

Employment, Workplace Relations & Safety

Update: Paid Parental Leave Act 2010

The Government has recently passed the Paid Parental Leave Act 2010 (**the PPL Act**) to implement its paid parental leave (**PPL**) scheme.

Paid Parental Leave Act 2010

The Government has recently passed the Paid Parental Leave Act 2010 (**the PPL Act**) to implement its paid parental leave (**PPL**) scheme.

Government funded parental leave payments made under the PPL Act complement the entitlement to unpaid parental leave under the National Employment Standards in the Fair Work Act 2009 (Cth) and are additional to an employee's other entitlements, including those contained in applicable industrial instruments.

Employers should review their parental leave policies to make reference to the PPL scheme as appropriate and commence planning to ensure that their payroll systems can administer the payments scheme from July 2011.

1. PPL AT A GLANCE

Parents of children born or adopted on or after 1 January 2011 will be eligible to apply for government funded PPL of up to 18 weeks (at currently the National Minimum Wage \$569.90 per week before tax). To be eligible the parent must meet the following criteria:

- be the primary carer of the child;
- meet Australian residency requirements;
- have worked in paid employment for at least 330 hours over 10 of the 13 months prior to the birth/adoption;
- have an adjusted taxable income of \$150,000 or less for the financial year before the birth/adoption;

- not have returned to paid work; and
- not be receiving the baby bonus for the child (either because they are ineligible or choose not to apply).

For claims made between October 2010 (for children expected to be born on or after 1 January 2011) and before 30 June 2011, employers will be able to opt-in to the scheme and make the PPL payments directly to employees who have been employed for at least 12 months rather than have the Family Assistance Office (**FAO**) making the payments to employees.

From 1 July 2011 employers must make the PPL payments to employees who have been employed for at least 12 months. The FAO will continue to pay the PPL payments to the employer, who then pays the employee through its payroll. For employees who have not been employed for 12 months, the FAO will continue to pay these employees directly.

In summary, the employer can opt to be the "paymaster" from 1 January 2011. It will be the paymaster from 1 July 2011 for employees with more than 12 months service. Employees with less than 12 months service will continue to be paid directly by the FAO.

2. ELIGIBILITY

To be eligible for PPL, clause the employee must satisfy:

- the "**work test**" where the claimant must have worked continuously for approximately 13 months prior to the birth or adoption, and during

10 of those 13 months worked at least 330 hours of paid work;

- the “**income test**”, whereby a claimant must have an adjusted taxable income of less than \$150,000 (indexed annually) for the year that ended before either the day the person made their claim for PPL or the day the child was born (whichever is earlier); and
- the “**residency test**”, where a claimant must be an Australian resident within the meaning of the Social Security Bill, or hold a special category visa and be resident in Australia in accordance with the Migration Act.
- be the “**primary carer**” of the child;
- not have “**returned to work**” - this means working one hour or more of paid work other than for a permissible purpose (outlined below); and
- not be receiving the baby bonus for the child (either because they are not eligible or because they have chosen not to receive it). The person’s partner and former partner also must not be entitled to the baby bonus for the child for that person to be eligible for PPL.

In circumstances where a child is stillborn, born prematurely, dies before birth, or there are pregnancy related complications or illness, a person remains eligible for PPL if the person satisfies the above criteria.

Under the PPL Act, full-time and part-time employees, casual workers and contractors (persons who work for a principal under a contract for services) may all be eligible for PPL if they perform “qualifying work”. Qualifying work is defined as being at least one hour of paid work on a day.

3. RETURN TO WORK

After the birth of the child, once a person has returned to work, they will no longer be eligible for PPL payments. Whether a person has returned to work or not will depend on whether they have performed one hour or more of paid work (not voluntary work) other than for a permissible purpose. In respect of employees, a “permissible purpose” is keeping in touch with the person’s employer on a day that would otherwise be a day of leave (up to a maximum of 10 “keeping in touch” days).

4. PROCESS FOR MAKING A PPL CLAIM

First Step: An employee makes claim to FAO. This must be in the prescribed form within 97 days of the expected date of birth. If the claim is a primary claim, the claim must state a specific date on which the primary claimant wants parental leave pay to start being paid.

Second Step: The FAO must make an initial eligibility determination as to whether the employee is entitled to receive PPL payments. The FAO will then make a “payability determination” that specifies the period for which PPL is payable to the claimant.

Third Step: If such determinations have been made by the FAO, and the person is an “eligible person” and has been employed for at least 12 months, then the FAO must send the person’s employer a written “employer determination”. The employer determination declares that the employer is required to make the payments after receiving the PPL funds from the FAO.

Fourth Step: The employer is required to send the FAO an acceptance notice to the employer determination within 14 days of the notice being given, or apply for a review of the decision. Any acceptance notice must include an employer’s acceptance of the obligation to pay instalments, bank account information and pay cycle information.

5. EMPLOYER’S OBLIGATIONS

In most cases, from 1 July 2011 (or 1 January 2011 if the employer agrees to be the paymaster) PPL payments will be made by the employer and processed through an employer’s existing payroll system. The FAO will issue an employer determination that notifies the employer they are required to make the PPL payments, and will ensure that money is transferred to the employer so that they can make the PPL payments. However, the employer does not have to pay PPL for an employee with less than 12 months service, nor does it have to make PPL payments if a determination has not yet been made or the FAO has not paid them enough to make the payment.

Where a person is usually paid for work over a regular period, the instalment period is that period and the payday for the instalment is in line with the employee’s paydays. If there is no such regular period, the instalment period is each calendar month and the employer must pay that money on the first day after then of that period.

Deductions from instalments are only permitted for PAYG withholding or child support purposes or otherwise are deductions which are authorised by the employee and principally for the employee's benefit (e.g. a salary sacrifice arrangement). Deductions are otherwise prohibited.

6. INTERACTION WITH EXISTING INSTRUMENTS AND OTHER PAYMENTS

Under the government's scheme, an employer will be required to pay the government funded PPL component in addition to any other obligations the employer may have in relation to the employee. This means that the full amount of the government-funded PPL payment of up to 18 weeks will not disturb the employer's other contractual or statutory obligations in relation to the employee.

For example, if an employee has an entitlement to 12 weeks PPL on full pay under the terms of their employment contract, in an enterprise agreement or under a binding company policy, the employee can access both the employer-funded PPL entitlement and their government-funded PPL entitlement. In this example the employee could receive these payments concurrently or consecutively.

If an employer currently has an obligation to provide a benefit or entitlement such as PPL or an automatic right to access other forms of paid leave during a period of parental leave (such as annual leave or long service leave) these obligations will continue to apply regardless of the commencement government-funded PPL scheme.

An employee does not accrue annual or personal leave whilst they are on government-funded PPL, as the Bill states that a period of parental leave does not count as "paid leave" simply because an employee is receiving the government-funded PPL payments. This means that it does not count as part of an employee's "service" for the purposes of the National Employment Standards. It does, however, count towards an employee's "continuous service", which is relevant for the purpose of eligibility for unpaid parental leave and requesting flexible working arrangements.

Similarly, superannuation payments under the *Superannuation Guarantees (Administration) Act 1992* are not payable on government-funded PPL payments.

This article was produced by Herbert Geer.
It is intended to provide general information in summary form on legal issues.
The contents do not constitute legal advice and should not be relied upon as such.

For further enquiries contact:

Melbourne

Chris Hartigan
Partner

chartigan@herbertgeer.com.au
Phone: (03) 9641 8745

Louise Russell
Partner

lrussell@herbertgeer.com.au
Phone: (03) 9641 8657

Luci Mummé
Partner

lmumme@herbertgeer.com.au
Phone: (03) 9641 8661

Sydney

Malcolm Davis
Partner

mdavis@herbertgeer.com.au
Phone: (02) 9239 4525

Gary Punch
Special Counsel

gpunch@herbertgeer.com.au
Phone: (02) 9239 4570

Paul Ludeke
Special Counsel

pludeke@herbertgeer.com.au
Phone: (02) 9239 4565

Richard Lund
Special Counsel

rlund@herbertgeer.com.au
Phone: (02) 9239 4501

Brisbane

Andrew Cardell-Ree
Special Counsel

acardell-ree@herbertgeer.com.au
Phone: (07) 3853 8822