

EXPLANATORY STATEMENT

PAID PARENTAL LEAVE AMENDMENT RULES 2012 (No. 1)

Summary

The *Paid Parental Leave Amendment Rules 2012 (No. 1)* (the Amendment Rules) amend the *Paid Parental Leave Rules 2010* (the PPL Rules) which were made under section 298 of the *Paid Parental Leave Act 2010* (the Act).

Section 298 of the Act provides that the PPL Rules are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Background

In the general case, one of the conditions for a person to be eligible for parental leave pay on a day is that the person has not returned to work (subsection 31(2) of the Act). A person will also be eligible for parental leave pay on a day under subsection 31(4) of the Act if they satisfy the conditions prescribed by the PPL rules (although in the case of a primary claimant, they will also need to satisfy the work, income, and Australian residency tests). The conditions prescribed by the PPL rules include alternative conditions to the condition that the person has not returned to work. For example, if a defence force member or law enforcement officer returns to work as a result of a compulsory recall to duty, that return to work will not affect their eligibility for parental leave pay.

Purpose

The Amendment Rules are being made to include additional alternative eligibility conditions to the condition that the person has not returned to work and make changes to exceptional circumstances provisions.

One alternative eligibility condition introduced by the Amendment Rules is intended to address the exceptional circumstance of a child being required to remain in hospital, or admitted to hospital if born elsewhere, immediately after their birth because of premature birth, or complications or illness that are associated with their birth or gestation period, or contracted or developed following their birth. This would allow the birth mother to return to work whilst the child is hospitalised without affecting her eligibility for parental leave pay, provided this occurs no earlier than 2 weeks after the child's birth, and only during the period the child remains in hospital. This alternative eligibility condition also extends to the birth father, partner of the birth mother and partner of the birth father if they return to work whilst the child is hospitalised.

The intention of this amendment is to allow parents to take PPL at the time their baby is discharged from hospital and they are able to care for the baby at home.

The other alternative eligibility condition introduced by the Amendment Rules addresses the exceptional circumstance of a person being required to perform paid work on a day in order to comply with the requirements of a summons or other compulsory process of a court, tribunal or other body, to give evidence and the like, or to produce documents or other things. It is intended that the performance of paid work on a day for this reason should not affect the person's eligibility for parental leave pay.

The Amendment Rules also make changes to the criteria a person needs to satisfy to make an effective claim for parental leave pay in exceptional circumstances involving a surrogacy arrangement to align with other family assistance legislation.

These changes are being made in response to issues raised by stakeholders and parents accessing PPL. The Amendment Rules also clarify the operation of some existing provisions in the PPL Rules and correct some minor typographical errors in the PPL rules.

Explanation of the Provisions

Rule 1 Name of Rules

Rule 1 states the name of these rules, which is the *Paid Parental Leave Amendment Rules 2012 (No. 1)* (the Amendment Rules).

Rule 2 Commencement

Rule 2 provides that Schedule 1 of the Amendment Rules (which contains the substantive amendments) commences on the day after these Rules are registered.

Rule 3 Amendment of *Paid Parental Leave Rules 2010*

Rule 3 provides that Schedule 1 amends the *Paid Parental Leave Rules 2010* (the PPL Rules).

Schedule 1 Amendments

Clauses 1 and 2 repeal paragraph 2.2(1)(b) of the PPL Rules and substitute new paragraph 2.2(1)(b) and subrule 2.2(1A).

This amendment clarifies the intended operation of, and interaction between, the various exceptions to the condition that a person claiming parental leave pay as a primary claimant has not returned to work. It also introduces two additional exceptions.

Paragraph 2.2(1)(b) states one basic condition that a person who is a primary claimant must satisfy to be eligible for parental leave pay is that the person has not returned to work. Subrule 2.2(1A) states various circumstances in which a return to work is disregarded for the purpose of paragraph 2.2(1)(b).

Paragraph 2.2(1A)(a) corresponds to the exception previously contained in subparagraph 2.2(1)(b)(ii). It provides that if the person satisfies rule 2.4, a return to work during the period the child is not in the person's care is disregarded.

Paragraph 2.2(1A)(b) corresponds to the exception previously contained in subparagraph 2.2(1)(c)(iii). It applies to persons who are defence force members or law enforcement officers and provides that a return to work because of a compulsory recall to duty is disregarded.

Paragraph 2.2(1A)(c) provides for a new exception to the return to work condition. It applies where a person satisfies the requirement of rule 2.5A (inserted by clause 4 of this Schedule). This has the effect of disregarding a return to work where the return to work is because the person is required to perform paid work in order to comply with the requirements of a summons or other compulsory process.

Paragraph 2.2(1A)(d) provides for another new exception to the return to work condition. It applies where a person satisfies the requirements of new rule 2.5B (inserted by clause 4 of this Schedule), which applies in certain circumstances where the child is hospitalised immediately after birth. If new rule 2.5B applies, paragraph 2.2(1A)(d) provides that a return to work by the birth mother during the period starting on the day that is 14 days after the day the child is born and ending on the day the child is discharged from hospital is disregarded.

Paragraph 2.2(1A)(e) corresponds to the exception previously contained in subparagraph 2.2(1)(b)(i). It provides for a return to work in circumstances where paragraph 2.6(b) applies to be disregarded.

Clause 3 is consequential to clauses 1 and 2.

Clause 4 inserts new rules 2.5A and 2.5B after rule 2.5 of the PPL Rules.

New rule 2.5A sets out the requirement that a person who is a primary claimant must satisfy for the purposes of new paragraph 2.2(1A)(c). Under new rule 2.5A, the requirement is that the person has performed paid work on a day because they have to comply with the requirements of a summons or other compulsory process to appear to give evidence or information, or to produce documents or other things. It is intended that the reference to 'summons or other compulsory process' would include compulsory processes of courts, tribunals and other bodies such as commissions, including subpoenas, summonses and notices, under which a person is required to appear to give evidence or information, for examination under oath or affirmation, or to answer questions, or to produce documents, writings, records or other things.

New rule 2.5B sets out the requirements that a person must satisfy for the purposes of new paragraph 2.2(1A)(d). Firstly, the person must be the birth mother of the child. Secondly, the person's child must be required to remain in hospital (or, in a case where the child is born elsewhere, is hospitalised immediately after their birth), for one or more of the following reasons: (i) the child was born prematurely; (ii) the child developed a complication or contracted an illness during their period of gestation or at birth; or (iii) the child developed a complication or contracted an illness following their birth.

Clauses 5 and 6 repeal paragraph 2.8(2)(e) of the PPL Rules and substitute new paragraph 2.8(2)(e) and subrule 2.8(2A).

This amendment clarifies the intended operation of, and interaction between, the various exceptions to the condition that a person claiming parental leave pay as a secondary claimant in normal circumstances has not returned to work. It also introduces two additional exceptions.

Paragraph 2.8(2)(e) states one basic condition that a person who is a secondary claimant in normal circumstances must satisfy to be eligible for parental leave pay is that the person has not returned to work. Subrule 2.8(2A) states various circumstances in which a return to work is disregarded for the purpose of paragraph 2.8(2)(e).

Paragraph 2.8(2A)(a) corresponds to the exception previously contained in subparagraph 2.8(2)(e)(ii). It provides that if the person satisfies rule 2.10, a return to work during the period the child is not in the person's care is disregarded.

Paragraph 2.8(2A)(b) corresponds to the exception previously contained in subparagraph 2.8(2)(e)(iii). It applies to persons who are defence force members or law enforcement officers and provides for a return to work because of a compulsory recall to duty to be disregarded.

Paragraph 2.8(2A)(c) provides for a new exception to the return to work condition. It applies where a person satisfies the requirement of rule 2.11A (inserted by clause 8 of this Schedule). This has the effect of disregarding a return to work where the return to work is because the person is required to perform paid work in order to comply with the requirements of a summons or other compulsory process.

Paragraph 2.8(2A)(d) provides for another new exception to the return to work condition. It applies where a person satisfies the requirements of new rule 2.11B (inserted by clause 8 of this Schedule), which applies in certain circumstances where the child is hospitalised immediately after birth. If new rule 2.11B applies, paragraph 2.8(2A)(d) provides for a return to work during the period the child remains in hospital to be disregarded.

Clause 7 is consequential to clauses 5 and 6.

Clause 8 inserts new rules 2.11A and 2.11B after rule 2.11 of the PPL Rules.

New rule 2.11A is similar to new rule 2.5A (inserted by clause 4 of this Schedule), but applies to secondary claimants in normal circumstances.

New rule 2.11B is similar to new rule 2.5B (inserted by clause 4 of this Schedule), but applies to the father of the child, a partner of the birth mother or a partner of the father of the child.

Clauses 9 and 10 repeal paragraph 2.12(2)(c) of the PPL Rules and substitute new paragraph 2.12(2)(c) and subrule 2.12(2A).

This amendment clarifies the intended operation of and interaction between the various exceptions to the condition that a person claiming parental leave pay as a secondary claimant in exceptional circumstances has not returned to work. It also introduces two additional exceptions.

Paragraph 2.12(2)(c) states one basic condition that a person who is a secondary claimant in exceptional circumstances must satisfy to be eligible for parental leave pay is that the person has not returned to work. Subrule 2.12(2A) states various circumstances in which a return to work is disregarded for the purpose of paragraph 2.12(2)(c).

Paragraph 2.12(2A)(a) corresponds to the exception previously contained in subparagraph 2.12(2)(c)(ii). It provides that if the person satisfies rule 2.14, a return to work during the period the child is not in the person's care is disregarded.

Paragraphs 2.12(2A)(b) and (c) correspond to the exceptions previously contained in subparagraph 2.12(2)(c)(iii). Paragraphs 2.12(2A)(b) applies to persons who are defence force members or law enforcement officers and provides for a return to work because of a compulsory recall to duty to be disregarded. Paragraph 2.12(2A)(c) applies where a person returns to work while care arrangements for the child are being settled and provides for such a return to work to be disregarded.

Paragraph 2.12(2A)(d) provides for a new exception to the return to work condition. It applies where a person satisfies the requirement of rule 2.16A (inserted by clause 14 of this Schedule). This has the effect of disregarding a return to work where the return to work is because the person is required to perform paid work in order to comply with the requirements of a summons or other compulsory process.

Clause 11 is consequential to clauses 9 and 10.

Clause 12 makes a minor amendment to paragraph 2.15(a) of the PPL Rules to include a law enforcement officer within the scope of rule 2.15. This is for consistency with rules setting out requirements for primary and secondary claimants.

Clause 13 is consequential to clauses 9 and 10.

Clause 14 inserts new rule 2.16A after rule 2.16 of the PPL Rules. New rule 2.16A is similar to new rules 2.5A and 2.11A, but applies to secondary claimants in exceptional circumstances.

Clauses 15 and 16 make amendments to rule 2.18 that are similar to those made by clauses 9 and 10 to rule 2.12. These amendments apply to tertiary claimants.

Clause 17 and 18 are consequential to clauses 15 and 16.

Clause 19 inserts new rule 2.22A after rule 2.22 of the PPL Rules. New rule 2.22A is similar to new rules 2.5A, 2.11A and 2.16A, but applies to tertiary claimants.

Clause 20 is consequential to clause 21.

Clause 21 inserts new subrule 2.28(3) which provides clarification that rule 2.28 does not apply to rule 2.30, which deals with exceptional circumstances for parental leave pay involving surrogacy arrangements.

Clause 22 repeals rule 2.30 and substitutes new rule 2.30. This amendment makes changes to the criteria a person needs to satisfy to make an effective claim for parental leave pay in exceptional circumstances involving a surrogacy arrangement. The requirement for a person to obtain a court order under a law prescribed for the purposes of section 60HB of the *Family Law Act 1975* or under a law of a State or Territory transferring the parentage of the child to the claimant is removed by the changes to this rule.

Subrule 2.30(1) provides that rule 2.30 applies to a person who is the primary carer of a child born of a surrogacy arrangement. Section 47 of the *Paid Parental Leave Act 2010* provides that a person is the primary carer of a child on a day in the person's reference period if the child is in the person's care in that period and the person meets the child's physical needs more than anyone else in that period.

Subrule 2.30(2) provides that the circumstances for a person to whom this rule applies are as follows: the person has, and is likely to continue to have, care of the child for at least 26 weeks and that the person became, or will become, the child's primary carer before the child's first birthday. The person must also satisfy the circumstances in subrule 2.30(3).

Subrule 2.30(3) provides that a person satisfies this subrule if the Secretary is satisfied on reasonable grounds that the person is the primary carer of a child born of a surrogacy arrangement and it is in the interests of the child for the person to care for the child. 'The interests of the child' is defined in subrule 2.30(4).

Subrule 2.30(4) provides that in considering what is in 'the interests of the child' for the purposes of paragraph 2.30(3)(b), the Secretary is to consider the following factors: whether the person intends to be the long-term primary carer of the child; whether the surrogate birth mother has relinquished care of the child and any other matter that the Secretary considers relevant to a proper consideration of what is in the interests of the child.

Clause 23 corrects a typographical error in subrule 3.5(1) of the PPL rules.

Clause 24 corrects a typographical error in subrule 4.2(1) of the PPL rules.

Consultation

The Department of Human Services was consulted on the Amendment Rules, particularly in relation to claims being held for assessment, pending the change to Rule 2.30. The Attorney-General's Department was also consulted. As the changes are minor and beneficial to parents accessing the Paid Parental Leave scheme in exceptional circumstances, further consultation on the Amendment Rules was not considered necessary or appropriate in the timeframe.

Regulatory Impact Analysis

The impact of the Amendment Rules is negligible. The Amendment Rules will only affect a few people in exceptional circumstances. They are beneficial in nature for claimants of parental leave pay. No adverse impacts on employers or other stakeholders are expected.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Paid Parental Leave Act 2010* (the Act) provides for the Paid Parental Leave scheme, a national Government-funded payment to complement the entitlement to unpaid leave under the National Employment Standards (NES) in the *Fair Work Act 2009*. The scheme provides eligible birth mothers and adoptive parents with up to 18 weeks of parental leave pay at the rate of the National Minimum Wage. From 1 January 2013, the scheme is being expanded to include a new payment for dads and partners. Dad and Partner Pay will provide eligible working dads or partners with two weeks of pay at the rate of the National Minimum Wage.

The *Paid Parental Leave Rules 2010* (PPL Rules) complement the Act by making provision for certain people in less usual or exceptional circumstances to be eligible for parental leave pay when they would not otherwise have entitlement under the Act.

The Act provides that, subject to the PPL Rules, one of the conditions for a person to be eligible for parental leave pay is that the person has not returned to work.

The *Paid Parental Leave Amendment Rules 2012 (No. 1)* (the Amendment Rules) include additional alternative eligibility conditions to prevent loss of eligibility for parental leave pay in two exceptional circumstances. The first exceptional circumstance addressed by the Amendment Rules is where a child is required to remain in hospital, or is admitted to hospital if born elsewhere, immediately after their

birth and the birth mother and certain other PPL claimants perform paid work while the child is hospitalised. The second exceptional circumstance addressed by the Amendment Rules is where a person is required to perform paid work on a day in order to comply with the requirements of a summons or other compulsory process of a court, tribunal or other body. For further details see the Background and Purpose sections of this Explanatory Statement.

The Amendment Rules also change the criteria a person needs to satisfy to make an effective claim for parental leave pay in exceptional circumstances involving a surrogacy arrangement. The changes remove the requirement for a person to obtain a court order transferring the parentage of the child to the claimant.

Human rights implications

Providing parental leave pay for people in exceptional circumstances is likely to engage rights to work contained in article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), rights to health contained in article 10 of the ICESCR, the right to social security contained in article 9 of the ICESCR and article 26 of the Convention on the Rights of the Child (CRC), as well as rights of parents and children contained in article 18 of the CRC.

Rights to work

Article 6(1) of ICESCR recognises “the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.” That right requires a country to “take appropriate steps to safeguard this right.” The Amendment Rules promote the right to work by ensuring that a mother and certain other PPL claimants eligible for parental leave pay who choose to work while her newborn is hospitalised, can do so without losing her PPL eligibility.

Rights to health

Article 10(2) of the ICESCR states that “special protection should be accorded to mothers during a reasonable period before and after childbirth.” The Amendment Rules allow a birth mother to return to work where her child is hospitalised and still be eligible for parental leave pay. However, clause 3 of the Amendment Rules ensures that this is only allowed during a period that is 14 days after the child is born. This promotes the right to health by preventing a mother from returning to work within two weeks after the birth.

The right to social security

Article 9 of the ICESCR recognises “the right of everyone to social security”. That right requires a social security system be established and that a country must, within its maximum available resources, ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. Article 26 of the CRC ensures that right to “every child” and requires that “the benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child”.

Providing parental leave pay for people in exceptional circumstances where they choose to work while their newborn is hospitalised or where they are required to work under a summons or other compulsory process, promotes the right to social security by extending eligibility for PPL in situations where they would not otherwise have entitlement under the primary legislation.

The amendments to allow a person to work while their newborn is hospitalised, without losing eligibility for parental leave pay, applies to birth mothers, birth fathers, and partners of the birth mother or birth father. The amendments do not apply to adoptive parents. To be eligible for parental leave pay, adoptive parents are required to meet eligibility requirements from the placement of the child. The timing of the placement can be arranged to occur after the baby is discharged from the hospital. The amendments also do not extend to secondary or tertiary claimants in exceptional circumstances as defined in the PPL Rules. Under the PPL Rules secondary and tertiary claimants in exceptional circumstances include people who take on care of a child when the birth mother or father is incapable of caring for the child for at least 26 weeks. The existing PPL Rules already allow secondary or tertiary claimants in these circumstances to perform paid work while the care arrangement is being settled, and therefore adequately addresses their right to social security.

The amendments to the criteria a person needs to satisfy to make a claim for parental leave pay in exceptional circumstances involving a surrogacy arrangement include the requirement that parental leave pay will only be paid when the Secretary is satisfied on reasonable grounds that it is in the interests of the child for the person to care for the child. The amendments promote the right to social security as the Secretary is to consider matters which are relevant to a proper consideration of what is in the interests of the child which encompass the circumstances of the child as well as the persons having responsibility for the maintenance of the child.

Rights of parents and children

Article 18 of the CRC requires that “States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child”. In guaranteeing and promoting those rights, “States Parties shall render appropriate assistance to the parents and legal guardians in the performance of their child-rearing responsibilities”. By extending parental leave pay eligibility in certain exceptional circumstances, the Amendment Rules promote article 18 of the CRC by providing additional assistance for the performance of child-rearing responsibilities. Extensions in eligibility apply to both mothers and fathers thus recognising the principle that both parents have common responsibilities for the upbringing and development of the child.

Conclusion

This Legislative Instrument is compatible with human rights because it advances the protection of human rights.