

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Employment and Workplace Relations

### ***Fair Work Act 2009***

### ***Fair Work Amendment (Paid Family and Domestic Violence Leave) Regulations 2023***

#### **AUTHORITY**

The *Fair Work Act 2009* (Fair Work Act) provides a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

Paragraph 796(1)(a) of the Fair Work Act provides that the Governor-General may make Regulations that are required or permitted by this Act to be prescribed. Paragraph 536(2)(d) of the Act permits this regulation to be prescribed.

The Fair Work Regulations support matters of detail within the legislative framework contained in the Fair Work Act.

Pursuant to row 27 of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, sunseting of legislative instruments does not apply to regulations made under the Fair Work Act. Pursuant to section 12, the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Regulations 2023* (Instrument) will not be subject to ordinary sunseting processes.

#### **PURPOSE AND OPERATION**

The purpose of the Instrument is to amend the Fair Work Regulations to provide that paid family and domestic violence leave must be reported on a pay slip as, for example, ordinary time worked, overtime or allowances, rather than as a type of leave such as ‘miscellaneous leave’ or ‘other leave’, unless an employee has requested it be recorded as a period of leave. This is intended to prevent perpetrators, who may have access to an employee’s pay slips, from drawing inferences about employees taking paid family and domestic violence leave and avoid associated risks for victim-survivors.

To allow employers time to update their payroll systems, the Instrument provides a grace period of 4 months after commencement of the instrument during which employers will not be penalised if they report a period of paid family and domestic violence leave on a pay slip as a period of leave (other than paid family and domestic violence leave).

The Instrument also supports recent measures implemented by the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022* and the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*. The Government consulted with referring states and territories under the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*, and the Committee on Industrial Legislation, on the Instrument.

## **REGULATORY IMPACT**

The Office of Impact Analysis (formerly the Office of Best Practice Regulation (OBPR)) assessed that a Regulation Impact Statement was not required for this instrument as the reforms are unlikely to have more than a minor regulatory impact (OBPR reference OBPR22-03620).

## **COMMENCEMENT**

The Instrument commences the day after it is registered.

## **CONSULTATION**

The Department of Employment and Workplace Relations consulted with referring states and territories under the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*, and the Committee on Industrial Legislation.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

### Fair Work Amendment (Paid Family and Domestic Violence Leave) Regulations 2023

The *Fair Work Amendment (Paid Family and Domestic Violence Leave) Regulations 2023* (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 *Fair Work Act 2009* (Fair Work Act) provides a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

The Instrument amends the *Fair Work Regulations 2009* (Fair Work Regulations) to provide that paid family and domestic violence leave must be reported on a pay slip as, for example, ordinary time worked, overtime or allowances, rather than as a type of leave such as ‘miscellaneous leave’ or ‘other leave’, unless an employee has requested it be recorded as a period of leave. This is intended to prevent perpetrators, who may have access to employee’s pay slips, from drawing inferences about employees taking paid family and domestic violence leave and avoid associated risks for victim-survivors.

#### **Human rights implications**

The Instrument engages the right to privacy and reputation under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

When the ILO Convention (No. 190) concerning Violence and Harassment comes into force for Australia, amendments made by the Instrument will engage Australia’s commitment under that Convention to mitigate the effects of domestic violence in the world of work.

#### Right to privacy and reputation

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Privacy guarantees a right to secrecy from the publication of personal information. For interference with privacy not to be arbitrary, it must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality to the end sought and necessity in the circumstances.

The Instrument positively engages the right to privacy by requiring employers to record paid family and domestic violence leave in a manner which, as far as possible, minimises the risk of perpetrators drawing inferences that an employee has taken paid family and domestic violence leave. This protects the privacy and reputation of employees in situations where perpetrators of family and domestic violence may have access to the employee’s pay slips.

The Instrument further supports the right to privacy by allowing employees to request that paid family and domestic violence leave be recorded on their pay slip as another type of

leave. This may be necessary to ensure the safety of an employee, for example, if the perpetrator knows the employee is absent from work during a period of paid family and domestic violence leave. In this instance, reporting the leave period as hours worked could alert a perpetrator that the employee has accessed paid family and domestic violence leave.

The amendments provide a grace period during which employers can record paid family and domestic violence leave on a pay slip as either a period of leave (other than paid family and domestic violence leave) or as, for example, ordinary time worked, overtime or allowances. This allows employers time to make necessary updates to their payroll systems, while recognising the importance of providing a high level of protection for individuals accessing paid family and domestic violence leave as early as practicable.

### **Conclusion**

The Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**The Hon. Tony Burke, Minister for Employment and Industrial Relations**

# FAIR WORK AMENDMENT (PAID FAMILY AND DOMESTIC VIOLENCE LEAVE) REGULATIONS 2023

## EXPLANATION OF PROVISIONS

### Section 1 – Name

1. This section provides that the name of the regulation is the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Regulations 2023*.

### Section 2 – Commencement

2. This section provides that the whole of the instrument commences the day after registration on the Federal Register of Legislation.

### Section 3 – Authority

3. This section provides that the instrument is made under the *Fair Work Act 2009* (Fair Work Act).

### Section 4 – Schedule

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

### Schedule 1 – Amendments

#### *Fair Work Regulations 2009*

#### **Item 1 – Division 3 of Part 3-6 (at the end of the last paragraph of the note to the Division heading)**

5. This item adds a sentence to the end of the note about employer obligations in relation to employee records and pay slips, which states that pay slips must comply with the requirements for reporting paid family and domestic violence leave set out in regulation 3.48.

#### **Item 2 – Regulation 3.47 (heading)**

6. This item makes a technical amendment to the heading of regulation 3.47 to specify that the information not to be included in pay slips under that regulation is information about paid family and domestic violence leave.

#### **Item 3 – Regulation 3.47 (note)**

7. This item repeals the note to regulation 3.47, which provides that employers can record paid family and domestic violence leave on a pay slip as a type of leave such as ‘miscellaneous’ or ‘other’ leave. This item prohibits employers from recording paid family and domestic violence leave in this way.

#### Item 4 – Regulation 3.48

8. This item inserts regulation 3.48, which specifies the requirements for recording a period of paid family and domestic violence leave on an employee's pay slip.
9. Subregulation 3.48(1) clarifies that regulation 3.48 is made under paragraph 536(2)(d) of the Fair Work Act as inserted by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*.
10. Under subregulation 3.48(2), unless an employee has made a request under subregulation 3.48(3), a pay slip:
  - a. must not record an amount paid to an employee for taking a period of paid family and domestic violence leave as an amount paid to the employee for taking a period of leave (paragraph 3.48(2)(a)); and
  - b. must instead report such an amount as an amount paid to the employee for performance of ordinary hours of work or as another kind of payment made in relation to the performance of work, including (but not limited to) an allowance, bonus or a payment of overtime (paragraph 3.48(2)(b)).
11. Subregulation 3.48(3) allows an employee to request that their employer report a period of paid family and domestic violence leave on a pay slip as another type of leave. For example, if an employee told a perpetrator that they were taking annual leave but instead took paid family and domestic violence leave and used that time to deal with the impact of family and domestic violence, the employee could request that the period be recorded on their pay slip as a period of annual leave. In this circumstance, the employer may record the leave as requested.
12. Regulation 3.48 complements regulation 3.47. While regulation 3.47 specifies information about paid family and domestic violence leave that must not be recorded on an employee's pay slip, regulation 3.48 specifies how a period of paid family and domestic violence leave taken by an employee should be recorded on a pay slip. Both regulations aim to minimise the potential for pay slips to compromise an employee's safety where a perpetrator is monitoring the employee's pay slips and bank account. Regulation 3.48, in particular, addresses concerns raised by stakeholders that recording paid family and domestic violence leave as a type of leave on a pay slip may pose a safety risk as the unique characteristics of the leave, such as that it is paid at the full rate of pay, could make it identifiable to perpetrators.
13. Employers should take a practical approach to recording a period of paid family and domestic violence leave. The intention is that employers will issue employees with pay slips which reflect as closely as possible the pay slip that would have been issued had the employee not taken a period of paid family and domestic violence leave. Generally, this will mean that the payment made to an employee in respect of a period of paid family and domestic violence leave will be recorded on a pay slip as the various amounts making up the full rate of pay for the period. For example, if a

casual employee was rostered to work 4 ordinary hours and would normally receive a supervisor allowance for their shifts, a period of paid family and domestic violence leave taken by the employee covering the rostered period should generally be recorded on the pay slip as 4 hours of ordinary time plus the allowance. The purpose of regulation 3.48 is not to enable employees to record the entire period of paid family and domestic violence leave as an allowance, bonus or overtime as this could make it identifiable to perpetrators.

14. Note 1 under regulation 3.48 states that a pay slip is not false or misleading merely because it complies with this regulation, per subsection 536(3A) of the Fair Work Act.
15. Note 2 clarifies that during the grace period ending 4 months after the instrument commences the whole of regulation 3.48 is subject to regulation 7.06.

### **Item 5 – in the appropriate position in Chapter 7**

#### *Part 7-4 Amendments made by the Fair Work Amendment (Paid Family and Domestic Violence Leave) Regulations 2023*

16. This item inserts new Part 7-4 into the *Fair Work Regulations 2009*, which provides transitional arrangements for the new requirements in relation to recording paid family and domestic violence leave on pay slips.

#### *Regulation 7.04*

17. This regulation sets out the following definitions that apply for the purposes of Part 7-4:
  - a. *amending instrument* means the *Fair Work Amendment (Paid Family and Domestic Violence Leave) Regulations 2023*.
  - b. *commencement day* means the day on which the amending instrument commences.
  - c. *grace period* means the period of 4 months after the instrument commences.

#### *Regulation 7.05*

18. This regulation provides that the amendments made by Schedule 1 to the amending instrument apply in relation to pay slips given to employees on or after commencement of the instrument.

#### *Regulation 7.06*

19. This regulation provides for a grace period for compliance with regulation 3.48 for 4 months after the instrument commences. During this grace period, employers can choose to record a period of paid family and domestic violence leave on an employee's pay slip as either a period of leave (other than paid family and domestic violence leave), or as ordinary hours of work, overtime, allowances etc. The purpose

of these transitional arrangements is to allow employers time after commencement to update their payroll systems to comply with the new regulations, while recognising the importance of providing a high level of protection for individuals accessing the leave as early as practicable.

20. During the grace period, employers will not be penalised for recording paid family and domestic violence leave as, for example, ‘miscellaneous leave’ in accordance with amendments made by the *Fair Work Legislation Amendment Regulations 2022*. After the grace period, employers may be liable to pay a civil penalty, as set out in Part 4-1 of the Fair Work Act, if they contravene their pay slip reporting requirements.