

Paid Parental Leave in 2011

Australia's first national Paid Parental Leave scheme will start on **1 January 2011**. It will provide eligible parents with 18 weeks of pay at the weekly rate of the National Minimum Wage (currently \$569.90 a week before tax).

The Paid Parental Leave Act 2010 was passed by Parliament on 17 June 2010 and received Royal Assent on 14 July 2010. The scheme will be fully funded by the Australian Government.

Eligibility

A person will be eligible for Parental Leave Pay if they:

- A. are an Australian resident
- B. are the mother of a newborn child or the initial primary carer of a recently adopted child
- C. have met the Paid Parental Leave *work test* before the birth or adoption occurs, and
- D. have received an individual adjusted taxable income of \$150,000 or less in the previous financial year.

The mother or the initial primary carer of an adoptive child must apply for Parental Leave Pay. Part, or all of the Parental Leave Pay may be transferred to another primary carer, such as the father, but parents or carers cannot both receive Parental Leave Pay at the same time for the same child.

A child's **primary carer** is defined as the person who physically cares for the child on a daily basis. This person would be responsible for meeting the child's physical needs.

A child's primary carer can be:

- the mother
- the adoptive parent
- the partner of the mother or adoptive parent, or
- the child's other legal parent or their partner.

Some exemptions to the primary carer requirement may apply, such as in cases of stillbirth.

An eligible mother or primary carer can receive Parental Leave Pay for up to 18 weeks after the birth of the child.

The Paid Parental Leave work test

A person meets the Paid Parental Leave work test if they have:

- (i) been in paid work continuously for at least 10 of the 13 months prior to the birth or adoption of the child, and
- (ii) worked for at least 330 hours in that 10 month period (just over one day a week) with no more than an eight week gap between two consecutive working days.

The person does not need to be working full-time to be eligible for Parental Leave pay. They may meet the work test even if they:

- are a part-time, casual or seasonal worker
- are a contractor or self-employed
- work in a family business or on a farm
- have multiple employers, or
- have recently changed jobs.

The person will need to have worked for at least one hour in a day for employment to be counted as a working day.

Where the person works for a family business (including a farm), they can include their hours of work, even if the business does not generate any income.

Working while receiving Parental Leave Pay

If the mother or primary carer returns to work, the Parental Leave Pay will stop. If the person decides to return to work before the end of the 18 week Paid Parental Leave period the person must notify the relevant Government department – the Family Assistance Office. In some cases, the unused part of the Parental Leave Pay may be transferred to another carer who meets the eligibility criteria, and claim the unused Parental Leave Pay.

The person in receipt of the Parental Leave Pay can choose to participate in workplace activities for up to 10 days for the purposes of 'keeping in touch' with their workplace. The days allowed to attend work do not need to be used all at once and the person must be paid their usual wages or salary in addition to Parental Leave Pay for the time they attend work.

What if the care or mother is self-employed?

If the person is self-employed, he or she will be able to keep an eye on their business without being regarded as having returned to work. They will be able to oversee business operation, and perform the occasional administrative task.

Will the Paid Parental Leave scheme affect existing leave entitlements offered by an employer?

If a mother or primary carer is eligible for the Paid Parental Leave scheme, they will be able to access up to 18 weeks of government-funded Parental Leave Pay, as well as any of the existing employer-provided paid or unpaid leave. The mother or primary carer can take the Parental Leave Pay before, during or after any paid maternity or parental leave, or other employer-funded leave entitlements (such as annual leave or long service leave).

If the employer currently provides paid maternity or parental leave through an industrial agreement, they cannot withdraw the entitlement for the life of that agreement.

What are the employer's responsibilities?

The employer's role in providing Parental Leave Pay will be voluntary until 30 June 2011.

From 1 July 2011, the employer will be responsible for providing Parental Leave Pay to eligible employees who have or adopt a child from 1 July 2011 and who have worked in their business for 12 months or more and who are expecting to receive more than eight weeks Parental Leave Pay. However, the employer will have the choice to pay the employee if they have worked for their business for less than 12 months, or are accessing less than eight weeks Parental Leave Pay.

The employer does not need to contact the Family Assistance Office if they have an employee who wishes to apply for Parental Leave Pay. The employee will need to lodge a claim for Parental Leave Pay.

Preparing for the Scheme

According to the Family Assistance Office employers can register for the Paid Parental Leave scheme through Business Online Services from 1 October 2010. If they do not have access to the internet they

can call 13 1158 to register. A [Business Requirement Statement](#) has been developed to help employers make the changes necessary for their role in the Paid Parental Leave scheme. The statement is intended to assist payroll software developers, human resources and payroll staff and accountants with the technical changes required for the scheme.

[\[More\]](#)

5.1 percent Unemployment rate

The Australian unemployment rate remained steady at 5.1 percent in June. The Australian Bureau of Statistics (ABS) reported an increase of 45,900 people employed in June taking the number of Australians in employment to 11.1 million. The rise in employment was driven by a rise in part-time employment and reinforced by rises to full-time employment.

[\[More\]](#)

Fair Work inspectors to make educational visits to employers in north Sydney suburbs

The Fair Work Ombudsman will make educational visits to about 110 businesses in North Ryde, 60 in Chatswood, 60 in Brookvale and 50 in Hornsby over the next six weeks. Fair Work inspectors will doorknock businesses to provide information packs with helpful resources such as fact sheets, templates and Best Practice Guides.

[\[More\]](#)

FBT – Exclusion of reporting on pooled or shared cars

In some circumstances, you do not have to report the use of a pooled or shared car as a fringe benefit.

If an employee uses a pooled or shared car and this results in a fringe benefit, it is an excluded benefit. This means that you:

- do not have to report the fringe benefit on your employee's payment summary
- have to pay FBT on the taxable value of the fringe benefit you provided.

[\[More\]](#)

TIP OF THE MONTH: Adverse action. Early indications from the Federal Court

One of the areas of the Fair Work Act 2009 (the "Act") that the experts predicted would become a fertile source of litigation by employees is within the area known as the **General Protections of Employees**. Recent decisions of the Federal Court have begun to shed some light on how this area of the law will be applied. Early indications are that common sense will prevail. This is good news for employers.

The law

Under the Act a person (employer or employee) must not take adverse action against another person

- (i) because the other person:
 - a. has a workplace right; or
 - b. has, or has not, exercised a workplace right; or
 - c. proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
- (ii) to prevent the exercise of a workplace right by the other person.

A person must not take adverse action against another person (the second person) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Adverse action in relation to an employee means an employer:

1. Dismisses the employee; or
2. Injures the employee in his or her employment; or
3. Alters the position of the employee to the employee's prejudice; or
4. Discriminates between the employee and other employees of the employer.

Adverse action in relation to a prospective employee means the prospective employer refuses to employ the prospective employee or discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee. For example, a prospective employer cannot require a prospective employee to agree to an individual flexibility arrangement (to alter the way in which award or

agreement entitlements are applied) as a condition of employment.

The approach of the Federal Court

Landers and Rogers Lawyers have reported that in a recent case the Federal Court expressly rejected an applicant's submission that the wording of the Act meant that the reasons given by an employer for taking the adverse action were irrelevant.

The court found that in determining whether an employer had taken an adverse action against an employee because of a proscribed reason, it was necessary to hear the decision-makers evidence as to why he or she took the adverse action. If this evidence establishes that the reason for the adverse action was lawful, the employer will have a good defence.

In another case a chief executive claimed that her employer had taken adverse action against her for reasons which included her "workplace right" by taking the following actions.

- Starting a disciplinary investigation against her without reasonable cause and in circumstances where the employer knew (or ought to have known) that the complaints against her were not bona fide and were made in the context of her participation in the enterprise bargaining negotiations.
- Issuing a "show cause" letter as to why she should not be subject to disciplinary action.
- Relying on the company secretary's diary notes to support a finding that there was an established pattern of unreasonable treatment of staff over an extended period.
- A failure to provide natural justice in carrying out the investigation.
- A refusal or failure to set aside the report flowing from the investigation.

The Court found that in certain circumstances, starting an investigation into bullying could constitute adverse action. However, the applicant had pleaded that the employer knew or ought to have known that the complaints were without reasonable cause. However, the Court was not satisfied that this was the case and rejected the applicant's claim that starting an investigation constituted adverse action.

The Court did decide that the 'show cause' letter was adverse action. However, the Court ultimately found that the employer had not taken adverse action against the applicant because she had exercised a "*workplace right*", but rather the employer had acted out of concern that she had been mistreating staff

members and had believed it was essential to investigate these allegations.

Conclusions

In the two instances cited above the Court has upheld the right of an employer to investigate unsatisfactory behaviour and misconduct. The responsible employer is not inhibited in acting to remedy such problems. Employees cannot use the General Protections as a shield to avoid or deflect legitimate disciplinary action.

Clearly, the common sense approach that I referred to earlier is the requirement placed on the aggrieved person to establish the casual relationship between the adverse action on the one hand (which is not difficult to establish) and the exercise of a workplace right (which is much more difficult to do). Let's hope this common sense approach continues.

Other News

Filing fee—Dismissals & general protections applications

The filing fee for dismissals and general protections applications made under ss.365, 372, 394 and 773 of the Fair Work Act 2009 increased to \$60.60 from 1 July 2010.

The high income threshold in unfair dismissal cases also increased to \$113,800 and the compensation limit is \$56,900.

Annual Wage Review 2010–11

Fair Work Australia has commenced the work on the Annual Wage Review 2010–11. A website has been published providing access to information about the review and the outcomes of it, including a recent notice of listing for a conference to consider the research agenda for the 2010–11 review.

[\[More\]](#).



Management of staff is increasingly more complex particularly compliance with employment regulations. The Fair Work Act 2010 has many challenges for employers.

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