



Parental leave and related entitlements and the National Employment Standards

Australia's workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, investigate workplace complaints, and enforce relevant Commonwealth workplace laws.

Parental leave and related entitlements form part of the National Employment Standards (NES). As of 1 January 2010, the NES apply to all employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment.

Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES, and those that do have no effect. An employer must not contravene a provision of the NES. A contravention of a provision of the NES may result in penalties of up to \$10,800 for an individual and \$54,000 for a corporation.

In addition to the NES, an employee's terms and conditions of employment generally come from an award or agreement. All references to an award or agreement in this fact sheet include modern awards, enterprise agreements, and award or agreement-based transitional instruments.

Overview

The NES establish minimum entitlements to unpaid parental leave and related entitlements, which apply to **all** employees in Australia.

Parental leave provisions include birth-related leave and adoption-related leave, and also recognise same sex de facto relationships.

In addition to unpaid parental leave, the NES also provide the following related entitlements:

- unpaid special maternity leave
- a right to transfer to a safe job in appropriate cases, or to take 'no safe job leave'
- consultation requirements
- a return to work guarantee
- unpaid pre-adoption leave.

Which employees are eligible for unpaid parental leave?

All employees in Australia are eligible for unpaid parental leave if they have completed at least 12 months of continuous service with their employer.

This includes casual employees, but only if:

- they have been employed by the employer on a regular and systematic basis for a sequence of periods over at least 12 months
- had it not been for the birth (or expected birth) or adoption (or expected adoption) of a child, they would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

What is the entitlement to parental leave?

Each eligible member of an employee couple may take a separate period of up to 12 months of unpaid parental leave. However, if only one person is taking leave, or if one member of an employee couple wishes to take more than 12 months leave, the employee may request a further period of up to 12 months, from their employer.

An 'employee couple' is where two employees (not necessarily of the same employer) are in a spousal or de facto relationship.

Parental leave is only available to employees who have or will have responsibility for the care of a child.

The leave must be associated with:

- the birth of a child to the employee, the employee's spouse, or the employee's de facto partner, or
- the placement of a child under 16 with the employee for adoption.

The 'child of a person' is defined by the *Family Law Act 1975* as someone who is a person's biological, adopted or step child.

An employee's 'de facto partner' is defined as a person who, although not legally married to the employee, lives with them in a relationship as a couple on a genuine domestic basis. Former de facto partners are also included.

The *Fair Work Act 2009* ensures that same sex de facto relationships are recognised for unpaid parental leave entitlements. This means that the same sex de facto partner of either a person who gives birth or a biological parent may be eligible to take unpaid birth-related leave.

What are the rules for taking unpaid parental leave?

There are different rules for taking unpaid parental leave, depending on:

- if one employee takes leave, or
- if both members of an employee couple take leave.

One employee taking unpaid parental leave

The following rules apply where one employee (or only one member of an employee couple) takes leave:

- Leave must be taken in a single continuous period (paid leave, such as annual leave, may be taken at the same time).
- In the case of a pregnant employee, leave can start up to six weeks before the expected date of birth, or earlier if the employer and employee agree. If the employee is not giving birth to the child, leave starts on the date of birth or placement of the child.
- Leave may start at any time within 12 months after the birth or placement of the child if:
 - the employee has a spouse or de facto partner who is not an employee, and
 - the spouse or de facto partner has responsibility for the care of the child.

Both members of an employee couple taking leave

The following rules apply to an employee couple if both employees take unpaid parental leave:

- The employees are entitled to no more than 24 months of leave between them, which generally must be taken separately in a single continuous period.
- If the employee who takes leave first is pregnant or gives birth, they may start their leave up to 6 weeks before the expected date of birth, or earlier if the employer and employee agree.

- If the employee who takes leave first is not pregnant, their leave must start on the date of birth or placement of a child.
- Both employees of an employee couple may take leave at the same time for a maximum period of 8 weeks. This leave must be taken within 12 months of the birth or adoption of a child. The concurrent leave may be taken in separate periods. Each period must be no shorter than 2 weeks unless the employer agrees.
- Concurrent leave is unpaid parental leave and is deducted from an employee's unpaid parental leave entitlement of 12 months.
- Paid leave, such as annual leave, may be taken at the same time as unpaid parental leave.

Can an employee extend their unpaid parental leave?

An employee taking 12 months parental leave may request an extension of a further 12 months leave (up to 24 months in total), unless they are a member of an employee couple and the other member has already taken 12 months of leave.

The request must be in writing and given to the employer at least four weeks before the end of the employee's initial period of parental leave. The employer must respond in writing within 21 days, stating whether they grant or refuse the request. They may only refuse if they have given the employee a reasonable opportunity to discuss their request, and there are reasonable business grounds to do so. If a request is refused, the written response must include details of the employer's reasons

The NES do not define 'reasonable business grounds' for refusing a request, but relevant factors may include:

- the effect on the workplace (e.g. the impact on finances, efficiency, productivity, customer service)
- the inability to manage the workload among existing staff
- the inability to recruit a replacement employee.

Can a pregnant employee be required to take parental leave within six weeks before the birth?

A pregnant employee wanting to work the six weeks before birth may be asked by the employer to provide a medical certificate containing the following:

- a statement of whether the employee is fit for work
- if the employee is fit for work, a statement of whether it is inadvisable for the employee to continue in her present position because of:
 - illness or risks arising out of the employee's pregnancy or
 - hazards connected with the position.

The employer may require the employee to take a period of unpaid parental leave as soon as possible if the employee:

- fails to provide the requested medical certificate within seven days of the request or
- provides a certificate within seven days stating that they are not fit for work

This form of directed leave runs until the end of the pregnancy or until the planned leave was due to start, and is deducted from the employee's unpaid parental leave entitlement. It is exempt from the rules about when the leave must start, that it be taken in a continuous period, and notice requirements.

What are the notice and evidence requirements for taking parental leave?

An employee is not entitled to take unpaid parental leave unless they:

- inform their employer of their intention to take unpaid parental leave by giving at least 10 weeks written notice (unless it is not possible to do so)
- specify the intended start and end dates of the leave
- at least four weeks before the intended start date:
 - confirm the intended start and end dates or
 - advise the employer of any changes to the intended start and end dates (unless it is not possible to do so).

Where concurrent leave is to be taken in separate periods, these notice requirements apply to the first period of that leave. For second and subsequent periods, the employee must provide the employer with 4 weeks notice.

An employer may require evidence that would satisfy a reasonable person of the actual or expected date of birth of a child (e.g. a medical certificate), or the day or expected day of placement of a child under 16.

Other entitlements related to parental leave

Where there is a stillbirth or infant death

An eligible pregnant employee can reduce or cancel their period of unpaid birth-related parental leave if their pregnancy ends due to their child being stillborn, or if their child dies after birth.

In the case of a stillbirth or infant death:

- if the employee or employer gives written notice to the other party cancelling the leave before leave starts, the employee won't be entitled to unpaid parental leave (under these circumstances, if the pregnant employee is not fit for work, she may be entitled to paid personal leave or unpaid special maternity leave)
- if the employee gives written notice cancelling the leave after leave starts, they may return to work within 4 weeks of giving notice to the employer
- an employer may also request the employee to return to work on a specified day after leave starts, but has to provide at least 6 weeks' notice to the employee.

Whether leave is cancelled or reduced, the employee's entitlement to unpaid parental leave ends immediately before the day they are specified to return to work. These provisions don't limit the employer or employee agreeing to reduce the period of unpaid parental leave once it has started, should an agreement be reached.

Unpaid special maternity leave

An eligible pregnant employee is entitled to take unpaid special maternity leave if the employee is not fit for work because of:

- a pregnancy-related illness, or
- the pregnancy ends, not in the birth of a living child, within 28 weeks of the expected date of birth.

An employee must give their employer notice they are taking unpaid special maternity leave as soon as possible (which may be after the leave has started), and the expected period of leave.

An employer may require evidence that would satisfy a reasonable person (e.g. a medical certificate).

The entitlement to unpaid parental leave is not reduced by the amount of any unpaid special maternity leave taken by the employee while they are pregnant.

Transfer to a safe job or 'no safe job leave'

A pregnant employee has an entitlement to be a transferred to an 'appropriate safe job'. An appropriate safe job is a job that has:

- the same ordinary hours of work as the employee's present position or
- a different number of ordinary hours agreed to by the employee.

This entitlement applies if the employee has provided evidence (e.g. a medical certificate) that would satisfy a reasonable person that they are fit for work, but that it is inadvisable for them to continue in their present position during a period because of:

- illness or risks arising out of the pregnancy or
- hazards connected with that position.

If this requirement is met and there is an appropriate safe job available, the employee must be transferred to that job for the risk period, with no other change to the employee's terms and conditions of employment. The employer must pay the employee at their full rate of pay for the position they were in before the transfer and for the hours they work during the risk period.

If there is no appropriate safe job available, and the employee is entitled to unpaid parental leave then the employee is entitled to take paid 'no safe job leave' for the risk period, and be paid at their base rate of pay for ordinary hours of work during the risk period.

If there is no appropriate safe job available, and the employee is not entitled to unpaid parental leave then the employee is entitled to take unpaid 'no safe job leave' for the risk period.

If an employee is on paid no safe job leave during the six week period before the expected date of birth, the employer may ask the employee to give the employer a medical certificate stating whether they are fit for work.

The employer may require the employee to take a period of unpaid parental leave, if they are eligible, as soon as practical if:

- the employee does not give the employer a medical certificate within seven days after the request or
- within seven days after the request, the employee provides a certificate stating they are not fit for work.

The no safe job leave ends when the period of unpaid parental leave starts.

Consultation requirements on unpaid parental leave

Employees on unpaid parental leave are entitled to be kept informed of decisions by their employer that will have a significant effect on the status, pay or location of their pre-parental leave position. The employer must take all reasonable steps to give the employee information about (and an opportunity to discuss) the effect of any such decisions on the employee's position.

The employee's pre-parental leave position is the position they held before starting the unpaid parental leave, or the position they held before they were transferred to a safe job or reduced their hours due to the pregnancy.

Return to work guarantee

An employee is guaranteed to return to work immediately following a period of unpaid parental leave, entitling them to:

- their pre-parental leave position, or
- if that position no longer exists, an available position for which they are qualified and suited, which is nearest in status and pay to their pre-parental leave position.

Before engaging an employee to perform the work of the employee on leave, the employer is required to notify the replacement employee:

- that their engagement is temporary
- that the employee on leave has a guarantee to return to work when their unpaid parental leave ends
- the rights of the employee on leave in the case of a stillbirth or infant death
- the rights of the employee on leave in the case where they cease to have responsibility for the care of the child.

Keeping in touch days

The Paid Parental Leave Act 2010 makes provision for keeping in touch days. A keeping in touch day is when an employee performs work for the employer on a day or part of a day while on a period of approved leave. Such a day (or part of a day) will be considered a keeping in touch day if:

- the purpose of performing work is to enable the employee to keep in touch with their employment (this will also assist when the employee returns to work once their leave has ended)
- both the employee and the employer consent to the employee performing specific work on that day
- the day is not within 42 days of the date of birth or placement of the child to which the period of leave relates (if requested by the employer)
- the day is not within 14 days of the date of birth or placement of the child to which the period of leave relates (if requested by the employee)
- the employee has not already performed 10 days of work during the period of leave that were keeping in touch days.

An employee who performs work on a keeping in touch day is entitled to payment from their employer in accordance with the relevant contract of employment or industrial instrument.

A keeping in touch day will not break the single continuous period of unpaid parental leave under the NES.

Unpaid pre-adoption leave

All employees (regardless of their length of service) are entitled to up to two days of unpaid pre-adoption leave to attend any interviews or examinations required for the adoption of a child.

This leave may be taken as:

- a single continuous period of up to two days or
- any separate periods to which the employee and employer agree.

An employer may, however, direct an employee to take another form of leave (e.g. paid annual leave) before accessing their unpaid pre-adoption leave entitlement.

An employee must give their employer notice they are taking unpaid pre-adoption leave and the expected

duration as soon as possible (which may be after the leave has started) and, if required, evidence that would satisfy a reasonable person.

What about paid parental leave?

In addition to the NES, employees may also have an entitlement to paid parental leave.

The Australian Government Paid Parental Leave scheme provides government-funded Parental Leave Pay, and Dad and Partner Pay at the National Minimum Wage to employees who meet the eligibility criteria. For more information about government-funded paid parental leave, you can visit the Department of Human Services' website at www.humanservices.gov.au or call them on **13 61 50**.

Further Information

The Fair Work Ombudsman has published a fact sheet on each NES entitlement. For further information on a specific NES entitlement, please see the relevant fact sheets at www.fairwork.gov.au.

The Fair Work website also provides a Best Practice Guide for parental leave and templates relating to requesting and granting parental leave.

For further information, visit www.fairwork.gov.au or contact the Fair Work Infoline on **13 13 94**.

Unpaid parental leave is provided for by sections 70–85 of the *Fair Work Act 2009*.

Related publications

Introduction to the NES

Maximum weekly hours and the NES

Requests for flexible working arrangements and the NES

Annual leave and the NES

Personal/carer's leave and compassionate leave and the NES

Community service leave and the NES

Long service leave and the NES

Public holidays and the NES

Notice of termination and redundancy pay and the NES

Fair Work Information Statement and the NES

Contact us

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

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