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# Small Business Assistance & Advisory Service

## Workplace Relations Guide – Types of Leave

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Over the period of their employment, individuals will have different needs requiring them to take leave from the organisation.

Under the FW Act National Employment Standards (NES), there are several leave entitlements that employers and employees should be aware of. These include:

## **Annual leave**

The FW Act NES provides for an entitlement for full-time and part-time employees to accrue paid annual leave based on 4 weeks per year service. Unused annual leave is cumulative and paid out on termination of employment.

Shift workers are entitled to 5 weeks paid annual leave per year of service. A shift worker is an employee described or defined as such by an applicable modern award or enterprise agreement. If the employee is award/agreement free, he/she will be a shift worker if employed in an enterprise in which shifts are continuously rostered 24 hours a day, 7 days a week and the employee is regularly rostered to work those shifts and regularly works weekends and public holidays.

If a public holiday falls within a period of annual leave, that day is not a day of annual leave.

## **Personal/carer's leave**

The FW Act NES provides an entitlement for full-time and part-time employees to accrue paid/personal carer's leave based on 10 days per year of service.

Personal leave can be taken as either sick leave or carer's leave (to provide care or support to a member of the employee's immediate family or member of the employee's household who requires care or support because of personal illness or personal injury affecting the member, or an unexpected emergency affecting the member).

Payment for personal/carer's leave is at the employee's base rate of pay for the employee's ordinary hours of work in the period taken.

Unused personal/carer's leave is not paid out on termination of employment.

If a public holiday falls within a period of personal/carer's leave, that day is not a day of personal carer's leave.

## **Compassionate leave**

Under the FW Act NES an employee is entitled to at least 2 day's compassionate leave for each occasion that a member of their immediate family or household passes away or suffers a serious injury or illness. The employee must provide the employer with notice of the expected period of leave as soon as practicable. The employer may also request that reasonable evidence be provided that the employee is taking the compassionate leave for a permissible reason.

## Parental leave

FW Act parental leave provisions apply to all full-time, part-time and eligible casual employees. Eligible casuals are those with at least 12 months' regular, systematic and continuous service with the employer and with a reasonable expectation of ongoing employment on the same basis.

An employee is eligible to take parental leave associated with the birth of his/her child (or his/her partner's child) or the placement of a child for adoption, if the employee has (or will have) a responsibility for the care of that child.

For more information on parental leave, please see our Frequently Asked Questions – Parental Leave and Information Sheet- Keeping In Touch When On Parental Leave. For more information on the paid parental leave scheme, please see our Information Sheet- Paid Parental Leave.

## Long service leave

Long service leave entitlements will vary from state to state depending on the legislation in place.

For more information on long service leave, please see our Guideline - Long Service Leave Entitlements Across Australia.

## Public holidays

The FW Act and State and territory legislation provides for at least 10 public holidays each year. Employees are entitled to take those holidays without loss of pay. Employers may reasonably require work on public holidays. Modern awards and enterprise agreements will typically require payment of a public holiday loading (usually at least 150% for work on those days).

## Community Service leave

Community service leave is an entitlement to be absent from employment when engaging in eligible community service activity.

An eligible community service activity is:

- jury service, including attendance for jury selection, that is required by Commonwealth, State or territory law;
- voluntary emergency management activity; or
- an activity that is of community service nature prescribed by regulations (FW Act Regulations).

Voluntary emergency management activity is a voluntary activity that involves dealing with an emergency or natural disaster. The employee must be a member of a recognised emergency management body (or have a 'member-like' association with the body). The body must request the employee to engage in the activity (or if circumstances do not permit the making of such request, it

would have been reasonable to expect that absent those circumstances a request would have been likely). Although the activity must be voluntary, this does not preclude the leave being available even if the employee agrees to take a gratuity or honorarium for engaging in the activity.

A recognised emergency management body is:

- a body that has a role or function under a plan prepared by Commonwealth, State or territory government to cope with emergencies and/or disasters;
- a fire-fighting, civil defence or rescue body;
- a body that has a substantial purpose of responding to an emergency or natural disaster (e.g. securing the safety of persons or animals or protecting property); and/or
- a body prescribed by regulations.

Under the FW Act community service leave an employee is entitled to community service leave under the NES for the period during which the employee engages in eligible community service activity plus reasonable travelling time associated with the activity and reasonable rest time immediately following the activity. Unless the activity is jury service, the employee's absence must be reasonable in all the circumstances.

State and territory legislation in Queensland, Western Australia and Victoria imposes obligations on employers to make-up the difference between the jury service fee paid by the State to employees summoned to attend for jury service, and their ordinary wages.

In Western Australia, there is an additional obligation in respect of employees absent from work due to carrying out emergency management response to pay their ordinary wages during the period of absence.

For example, in Victoria, a casual is entitled to make up pay when summonsed to attend for jury service under the Juries Act 2000 (Vic). The community service leave NES does not give any entitlements to casuals to payment for jury service.

Some modern awards and enterprise agreements make provision for jury service leave or other community service leave entitlements.

Community service leave is unpaid except for non-casuals engaged in jury service. The payment for leave for jury service is made at the employee's base rate of pay for ordinary hours of work in the period, capped at 10 days for each jury service summons. You may make payment conditional upon the employee taking all necessary steps to obtain jury service pay from the relevant authorities and to provide you with evidence of this fact. You are entitled to reduce the pay made to the employee for jury service leave by the amount of jury service pay received from the authorities.

The employee must notify you of the expected period of absence as soon as practicable. You may require the employee to provide reasonable evidence that the absence from work is because the employee is engaging in an eligible community service activity.

## **Defence Services Leave**

Defence services leave refers to leave sought by employees who are members of the Defence Reserve to attend military training. It also refers to leave for employees and other members of the public if called upon to undertake Defence Reserve duties in “times of exceptional need”.

Defence services leave is covered by the Commonwealth Defence Act 1903 and the Defence Reserve Service (Protection) Act 2001. An employer must not hinder a person from volunteering for service in the Emergency Forces or the Reserve Forces or penalise a person on account of their service in these forces. This means that employers are required by law to release employee to undertake all types of defence service (including training), and to continue to employ them on their return.

There is no fixed period of leave, however, generally requests for this type of leave are for a period of 2 weeks (10 working days) on one occasion per year (usually to undertake training).

Employers are not obliged to pay employees for any absence on military service. Generally, employees receive a tax- free payment from the government for such leave. However, employers may choose to “make up” the difference between this amount and the employee’s usual pay.

The employee’s contract of service will continue uninterrupted during this type of leave. Entitlements to other forms of leave (annual leave, sick leave, long service leave) will also continue to accrue as if the employee was at work.

Employees cannot be required to take their annual leave or long service leave for absences on defence service but may voluntarily elect to do so by mutual agreement with their employer.

Employees are also entitled to various protections for undertaking Defence Service leave. The Act makes it unlawful for an employer to discriminate against a person because the person has volunteered for defence service by changing the terms and conditions of their employment to their detriment or discriminating against them in their terms and conditions of employment or dismissing them. Nor can an employer refuse to give work to a person on the ground that the person is, has, or might in the future serve in the Defence Reserve/Defence Force.

## Parental Leave

The FW Act parental leave provisions apply to all full-time, part-time and eligible casual employees. Eligible casuals are those with at least 12 months' regular, systematic and continuous service with the employer and with a reasonable expectation of ongoing employment on the same basis.

An employee is eligible to take parental leave associated with the birth of his/her child (or his/her partner's child) or the placement of a child for adoption, if the employee has (or will have) a responsibility for the care of that child.

'Partner' means spouse or de facto partner, or former spouse or de facto partner. De facto partner means another person (whether of the same or different sex) with whom the person lives in a relationship as a couple on a genuine domestic basis.

The employee should give written notification of intention to take parental leave no later than 10 weeks before the start of the leave. The employer may also require, in the case of maternity leave, a doctor's certificate confirming pregnancy and the expected date of birth at least 10 weeks' prior to which the leave is to be taken.

An employee taking parental leave in association with their partner who is giving birth is also required to provide a doctor's certificate confirming their partner's pregnancy and the expected date of the birth (or the actual birth certificate). If the employee is taking over from the partner giving birth as the primary care giver, the employee may be required to provide a statutory declaration detailing any leave their partner intends to take.

In the case of adoption, the employee may also be required to provide a statement from the adoption agency confirming the expected date of placement of the child, and a statutory declaration verifying the details of the adoption, the leave sought and any adoption leave your partner intends to take.

### Entitlement

After 12 months uninterrupted service with the employer, the employee is entitled under the FW Act NES to 52 weeks' unpaid parental leave to be taken in one continuous period. Parental leave includes adoption leave.

Parental leave is available for male and female employees. However, except for a limited entitlement to take concurrent leave (see below), an employee cannot take parental leave at the same time as their partner takes parental leave.

If the employee's partner does not work, he/she can take parental leave starting no later than 12 months after the child's birth or placement (in the case of adoption related leave), provided that the partner ceases to have responsibility for the care of the child. The employee may be required to substantiate this fact (e.g. by submitting statutory declarations made by the partner and the employee).

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If the employee has 12 months' continuous service with the firm, the employee may take up to 8 weeks parental leave at the same time as their partner (concurrent leave) this concurrent leave may be taken in one or more blocks of leave, not less than 2 weeks each (unless the employer agrees).

An employee is not entitled to payment for personal leave or public holidays during parental leave.

If pregnant, an employee may take parental leave starting 6 weeks before the expected day of birth. In all other cases, parental leave will start on the day of birth or placement (unless the employee is taking the leave after their partner has taken a period of parental leave, in which case it will start immediately after the partner's parental leave ends).

If an approved period of parental leave is less than 12 months (excluding any period of concurrent leave) then the employee may extend the leave for a further period up to the full amount of the 12-month entitlement. The employee will need to give the employer written notice specifying the new end date for the leave at least 4 weeks before the original end date. The employee can only exercise this right once.

Even if the employee takes his/her full 12-month entitlement to parental leave, the employee may request that parental leave be extended by a further period of up to 12 months. Again, the employee must give the employer written notice specifying the new end date for the leave at least 4 weeks before the current end date. The employer may refuse the request on reasonable business grounds (e.g. inability to make arrangements for your role to be covered during the extended period).

## **Paid Parental Scheme**

### **Scheme**

Under the Commonwealth Government's Paid Parental Leave Scheme working parents of children born or adopted are eligible to receive 18 weeks of government-funded parental pay at the rate of the national minimum wage (as at 1 July 2012 \$606.40).

### **Eligibility**

To be eligible an employee must:

- be the primary carer of a newborn or recently adopted child (a child's primary carer is the person who is most meeting the child's physical needs. This will usually be the birth mother of a newborn child or the initial primary carer of an adopted child, even if the child is in hospital);
- meet Australian residence requirements from the date the child enters your care until the end of your Paid Parental Leave period;
- have met the Paid Parental Leave work test before the birth or adoption;
- have received an individual adjusted taxable income of \$150,000.00 or less in the financial year before the date of birth or adoption or date of claim, whichever is earlier; and
- be on leave or not working, from when the employee becomes the child's primary carer until the end of the Paid Parental Leave period.

Full-time, part-time, casual, seasonal, contract, and self-employed workers may be eligible for Parental Leave Pay. An employee may "keep in touch" with their workplace for up to 10 days without losing Parental Leave Pay.

Visit the Family Assistance Office's website at [www.familyassist.gov.au](http://www.familyassist.gov.au) for more information.

### **Obligations of employers**

Employers are required to pass on Parental Leave Pay payments to eligible employees in the same way as they would pay wages. The Department of Human Services Family Assistance Office will contact the employer if required to provide Parental Leave Pay to an employee and ask them to provide business bank account details, employee's pay cycle details, business name, ABN and contact details.

Parental leave pay does not count for the purposes of superannuation guarantee contributions, payroll tax or workers' compensation premiums. When Parental Leave Pay payments are forwarded to the employer, they become the employer's income. The employer can claim a deduction for the payment of the amounts to eligible employees plus reasonable costs for administering the Scheme.

### **Dad and Partner Pay**

On 1 January 2013, the Federal Government introduced a payment scheme for new fathers and partners (including partners in same sex couples) called Dad and Partner Pay (DAPP).

Under this scheme, fathers and partners to newly born or adopted children can receive up to 2 weeks of pay from the Government at the at the rate of the national minimum wage (as at 1 July 2013 \$622.20).

A person can be eligible for DAPP if they are:

- the biological father of the child;
- a partner of the birth mother;
- an adopting parent;
- the partner of the adopting parent;
- a parent in a surrogacy arrangement;
- the partner of a parent in a surrogacy arrangement; or
- the same-sex partner of the birth mother, biological father or the adopting parent. To be eligible for DAPP, the person must:
  - be an Australian resident;
  - provide care for a child born or adopted on or after 1 January 2013;
  - meet the 'work test' which requires the person to have worked:
    - for at least 10 of the 13 months before the date the DAPP commences; and
    - have worked at least 330 hours in that 10-month period, with no more than an 8 weeks' gap between 2 consecutive working days;
  - have an individual adjusted taxable income of \$150,000 or less in the financial year either before the date of the person's claim or the date the DAPP period commences (whichever is earlier); and
  - be on unpaid leave or not working during the DAPP period.
- Eligible fathers and partners can access DAPP regardless of whether they work full-time, part-time, casually, seasonally, on contract, or in a family business.

#### Interaction with paid parental leave scheme of employer

Parental Leave Pay is separate and additional to any other obligation the employer may have in relation to parental leave. The Government scheme will have no effect on a pre-existing right an employee has to paid parental leave under a contract of employment.

Employers cannot use the statutory scheme to offset any leave benefits they are legally required to provide employees.

For example, if an employer has a contractual or award obligation to provide paid parental leave benefits, the Government scheme will be in addition to those entitlements. However, if an employer has a non-binding policy regarding paid parental leave, it will be open to the employer to vary that policy to take into account the statutory scheme.

## Unpaid Special Maternity Leave

Unpaid special maternity leave is available to female employees who:

- are suffering from a pregnancy related illness; or
- have been pregnant, but their pregnancy ends within 28 weeks of the expected date of birth of the child otherwise than by the birth of a living child.

### Notice and evidence requirements

Before an employee is entitled to take a period of special maternity leave, they must provide their employer with notice and evidence (if required by the employer and may include a medical certificate) that would satisfy a reasonable person of the need to take unpaid special maternity leave. The notice must be provided to the employer as soon as practicable, which may be at a time after the leave has commenced, and advise the duration, or anticipated duration of the leave. Where these requirements are not met, the employee will not be entitled to take the leave.

### Interaction with other periods of leave

Any period of unpaid special maternity leave taken by an employee will not count as time spent on unpaid parental leave and will therefore not reduce the employee's 12 month entitlement (if any). If an employee has an entitlement to paid personal/carer's leave, she is entitled to take that leave instead of unpaid special maternity leave.

There is no stipulation in the FW Act as to whether special maternity leave must be taken in a single continuous period of time, however, this is usually the case. It is therefore practically possible for an employee to take several non-consecutive periods of unpaid special maternity leave so long as they comply with the notice and evidence requirements on each occasion.

### Requiring an Employee to Commence Parental Leave Early

#### REQUIRING AN EMPLOYEE TO COMMENCE PARENTAL LEAVE EARLY

Despite being able to commence unpaid parental leave up to six weeks before the expected birth of a child, many pregnant employees elect to continue working during this period with an anticipated leave start date somewhere between two and four weeks. If a pregnant employee does this however, an employer can request a medical certificate. This medical certificate may contain any of the following statements if applicable:

- Whether the employee is fit for work or not;
- If the employee is fit for work, a further statement of whether it is inadvisable for her to continue in her present position during a stated period because of:
  - illness, or risks, arising out of the employee's pregnancy; or
  - hazards connected with the position.

If a pregnant employee has been asked to provide a medical certificate, and they have failed to produce this within seven (7) days of the request, the employer may require the employee to take unpaid parental leave as soon as practicable. The employer may also require the employee to commence unpaid parental leave where:

- Within seven (7) days of the request being made, the employee produces a medical certificate which states that the employee is not fit for work, or
- An employee who has not complied with the notice and evidence requirements for the taking of unpaid parental leave gives the employer a medical certificate within seven (7) days of the request being made, and that certificate states that the employee is fit for work, but that it is inadvisable for the employee to continue in her present position for a stated period because of:
  - illness, or risks, arising out of the employee's pregnancy; or
  - hazards connected with the position.

**Note:** The situation is different where the employee has complied with the notice and evidence requirements for the taking of unpaid parental leave. If this is the case, the employee will be entitled to be transferred to a safe job or be put on paid no safe job leave.

### Parental Leave Timeline

	When	Action	Responsibility
Prior to Leave Commencing	At least 10 weeks before intended leave start date	Advise employer of intention to take unpaid parental leave and intended start and finish dates of leave	Employee
	Any time during pregnancy	Advise employer of need to take special maternity leave with medical certificate.	Employee
	Any time during pregnancy	Advise employer of need to be transferred to a safe job with evidence	Employee
	10 – 4 weeks before intended leave start date	Recruit temporary parental leave replacement employee	Employer
	At least 4 weeks before intended leave start date	Confirm intended start date and end date of leave in writing	Employee
	6 – 0 weeks before expected date of birth	Pregnant employees can commence parental leave	Employee
	6 – 0 weeks before expected date of birth	Employers can, (not <i>must</i> ) request a medical certificate if employee continues to work during the 6 weeks before the expected date of birth advising of fitness for work.	Employer

		Where the medical certificate states employee is unfit for work, or where employee fails to produce a medical certificate within seven (7) days of request, employer can arrange for employee to commence unpaid parental leave early  Or  Where the medical certificate states employee is fit for work, allow employee to continue working.	Employer, Employee and Employee's treating doctor
	6 – 0 weeks before expected date of birth (if employee on paid no safe job leave)	Request an additional medical certificate stating whether employee is fit for work  Employer can direct employee to commence unpaid parental leave if unfit for work, or where employee does not produce a medical certificate within seven (7) days of request	Employer  Employee / Employer
	At least 1 week before intended start date of leave	Hand over / induction of temporary replacement parental leave employee	Employer and Employee
	Employee's last day before leave commences	Hold pre-parental leave departure meeting with employee and ensure farewell organised	Employee and Employer
<b>During Leave</b>	Date of birth of child / placement	Congratulate employee on birth of child / placement	Employer
	As appropriate	Keep in touch days	Employer / Employee
	As appropriate	Communicate important work notices and invites to employee whilst on leave	Employer
	As appropriate	Consult with employee about any decision made that will have a significant effect on the status, pay or location of the employee's pre-parental leave position	Employer

	At any time before end date of unpaid parental leave	Employee can request flexible working arrangement for when they returning to work, setting out reasons for request	Employee
	Within 21 days after request for flexible work arrangements have been received from employee	Respond to request in writing either granting request or refusing the request. <i>See: Checklist – considering and responding to flexible work requests</i>	Employer
	At least 4 weeks before original return to work date	Confirm intention to return to work Or Request extension of parental leave, specifying new intended return date	Employee
	During the 4 weeks before original return to work date and no later than 21 days after request for extension of parental leave received from employee	Respond to request for extension of parental leave (approve or refuse)	Employer
	As appropriate	Make arrangements for parental leave replacement worker to complete their contract upon return to work of parent employee  Or Request parental leave replacement worker stay on in necessary capacity to accommodate flexible work request by employee  Or Recruit for a replacement employee depending on circumstances (for example, employee’s request for flexible work is denied, the employee resigns, and the temporary worker cannot stay on).	Employer  Employer and Temporary Employee  Employer
<b>Af te r</b>	Return to work date	Return to work	Employee

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	Within first week of employee returning to work	Welcome employee back and notify organisation. Conduct any necessary updates, training, and refreshers for employee.	Employer
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## Keeping in Touch

Employees on unpaid parental leave are entitled to take up to 10 ‘keeping in touch days’ without affecting their NES entitlements.

A keeping in touch day is a day on which an employee performs work for their employer in order to “keep in touch” with their employment so they can facilitate a return to that employment after a period of leave.

An employee will be able to perform paid for up to 10 ‘keeping in touch’ days while they are taking unpaid parental leave without breaking the continuity of their period of unpaid parental leave.

An employer is not obliged to give the employee ‘keeping in touch’ days. An employee cannot request to take a ‘keeping in touch’ day in the 14-day period commencing on the date of birth, or day of placement, of the child.

The employer cannot arrange a ‘keeping in touch’ day in the first 6 weeks after the date of birth, or day of placement, of the child.

An employee can only take up to 10 ‘keeping in touch’ days during the available 12-month unpaid parental leave period. If their period of leave is extended, a further 10 days will be available.

An employee taking a ‘keeping in touch’ day does not have to work a full day. The employer will be obliged to pay the employee for performing work on a ‘keeping in touch’ day as if it was ordinary work.

The employer cannot exert undue influence or pressure on an employee to work or not work ‘keeping in touch’ days.

Unpaid parental leave is not extended by ‘keeping in touch’ days.