

# EMPLOYMENT UPDATE

30 SEPTEMBER 2010

## PAID PARENTAL LEAVE – BEING DELIVERED NOW

The *Paid Parental Leave Act 2010* ('Act') and *Paid Parental Leave (Consequential) Amendment Act 2010*, came into effect on 1 October 2010. This is a government funded scheme for paid parental leave under which employees may be entitled to receive up to 18 weeks paid parental leave following the birth of their child or placement of an adopted child after 1 January 2011.

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The right to paid parental leave under the Act supplements any contractual entitlement to paid parental leave, and those entitlements that an employee has under the *Fair Work Act 2009* (Cth) to:

- Unpaid parental leave;
- Request extended unpaid parental leave; and
- Request flexible working arrangements.

The Act provides that eligible care-givers of a child born or adopted and placed after 1 January 2011, will be entitled to a payment of \$570 per week (as adjusted from time to time in line with minimum wage orders) for a period of up to 18 weeks during the first year of the child's life or the first year after placement of the adopted child.<sup>1</sup>

There are numerous rules around applying for and making a claim;

<sup>1</sup> Reference in this summary to birth of a child and date of birth of the child means also adoption of a child and the placement of an adopted child.

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entitlement/eligibility to a payment; the payment of a benefit and cessation of such payment.

This summary provides you with an overview of the legislation governing paid parental leave and what you should do as an employer to prepare for and comply with the paid parental leave legislation.

### APPLICATION/CLAIM

An application and claim for paid parental leave may be made by the primary care-giver, secondary care-giver or such other person as determined by the Secretary of the Family Assistance Office ('Secretary') as having entitlement to such payments (for example, grandparents). No claim can be made by a secondary or other care-giver unless the primary care-giver has made an application/claim.

The application/claim can be lodged any time from 97 days before the birth of a child up until the date of the child's first birthday. However, the entitlement expires on the child's first birthday regardless of whether the applicant has received eighteen weeks of payments.

All applications/claims must be in the proscribed form and have the necessary documentation attached, including verification of the child's birth.

### ELIGIBILITY

To be eligible for the parental leave payment the employee applicant must:

- be a long term employee, that is, a minimum of 12 months continuous service. This can include casual employees who have worked on a regular and systematic basis and who have a reasonable expectation of ongoing work;
- lodge an application in the approved form with the Secretary;
- provide details of their employer or employment details;
- Satisfy the *work test*, being that they worked 330 hours in the 392 days immediately before the child was born;
- Satisfy the *income test*, being that their adjustable taxable income for the previous income year prior to birth was less than \$150,000<sup>2</sup>. This amount will be indexed from 1 July 2012;
- Satisfy the Australian residency *test*, being that they are an Australian resident or in a special category of visa holders;
- Provide details of the date that payment is to commence;
- Provide their tax file number;

<sup>2</sup> The adjustable taxable income includes the person's taxable income, reportable fringe benefits and reportable superannuation contributions. See <http://www.familyassist.gov.au/payments/family-assistance-payments/baby-bonus/adjusted-taxable-income.html>

- Confirm that they will be the child's primary care-giver;
- Confirm that they have not returned to work. As this is a continuous payment entitlement, the applicant will lose eligibility for the parental leave payment if they return to work and undertake one hour or more of paid work, other than for a permissible purpose (as detailed in the Act); and
- not be entitled to a baby bonus on the day of the application.

### PAYMENT

The parental leave payment will be made by way of instalments of \$570 per week for a period of up to 18 weeks during the first year of the child's life. The Applicant is entitled to nominate the start date of the payments as the date of birth or a later date ('commencement date').

From 1 January 2011 to 30 June 2011, the obligation will be on the Secretary to make payment of instalments to the applicant where the child is born before 1 July 2011, unless the employer elects in writing (as proscribed by the Act) to make the payments on behalf of the Commonwealth.

For all births after 1 July 2011, the primary obligation will be on the employer to make the payment on behalf of the Commonwealth. The employer will be notified of this obligation by way of an 'Employer Determination Order' from the Secretary. Such Order will set out

the payment details that must be made to the applicant. The Commonwealth Government will deposit the funds for the payment into the employer's bank account.

The only allowable deductions from any instalment payment are PAYG withholding; any child support deductions and any deductions authorised by the employee, which have been authorised by the employee and principally for the benefit of the employee. Employers will note that this obligation is similar to that under s.324 of the *Fair Work Act 2009*, which regulates deductions from the employee's wages/salaries.

Employers should also note that the introduction of the government funded scheme does not mean that employers are no longer required to make any paid parental leave payments agreed to in an employee's contract of employment; an enterprise agreement or company policy, etc.

If the employer has agreed contractually (including in an Enterprise Agreement) to provide such a benefit, it cannot unilaterally take that right/benefit away without being exposed to a claim for breach of the contract or enterprise agreement. Caution should be exercised where the right or entitlement exists under employer's policies.

### EMPLOYER OBLIGATION TO MAKE PAYMENTS

Where the employer agrees to make the payments (pre-July 2011) or is required by an 'Employer Determination Order'

to make the payments (post-July 2011), it must within 14 days of the date of the Order provide details of its bank account and pay cycle to the Family Assistance Office ('FAO'). The 'Employer Determination Order' will generally only be made where the applicant is entitled to more than eight weeks of payments.

The employer is only required to make a payment after it has received the funds from the FAO, and after any allowable or required deductions. If the commencement date for the payments is before the employer receives the funds it will be required to make a back payment on receipt of the funds.

The employer must withhold tax from the parental leave payment under usual PAYG requirements, and must include the parental leave payments in the total amounts of annual and part-year payment summaries.

Superannuation is not payable on the parental leave payments nor will the payments need to be taken into consideration for workers compensation declarations or payroll tax declarations. Employers should consult with their insurance brokers and accountants to confirm there will be no other obligations as a result of having to make the payment.

Further, employees will not accrue leave while on paid parental leave notwithstanding that their service with considered continuous.

Subject to receiving the funds from the FAO the Employer is

required to make payment of any future instalments in accordance with the employees' normal pay cycle, which can be no greater than monthly.

Employers will also be obliged to give employees details of the payments (at intervals proscribed by the yet to be released rules), and will be required to keep records of the payment for seven years.

If the employer fails to make any payment it has agreed to make (for births prior to 1 July 2011) or it is obliged to make pursuant to an 'Employer Determination Order' (for births post-1 July 2011), and has not lodged a review of the obligation to pay as detailed below, it will be exposed to a civil penalty and/or a pecuniary penalty for the non-compliance.

There is a right to seek review of an 'Employer Determination Order'. This will generally be where the employer disputes the obligation to make the payment, including where the person is not an employee.

### EMPLOYER OBLIGATIONS GENERALLY

There is an underlying obligation on the employer, similar to that of the applicant, to notify the Secretary when there is a change of circumstances.

The employer is required to notify of such changes as:

- its bank details change;
- the instalment date changes;

- the employer has ceased to trade;
- the employee has returned to work;
- the employee is no longer an employee of the employer; and
- a number of other procedural matters set out in s.82 of the Act.

Failure to notify of these changes will expose the employer to a penalty of up to 60 units (\$6,600) and an additional pecuniary penalty of up to \$33,000 in the case of a corporation. Sections 146 and 147 of the Act set out the penalty provisions for noncompliance. This can include penalties for:

- making an unauthorised deduction
- failure to make payments in accordance with an Employer Determination Order
- failure to give the applicant employee a record of the payment
- failing to keep records of payments for seven years; and
- failing to notify the Secretary of certain events including the applicant returning to work or ceasing to be an employee.

## COMPLIANCE AND ENFORCEMENT

The Secretary and/or the Fair Work Ombudsman have power under the legislation to investigate

and gather documents regarding compliance and/or alleged breaches. If a request is made on an employer in writing the employer is obligated to provide those documents or attend as requested to “appear and answer questions”. Failure to do so can expose that person identified in the notice to a penalty of up to six months imprisonment.

We recommend upon receipt of any notice from the Secretary or the Fair Work Ombudsman that you contact Aitken Legal to discuss your rights as the employer and the appropriate response. We are also happy to assist you in any interview to be conducted by the Fair Work Ombudsman.

While significant pecuniary penalties can be imposed by the Federal Court of Australia or the Federal Magistrates Court of Australia pursuant to s.147 of the Act, the Secretary and the Fair Work Ombudsman do have discretion to instead issue an infringement notice. It is likely this will be exercised in the case of minor infringements. However, the penalty under such notices are fixed at 15 penalty units for a body corporate (\$1,650) and 6 penalty units for an individual (\$660).

## SUMMARY

The Act imposes a number of obligations on employers with respect to the processing of the parental leave payment for births after 1 July 2011 and the monitoring of compliance under the Act.

Employers need to assess now whether their payroll system is capable of meeting the obligations to make the payments and manage the compliance impose on it by the Act. Employers need to ensure they are aware when the funds have been received, when the payment is to be made and when they are

required to give notice to the Secretary due to a change of circumstance.

These obligations come on top of the current obligations imposed on payroll systems to comply with Modern Awards and phasing in.

It is highly recommended that employers log on to the Family Assistance website or contact the Family Assistance Office and read and review the Business Requirements Statement. Employers are being encouraged to do business online via the Centrelink website or through use of the employer's AUSKey.

These online facilities should make it easier to process the parental leave payment. The relevant web address is <http://www.familyassist.gov.au/publications/paid-parental-leave-employer-business-requirement-statement/index.html>

**Lisa Aitken**  
Managing Partner  
+61 7 5413 4000

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## FOR MORE INFORMATION PLEASE CONTACT



**LISA AITKEN**  
 Managing Partner  
[lisa.aitken@aitkenlegal.com.au](mailto:lisa.aitken@aitkenlegal.com.au)



AITKEN LEGAL  
 Level 1, Regatta Corporate  
 2 Innovation Parkway  
 Birtinya Qld 4575

PO Box 256 Wurtulla Qld 4575

Phone: 07 5413 4000  
 Fax: 07 5413 4099  
 Email: [info@aitkenlegal.com.au](mailto:info@aitkenlegal.com.au)



**CHRISTOPHER CAMPBELL**  
 Partner  
[chris.Campbell@aitkenlegal.com.au](mailto:chris.Campbell@aitkenlegal.com.au)

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