



Parental leave and related entitlements and the National Employment Standards

Australia's new 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 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 \$6,600 for an individual and \$33,000 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 take paid '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 to 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 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)
- leave starts at the birth or placement of the child or, in the case of a pregnant employee, up to six weeks before the expected date of birth
- 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
 - 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:

- both employees may at the same time each take up to three weeks unpaid parental leave (reducing their overall entitlement) either immediately after the birth or placement of a child or, by agreement with the employer, at any time during an extended period starting before the birth and ending no later than six weeks after the birth or placement.

- remaining leave must be taken separately in a single continuous period (paid leave, such as annual leave, may be taken at the same time)
- if the employee who takes leave first is pregnant or gives birth, they may start their leave up to six weeks before the expected date of birth
- if the employee who takes leave first is not pregnant, their leave must start on the date of birth or placement of a child
- the second employee must start their leave immediately after the first employee's leave finishes
- they are entitled to no more than 24 months between them.

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 there are reasonable business grounds to do so, and must detail their reasons in writing.

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 or
- provides a certificate stating they are fit for work, but that it is inadvisable to continue in the present position due to illness, risk to the pregnancy, or job-related hazards
- is not entitled to transfer to a safe job or to 'no safe job leave' (see below).

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 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).

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

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 reduced by the amount of any unpaid special maternity leave taken by the employee while they are pregnant.

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

An eligible pregnant employee has in specified circumstances an entitlement to be transferred to an 'appropriate safe job'. An appropriate safe job is a safe 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:

- is entitled to unpaid parental leave
- has complied with the notice and evidence requirements for accessing that unpaid parental leave
- 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 these requirements are 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 pay¹ for the position they were in before the transfer, for the hours they work in the risk period.

If there is no appropriate safe job available, the employee is entitled to take paid 'no safe job leave' for the risk period, and be payed at their base rate of pay² for ordinary hours of work in the risk period.

¹ The full rate of pay is the rate of pay payable to the employee plus incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, and any other separately identifiable amounts.

² The base rate of pay is the rate of pay payable to the employee for their ordinary hours of work, but not including incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates, and any other separately identifiable amounts.

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 as soon as practicable if:

- the employee does not give the employer a medical certificate within seven days after the request or
- within 7 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 a 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.

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.

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.fwo.gov.au

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

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**

Monday to Friday, between 8.00am–6.00pm

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Contact the Translating and Interpreting Service (TIS) on 13 14 50

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Call through the National Relay Service (NRS):

- For TTY: 13 36 77. Ask for the Fair Work Infoline 13 13 94
- Speak & Listen: 1300 555 727. Ask for the Fair Work Infoline 13 13 94