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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

FAIR WORK AMENDMENT (COVID-19) BILL 2020

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Mehreen Faruqi)

Fair Work Amendment (COVID-19) Bill 2020

OUTLINE

The Bill provides 14 days paid COVID-19 leave to all workers, including part-time, casual and gig economy workers.

Paid COVID-19 leave will be available for the following reasons:

- The employee has been diagnosed with COVID-19;
- The employee is unable to attend work because the employee's workplace has been shut down because of COVID-19;
- The employee is subject to self-isolation or quarantine measures in accordance with a Commonwealth, State or Territory government policy relating to COVID-19;
- The employee is caring for another person who:
 - Has been diagnosed with COVID-19; or
 - Is subject to self-isolation or quarantine measures in accordance with Commonwealth, State or Territory government policy relating to COVID-19.

Paid COVID-19 leave will be added to the National Employment Standards which sets out minimum standards that cannot be displaced.

The Bill also provides for the Fair Work Commission (FWC) to make COVID-19 leave orders which would extend provisions relating to COVID-19 leave in the *Fair Work Act 2009* to all workers such as gig economy workers who may not be employees, like food delivery drivers. Workers, unions and corporations can apply for the FWC to make a COVID-19 leave order and the FWC must make a determination within 2 days of the application being made. The FWC must make the order unless there are compelling reasons not to do so, and consider the principle that all workers should be entitled to COVID-19 leave that is no less favourable than that of employees performing the same work.

NOTES ON CLAUSES

Clause 1: Short Title

This clause provides for the Act to be cited as the *Fair Work Amendment (COVID-19) Bill 2020*.

Clause 2: Commencement

This clause states the whole of this Act will commence on the day after it receives the Royal Assent.

Clause 3: Schedules

This clause gives effect to the Schedules. It provides that legislation that is specified in the Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Part 1 – Amendments to the National Employment Standards

Fair Work Act 2009

Item 1: Section 12

Inserts ***paid COVID-19 leave*** into the dictionary as defined by new section 106F.

Item 2: Subsection 17(2) note

A consequential amendment which adds paid ***COVID-19 leave*** to the note which provides an example of leave entitlements in relation to immediate family members, specifically a child.

Item 3: Paragraph 61(2)(e)

Adds “paid COVID-19 leave” as a minimum standard that cannot be displaced.

Item 4: Division 7 of Part 2-2 (heading)

A consequential amendment which adds ***paid COVID-19 leave*** to the heading of Division 7.

Item 5: After Subdivision CA of Division 7 of Part 2-2

Inserts a new subdivision – ***Subdivision CB – Paid COVID-19 leave***, which sets out an employee’s entitlement to paid COVID-19 leave, the requirement for taking paid COVID-19 leave, the rate the leave is to be paid at and outlines the confidentiality requirements.

106F Entitlement to paid COVID-19 leave

Provides for 14 days paid COVID-19 leave to be available in full, for each 12 month period, for all employees, including part-time and casual and prevents the accumulation of leave from year to year.

(1) An employee is entitled to 14 days of paid COVID-19 leave in a 12 month period.

(2) Paid COVID-19 leave:

(a) is available in full at the start of each 12 month period of the employee’s employment; and

- (b) does not accumulate from year to year; and
 - (c) is available in full to all employees, including part-time and casual employees.
- (3) For the purposes of subsection (2), if an employee is employed by a particular employer:
- (a) as a casual employee; or
 - (b) for a specified period of time, for a specified task, or for the duration of a specified season;
the start of the employee's employment is taken to be the start of the employee's first employment with that employer.
- (4) The employee may take paid COVID-19 leave as:
- (a) a single continuous 14 day period; or
 - (b) separate periods of one or more days each; or
 - (c) any separate periods to which the employee and the employer agree, including periods of less than one day.
- (5) To avoid doubt, this section does not prevent the employee and the employer agreeing that the employee may take more than 14 days of paid or unpaid leave to deal with the impact of COVID-19.
- (6) This section applied to a 12-month period referred to in paragraph (2)(a) that:
- (a) begins after the commencement of this section; or
 - (b) began before the commencement of this section but had not expired immediately before that commencement.

106G Taking paid COVID-19 leave

Provides the criteria under which an employee may take paid COVID-19 leave.

- (1) The employee may take paid COVID-19 leave if any of the following occur (whether before or after the commencement of this section):
- (a) the employee has been diagnosed with COVID-19;
 - (b) the employee is unable to attend work because the employee's workplace has been shut down because of COVID-19;
 - (c) the employee is subject to self-isolation or quarantine measures in accordance with a Commonwealth, State or Territory government policy relating to COVID-19;
 - (d) the employee is caring for another person who:
 - (i) has been diagnosed with COVID-19; or
 - (ii) is subject to self-isolation or quarantine measures in accordance with a Commonwealth, State or Territory government policy relating to COVID-19.

Note: The notice and evidence requirements of section 107 must be complied with.

- (2) To avoid doubt, the employee may take paid COVID-19 leave for a period that occurs before the commencement of this section if that period occurs in a 12 month period for the employee to which subsection 106F(6) applies.
- (3) An employer must not refuse a request by an employee to reverse a leave application previously made if the request is for the purposes of applying for paid COVID-19 leave.

106H Payment for paid COVID-19 leave

Sets out the rate of pay for paid COVID-19 leave.

If, in accordance with this Subdivision, an employee take a period of paid COVID-19 leave, the employer must pay the employee:

- (a) For an employee other than a casual employee – at the employee’s base rate of pay for the employee’s ordinary hours of work in the period; and
- (b) Otherwise – at the daily rate of pay equal to the average of the daily rates of pay paid to the employee over the previous 12 month period (or such lesser period for which the employee has been employed by the employer).

106J Confidentiality

Outlines the confidentiality requirements of the employer.

- (1) Employers must take steps to ensure information concerning any notice or evidence an employee has given under section 107 of the employee taking leave under this Subdivision is treated confidentiality, as far as is reasonably practicable to do so.
- (2) Nothing in this Subdivision prevents an employer from disclosing information provided by an employee if the disclosure is required by an Australian law or is necessary to protect the life, health or safety of the employee or another person.

Note: information covered by this section that is personal information may also be regulated under the *Privacy Act 1988*.

106K Entitlement of days of leave

What constitutes a day of leave for the purposes of this Subdivision is taken to be the same as what constitutes a day of leave for the purposes of section 85 and Subdivision B and C.

Item 6: At the end of subsection 107(3)

Includes paid COVID-19 leave as a leave entitlement that is subject to notice and evidence requirements.

Part 2 – Amendments relating to workers generally

Item 7: Subsection 9(5B)

Consequential amendment that adds COVID-19 leave orders in the guide to the *Fair Work Act 2009*.

Item 8: Section 12 (at the end of the definition of *employee*)

Adds Note 4 to the definition of *employee* which identifies new Division 1A of Part 6-44B (COVID-19 leave orders) as a Division where the meaning of *employee* differs from its ordinary meaning.

Item 9: Section 12 (at the end of the definition of *employer*)

Adds Note 4 to the definition of *employer* which identifies new Division 1A of Part 6-4B (COVID-19 leave orders) as a Division which may alter the effect of provisions of the Act

applying to an *employer*.

Item 10: Section 12

Inserts **COVID-19 leave order** into the Dictionary as defined by new subsection 789FBA(1).

Item 11: Section 12 (at the end of the definition of *national system employee*)

Adds Note 3 to the definition of *national system employee* to include Division 1A of Part 6-4B (COVID-19 leave orders).

Item 12: Section 12 (at the end of the definition of *national system employer*)

Adds Note 3 to the definition of *national system employer* to include Division 1A of Part 6-4B (COVID-19 leave orders).

Item 13: Paragraph 576(1)(q)

Replaces paragraph 576(1)(q) to reflect the new Part 6-4B heading - Workers.

Item 14: Paragraph 675(2)(j)

Clarifies that Division 1A of Part 6-4B which deals with COVID-19 leave orders is subject to provisions regarding contraventions of a FWC order.

Item 15: Part 6-4B (heading)

Amends heading to **Part 6-4B – Workers**

Item 16: Section 789FA

Provides a new guide to this Part which explains that Division 1A provides for the making of COVID-19 leave orders by FWC that extend the paid COVID-19 leave provisions of this Act to workers. Division 2 continues to allow a worker who has been bullied at work to apply to the FWC for an order to stop the bullying.

Item 17: Before Division 3 of Part 6-4B

Inserts a new Division – **Division 1A – Paid COVID-19 leave orders**, which sets out the criteria for the order including: what provisions of the Act an order can include, workers to whom the order may apply, the businesses required to comply with the order, when a worker is considered to be working for a business, the effect of a COVID-19 leave order, applications for an order and matters the FWC must consider when deciding whether, or the terms on which to make an order.

789FBA COVID-19 leave orders

- (1) Provides for the FWC to make **COVID-19 leave orders** that specify the provisions of Subdivision CB of Division 7 of Part 2-2 (paid COVID-19 leave) and any other provisions in this Act considered necessary, that apply to workers. The Businesses specified in the order are required to comply.

Worker

- (2) States that a COVID-19 leave order may apply (subject to subsections (4) and (5)) to:

- (a) a worker; or
 - (b) two or more workers; or
 - (c) a class of workers.
- (3) Clarifies for the purposes of (2)(c) that a class of workers can be described as one or more of the following;
- (a) a particular industry or part of an industry;
 - (b) a particular kind of work;
 - (c) workers who perform work for a particular constitutionally-covered business.
- (4) Specifies that a COVID-19 leave order must not apply to a worker unless the FWC is satisfied that the worker's terms and conditions as affected by the order will, considered on an overall basis, be no less favourable than the worker's terms and conditions before the order is made.
- (5) States that a COVID-19 leave order must not apply to work experience students or volunteers.
- (6) States that COVID-19 leave order must specify for each worker to whom the order applies, the constitutionally-covered business or businesses; or a class of constitutionally-covered businesses, that are required to comply with the order.
- (7) Clarifies that a class of constitutionally-covered businesses can be described by reference to either of both of the following:
- (a) a particular industry or part of an industry;
 - (b) a particular kind of work.

789FFB When does a worker perform work for a constitutionally-covered business?

This section gives the FWC wide powers to regulate the broad range of work-related relationships existing in Australia.

- (1) States that a worker performs work for a constitutionally-covered business for the purposes of a COVID-19 leave if:
- (a) the worker performs work directly or indirectly for the constitutionally-covered business; or
 - (b) the worker performs work directly for another entity, and the constitutionally-covered business, irrespective of the legal relationship (contractual or otherwise) between the workers and the constitutionally-covered business.
- (2) Clarifies for the purposes of (1)(a) that a worker indirectly performs work if the work is for the benefit of a constitutionally-covered business, irrespective of the legal relationship (contractual or otherwise) between the worker and the constitutionally covered business.
- (3) State that if a worker performs the same work for 2 or more constitutionally covered businesses, the FWC may specify any or all of them in a COVID-19 leave order.

789FBC Effect of a COVID-19 leave order

- (1) Provides that if the FWC makes a COVID-19 leave order it applies as if:

- (a) any reference to an employee (within the ordinary meaning of that expression), or a national system employee, also included a reference to the worker; and
 - (b) any reference to an employer (within the ordinary meaning of that expression), or a national system employer, also included a reference to the constitutionally-covered business.
- (2) States that the order applies from the time or times specified in the order (which must not be earlier than the time the order is made) and with any other modifications specified in the order.

789FBD Application for a COVID-19 leave order

- (1) States that the FWC can only make an order on application by:
- (a) A worker to whom the order will apply; or
 - (b) An organisation that is entitled to represent the industrial interests of the worker, workers or class of workers to whom the order will apply; or
 - (c) An organisation that would, if a worker to whom the order will apply were instead an employee, be entitled to represent the industrial interests of the worker.
- (2) As far as practicable, the FWC must determine an application for an order under subsection (1) within 2 days after the application is made.
- (3) Subject to subsection (1) and subsection 789FBA(4), the FWC must make the order unless there are compelling reasons not to do so).

789FBE Matters for FWC to consider

This provides that the FWC must as far as is practicable give effect to the principle that all workers should be entitled to minimum terms and conditions that are no less favourable than those of employees performing the same work when deciding whether to make an order or the terms of the order.

Statement of Compatibility with Human Rights

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

Fair Work Amendment (COVID-19) Bill 2020

This Bill 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 Bill

The Bill provides 14 days paid COVID-19 leave to all workers, including part-time, casual and gig economy workers.

Paid COVID-19 leave will be available for the following reasons:

- The employee has been diagnosed with COVID-19;
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Human rights implications

This Bill does not engage any of the applicable rights or freedoms.

Conclusion

This Bill is compatible with human rights as it does not raise any human rights issues.

Senator Mehreen Faruqi