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MATERNITY LEAVE – LATEST DEVELOPMENTS

An Australian company has recently been fined \$33,000 for failing to provide an employee with a job upon her return from maternity leave.

In this edition of the Employment Alert, we consider the implications of this case and provide an overview of:

- the current law relating to maternity leave;
- the new National Employment Standard on maternity leave; and
- proposals for paid maternity leave.

Case Note – return to work after maternity leave

When Belinda Iliff sought to return from maternity leave, her employer, Sterling Commerce, informed her that her job as 'Marketing Specialist – Australia' no longer existed. However, the company continued to employ another person (who had been filling in for Ms Iliff) as 'Marketing Manager, Financial Services Solutions APO'.

On 21 May 2008, the Federal Court ruled that Sterling Commerce had breached its obligations under the *Workplace Relations Act 1996* ('the WR Act'). Under the WR Act, Sterling Commerce was obliged to appoint Ms Iliff to the position she held before her maternity leave. The Court found "Ms Iliff's position still existed and she should have been reinstated to it ... Sterling Commerce sought to hide its tracks by the manipulation of a new job description."

Sterling Commerce was ordered to pay the maximum penalty of \$33,000.

Current Law

The WR Act guarantees a basic parental leave entitlement to Australian employees who meet certain conditions. Some employees have additional entitlements under awards, workplace agreements or common law contracts.

1. Eligibility
 - The WR Act guarantees that all permanent employees are entitled to parental leave, after 12 months continuous service.
 - Casual employees are eligible for parental leave after working on a regular and systematic basis for at least 12 months, provided they have a reasonable expectation of ongoing employment.
2. Entitlements
 - 52 weeks unpaid maternity leave. This period is reduced by any paid leave taken during the same period (eg annual leave) and by any paternity leave taken by the child's father (this can be up to 52 weeks).
 - A right to return to work to the position held before maternity leave. If the position no longer exists, and the employee is qualified and able to work in another position, the employee is entitled to return to that position. If there are 2 or more such positions, the employee is entitled to whichever position is nearest in status and remuneration to the former position.
3. Procedural requirements
 - To be entitled to parental leave, an employee must follow detailed procedural requirements set out in the WR Act, including provision of a medical certificate 10 weeks prior to the expected date of birth.
 - Employees must also give at least 4 weeks notice of the start and end dates of their parental leave.

New National Employment Standards

On 16 June 2008, the Government released the National Employment Standards ('NES'). The NES are expected to take effect from 1 January 2010 and will provide a minimum safety net for all Australian employees.

1. **Eligibility**

Under the NES, permanent and casual employees will be subject to the same eligibility test for parental leave as currently applies.
2. **Entitlements**

Under the NES, both parents will have the following entitlements:

 - Each parent may take 12 months unpaid leave, one after the other. Only 3 weeks unpaid leave can be taken by both parents at the same time, immediately following the birth (this period is deducted from the 12 month entitlement). The period of unpaid parental leave is reduced by any paid leave taken during the same period (eg annual leave).

- The right to request an extension of up to 12 months immediately following the first 12 months leave. The employer must agree to the extension, unless it has “reasonable business grounds for refusing”. However, the total period of parental leave for both parents combined must be no more than 2 years.
- The right to return to the employee’s pre-parental leave position. If that position no longer exists, the employee is entitled to return to “an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position”.
- The right to request flexible working arrangements to care for a pre-school child. The employer may refuse the request only on reasonable business grounds.

3. Procedural requirements

- The documentation requirements will be simplified under the NES. Employers will have a right to request evidence to support the application for parental leave, such as a medical certificate.
- Employees will be required to give 10 weeks written notice of their intention to take parental leave.

4. Implications

Employee couples will be able to take up to 2 years unpaid parental leave between them, rather than a total of 12 months.

Employees with pre-school children will have a new right to request flexible working arrangements. It remains to be seen what will constitute “reasonable business grounds” for an employer to refuse such a request. Similar legislation has been in place in the United Kingdom since 2003 and over 80% of requests have been accepted or partially accepted by employers.

Paid Maternity Leave

While increased unpaid parental leave entitlements will benefit some employees, the current debate is whether maternity leave should be paid. Australia is one of only two OECD countries without a legislated right to paid maternity leave.

The Productivity Commission is conducting an inquiry into paid maternity leave, including its potential economic, productivity and social implications. The Commission is due to report by February 2009. This may lead to the Government introducing a national paid parental leave entitlement.

Many employers are finding that offering paid maternity leave is a way of retaining employees in a tight labour market. As a result, several large Australian employers have already brought in paid maternity leave entitlements.

Issues for employers to consider

Employers should be aware of their current parental leave obligations, including:

- which employees are eligible;
- notice and documentation requirements before taking parental leave or returning from parental leave;
- return to work entitlements.

Employers who restructure their workforce to avoid return to work obligations are at risk of substantial penalties.

Additionally, it is advisable for employers to:

- familiarise themselves with the NES (which come into operation on 1 January 2010) and to consider how they would respond to requests for extended periods of parental leave and/or flexible working arrangements; and
- be aware of developments in the debate on paid maternity leave.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations, contact the Workplace Relations team at Moores Legal.

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