave after stillbirth is the threshold of fetal viability, established by the Infant Life (Preservation) Act 1929, the Abortion Act 1967, and the Human Fertilisation and Embryology Act 1990. This boundary acts as a strategy of biopolitical intervention which categorizes the adults involved into those who are entitled and those who are not entitled to employment leave through the production of parental subjects and non-parental subjects, based on the developmental stage of the fetal being. Whilst there is no new citizen in the case of stillbirth, the state still recognizes the parental relationship, and bases statutory entitlements for the living on the registered status of the dead. This is consistent with previously noted entitlements for the living based on the relationship between the state and the dead in other contexts, such as war widow pensions in England (Higgs, 2004a) or posthumous citizenship for the families of non-citizen soldiers who died in combat for the USA (Sanger, 2012).

Stillbirth registration and its associated entitlement to parental leave from employment also challenges and extends the underlying justification for maternity leave. Leave from work in the post-stillbirth period is not to nurture the child, who has died. Only the ring-fenced part of the maternity leave is for the physical recovery of the woman or gestating parent. The remainder of this leave in the case of stillbirth, which can be shared with a non-gestational parent, is effectively time off work to recover from the death of the infant. This can be contrasted with the statutory time off for the death of an older child under the age of 18, introduced in 2020, which is two weeks of Statutory Parental Bereavement Leave and Parental Bereavement Pay where employees are eligible (UK Government, n.d.-b). Statutory Parental Bereavement Leave and Parental Bereavement apply to all those in parental roles, including non-gestational parents and the partners of parents. The death of an older child entitles an employed parent to just 2 weeks of mourning. Stillbirth usually entitles a parental couple to more than 50 weeks of mourning via maternity and paternity leave plus Statutory Parental Bereavement Leave. At the same time, the death of other kin, such as partners, parents, or siblings, does not carry any statutory leave entitlement, although organizations may offer it on a compassionate basis. A post-viability fetal death is therefore highly prioritized for leave from employment, giving a larger entitlement than any other death, and indeed, any other live birth and subsequent death. The justification is not care of the infant, or, beyond the first 2 weeks, the recovery of the gestational parent. It can therefore only be the bereaved status of the parents. This form of governance of post-pregnancy leave dovetails with the truth discourse of pregnancy loss as bereavement.

### 3.3 | Post-viability abortion: Automatic eligibility for extended employment leave

A less well-known aspect of stillbirth and entitlement to employment leave in England and Wales is the fact that viability, and the stage of fetal development, is the determining factor in cases of abortion. A dead fetus, whatever the intentions or wishes of the pregnant person, will be recorded by the state as a stillbirth if it was aborted after 24 completed weeks of gestation (Royal College of Obstetricians and Gynaecologists, 2011). Abortion after viability



is allowable in England and Wales in cases of serious fetal anomaly or threat to the health of the pregnant woman (Statham et al., 2006). In such cases, the fetal death will be recorded as stillbirth. This means that the post-viable fetal body brings with it entitlements for related adults who meet the other qualifying requirements. A parental relationship is defined and recorded by the state via the biopolitical technology of stillbirth registration.

Adults may choose not to take up this leave entitlement, but the Stillbirth Register's classification of them as parental subjects, and of the fetal being as a baby, is not negotiable. The linkage of bereavement and employment leave described in relation to spontaneous stillbirth, above, is also implied in this bureaucratic process. While post-viability abortion may be experienced as the loss of a person or baby by the pregnant person and their kin, it also may not be. However, in this case, the truth discourse embedded in the biopolitical technology of stillbirth registration does not leave space for choice. The pregnancy and parenting-related intentions of pregnant women or other people who do not want a parental relationship recorded, who do not want fetal personhood to be bureaucratically produced, or who do not wish to conceptualize the pregnancy ending as a bereavement have no place here. At the same time, those who have a pre-viability abortion, including TOPFA after the routine fetal anomaly ultrasound at 20 weeks, are again excluded from the stillbirth register and its entitlements to employment leave.

### 3.4 | Early pregnancy endings before viability: Live birth as a gateway to entitlements to leave

The interplay between viability and live birth as the boundaries of state-recognized personhood, which entitles people to specific time away from employment and defines them as parents can be seen in relation to those who experience pre-viability pregnancy losses and endings. Reproductive governance draws in the expertise and truth discourse of biomedicine to certify live birth. Certified live births at any stage of pregnancy, including before 24-week viability, whether due to miscarriage or abortion, entitle the gestational parent to Statutory Maternity Leave (SML), Statutory Maternity Pay (SMP), or Maternity Allowance (UK Government, n.d.-a) depending on employment circumstances. The UK definition of live birth at any stage of pregnancy, which should be noted, is still open to interpretation by medical professionals and is set out by Chief Coroner Thomas Teague (2023). All live births, like post-viability stillbirths, also bring entitlement to the new 'Jack's Law' Statutory Parental Bereavement Leave and Parental Bereavement Pay (UK Government, n.d.-b). This applies to all those defined as having parental roles, including non-gestational parents and the partners of parents. In these instances, some miscarriages and abortions are aligned with completed pregnancies and live registered births. Civil registration of the birth and death of a person is again mandated by the state here. It includes entitlements to leave, including the compulsory two or 4 week period for recovery from pregnancy and birth. Subject positions of fetal persons and parents to them are therefore produced by the convergence of biomedicine and law.

In contrast, pregnancy endings before 24 weeks of gestation, such as miscarriage or abortion that do not involve medically defined live birth do not qualify pregnant women or people for specific paid leave from work, or financial support based on pregnancy or maternity. In England and Wales, there is, however, a broad statutory protection of women in pregnancy through the Equality Act 2010. The Act specifically states that a pregnant woman cannot be discriminated against for being pregnant or for 'illness suffered by her' as a result of pregnancy, including as a result of 'decisions made during that period' (i.e., of pregnancy). The protections of pregnancy extend up to 2 weeks after the end of any pregnancy, which does not entitle the pregnant woman to maternity leave. Therefore, pregnancy entitlements that offer protection from employment discrimination in the workplace cover miscarriage and abortion before 24 weeks. Equality Act employment protections include from dismissal, limitation of opportunity, victimization in the workplace, and the right to reasonable adjustments to work. Such protections are specifically for the person ('woman' in the legislation) who has been pregnant.

The concept of reasonable adjustments to work could be used to allow the post-pregnant person some flexibility around absence from employment. If this is not a route to time off after pregnancy ending, there may be entitlement

to sick leave (UK Government, [ND-e](#); Moulder, [2001](#)). However, sick leave beyond seven consecutive days must be certified by a medical professional, and entitlement to statutory sick pay (or any enhanced pay from the employer) depends on employment status (UK Government, [ND-d](#)) with statutory sick pay lasting up to a threshold of 28 weeks. Pregnancy-related sick leave should be accounted for separately by employers so that it does not count toward overall sick leave, for example, for disciplinary purposes. Non-gestating partners do not have any statutory rights here. Before viability, therefore, persons experiencing pregnancy loss and ending are mostly classified as 'sick' with limitations on the possibility of leave from employment compared to those who experience the end of a pregnancy after viability or one with a live birth. There is an assumption that time off for bereavement is only necessary at a certain gestational stage or with live birth, so pregnancy endings that do not fit these truth discourses are excluded.

## 4 | POSSIBILITIES FOR CHANGE

Analysis to this point has focused on the existing reproductive governance of pregnancy endings in relation to leave from employment in England and Wales. Reproductive governance, however, seeks to track shifts in biopolitics in relation to Foucauldian truth discourses, strategies of intervention, and modes of subjectification (Morgan & Roberts, [2012](#)). At present, the employment leave for pregnancy endings is a biopolitical project of reproductive governance in which biomedical truth discourses about gestational time and live birth are enacted through political technologies of civil registration. The paper so far has described how inclusions and exclusions are generated by the operations of biopower in this context.

However, as set out above, discursive truths are being challenged by strategies of intervention in other countries, in other nations of the UK, and by some employers in relation to employment leave for early pregnancy endings. Some of these interventions are based on bereavement discourses, others on ideas of equity and supporting employees in their reproductive endeavors. These new political technologies are also moving into the English and Welsh context. The lack of a general entitlement to UK statutory pregnancy ending leaves before fetal viability at 24 weeks of gestation has recently been criticized on the basis of a lack of acknowledgment of those who consider themselves bereaved (see, e.g., Hodson, [2021](#), Winter [2022](#)). There have also been moves in the UK Parliament to make changes through Private Member's Bills. In October 2021, Labor MP Sarah Owen proposed the Bereavement Leave and Pay (Stillborn and Miscarried Babies) Bill, which called for the extension of two weeks of bereavement leave—currently only available to parents of children who have died—to miscarriage (House of Commons, [2021-22a](#)). This Bill framed pregnancy losses of miscarriage and stillbirth as bereavement rather than illness, requiring bereavement leave not sick leave, but fell when Parliament was prorogued in 2022. Scottish National Party MP Angela Crawley put forward a Miscarriage Leave Bill, which proposed 3 days of paid leave after miscarriages, ectopic, and molar pregnancies (House of Commons, [2021-22b](#), Winter, [2022](#)). The proposed mechanism was an amendment to the Parental Bereavement Pay regulations, clearly situating these types of pregnancy losses within a bereavement discourse. This bill failed to achieve a second reading in March 2023.

### 4.1 | New subject positions in proposals around leave for early pregnancy endings

Analyzing the inclusions and exclusions produced in different forms of pregnancy leave also makes visible potential new subjectivities in relation to proposals to offer employment leave for pregnancy loss or ending in England and Wales. The Australian and New Zealand models, which offer specific paid leave for defined classifications of pregnancy endings such as miscarriage or stillbirth, are effectively an extension of the current UK system of prioritizing some forms of pregnancy ending over others. Both the Australian and New Zealand systems are explicitly based on underpinning discourses of bereavement rather than pregnancy entitlement, also evidenced by their inclusion of partners. However, they do not apply to abortion and termination. This produces new excluded subjectivities—those

who have abortions but experience bereavement. Some pregnancy endings are thus considered more impactful or more meaningful than others as well as more socially validated. At the same time, Australia's unpaid 'special maternity leave' is also problematic because, while it can include termination, it relates this to maternity rather than pregnancy, excluding those who cannot or do not wish to occupy the subject position of mother/gestational parent. Furthermore, the limited time duration of early pregnancy endings in these systems invokes contrast with the much more substantial leave for stillbirth, creating modes of subjectification involving hierarchies of loss.

A connected but different approach uses a discourse of bereavement to justify employment leave, as underway in Northern Ireland and as proposed in the UK Parliament, by extending the extant Statutory Parental Bereavement Leave and Parental Bereavement Pay to before fetal viability. This could include pre-viability pregnancy loss and those families who consider themselves bereaved but are currently excluded from entitlements, which only apply to stillbirth or post-viability termination. It could also include abortion and termination if it was an opt-in system for all pregnancy endings, though abortion including TOPFA has not been explicitly considered to date in these proposals (Winter, 2022). It would potentially be possible to include different routes to bereavement, such as TOPFA, because the model recognizes the intention of the pregnancy. Partners could also be included in such a model. However, potential time away from employment is still likely to be much lower than in stillbirth entitlements. Furthermore, this model is difficult for those who are uncomfortable with a bereaved or parental subject position, perhaps because of their attitudes to the fetal being, or because of their intentions in ending a pregnancy, or for other reasons. There is also a reification of the already dominant discourse that bereavement is the normative response to a pregnancy ending. An extension of bereavement leave situates pregnancy endings as losses. It discounts those pregnancy endings which are not understood to be losses. The focus on partners also being entitled to leave reifies the idea that a second parent has a stake in a pregnancy ending (such as abortion), which has previously been understood to be the decision of the pregnant person alone.

A further contextual point for these proposals based on the extension of bereavement leave is that there is currently no UK statutory bereavement leave related to the death of adults. This means that introducing forms of bereavement leave for prenatal deaths aligns the losses with the loss of children. The application of Statutory Parental Bereavement Leave and Parental Bereavement Pay to stillbirth has already extended this reproductive governance, but moving into the pre-viable period of pregnancy extends state recognition of personhood beyond the current live birth and viability thresholds. It makes pre-viable loss similar to stillbirth, which itself is already understood to be similar to the live birth of a person in terms of the potential entitlements of parents.

An alternative underpinning of leave from employment in pregnancy endings could be the need of the post-pregnant body to recover. The protected period of Statutory Maternity Leave could be a model for this, offering between two and 4 weeks of post-pregnancy leave. The mechanism in England and Wales could be an amendment to the protected characteristic of pregnancy in the Equality Act. This approach would center the physical experiences of the woman or person who has been pregnant and could include all forms of pregnancy ending, including abortion, TOPFA, and pre-viability losses. Those who do not experience bereavement could be included, and there would not be a prioritization of pregnancy bereavement over other forms of bereavement. However, a different exclusion is produced, of non-pregnant persons who may have been involved with the pregnancy and its ending, such as partners, or other non-gestating persons who consider themselves to be in a parental role to the fetus. There might also be the exclusion of persons who are not in the medical system or have not had medically confirmed pregnancies, depending on the bureaucratic mechanism for triggering such employment leave.

## 5 | CONCLUSION

This paper has used the concept of reproductive governance to analyze the shifting biopolitics of employment leave after pregnancy in England and Wales. Reproductive governance (Morgan & Roberts, 2012) pays attention to fields of power through which reproductive behaviors and outcomes are produced, delineated, and controlled by

intersections between a wide range of actors. Its origins in Foucauldian biopolitics (Foucault, 1998, 2003b) means that analytic tools can be deployed to consider the production of truth discourses, concepts and boundaries, strategies of intervention, and modes of subjectification (Lemke, 2001; Rabinow & Rose, 2006). Using these tools, we have shown that current entitlements to post-pregnancy leave in England and Wales are primarily predicated on the state's biopolitical goals of producing new, cared-for citizens. The political technology of civil registration facilitates the implementation of these policies through the production of subjectivities of fetal beings, newborn babies, and parental kin. Furthermore, the fetal and newborn body is prioritized in the determination of benefits for the pregnant woman, because leave entitlements after pregnancy are only partially accrued based on the existence of pregnancy itself and require civil registration to bureaucratically activate such entitlements. Whether a fetal or newborn body is productive of such entitlements is determined by biomedical reproductive governance, through the assessment of fetal viability and live birth. Biomedical assessment of the post-pregnant body and its requirements for time away from employment in cases of early pregnancy ending usually occurs through mechanisms of sickness entitlement rather than pregnancy entitlement. These complex situations result in some women, other persons, and families being excluded from employment leave in the case of early pregnancy endings.

We have described several circumstances in which actual or proposed policies around employment leaves for different pregnancy endings exclude particular persons from support. The categorizing aspects of such policies reflect and extend exclusions already built into pregnancy-related leaves, such as the distinction between pre-viability miscarriage that does not currently accrue leave rights in the UK, and post-viability stillbirth, which carries full and extended maternity entitlements. Besides the use of live birth, viability, and civil registration as the current thresholds for employment leave related to pregnancy, there are issues with policy proposals for employment leaves, which distinguish between abortion and spontaneous pregnancy endings. Overall, basing leave policies around whether a loss is spontaneous or not, such as 'miscarriage leave' policies that do not include abortion, is problematic because it is assumed that the physical effects of abortion are compatible with working, and that women and others in the excluded groups are not entitled to care for the aftereffects of pregnancy and its ending on their bodies. Such targeted policies categorize pregnancy endings in ways which are coterminous with pronatalist or anti-abortion 'moral regimes' (Qvarsebo, 2019).

An alternative model of offering bereavement leave for pre-viability pregnancy endings is also problematic because not everyone is comfortable with the subject position of bereaved parent. This could depend on the nature of their pregnancy ending, or their personal beliefs about what it was which ended. Furthermore, not everyone wants their emotional state made public by a label of bereavement if they are, in fact, grieving a bereavement. Bereavement as the only truth discourse in pregnancy loss or ending is also uncomfortably close to the imposition of a model of non-negotiable fetal personhood, which many people find politically unacceptable. The bereavement model also tends to be conflated with the process by which the pregnancy ended. 'Bereavement' policies are often targeted at miscarriage, and modeled on stillbirth though the support is much more limited. They exclude TOPFA and other forms of abortion in which bereavement or grief may well be felt by the persons involved. As such, they reify distinctions between types of pregnancy ending, embedding moral and emotional subject positions for some people and excluding others because of the way in which their pregnancy ending came about. Those who are excluded and not granted such leaves therefore lose the benefit itself, of time away from work to deal with the pregnancy ending, and are also excluded from the normative moral and truth regimes of pregnancy and bereavement. Basing employment benefits policy on assumed emotional reactions from the persons involved is a highly normative and restrictive intervention in both reproduction and employment.

As a consequence, we end with a call to all policymakers, whether in legislative or employment contexts, to carefully assess the consequences of new proposals around employment leaves for pregnancy ending and pregnancy loss. Navigating the complexities of these situations is difficult, and what appears to be a solution for one group of people may well exclude others. Formulating inclusive and fair proposals for change is likely to require a step away from the moral and emotional discourses, which characterize debates about pregnancy, abortion, and bereavement. Instead, policymakers should perhaps move toward more neutral, open solutions, or a multiplicity of options, which would allow the persons at the center of the early end of a pregnancy more agency and choice.

## ACKNOWLEDGMENTS

The Early Pregnancy Endings and the Workplace project was funded by an Open University Impact Acceleration award between August 2021 and July 2022 and has subsequently received seedcorn funding from The Open University Business School for the academic year 2022–2023. It was reviewed by, and received a favourable opinion, from The Open University Human Research Ethics Committee—HREC reference number: HREC/4201/Brewis. This paper was also supported by the first author's Economic and Social Research Council grants ES/J50015X/1 and ES/X00712X/1 and the Wellcome Center for Cultures and Environments of Health at the University of Exeter.

## DATA AVAILABILITY STATEMENT

Data sharing is not applicable—no new data generated.

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**How to cite this article:** Middlemiss, Aimee L., Ilaria Boncori, Joanna Brewis, Julie Davies, and Victoria L. Newton. 2023. "Employment leave for early pregnancy endings: A biopolitical reproductive governance analysis in England and Wales." *Gender, Work & Organization*: 1–17. <https://doi.org/10.1111/gwao.13055>.