

Global Watch

International Assignment Services

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Australia

Final Living-Away-From-Home legislation introduced into Parliament

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This article is intended to highlight general issues and is not a comprehensive statement of the topic or the laws of that country.

In Brief

Today, the Australian Government has introduced into Parliament the bill in relation to the new rules for Living - Away - From - Home (LAFH) concessions.

This bill is not yet law and, as Parliament's winter session ends today, it is unlikely to be considered by Parliament until it resumes on August 14, 2012.

Based on our initial reading and analysis, the bill appears consistent with the previously released draft legislation with the exception of the following items:

1. A new start date of October 1, 2012 (rather than July 1, 2012) - a welcome change;
2. Guidance on when an employment contract would be considered to be "varied" for those employees who may fall within the transitional

provisions especially in relation to contract extensions, pay increases, promotions and changes to working hours;

3. Clarification on the start date of the 12 month period for claiming LAFH benefits for employees who are living away from home on October 1, 2012 and qualify for LAFH concessions under the new rules; and

4. A change to the "ordinary weekly food and drink" amounts back to A\$42 per adult and A\$21 per child under 12.

New start date

Some welcome news from the bill is that the Government has listened to extensive feedback regarding the application date for the new LAFH rules.

Subject to the bill being passed into law in its current form, the rules will now apply from October 1, 2012 and not

July 1, 2012 as originally announced by the Government.

As the new LAFH rules will now apply from October 1, 2012, any employees that will no longer be able to access the LAFH concessions under the new LAFH rules can continue to access the LAFH concessions until October 1, 2012.

When an eligible employment arrangement is “varied”

The new LAFH rules provide transitional relief for employees who are:

- a) Neither temporary residents¹ or non-residents, and
- b) Temporary residents or non-residents who are living away from an Australian home,

where LAFH allowances or reimbursements were provided to the employee under an “eligible employment arrangement” that was entered into before 7.30pm (Australian Eastern Standard Time) on May 8, 2012 - the time and date that the Government announced the updated proposed reforms.

The transitional relief applies until the earlier of the following occurs:

- July 1, 2014; or
- The time the employee’s eligible employment arrangement ends; or
- The time that the employee’s eligible employment arrangement is varied or renewed.

¹ Broadly, a temporary resident is a resident of Australia who is in Australia on a temporary visa and is not married to or in a de facto relationship with an Australian citizen or permanent resident. There are additional considerations for people who are New Zealand citizens.

The Government has provided guidance in the Explanatory Memorandum to the bill as to when an eligible employment arrangement is “varied” for the purposes of the transitional provisions. The Explanatory Memorandum to the bill states (at paragraph 1.81):

“Any material variation to an existing employment arrangement triggers the commencement of the new arrangements. For example, an extension of time of an existing contract, change in the salary of an employee or change in the working hours of the employee would trigger the commencement of the new provisions. Changes such as an employee changing their name on the contract (for example, they get married and change their last name) or fixing a typo in a contract would not be considered a material change in a contract, and the employee could still be covered by the transitional arrangements.”

We have discussed this paragraph with Treasury today and they informed us that they were of the view that a pay increase as part of an annual salary review should not result in an eligible employment contract being varied for the purposes of the transitional rules; however, a pay increase as a result of a promotion may give rise to a variation. This view is not yet in writing from Treasury.

Even though the Explanatory Memorandum is only supposed to provide guidance as to how the law is to be interpreted if the law itself is unclear, it is likely that the Australian Taxation Office will rely on the Explanatory Memorandum when applying the legislation.

Employers need to be aware that any material change to the contract of an

employee who qualifies for the transitional provisions may result in the employee no longer being able to access LAFH concessions under the transitional rules in the bill.

12 month limit – when does it apply from for those living away from home on October 1, 2012?

The bill also provides some clarity around when the 12-month period for the concessions under the new LAFH rules starts for those employees who are living away from home on October 1, 2012 and may qualify for the concessions under the new LAFH rules where the transitional rules do not apply to the employee. For example, an employee who starts living away from home on or after May 9, 2012 where the requirements of the new LAFH concession are met.

Employees who are living away from their usual place of residence in Australia for employment purposes on October 1, 2012 and who meet the requirements of the new LAFH rules should be able to claim the LAFH concessions for a period of 12 months from October 1, 2012 (i.e. not from the date the assignment originally commenced).

Similarly, an employee who is temporarily residing at their usual place of residence on October 1, 2012 but expects to resume living away from that residence for employment purposes as required by their employer and who will meet the requirements of the new LAFH rules, should be able to claim the LAFH concessions for a period of 12 months from October 1, 2012.

Ordinary weekly food and drink expenses

The proposed legislation has updated the ordinary weekly food and drink expenses as follows:

- A\$42 for the employee, the employee's spouse and any children aged 12 or over; and
- A\$21 for any children aged under 12.

This is different to the A\$110 for each adult and child over 12 and A\$55 per child under 12 that was in the draft legislation.

LAFH allowances paid by an employer to an employee may include a portion to cover the ordinary weekly food and drink expenses incurred by the employee and the employee's family. Where this is the case, the employer will continue to be subject to fringe benefits tax on this portion of the LAFH allowance. This is provided that the employee provides the employer a declaration stating that the employee will incur food and drink expenses that will be deductible expenses for the purpose of the new LAFH rules.

The taxable value of the fringe benefit to the employer is the portion of the LAFH allowance that relates to ordinary weekly food and drink expenses reduced by the employee's contribution (if any).

The portion of the allowance in excess of the ordinary weekly food and drink expense amounts will be included in the employee's assessable income and, if eligible, the employee will need to claim deductions for expenses in excess of this amount.

The Bottom Line

The bill is not yet law and is subject to the Parliamentary process in Australia.

The deferred start date of October 1, 2012 gives both employers and employees time to fully consider and implement the changes contained within the bill.

Employers should be very careful in varying eligible employment contracts for employees who qualify for the transitional concessions under the LAFH rules especially in relation to contract extensions, pay rises and promotions and changes to working hours.

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