

## Fact Sheet

### Parental Leave

September 2021

Parental leave and its related entitlements form part of the National Employment Standards (NES). The NES applies to all employees covered by the national workplace relations system, regardless of any award, agreement or contract.

Parental leave provisions include birth-related and adoption-related leave (including in relation to premature birth, stillbirth or infant death), and also recognises same-sex de facto relationships. In addition to unpaid parental leave, the NES also allows for the following entitlements:

- Unpaid special maternity leave
- A right to transfer to a “safe job”, or to take “no safe job leave” if appropriate
- Consultation requirements
- A return to work guarantee
- Unpaid pre-adoption leave

#### Who is eligible for unpaid parental leave?

- All employees in Australia provided they have completed at least 12 months of continuous service with their employer
- This also extends to casual employees provided they have been employed by an employer on a regular and systematic basis over the previous 12 months, and had it not been for the birth (or expected birth) or adoption (or expected adoption) of a child, there would have been a reasonable expectation of continuing employment.

#### What is the parental leave entitlement?

The parental leave entitlement allows each member of an employee couple to take separate periods of up to 12 months unpaid parental leave. An “employee couple” is where two employees (not necessarily of the same employer) are in a spousal or de facto couple. *The Fair Work Act 2009* ensures that same sex relationships are also recognised for unpaid parental leave.

Parental leave is only available to employees who have or will have the responsibility for the care of a child. Parents who experience a stillbirth or the death of an infant during the first 24 months of life can also take unpaid parental leave. Parents are entitled to unpaid parental leave if:

- 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.

## What are the rules for taking parental leave?

There are different rules for taking parental leave, depending on if one or if both members of an employee couple take leave.

If one employee takes leave:

- leave must be taken in a single continuous period
- if the employee is pregnant, leave can start up to six weeks prior to the expected date of birth, or earlier if the employer and employee agree
- if the employee is not giving birth, the leave commences 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 a child provided:
  - the employee's spouse or de facto partner is not an employee, and
  - the spouse or de facto partner has responsibility for the care of the child.

If both members of an employee couple are taking leave different rules apply:

- the employees are entitled to no more than 24 months leave between them, and generally this is taken separately, in a single continuous period
- if the employee who takes leave first is pregnant or gives birth, leave can start up to six weeks prior to the expected date of birth, or earlier if the employer and employee agree
- if the employee who takes leave first is not pregnant, the leave commences on the date of birth or placement of the child
- an employee couple can may take leave at the same time, but for a maximum period of 8 weeks. This leave must be taken within 12 months or the birth or placement of a child
- concurrent leave is unpaid parental leave and is deducted from the employee's 12 month unpaid parental leave entitlement

In addition to the above, paid leave, such as annual leave, can be taken at the same time as unpaid parental leave.

## What is flexible parental leave?

Employees can take up to 30 days (6 weeks) of their unpaid parental leave flexibly at any time within 24 months of a child's birth or adoption. Flexible unpaid parental leave can be taken as:

- a single continuous period of 1 day or longer
- separate periods of 1 day or longer each.

An employee can take flexible unpaid parental leave on the same day their partner is on continuous unpaid parental leave. The 2 employees can only take a total of up to 8 weeks of unpaid parental leave at the same time. An employee's entitlement to unpaid parental leave, except for flexible unpaid parental leave, will end on the first day that the employee takes flexible unpaid parental leave. Once an employee takes flexible unpaid parental leave, they can't later take a period of continuous unpaid parental leave.

This means that if an employee is planning on taking a period of continuous unpaid parental leave, they should do so before they take any flexible unpaid parental leave.

## **What happens if an employee wants to extend their unpaid parental leave?**

An employee taking 12 months parental leave may request up to an additional 12 months leave (up to 24 months in total), provided the other member of the employee couple (if there is one) has not utilised their 12 months of leave.

The employee must provide the request in writing at least four weeks prior to the end of their initial period of parental leave. The employer must respond in writing to the request within 21 days advising if the request has been approved or denied. An employer may only deny the request where there are reasonable grounds to do so, and they must detail these reasons to the employee.

While the NES do not define “reasonable grounds” for refusing a request, some relevant factors for refusal could include:

- an effect on the workplace – finances, efficiency, production, customer service etc
- the workload is unable to be managed among existing staff
- there is an inability to recruit an employee to temporarily fill the vacancy.

## **Can a pregnant employee be required to take parental leave within 6 weeks before the birth?**

If a pregnant employee wants to work during the 6 weeks before birth, their employer can ask them to provide a medical certificate within 7 days that states:

- the employee is fit for work
- if the employee is fit for work, 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 can 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 7 days of the request, or
- provides a certificate within 7 days that states they are not fit for work at all.

The employee’s unpaid parental leave will then start when she is directed to take unpaid parental leave and will count as part of the employee’s total unpaid parental leave entitlement. The rules about when the leave must start, and notice requirements don’t apply.

## **What notice and evidence is required for taking parental leave?**

For an employee to take unpaid parental leave they must:

- provide their employee with at least 10 weeks written notice of their intention to take unpaid parental leave (unless it is not possible to do so)
- specify the intended start and end dates of the leave, and
- at least 4 weeks prior to the intended start date;
  - reconfirm in writing the intended start and end dates, or

- advise of any changes to the intended start and end dates (where possible)

An employer has a right to ask for evidence that would satisfy a reasonable person of the actual or expected date of birth of a child (usually a medical certificate), or the day or expected day of the placement of a child under 16.

### **Notice requirements for flexible parental leave**

If an employee wants to take flexible unpaid parental leave (up to 30 days), they need to tell their employer:

- at the same time they give notice of their continuous parental leave, or
- at least 10 weeks before the start of their flexible parental leave.

Notice can also be provided later if the employer agrees. An employee needs to tell their employer the total number of days of flexible parental leave they intend to take. An employee can't take more than 30 days of flexible leave.

### **What about other entitlements related to parental leave?**

Sadly, not all pregnancies result in the birth of a living child, or a child dies shortly after the birth, and in these circumstances an eligible employee is still entitled to take unpaid parental leave. They can take up to 12 months unpaid parental leave.

An employer can't make an employee come back to work, or cancel any upcoming planned leave, after a stillbirth or an infant death. The employee can also take unpaid parental leave even if they haven't previously given notice to their employer (as long as they notify their employer as soon as practicable).

An employee can also choose to return to work if they want to. They can reduce or cancel their planned parental leave if their pregnancy ends due to stillbirth or infant death. If the unpaid parental leave hasn't started, the employee can cancel the leave with written notice. If the leave has started, the employee can give at least 4 weeks written notice cancelling the leave and providing a return to work date. This date must be at least 4 weeks after the employer receives the notice.

### **Compassionate leave**

Parents who experience a stillbirth or an infant death may take compassionate leave while on parental leave. Another employee may also be entitled to take compassionate leave where the child was, or would have been, their immediate family or household member.

### **Premature birth and birth-related complications**

Parents can agree with their employers to put their unpaid parental leave on hold if the child has to remain in hospital after birth or is hospitalised immediately after birth. This includes if the child was premature or developed a complication or contracted an illness during birth or following birth.

This means that while their baby is hospitalised, a parent can return to work and the period where they are back at work will not be deducted from their unpaid parental leave. The parent can then resume their unpaid parental leave at the earliest of:

# NOWACTUALLY

- a time agreed with their employer
- the end of the day when the child is discharged from the hospital or
- if the child dies, the end of the day when the child dies.

The period the employee works doesn't break their period of continuous unpaid parental leave.

Employers can request evidence that would satisfy a reasonable person that the child is in hospital and the employee is fit for work, such as a medical certificate.

## **Unpaid special maternity leave**

In particular circumstances, a pregnant employee is eligible to take unpaid special maternity leave if they are 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 due date

As soon as practicable, an employee must provide the employer with their notice to commence leave and their anticipated date of return to the workplace. In some circumstances this may be after the leave has commenced. The employer is entitled to ask for evidence that would satisfy a reasonable person (a medical certificate).

## **Transferring an employee to a safe job, or no safe job leave.**

Pregnant employees have a right to be transferred to an appropriate safe job, that has;

- the same ordinary hours as their current role, or
- a change in the ordinary number of hours as agreed to by the employee

For this entitlement to apply, an employee needs to provide evidence (eg a medical certificate), that although they are fit for work it is inadvisable for them to continue in their current position because of illness or risks arising from the pregnancy, or hazards that are connected to the position.

If there is an appropriate position available the employee must be transferred to that job for that risk period, without change to the terms and conditions of the employee's employment. The employee must be paid at the full rate of pay for the position they were in prior to the transfer.

In some workplaces there is no alternative safe job available, and the employee (if entitled to unpaid parental leave) is entitled to take paid no safe job leave for the risk period and be paid at the base rate of pay for ordinary hours of work during the period of risk.

The safe job and no safe job leave ends once the period of unpaid parental leave begins.

## **Consulting with an employee when they are on unpaid parental leave.**

Employers have an obligation to inform and have a discussion on decisions that will have a significant impact on the pay, status and/or location of the employee's pre-parental leave position. The employer must take all reasonable steps to ensure the employee receives the information about any such effects on the employee's position.

## **Return to work guarantee.**

An employee on unpaid parental leave is guaranteed to return to work immediately following the end of their leave period, entitling them to:

# NOWACTUALLY

- the position they held pre-parental leave, or
- if the position no longer exists, they must be offered a role that is closest in status and pay, and which they are qualified and suited to the position they held prior to the parental leave position.

Employers need to be aware of their obligation of informing the employee they have engaged to fulfill the work of the employee on leave. Employers must tell the replacement employee:

- the engagement is temporary
- the employee on leave has a guarantee to return to their position when their period of unpaid parental leave ends

## **Keeping in touch with an employee on parental leave.**

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

- the performance of the work allows the employee to keep in touch with their employment
- both the employer and employee consent to the employee performing specific work on that day
- the day cannot be within 42 days of the date of birth or placement of the child to whom the leave period relates to (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 leave period relates (if requested by the employee)
- the employee has not already performed 10 days of work during the period of leave during the period of leave that were keeping in touch days.

Any keeping touch days are to be paid to the employee by the employer in accordance with the contract of employment or industrial instrument.

## **What about unpaid pre-adoption leave?**

All employees (regardless of their length of service), have a right to access up to 2 days of unpaid pre-adoption leave. This leave is to be used to attend interviews or examinations that are required as part of the process of adopting a child.

An employee may take the leave as:

- a single period of up to 2 days, or
- separate periods to which the employer and employee agree

However, an employer may ask an employee to take another form of paid leave prior to accessing the unpaid pre-adoption leave entitlement. Employees must give their employer notice as soon as possible that they plan to take leave and their expected return date, and may need to provide evidence that would satisfy a reasonable person.

## **What about paid parental leave?**

The Australian Government Paid Parental Leave Scheme may provide employees with access to paid parental leave. For more information on this government -funded scheme please visit [DHHS](https://www.dhhs.gov.au) or call 13 61 50.