

EXPLANATORY STATEMENT

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

Paid Parental Leave Rules 2021

Paid Parental Leave Amendment (Work Test Special Circumstances) Rules 2021.

Purpose

The *Paid Parental Leave Amendment (Work Test Special Circumstances) Rules 2021* (Amendment Rules) amend the existing *Paid Parental Leave Rules 2021* (PPL Rules) to specify the following three circumstances: family and domestic violence, severe medical condition or a declared natural disaster will constitute special circumstances for the purposes of section 36AA the *Paid Parental Leave Act 2010* (the Act).

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

Subsection 33(3) of the *Acts Interpretation Act 1901* provides where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power is 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.

Decisions informed by this instrument, made under section 36AA of the Act are reviewable decisions. Internal and merits review of such decisions is available in accordance with Chapter 5 of the Act. External review of internally reviewed decisions is available by the Administrative Appeals Tribunal.

This instrument does not affect a person's right to privacy, nor impact upon their privacy.

Background

The Legislative Framework

The Paid Parental Leave scheme is enabled by the Paid Parental Leave Act, with the PPL Rules giving effect to specific provisions such as matters related to the work test.

These amendments will prescribe the circumstances in which the Secretary may be satisfied that special circumstances for the purposes of section 36AA, in relation to a person meeting the work test as described below. The following three circumstances: family and domestic violence, severe medical condition or a declared natural disaster will constitute special circumstances

Paragraph 36AA(a) of the Act allows for the PPL Rules to prescribe the circumstances which, if the Secretary is satisfied exist when considering whether a

person satisfies the work test on a day, may allow the person to meet the work test on a day. Paragraph 36AA(b) of the Act additionally provides that for the Secretary to be satisfied that special circumstances exist such that the work test is met, the Secretary also must be satisfied that the person would have met the work test if that circumstance or those circumstances had not existed. For the Secretary to be satisfied that someone could have otherwise met the work test, they need to have a timely and real connection to the work force.

To be eligible for parental leave pay or dad and partner pay, a person must, among other things, satisfy the work, income and residency tests.

The work test requires that the person:

- perform qualifying work for at least 10 months out of a 13 month work test period;
- work at least 330 hours during those 10 months; and
- not have a break between work days of more than 12 weeks.

The Amendment Rules

The particular circumstances that constitute special circumstances for the purposes of section 36AA are domestic or family violence, a severe medical condition or the need to care for a family member with a severe medical condition, or a natural disaster as declared by a state, territory or commonwealth government or relevant authority.

Commencement

The Amendment Rules commence on 4 September 2021, which is when the *Paid Parental Leave Amendment (COVID-19 Work Test) Act 2021* commenced.

Consultation

Consultation was undertaken with Services Australia, the Office of Parliamentary Counsel and the National Recovery and Resilience Agency.

Regulation Impact Statement (RIS)

A Regulation Impact Statement is not required for the Rules as it has a minor regulatory impact. This is based upon the same assessment done for the *Paid Parental Leave Amendment (COVID-19 Work Test) Act 2021* as these two items are linked (OBPR ID 44348).

Explanation of the provisions

Section 1 provides that the name of the Amendment Rules is the Paid Parental Leave Amendment (Work Test Special Circumstances) Rules 2021.

Section 2 provides that the Amendment Rules commence on 4 September 2021. This is the date that the empowering provision, section 36AA of the Act took effect.

This is a retrospective commencement, however the amendment is entirely beneficial. The retrospective commencement will allow those who did not meet the work test but who experienced special circumstances to be found have satisfied the work test, due to the existence of those circumstances, from the time that the section was enacted.

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

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

Schedule 1

Schedule 1 amends the Paid Parental Leave Rules 2021.

Item 1 amends section 8 to add, to the simplified outline of Part 2 regarding eligibility for parental leave pay, a new description of the elements that Division 3 of the PPL Rules prescribes. This amendment adds to the description of Division 3 that the Division also prescribes special circumstances for the purposes of a person satisfying the work test on a day.

Item 2 adds new section 24B at the end of Division 3 of Part 2. This new section describes the special circumstances of which the Secretary may be satisfied, in order to determine if a person would have satisfied the work test on that day, if those circumstances had not existed.

Subsection 24B(1) provides that the section prescribes special circumstances that a person may experience resulting in them being taken to satisfy the work test. This section refers to the empowering provision, section 36AA of the Act, which applies the special circumstances to both those in a parental leave pay and dad and partner pay work test period in accordance with section 32, Note 1A of the Act.

Subsection 24B(2) prescribes the special circumstances.

Paragraph 24B(2)(a) prescribes the special circumstance of a person experiencing family or domestic violence, or is dealing with the impact of the family and domestic violence that prevents a person performing paid work on a day. This section uses the plain English meaning of family and domestic violence to acknowledge that domestic and family violence entails a broad range of experiences and impacts.

Paragraph 24B(2)(b) prescribes the special circumstance where a person is affected by a severe medical condition, that prevents the person from performing paid work on a day. The term severe medical condition has been used to cover both illness and injury. The severe medical condition 'preventing the person from performing paid work' in this section denotes that the severity of the medical condition needs to be of a degree beyond that of a person experiencing a medical condition where they can still work.

Paragraph 24B(2)(c) prescribes a special circumstance where a person is caring for a family member who is affected by a severe medical condition. The severity of that medical condition is denoted by the description of the severity of the medical condition requiring the provision of care to a degree that the person caring for their family member with the severe medical condition, is prevented from performing paid work on that day. As someone needs to demonstrate that the existence of this circumstance prevents them from performing paid work on a day, they need to be able to demonstrate a timely and real connection to the workplace in order for this circumstance to apply. This section is not intended to cover someone who has been a long term carer and cannot meet the work test due to their ongoing caring responsibilities. The intention of this section is to account for care needs in a more acute situation. 'Family member' is defined at subsection 24B(3) below.

Paragraph 24B(2)(d) prescribes a special circumstance that a person is severely affected by a natural disaster, which prevents the person from performing paid work on a day, that has been declared by the Commonwealth or a State or Territory. Declared takes its plain English meaning in this context. A Commonwealth, State or Territory denotes the jurisdiction in which the natural disaster must occur for the person to be considered severely affected by the natural disaster. Natural disaster also takes its plain English meaning and is intended to cover circumstances such as a bush, fire, flood or major storm, declared as a natural disaster by the government or the relevant jurisdiction or authority in that jurisdiction. The jurisdictions are any part of Australia as defined in the Act, or a State or Territory within Australia, as declared by the relevant government (at subparagraph 24B(2)(d)(i)). Subparagraph 24B(2)(d)(ii) allows an authority responsible for managing responses to natural disasters within those jurisdictions to make the declaration of a natural disaster and if that is the case, a person can still be considered severely affected by a natural disaster on a day.

Subsection 24B(3) gives the meaning of family member for the purposes of paragraph 24B(2)(c).

This definition is quite broad to acknowledge that families are constituted in a variety of ways.

Paragraph 24B(3)(a) includes a person's partner.

Paragraph 24B(3)(b) includes a person's natural child, adoptive child or stepchild so as not to disadvantage adoptive parents or parents with stepchildren.

Paragraph 24B(3)(c) includes a person's natural parent, adoptive parent or step-parent so as not to disadvantage a person who was adopted or has step-parents.

Paragraph 24B(3)(d) includes a person's siblings or step-siblings so as not to disadvantage those who have a family constituted in that way.

Paragraph 24B(3)(e) includes a person's partner's parent, step-parent or adoptive parent so as not to disadvantage a person whose partner's parents are related to them in that way.

Paragraph 24B(3)(f) includes a person over whom the person has legal custody or guardianship, so as not to disadvantage those who may have long term care orders or foster care arrangements in their family.

Paragraph 24B(3)(g) includes a family member as being a person related to another person according to Aboriginal or Torres Strait Islander kinship rules, so as not to disadvantage those whose families are constituted in this way.

Statement of Compatibility with Human Rights

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

Paid Parental Leave Amendment (Special Circumstances Rules Amendment) Rules 2021

The Regulations 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 (Special Circumstances Rules Amendment) Rules 2021 (Amendment Rules) amend the Paid Parental Leave Rules 2021 (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 special circumstances in a work test period.

The work test for PLP and DaPP requires a person to have worked for at least 10 months out of a 13-month work test period and to have performed qualifying work for at least 330 hours in that 10-month period with no more than a 12 week gap between two working days.

The *Paid Parental Leave Amendment (COVID-19 Work Test) Act 2021* amended the Act to provide that a person experiencing particular circumstances can be considered by the Secretary as meeting the work test on that day, if the Secretary is satisfied if not for those circumstances the person would meet the work test.

This is intended to support people who experience particular circumstances that prevent them from undertaking paid work during a work test period for PLP or DaPP.

These amendments are necessary to give effect to the changes to the PPL Act under section 36AA of the PPL Act that provides that a person satisfies the work test on a day if the Secretary is satisfied that special circumstances of a kind prescribed by the PPL rules for the purposes of paragraph 36AA(a) exist in relation to the person on that day, and that the person would have satisfied the work test on the day in accordance with section 32 if those circumstances had not existed. This will

allow a person who has not performed qualifying work on a day to be regarded as meeting the work test on that day.

Special Circumstances

The amended provisions prescribe three kinds of special circumstances, namely domestic or family violence, natural disasters and severe medical condition. The inclusion of this provision will support certain employees, who were prevented from performing paid work due the existence of these special circumstances, to meet the eligibility requirement of the work test for PLP and 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. This provision to the PPL Act ensures that a person in these circumstances does not lose their parental leave entitlements as the days these special circumstances were in effect count as qualifying work towards the work test for PLP and DaPP.

Human rights implications

This legislative instrument engages the following rights:

- the right to social security,
- the right to protection and assistance for families,
- 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. This instrument engages these rights by broadening the eligibility criteria for PPL and increasing the number of claimants who can receive the payments.

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.

Article 7 of the ICESCR recognises the right of everyone to the enjoyment of just and favourable conditions of 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 Amendment Rules engage these rights by broadening the eligibility criteria for PLP and DaPP to allow more families to access the PPL scheme, which provides assistance to families following the birth of a child, and supports families to balance work and family obligations.

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'. Note that Australia has a reservation in relation to Article 11(2)(b) of the CEDAW.

These amendments are beneficial, broadening the eligibility criteria for PLP to support women affected by special circumstances to continue to be eligible for Government-funded paid parental leave following the birth of a child.

Conclusion

The Regulations are compatible with human rights because they do not raise any human rights issues.

Senator the Hon Anne Ruston, Minister for Families and Social Services