

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Families and Social Services

### *Paid Parental Leave Rules 2010*

Paid Parental Leave Amendment (Coronavirus Economic Response) Rules 2020

#### **Purpose**

The Paid Parental Leave Amendment (Coronavirus Economic Response) Rules 2020 (Amendment Rules) amend the Paid Parental Leave Rules 2010 (PPL Rules) to assist people who have been affected by the economic impacts of the Coronavirus (COVID-19) pandemic to be eligible for parental leave pay (PLP) or dad and partner pay (DaPP) under the *Paid Parental Leave Act 2010* (PPL Act).

The Amendment Rules set out the number of hours for which a person will be taken to have performed qualifying work under the work test for PLP or DaPP, where the person is in a JobKeeper payment period. This is in response to amendments to the PPL Act made by the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (the Coronavirus Act) as part of the JobKeeper scheme.

The other amendments made by the Amendment Rules will allow a return to work on or after 12 March 2020 to be disregarded for the purpose of PLP and DaPP eligibility for health professionals, emergency services workers and other essential workers that return to work in response to an emergency, such as the COVID-19 pandemic. These amendments will commence from 12 March 2020 as this is the date the COVID-19 pandemic was declared by the World Health Organisation. These amendments commence before the registration of the Amendment Rules. However, these amendments are beneficial and will result in greater access to PLP and DaPP for those required to return to work during the COVID-19 pandemic.

The Amendment Rules are made by the Minister for Families and Social Services (the Minister) in accordance with section 298 of the PPL Act.

#### **Background**

##### The Legislative Framework

The PPL Act provides for the payment of PLP and DaPP in the first year after the birth of a child or, for adoption, the placement of a child.

The PPL Rules prescribe matters relevant to the assessment and provision of PLP and DaPP.

Section 298 of the PPL Act provides that the Minister may, by legislative instrument, make rules from time to time, providing for matters required or permitted by the PPL Act to be provided; or necessary or convenient to be provided in order to carry out or give effect to the PPL Act.

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that the power to make a legislative instrument 'shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument'. In making the Amendment Rules, the Minister is relying upon this subsection in conjunction with the instrument-making power in section 298 of the PPL Act.

### General description of the Amendment Rules

#### *JobKeeper payment as qualifying work*

The *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* and the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* introduced the JobKeeper scheme. By temporarily offsetting wage costs, the JobKeeper scheme supports businesses to retain staff – and continue paying them – despite suffering decreased turnover during the current economic downturn. The payment also supports these businesses to recommence their operations or scale up operations quickly without needing to rehire when the downturn is over.

The Coronavirus Act also included amendments to the PPL Act, inserting a new section 35B to allow the period an employee is covered by the JobKeeper scheme to count as qualifying work for the purposes of the work test for PLP and DaPP.

New subsection 35B(1) of the PPL Act provides that the hours of qualifying work on a day in a JobKeeper payment period is to be worked out in accordance with the PPL Rules.

The Amendment Rules therefore insert a new Subdivision 2.3.2.3 at the end of Division 2.3.2 of Part 2-3 of the PPL Rules to provide for how hours of qualifying work on a day in a JobKeeper payment period are to be calculated for the purposes of the work test for PLP and DaPP.

The work test requires that the person:

- perform qualifying work for at least 10 of the 13 months prior to the expected birth date of the child for PLP, or prior to the person's nominated start date for DaPP;
- work at least 330 hours during those 10 months; and
- not have a gap in work days of more than 12 weeks.

Under the Amendment Rules, a person will be taken to have performed 7.6 hours of qualifying work for the purposes of the work test for each week day during a period or periods of JobKeeper payment. A person will also be taken to have performed no hours of qualifying work a day for each Saturday or Sunday during a JobKeeper payment period.

Where a person performs at least one hour of paid work on a week day and the day is in the person's JobKeeper payment period, new subrule 2.26B(2) provides that the

person will be taken to have performed the greater of 7.6 hours or the number of hours of paid work actually performed by the person on that day.

Where a person performs at least one hour of paid work on a day and the day is a Saturday or Sunday that falls in a JobKeeper payment period, the person will be taken to have worked the hours actually performed on that day (instead of no hours).

The Amendment Rules also provide for similar calculations where a person takes a period of paid leave for a day that is in a JobKeeper payment period (new subrule 2.26B(3)).

This is consistent with the approach used in the PPL Act to determine how many hours of qualifying work a person has performed while receiving PLP or DaPP for a previous child (section 35A of the PPL Act).

#### *Disregarding a return to work for essential workers during crisis*

It is anticipated that a cohort of PLP and DaPP customers may lose eligibility for all or part of their PLP or DaPP entitlement where they have returned to work as a result of the COVID-19 pandemic. In response, the Amendment Rules includes a number of amendments to expand the circumstances in which a return to work may be disregarded for the purposes of determining eligibility for primary claimants, secondary claimants, secondary claimants in exceptional circumstances, tertiary claimants and DaPP claimants.

Currently, where a person returns to work before or while they are receiving PLP, or while they are receiving DaPP, any remaining amount of payment will be forfeited. However, under the PPL Rules, a return to work can be disregarded in a number of circumstances, including where:

- a defence force member or a law enforcement officer has been compulsorily recalled to duty;
- a person was complying with the requirements of a summons or other compulsory process; and
- a child is required to remain in hospital following birth or is hospitalised immediately after their birth due to complications.

The PPL Rules will be amended to include an additional circumstance in which a return to work can be disregarded to cover emergency services workers, health professionals and other essential workers that return to work in response to a state, territory or national emergency, such as the COVID-19 pandemic.

A general definition of “essential worker” is provided in subrule (2) of each of the relevant amendments. This broad definition recognises that a range of workers may be considered essential in a state, territory or national emergency, and that it is not possible to develop an exhaustive list of occupations that are regarded as “essential”. The Department of Social Services will publish guidance material on its view of how the definition of “essential worker” should be applied.

## **Commencement**

Sections 1 to 4 of the Amendment Rules and item 1 of Schedule 1 to the Amendment Rules (which inserts new rules 2.26A and 2.26B) commence immediately after the Amendment Rules are registered on the Federal Register of Legislation.

The commencement date for items 2 to 11 of Schedule 1 to the Amendment Rules is 12 March 2020, which is the day on which the COVID-19 pandemic was declared by the World Health Organisation. Subsection 12(1A) of the *Legislation Act 2003* (Legislation Act) provides that, despite any principle or rule of common law, a legislative instrument may provide that the instrument, or a provision of the instrument, commences before the instrument is registered on the Federal Register of Legislation.

Subsection 12(2) of the Legislation Act provides that a legislative instrument (or a provision of a legislative instrument) that commences before it is registered does not apply to a person to the extent that, as a result of that commencement, the person's rights at the time that the instrument is registered would be affected so as to disadvantage that person, or liabilities would be imposed on the person in respect of anything done or omitted to be done before the instrument is registered.

The amendments made by items 2 to 11 of Schedule 1 to the Amendment Rules do not disadvantage, or impose a liability on, any person. These amendments are beneficial and provide greater access to PLP and DaPP for some people who are required to return to work.

## **Consultation**

External consultation was undertaken with the Treasury and Services Australia.

Broader consultation was not undertaken as the effect of the Amendment Rules is beneficial and will have the effect that more people will be eligible for PLP or DaPP than would otherwise have been the case.

## **Regulation Impact Statement (RIS)**

An exemption from the Regulation Impact Statement requirements was granted by the Prime Minister as there were urgent and unforeseen events (OBPR ID 26371).

## **Explanation of the provisions**

**Section 1** provides that the name of the Amendment Rules is the Paid Parental Leave Amendment (Coronavirus Economic Response) Rules 2020.

**Section 2** provides that sections 1 to 4 of the Amendment Rules and item 1 of Schedule 1 to the Amendment Rules (which inserts new rules 2.26A and 2.26B) commence immediately after the Amendment Rules are registered on the Federal Register of Legislation. This section also provides that items 2 to 11 of Schedule 1 to the Amendment Rules commence on 12 March 2020.

**Section 3** provides that the Amendment Rules are made under the PPL Act.

**Section 4** provides that the instruments that are specified in a Schedule to the Amendment Rules are amended or repealed as set out in the applicable items of the Schedule, and any other item in a Schedule to this instrument has effect according to its terms.

### **Schedule 1**

**Item 1** inserts a new Subdivision 2.3.2.3 relating to the calculation of hours of qualifying work on a day in a JobKeeper payment period.

New rule 2.26A sets out the purpose of the new Subdivision 2.3.2.3.

New subrule 2.26B(1) provides that for the purposes of step 5 of the method statement in section 32 of the Act, a person is taken to have performed 7.6 hours of work per week day where the person performs qualifying work on a day only because the day is in a JobKeeper payment period. The new subrule also provides that a person is taken to have performed no hours of qualifying work a day for a Saturday or Sunday that occurs during a JobKeeper payment period.

Where a person performs at least one hour of paid work on a week day and the day is in the person's JobKeeper payment period, new subrule 2.26B(2) provides that the person will be taken to have performed the greater of 7.6 hours or the number of hours of paid work actually performed by the person on that day.

For example, Sarah performs 9 hours of work on a Monday that is in a JobKeeper payment period because she is required to work overtime. However, on Tuesday her hours are reduced to 4 hours due to a decrease in demand, and on Wednesday reduced to nil hours. It would be unfair to determine that on Monday, when she was required to work overtime due to the constantly fluctuating nature of the current work environment, she be taken to have performed 7.6 hours of work because she was working during a JobKeeper payment period. Therefore, the greater of the two should be taken into account when applying the PLP work test. Therefore, in Sarah's case, the 9 hours actually worked would be counted for Monday not 7.6 hours. Sarah would be taken to have performed 7.6 hours of work on Tuesday, Wednesday and any other days that occur in a JobKeeper payment period.

Where a person performs at least one hour of paid work on a day and the day is a Saturday or Sunday that falls in a JobKeeper payment period, the person will be taken to have worked the hours actually performed on that day (instead of no hours).

The Amendment Rules also provide for similar calculations where a person takes a period of paid leave for a day that is in a JobKeeper payment period (new subrule 2.26B(3)).

**Item 2** repeals subrule 2.2(1A), and inserts a new subrule 2.2(1A) which includes a new paragraph 2.2(1A)(e) which refers to new rule 2.5C inserted by **item 3**. Subrule 2.2(1A) provides that a return to work can be disregarded for the purposes of determining PLP eligibility for a primary claimant if the return to work happens for one of the reasons outlined in rules 2.4 to 2.6 of the PPL Rules. **Item 2** repeals and remakes subrule 2.2(1A) in substantially the same terms with the only update being the inclusion of a reference to new rule 2.5C.

**Item 3** inserts new rule 2.5C which will ensure that if a person is a health professional, emergency services worker or other essential worker who has returned to work in response to a state, territory or national emergency (including in response to the Coronavirus known as COVID-19), this return to work will be disregarded, and they will remain eligible as a primary claimant for PLP. New subrule 2.5C(2) provides a definition of “essential worker” for the purposes of the rule.

It is intended that a person working in roles such as the manufacture of medical supplies and personal protective equipment; the transport, stocking, preparation, sale and delivery of food; the collection of garbage and recycling; the delivery of mail and packages; public transport; and the provision and maintenance of services such as electricity, gas and, water and sewerage would come within the definition of “essential worker”. The same definition of ‘essential worker’ is inserted in other provisions by Items 4, 6, 8 and 10.

For example, Jane is a worker at a factory that manufactures surgical gowns and facemasks for the medical workforce, but on 20 March 2020 she is half way through her Paid Parental Leave period. Due to the increased demand for medical items and the need for more workers at the factory, while she isn’t required to, she returns to work to assist with production. Prior to the Amendment Rules, she would consequently forfeit any remaining entitlement she has to PLP.

**Item 4** inserts new paragraph 2.8(2A)(e) which refers to new rule 2.11C inserted by **item 5**. Subrule 2.8(2A) provides that a return to work can be disregarded for the purposes of determining PLP eligibility for a secondary claimant if the return to work happens for one of the reasons outlined in rules 2.10 to 2.11B of the PPL Rules. Subrule 2.8(2A) has only been amended to include a reference to new rule 2.11C.

**Item 5** inserts new rule 2.11C which will ensure that if a person is a health professional, emergency services worker or other essential worker who has returned to work in response to a state, territory or national emergency (including in response to the Coronavirus known as COVID-19), this return to work will be disregarded, and they will remain eligible as a secondary claimant for PLP. New

subrule 2.11C(2) provides a definition of “essential worker” for the purposes of the rule.

**Item 6** inserts new paragraph 2.12(2A)(e) which refers to new rule 2.16B inserted by **item 7**. Subrule 2.12(2A) provides that a return to work can be disregarded for the purposes of determining PLP eligibility for a secondary claimant (who claims PLP in exceptional circumstances) if the return to work happens for one of the reasons outlined in rules 2.14 to 2.16A of the PPL Rules. Subrule 2.12(2A) has only been amended to include a reference to new rule 2.16B.

**Item 7** inserts new rule 2.16B which will ensure that if a person is a health professional, emergency services worker or other essential worker who has returned to work in response to a state, territory or national emergency (including in response to the Coronavirus known as COVID-19), this return to work will be disregarded, and they will be eligible to make a secondary claim for PLP in exceptional circumstances. New subrule 2.16B(2) provides a definition of “essential worker” for the purposes of the rule.

**Item 8** inserts new paragraph 2.18(1A)(e) which refers to new rule 2.22AB inserted by **item 9**. Subrule 2.18(1A) provides that a return to work can be disregarded for the purposes of determining PLP eligibility for a tertiary claimant if the return to work happens for one of the reasons outlined in rules 2.20 to 2.22A of the PPL Rules. Subrule 2.18(1A) has only been amended to include a reference to new rule 2.22AB.

**Item 9** inserts new rule 2.22AB which will ensure that if a person is a health professional, emergency services worker or other essential worker who has returned to work in response to a state, territory or national emergency (including in response to the Coronavirus known as COVID-19), this return to work will be disregarded, and they will remain eligible as a tertiary claimant for PLP. New subrule 2.22AA(2) provides a definition of “essential worker” for the purposes of the rule.

**Item 10** inserts new paragraph 3A.3(1A)(c) which refers to new rule 3A.7A inserted by **item 11**. Subrule 3A.3(1A) provides that a return to work can be disregarded for the purposes of determining DaPP eligibility if the return to work happens for one of the reasons outlined in rules 3A.5 to 3A.7 of the PPL Rules. Subrule 3A.3(1A) has only been amended to include a reference to new rule 3A.7A.

**Item 11** inserts new rule 3A.7A which will ensure that if a person is a health professional, emergency services worker or other essential worker who has returned to work in response to a state, territory or national emergency (including in response to the Coronavirus known as COVID-19), this return to work will be disregarded, and they will remain eligible as a DAPP claimant. New subrule 3A.7A(2) provides a definition of “essential worker” for the purposes of the rule.

## Statement of Compatibility with Human Rights

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

### **Paid Parental Leave Amendment (Coronavirus Economic Response) Rules 2020**

The Amendment Rules are 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 Amendment (Coronavirus Economic Response) Rules 2020 (Amendment Rules) amend the Paid Parental Leave Rules 2010 (PPL Rules). The Amendment Rules are made by the Minister for Families and Social Services under section 298 of the *Paid Parental Leave Act 2010* (PPL Act).

The Paid Parental Leave (PPL) scheme is a Government-funded scheme consisting of Parental Leave Pay (PLP), an 18-week payment at the rate of the national minimum wage for eligible primary carers of newborn and recently adopted children; and Dad and Partner Pay (DaPP), a two-week payment at the rate of the national minimum wage for eligible fathers and partners caring for newborn or recently adopted children.

The amendments made by this instrument are intended to assist people who have been affected by the economic impacts of the Coronavirus (COVID-19) pandemic to be eligible for PLP and DaPP.

#### *JobKeeper payment as qualifying work*

The first amendment will support certain employees who have had their work hours reduced or who are stood down from their jobs due to the COVID-19 pandemic to continue to meet the work test for PLP or DaPP. The work test requires a person to have worked for at least 10 months of the 13 months prior to the birth or adoption of their child (or prior to their nominated start date for DaPP); and to have worked for at least 330 hours in that 10-month period with no more than a 12 week gap between two working days. Under this amendment, employees who are covered by the JobKeeper scheme may be able to still meet the work test requirements despite being stood down from their job or having reduced hours of work.

This amendment is necessary to give effect to amendments made to the PPL Act by the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Coronavirus Act). The Coronavirus Act inserted new section 35B into the PPL Act to allow the time a person is covered by the JobKeeper scheme to count as qualifying work towards the work test for PLP and DaPP. The Amendment Rules provide a method for calculating how being covered by the JobKeeper scheme will count towards the work test. The Amendment Rules provide that a person will

be taken to have performed 7.6 hours of qualifying work for the purposes of the work test for PLP and DaPP for each week day during a period or periods of JobKeeper payment. If they work more than 7.6 hours or take paid leave of more than 7.6 hours on a week day the hours actually worked or hours of paid leave taken will be counted when calculating their hours for the purposes of the work test. For weekends, a person in a JobKeeper payment period will be taken to work no hours, unless they work or take paid leave for one or more hours on a Saturday or Sunday in which case the actual hours of paid work or paid leave will be counted.

By temporarily offsetting wage costs, the JobKeeper scheme supports businesses to retain staff – and continue paying them – despite suffering decreased turnover during the current economic downturn. The payment also supports these businesses to recommence their operations or scale up operations quickly without needing to rehire when the downturn is over. This is consistent with the work test that aims to target support to parents with an ongoing connection to the work force.

### *Disregarding a return to work for essential workers during an emergency*

The other amendments made by the Amendment Rules are intended to prevent people from losing eligibility for PLP and DaPP where they return to work as an essential worker in response to the COVID-19 pandemic or another emergency.

Generally, where a person returns to work before or while they are receiving PLP, or while they are receiving DaPP, they will be ineligible for the remainder of their payment. This amendment is intended to allow a person to continue to receive their entitlement where they have returned to work in response to a state, territory or national emergency (which includes the COVID-19 pandemic).

### **Human rights implications**

This legislative instrument engages the following rights:

- the right to social security,
- the right to protection and assistance for families, and
- the right to maternity leave.

#### The right to social security

Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognises the right of everyone to social security, and Article 26 of the Convention on the Rights of Children recognises the right of every child to benefit from social security. The Amendment Rules engages these rights by broadening the eligibility criteria for PLP and DaPP and increasing the number of claimants who can receive the payments during the COVID-19 pandemic and other emergencies.

#### The right to protection and assistance for families

The right to protection and assistance to families, particularly mothers during a reasonable period before and after childbirth in Article 10(2) of the ICESCR recognises protection should be accorded to mothers. During such a period, working

mothers should be accorded paid leave or leave with adequate social security benefits.

The Amendment Rules engage these rights by broadening the eligibility criteria for PLP to allow more women to access the PPL scheme. It also engages the right to protection and assistance to families by ensuring continuing eligibility to DaPP for certain fathers who return to work.

The UN Committee on Economic, Social and Cultural Rights has commented that Article 7 of the ICESCR requires States Parties to take steps to 'reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members.'

### The right to maternity leave

The right to maternity leave is contained within Article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Article 10(2) of the ICESCR. Article 11(2)(b) of the CEDAW requires States Parties 'to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances'.

The amendments do not interfere with the existing rights under the *Fair Work Act 2009*, including access to 12 months of unpaid parental leave, noting that Australia has a reservation in relation to Article 11(2)(b) of the Convention on the Elimination of All Forms of Discrimination Against Women.

### **Conclusion**

The Amendment Rules are compatible with human rights because they do not interfere with human rights and provide families with greater access to financial assistance.

**Senator the Hon Anne Ruston, Minister for Families and Social Service**