



Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020

No. 105, 2020

**An Act to amend the *Fair Work Act 2009* in relation
to unpaid parental leave, and for related purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation
(<https://www.legislation.gov.au/>)

Contents

1	Short title.....	2
2	Commencement.....	2
3	Schedules.....	2
Schedule 1—Amendments about stillbirth, death and hospitalisation of children		3
	<i>Fair Work Act 2009</i>	3
Schedule 2—Amendments about flexible unpaid parental leave		11
	<i>Fair Work Act 2009</i>	11



Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020

No. 105, 2020

An Act to amend the *Fair Work Act 2009* in relation to unpaid parental leave, and for related purposes

[Assented to 26 November 2020]

The Parliament of Australia enacts:

No. 105, 2020 Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020 1

1 Short title

This Act is the *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	26 November 2020
2. Schedule 1	The day after this Act receives the Royal Assent.	27 November 2020
3. Schedule 2	Immediately after the commencement of the provisions covered by table item 2.	27 November 2020

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments about stillbirth, death and hospitalisation of children

Fair Work Act 2009

1 Section 12

Insert:

stillborn: see subsection 77A(2).

2 Section 70 (note)

Repeal the note, substitute:

Note: The employee's entitlement under this section may be affected by other provisions of this Division.

3 At the end of subsections 71(2) and 72(2)

Add:

Note 3: An employee is taken not to be on unpaid parental leave during a permitted work period that occurs while a child remains in hospital due to premature birth or a birth-related complication or illness (see section 78A).

4 Paragraph 74(5)(a)

Repeal the paragraph, substitute:

- (a) if the leave is birth-related leave:
 - (i) of the date of birth, or the expected date of birth, of the child; and
 - (ii) that paragraph 77A(1)(a) (which deals with the stillbirth of a child) applies in relation to the employee, if relevant; or

5 At the end of subsection 74(6)

Add:

Example: If the application of paragraph 77A(1)(a) (which deals with the stillbirth of a child) is relevant—certification by a medical practitioner of the child as having been delivered.

6 Section 77A

Repeal the section, substitute:

77A Effect of stillbirth or death of child on unpaid parental leave

Stillbirth—preserving entitlement to birth-related leave

- (1) If:
- (a) a child is stillborn; and
 - (b) an employee would have been entitled to unpaid parental leave that is birth-related leave, if the child had been born alive;
- then the employee is taken to be entitled to the unpaid parental leave, despite the stillbirth of the child.
- (2) A *stillborn* child is a child:
- (a) who weighs at least 400 grams at delivery or whose period of gestation was at least 20 weeks; and
 - (b) who has not breathed since delivery; and
 - (c) whose heart has not beaten since delivery.
- (3) The provisions of this Division have effect in relation to the employee as if the birth of a child included the stillbirth of a child.

Note: One effect of this subsection is that if the employee has not given notice in accordance with section 74 before the stillbirth of the child, the employee can do so as soon as practicable (which may be a time after the leave has started).

Stillbirth or death of child—cancelling leave or returning to work

- (4) If a child is stillborn, or dies during the 24-month period starting on the child's date of birth, then an employee who is entitled to a period of unpaid parental leave in relation to the child may:
- (a) before the period of leave starts, give his or her employer written notice cancelling the leave; or
 - (b) if the period of leave has started, give his or her employer written notice that the employee wishes to return to work on a specified day.

- (5) For the purposes of paragraph (4)(b), the specified day must be at least 4 weeks after the employer receives the notice.
- (6) If the employee takes action under subsection (4), the employee's entitlement to unpaid parental leave in relation to the child ends:
 - (a) if the action is taken under paragraph (4)(a)—immediately after the cancellation of the leave; or
 - (b) if the action is taken under paragraph (4)(b)—immediately before the specified day.

Interaction with section 77

- (7) Subsections (4) to (6) do not limit section 77 (which deals with the employee reducing the period of unpaid parental leave with the agreement of the employer).

7 Subsections 78(1) and (1A)

Repeal the subsections, substitute:

- (1) This section applies to an employee who has taken unpaid parental leave in relation to a child if the employee ceases to have any responsibility for the care of the child for a reason other than because the child:
 - (a) is stillborn; or
 - (b) dies during the 24-month period starting on the child's date of birth.

8 After section 78

Insert:

78A Hospitalised children

Agreeing to not take unpaid parental leave for a period while child remains in hospital

- (1) If:
 - (a) a child is required to remain in hospital after the child's birth, or is hospitalised immediately after the child's birth, including because:
 - (i) the child was born prematurely; or

- (ii) the child developed a complication or contracted an illness during the child's period of gestation or at birth; or
 - (iii) the child developed a complication or contracted an illness following the child's birth; and
- (b) an employee, whether before or after the birth of the child, gives notice in accordance with section 74 of the taking of a period of unpaid parental leave (the *original leave period*) in relation to the child;

then the employee may agree with his or her employer that the employee will not take unpaid parental leave for a period (the *permitted work period*) while the child remains in hospital.

Note: Section 344 prohibits the exertion of undue influence or undue pressure on the employee in relation to a decision by the employee whether to agree.

- (2) If the employee and employer so agree, then the following rules have effect:
- (a) the employee is taken to not be taking unpaid parental leave during the permitted work period;
 - (b) the permitted work period does not break the continuity of the original leave period;
 - (c) the employee is taken to have advised the employer, for the purposes of subsection 74(4), of an end date for the original leave period that is the date on which that period would end if it were extended by a period equal to the permitted work period.

Note: One effect of paragraph (b) is that, if the employee takes periods of unpaid parental leave either side of the permitted work period, the periods are still treated as a single continuous period for the purposes of sections 71 and 72.

When permitted work period must start

- (3) The permitted work period must start after the birth of the child.

When permitted work period ends

- (4) The permitted work period ends at the earliest of the following:
- (a) the time agreed by the employee and employer;

- (b) the end of the day of the child’s first discharge from hospital after birth;
- (c) if the child dies before being discharged—the end of the day the child dies.

Only one permitted work period allowed

- (5) Only one period may be agreed to under subsection (1) for which the employee will not take unpaid parental leave in relation to the child.

Evidence

- (6) The employee must, if required by the employer, give the employer evidence that would satisfy a reasonable person of either or both of the following:
 - (a) that paragraph (1)(a) applies in relation to the child;
 - (b) that the employee is fit for work.
- (7) Without limiting subsection (6), an employer may require the evidence referred to in that subsection to be a medical certificate.

Note: Personal information given to an employer under this section may be regulated under the *Privacy Act 1988*.

9 Subsection 79(2)

Repeal the subsection, substitute:

- (2) While an employee is taking unpaid parental leave, the employee is not entitled to take:
 - (a) paid personal/carer’s leave; or
 - (b) compassionate leave, unless the permissible occasion is the stillbirth or death of the child in relation to whom the employee is taking unpaid parental leave.

10 Paragraph 80(1)(b)

Repeal the paragraph, substitute:

- (b) all of the following apply:
 - (i) she has been pregnant;
 - (ii) the pregnancy ends after a period of gestation of at least 12 weeks otherwise than by the birth of a living child;

- (iii) the child is not stillborn.

11 Subsection 80(1) (after note 1)

Insert:

Note 1A: If the child is stillborn, the female employee may be entitled to unpaid parental leave (see section 77A).

12 Paragraphs 84A(b) and (c)

Repeal the paragraphs, substitute:

- (b) of the rights the employee taking unpaid parental leave has under:
 - (i) subsections 77A(4) and (5) (which provide a right to cancel the leave or end the leave early if the child is stillborn or dies within 24 months); and
 - (ii) section 84 (which deals with the return to work guarantee); and

13 Section 104

Omit all the words after “(a *permissible occasion*)”, substitute:

when:

- (a) a member of the employee’s immediate family or a member of the employee’s household:
 - (i) contracts or develops a personal illness that poses a serious threat to his or her life; or
 - (ii) sustains a personal injury that poses a serious threat to his or her life; or
 - (iii) dies; or
- (b) a child is stillborn, where the child would have been a member of the employee’s immediate family, or a member of the employee’s household, if the child had been born alive.

14 Paragraph 105(1)(b)

After “household”, insert “, or the stillbirth of the child,”.

15 In the appropriate position in Schedule 1

Insert:

Part 9—Amendments made by the Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020

41 Definitions

In this Part:

amending Act means the *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020*.

Schedule 1 commencement day means the day on which Schedule 1 to the amending Act commences.

42 Amendments about stillbirth, death and hospitalisation of children

Unpaid parental leave

- (1) The amendments of Division 5 (parental leave and related entitlements) of Part 2-2 made by Schedule 1 to the amending Act apply in relation to the stillbirth or death of a child on or after the Schedule 1 commencement day, subject to subclauses (2) to (4).
- (2) Section 78A (hospitalised children), as inserted by Schedule 1 to the amending Act, applies in relation to a child born on or after the Schedule 1 commencement day.
- (3) The amendment of section 84A (replacement employees) made by Schedule 1 to the amending Act applies if:
 - (a) an employer engages the replacement employee on or after the Schedule 1 commencement day; and
 - (b) the child in relation to whom the other employee is taking unpaid parental leave was not stillborn, or did not die, before that day.

Unpaid special maternity leave

- (4) The amendments of section 80 (unpaid special maternity leave) made by Schedule 1 to the amending Act apply to a pregnancy that ends on or after the Schedule 1 commencement day.

Compassionate leave

- (5) The amendments of Subdivision C (compassionate leave) of Division 7 of Part 2-2 made by Schedule 1 to the amending Act apply in relation to a permissible occasion that occurs on or after the Schedule 1 commencement day.

Schedule 2—Amendments about flexible unpaid parental leave

Fair Work Act 2009

1 Section 12

Insert:

flexible day: see subsection 74(3C).

flexible unpaid parental leave: see subsection 72A(1).

notional flexible period: see subsection 72A(6).

2 Section 12 (definition of *pre-parental leave position*)

Repeal the definition, substitute:

pre-parental leave position: an employee’s ***pre-parental leave position***, in relation to a particular period of unpaid parental leave, is:

- (a) unless paragraph (b) applies, the position the employee held before starting the period of unpaid parental leave; or
- (b) if, before starting the period of unpaid parental leave, the employee:
 - (i) was transferred to a safe job because of her pregnancy; or
 - (ii) reduced her working hours due to her pregnancy; the position the employee held immediately before that transfer or reduction.

3 Subsection 69(2) (note)

Omit all the words after “(for example)”, substitute “complying with a notice or evidence requirement of section 74 in relation to the first employer”.

4 Subsection 71(2) (notes 2 and 3)

Repeal the notes, substitute:

Note 2: For provisions affecting the rule in this subsection, see:

- (a) subsection 72A(11) (flexible unpaid parental leave); and
- (b) subsection 73(4) (pregnant employee may be required to take unpaid parental leave within 6 weeks before the birth); and
- (c) paragraph 78A(2)(b) (permitted work periods while child is hospitalised); and
- (d) subsection 79A(1) (keeping in touch days).

5 Subsection 72(2) (notes 2 and 3)

Repeal the notes, substitute:

Note 2: For provisions affecting the rule in this subsection, see:

- (a) subsection (6) (concurrent leave); and
- (b) subsection 72A(11) (flexible unpaid parental leave); and
- (c) subsection 73(4) (pregnant employee may be required to take unpaid parental leave within 6 weeks before the birth); and
- (d) paragraph 78A(2)(b) (permitted work periods while child is hospitalised); and
- (e) subsection 79A(1) (keeping in touch days).

6 Subsection 72(3)

After “is birth-related leave”, insert “other than flexible unpaid parental leave”.

7 Paragraph 72(3)(a)

Omit “first”.

8 Subparagraph 72(3)(a)(i)

Omit “the member of the employee couple whose period of leave starts first”, substitute “the employee”.

9 Paragraph 72(3)(b)

Repeal the paragraph, substitute:

- (b) any period of unpaid parental leave (other than flexible unpaid parental leave) that the other employee takes must start immediately after the end of the first employee’s period of leave taken in accordance with paragraph (a) (or that period as extended under section 75 or 76).

10 Subsection 72(4)

After “is adoption-related leave”, insert “other than flexible unpaid parental leave”.

11 Paragraph 72(4)(b)

Repeal the paragraph, substitute:

- (b) any period of unpaid parental leave (other than flexible unpaid parental leave) that the other employee takes must start immediately after the end of the first employee's period of leave taken in accordance with paragraph (a) (or that period as extended under section 75 or 76).

12 Paragraph 72(6)(a)

Omit "that the employee must take his or her leave in a single continuous period (see subsection (2))", substitute "in subsection (2) that the employee must take his or her leave in a single continuous period".

13 Paragraph 72(6)(b)

Omit "about when the employee's period of unpaid parental leave must start (see subsection (3) or (4))", substitute "in subsections (3) and (4) about when the employee's period of unpaid parental leave must start".

14 At the end of section 72

Add:

- (7) To avoid doubt, if the other employee takes flexible unpaid parental leave during the first employee's period of leave, the other employee's leave is taken not to be concurrent leave.

Note: The combined effect of this subsection, paragraph (5)(a) and subsection 72A(9) is that members of an employee couple cannot take longer than 8 weeks of unpaid parental leave at the same time, whether the leave is taken under this section (including as concurrent leave) or as flexible unpaid parental leave.

15 After section 72

Insert:

72A Flexible unpaid parental leave

Taking up to 30 days' leave during 24 months starting on date of birth or day of placement

- (1) An employee may take up to 30 days of unpaid parental leave (***flexible unpaid parental leave***) during the 24-month period starting on the date of birth or day of placement of the child if the requirements of this section are satisfied in relation to the leave.

Note 1: The flexible unpaid parental leave is unpaid parental leave and so comes out of the employee's entitlement to 12 months of unpaid parental leave under section 70.

Note 2: The number of days of flexible unpaid parental leave that the employee takes must not be more than the number of flexible days notified to the employer under subsection 74(3C) (subject to any agreement under subsection 74(3D)).

- (2) Flexible unpaid parental leave is available in full to part-time and casual employees.

How flexible unpaid parental leave may be taken

- (3) The employee must take the flexible unpaid parental leave as:
 - (a) a single continuous period of one or more days; or
 - (b) separate periods of one or more days each.

Effect of taking unpaid parental leave under other provisions

- (4) The employee may take the flexible unpaid parental leave whether or not the employee has taken unpaid parental leave under another provision of this Division in relation to the child.
- (5) However, the employee may take flexible unpaid parental leave after taking one or more periods of unpaid parental leave under another provision of this Division only if the total of those periods (disregarding any extension under section 76) is no longer than 12 months, less the employee's notional flexible period.

Meaning of notional flexible period

- (6) An employee's ***notional flexible period*** is the period during which the employee would be on flexible unpaid parental leave if the

employee took leave for all the employee's flexible days in a single continuous period.

- (7) For the purposes of subsection (6), assume that:
- (a) the employee ordinarily works each day that is not a Saturday or a Sunday; and
 - (b) there are no public holidays during the period.

Entitlement to take unpaid parental leave under other provisions ends on taking flexible unpaid parental leave

- (8) The employee's entitlement to any unpaid parental leave in relation to the child that is not flexible unpaid parental leave ends on the first day the employee takes flexible unpaid parental leave.

Note: This means that if the employee is to take unpaid parental leave under another provision of this Division, the leave must be taken before the employee takes the flexible unpaid parental leave.

Members of employee couples

- (9) A member of an employee couple (the **first employee**) may take flexible unpaid parental leave on the same day as the other member of the couple (the **other employee**) is taking unpaid parental leave only if the total of all periods of unpaid parental leave the first employee takes at the same time as the other employee is no longer than 8 weeks.

Note: The unpaid parental leave making up the first employee's total could be leave the first employee has taken under section 72 (including concurrent leave) or flexible unpaid parental leave.

Multiple births

- (10) An employee is not entitled to take flexible unpaid parental leave in relation to a child if:
- (a) the child and another child:
 - (i) are born during the same multiple birth; or
 - (ii) are both placed with the employee for adoption and have the same day of placement; and
 - (b) the employee takes flexible unpaid parental leave in relation to the other child.

Interaction with sections 71 and 72

- (11) Flexible unpaid parental leave taken by an employee is an exception to the rules in sections 71 and 72 about:
- (a) taking the employee's unpaid parental leave in a single continuous period; and
 - (b) when the employee's period of unpaid parental leave must start.

16 At the end of subsection 73(3)

Add:

Note: The combined effect of this subsection and subsection 72A(1) is that the employer cannot require the employee to take any part of the period of leave as flexible unpaid parental leave.

17 Subsection 73(4)

Repeal the subsection (not including the heading or the note), substitute:

- (4) The period of leave is an exception to the rules in sections 71 and 72 about:
- (a) taking the employee's unpaid parental leave in a single continuous period; and
 - (b) when the employee's period of unpaid parental leave must start.

18 Subsection 74(1) (heading)

Repeal the heading, substitute:

General requirement to give notice of taking leave

19 Subsection 74(1)

After "or 72", insert ", or flexible unpaid parental leave,".

20 Before subsection 74(2)

Insert:

Notice requirements—leave to be taken under section 71 or 72

21 Subsection 74(2)

Omit “The employee”, substitute “If the leave is to be taken under section 71 or 72, the employee”.

22 After subsection 74(3)

Insert:

Notice requirements—flexible unpaid parental leave

- (3A) If the leave is flexible unpaid parental leave, the employee must give the notice to the employer:
- (a) in the case where the employee also takes unpaid parental leave (the **original leave**) under section 71 or 72:
 - (i) at the same time as the employee gives notice in accordance with subsection (2) in relation to the original leave, unless subparagraph (ii) applies; or
 - (ii) if the employee takes more than one period of leave under section 72—at the same time as the employee gives notice in accordance with subsection (2) in relation to the first of those periods of leave; or
 - (b) otherwise—at least 10 weeks before starting the flexible unpaid parental leave.
- (3B) However, the notice may be given at any later time if the employer agrees.
- (3C) The notice must specify the total number of days (**flexible days**) of flexible unpaid parental leave that the employee intends to take in relation to the child.
- (3D) If the employer agrees, the employee may:
- (a) reduce the number of flexible days, including by reducing the number of flexible days to zero; or
 - (b) increase the number of flexible days, but not so as to increase the number of flexible days above 30.

23 Subsection 74(4) (heading)

Repeal the heading, substitute:

Taking leave under section 71 or 72—confirming or changing intended start and end dates

24 Subsection 74(4)

Omit “At least”, substitute “If the leave is to be taken under section 71 or 72, then at least”.

25 After subsection 74(4A)

Insert:

Taking flexible unpaid parental leave—notifying days on which employee will take leave

- (4B) The employee must give the employer written notice of a flexible day on which the employee will take flexible unpaid parental leave:
- (a) at least 4 weeks before that day; or
 - (b) if that is not practicable—as soon as practicable (which may be a time after the leave has started).
- (4C) If the employer agrees, the employee may change a day on which the employee takes flexible unpaid parental leave from a day specified in a notice under subsection (4B).

26 Subsection 74(5) (at the end of the heading)

Add “*requirements*”.

27 Subsection 74(7)

After “or 72”, insert “, or flexible unpaid parental leave,”.

28 Paragraph 75(1)(a)

After “(the *original leave period*)”, insert “under section 71 or 72”.

29 At the end of subsection 75(2)

Add:

- ; (d) if the employee has given notice in accordance with subsection 74(3A) or (3B) of the taking of flexible unpaid parental leave—a period equal to the employee’s notional flexible period.

30 Subsection 76(1)

After “takes unpaid parental leave”, insert “under section 71 or 72”.

31 Paragraphs 76(6)(a) and (b)

Repeal the paragraphs, substitute:

- (a) the request must specify:
 - (i) any amount of unpaid parental leave that the other member of the employee couple has taken, or will have taken, in relation to the child before the extension starts; and
 - (ii) if the other member has given notice in accordance with subsection 74(3A) or (3B) of the taking of flexible unpaid parental leave—the number of flexible days for the other member that will not have been taken before the extension starts;
- (b) the period of the extension cannot exceed 12 months, less any periods of the following kinds:
 - (i) any period of unpaid parental leave, other than flexible unpaid parental leave, that the other member of the employee couple has taken, or will have taken, in relation to the child before the extension starts;
 - (ii) if subparagraph (a)(ii) applies—a period equal to the other member’s notional flexible period;

32 At the end of section 79A

Add:

- (5) Subsection (1) does not apply in relation to the employee on and after the first day on which the employee takes flexible unpaid parental leave in relation to the child.

33 Subsection 83(1)

Omit “(1)”.

34 Paragraph 83(1)(a)

Repeal the paragraph, substitute:

- (a) an employee is taking a period of unpaid parental leave, other than flexible unpaid parental leave; and
-

35 Subsection 83(2)

Repeal the subsection.

36 Section 84

After “On ending”, insert “a period of”.

37 Section 84A

Before “Before an employer”, insert “(1)”.

38 At the end of section 84A

Add:

- (2) Subsection (1) does not apply in relation to the taking of flexible unpaid parental leave.

39 Section 106E

Omit “section 85”, substitute “sections 72A and 85”.

40 Clause 41 of Schedule 1

Insert:

Schedule 2 commencement day means the day on which Schedule 2 to the amending Act commences.

41 At the end of Part 9 of Schedule 1

Add:

43 Amendments about flexible unpaid parental leave

Application provision

- (1) The amendments of Division 5 of Part 2-2 made by Schedule 2 to the amending Act apply in relation to a child if the child’s date of birth, or day of placement, is on or after the Schedule 2 commencement day.

Transitional provision—giving notice of taking flexible unpaid parental leave

- (2) If:
- (a) before the Schedule 2 commencement day, an employee gives notice to an employer in accordance with subsection 74(1) of the taking of a period (the ***initial leave period***) of unpaid parental leave under section 71 or 72 in relation to a child; and
 - (b) the child’s date of birth or day of placement is on or after the Schedule 2 commencement day;
- then the employee may, during the 1-month period starting on the Schedule 2 commencement day, give the employer written notice of the taking of flexible unpaid parental leave.
- (3) The notice under subclause (2) must specify the number of days of flexible unpaid parental leave that the employee intends to take in relation to the child.
- (4) The employee may, in the notice under subclause (2), advise the employer of a change to the end date of the initial leave period, but only if the change is necessary to allow the employee to take the flexible unpaid parental leave for the number of days referred to in subclause (3).
- (5) If the employee gives notice in accordance with subclauses (2) and (3), then:
- (a) the notice is taken to be a notice given under subsection 74(1) in relation to the taking of flexible unpaid parental leave; and
 - (b) subsections 74(3A) and (3B) are taken to have been complied with in relation to the giving of that notice; and
 - (c) if the notice contains advice as referred to in subclause (4)—the employee is taken to have complied with subsection 74(4) in relation to the initial leave period.
- (6) The employee cannot take flexible unpaid parental leave before the end of 4 weeks starting on the day the notice under subclause (2) is given, despite subsection 74(4B).

*[Minister's second reading speech made in—
House of Representatives on 3 September 2020
Senate on 9 November 2020]*

(61/20)

22 *Fair Work Amendment (Improving Unpaid Parental Leave for Parents
of Stillborn Babies and Other Measures) Act 2020* No. 105, 2020