

Explanatory Statement

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

Fair Work Act 2009

Fair Work Amendment (Unpaid Parental Leave) Regulations 2024

Authority

The *Fair Work Act 2009* (Act) provides a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians. The *Fair Work Regulations 2009* (Principal Regulations) support matters of detail within the legislative framework contained in the Act.

Section 796(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

As the *Fair Work Amendment (Unpaid Parental Leave) Regulations 2024* (Instrument) is made under the Act, the Instrument will not be subject to ordinary processes pursuant to section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

Purpose and Operation

The purpose of the Instrument is to support amendments in the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023*.

These changes complement recent amendments to the *Paid Parental Leave Act 2010* made by the *Paid Parental Leave Amendment (More Support for Working Families) Act 2024*.

The Instrument amends the Principal Regulations to prescribe the entitlement to flexible unpaid parental leave under subsection 72A(1) of the Act.

Regulatory Impact

The Office of Impact Analysis has advised that an Impact Analysis is not required for this Instrument as the reforms are unlikely to have more than a minor regulatory impact (OBPR22-03215).

Commencement

The Instrument commences on 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 (Unpaid Parental Leave) Regulations 2024

The *Fair Work Amendment (Unpaid Parental Leave) Regulations 2024* (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 Instrument

The Instrument amends the *Fair Work Regulations 2009* (Principal Regulations) to prescribe the number of days of flexible unpaid parental leave that an eligible employee may take under section 72A(1) of the *Fair Work Act 2009* (Act).

The amendments align the entitlement to flexible unpaid parental leave with the changes to the paid parental leave scheme made by the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2024*.

Human rights implications

The Instrument engages the following rights:

- The right to just and favourable conditions of work – article 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- The right to social security – article 9 of the ICESCR and 26 of the *Convention on the Rights of Children* (CRC)
- The right to protection and assistance for families – article 10(2) of the ICESCR
- The right to maternity leave – article 11(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and article 10(2) of the ICESCR
- The right to equal treatment – article 3 of the ICESCR
- The right to respect for the family – article 17 and 23 of the *International Covenant and Political Rights* (ICCPR), and ICCPR General comment No.19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses (ICCPR General comment No.19: Article 23)
- The rights of the child – article 3 and 18(1) of the CRC, and article 5(b) of the CEDAW

The content of the right to work and the right to just and favourable conditions of work can be informed by specific obligations in treaties of the International Labour Organisation (ILO), such as the Employment Policy Convention 1964 (No. 122) (ILO Convention 122).

The right to just and favourable conditions of work

The United Nations Committee on Economic, Social and Cultural Rights has commented that article 7 of the ICESCR, regarding the right of everyone to the enjoyment of just and favourable conditions of work, 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 Instrument engages this right by increasing the length of unpaid parental leave available to parents, supporting parents to better balance work and caring responsibilities.

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

Article 9 of the ICESCR recognises the right of everyone to social security, and article 26 of the CRC recognises the right of every child to benefit from social security.

Article 10(2) of the ICESCR recognises that special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

The right to maternity leave is contained within article 11(2)(b) of the 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 Instrument engages these rights by extending the period in which an eligible employee may take unpaid parental leave, supporting parents to access the financial support available under the *Paid Parental Leave Act 2010*.

The *Fair Work Act 2009* also provides further special protection for pregnant employees, supporting pregnant employees to take flexible unpaid parental leave prior to the expected birth of the child. The Instrument supports this by extending the period of unpaid leave that the employee can choose to take either before or after the birth of the child.

The right to equal treatment and the right to respect for the family

Article 3 of the ICESCR recognises ensuring the equal right of men and women to the enjoyment of all economic, social, and cultural rights.

Article 23 of the ICCPR recognizes that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. This is supported by the prohibition under article 17 of the ICCPR on arbitrary or unlawful interference with the family.

The ICCPR General comment No.19: Article 23 provides that spouses should have equal rights and responsibilities in the family.

The Instrument engages these rights by extending the entitlement to take flexible unpaid parental leave, supporting parents to take on equal caring roles if they choose to do so.

The rights of parents and children

Article 3 of the CRC requires legislative bodies to consider the best interests of the child as a primary consideration. The principle applies to all actions concerning children and requires active measures to promote their survival, growth, and wellbeing, as well as measures to support and assist parents and others who have day-to-day responsibility for ensuring recognition of children's rights.

Similarly, Article 5(b) of the CEDAW provides parties shall take measures to promote the recognition of the common responsibility of men and women in the upbringing and development of their children.

The Instrument engages these rights by extending the entitlement to flexible unpaid parental leave, supporting working parents to balance their work and caring responsibilities in the best interests of the child.

Conclusion

The Instrument is compatible with human rights as it promotes the protection of human rights by positively engaging with the right to social security, the right to protection and assistance for families, the right to maternity leave, the right to equal treatment, the right to respect for the family and the rights of parents and children.

The Hon. Tony Burke, Minister for Employment and Workplace Relations

FAIR WORK AMENDMENT (UNPAID PARENTAL LEAVE) REGULATIONS 2024

EXPLANATION OF PROVISIONS

Section 1: Name

1. This section provides that the title of the instrument is the *Fair Work Amendment (Unpaid Parental Leave) Regulations 2024* (Instrument).

Section 2: Commencement

2. This section provides for commencement of the provisions of the Instrument.

Section 3: Authority

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

Section 4: Schedules

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 – Before Division 12 of Part 2-2

This item inserts a new Division 5 – Parental leave and related entitlements, including a new Subdivision B – Parental leave and a new regulation 2.00, before Division 12 of Part 2-2 – The National Employment Standards to align the entitlement to flexible unpaid parental leave under subsection 72A(1) of the Act with the entitlement to parental leave pay under the *Paid Parental Leave Act 2010*.

New Division 5 and Subdivision B have been numbered to reflect the relevant provisions in Part 2-2 of the Act and improve the readability of the Instrument.

Subsection 72A(1) of the Act provides an entitlement to take up to 100 days of flexible unpaid parental leave during the 24-month period starting on the date of birth or day of placement of the child. The number of days may be increased by regulation.

New regulation 2.00 provides for an increased entitlement to flexible unpaid parental leave based on the date of birth of day or placement of the child as follows:

- Between 1 July 2024 and 30 June 2025 – 110 days.
- Between 1 July 2025 and 30 June 2026 – 120 days.
- On or after 1 July 2026 – 130 days.

New regulation 2.00 includes a note to clarify that, where the date of birth or placement of a child is before 1 July 2024, an eligible employee will be entitled to up to 100 days of flexible unpaid parental leave in accordance with subsection 72A(1) of the Act.