

Fair Work | Fact Sheet

Parental Leave

The information in this sheet concerns all Australian employers. It explains minimum entitlements to parental leave and related matters set out in the National Employment Standards (NES) contained in the Fair Work Act 2009 (Cth).

The NES entitlement commences operation on 1 January 2010. It is similar to the existing provision for minimum parental leave entitlements in the Workplace Relations Act (WR Act). The significant difference between the NES entitlement and the WR Act entitlement is that under the NES entitlement employees may request extension of unpaid parental leave for a period of up to 12 months. Other minimum entitlements to parental leave may arise under awards or workplace agreements. Another difference is that there is an obligation on employers to consult with employees during their parental leave about any changes that might affect their pre-parental leave position.

If before 1 January 2010 an employee has taken a step in relation to the WR Act parental leave provisions, the employee is entitled to adjust that step consistent with the parental leave NES e.g. if an employee is on parental leave under the WR Act entitlement on 1 January 2010, on that date he or she will become entitled to request an extension to that parental leave under the NES.

Entitlement

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A parent who is an eligible employee may take separate periods of up to 12 months of unpaid parental leave in relation to the birth of a child or adoption of a child below school age. One parent may request up to 12 months additional leave, which request his/her employer will only be able to refuse on reasonable business grounds.

Pre-Adoption Leave

An employee is entitled up to 2 days unpaid pre-adoption leave to attend any interviews or examinations required in order to obtain approval for the employee's adoption of a child.

Eligibility

The NES entitlement may be exercised by permanent employees (including same sex defector couples) after 12 months continuous service. Casual employees who work on a regular and systematic basis for more than 12 months also enjoy the entitlement. Parental leave can only be taken in association with the birth of a child to the employee or the employee's spouse or de facto partner (including the employee's former spouse or de facto



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partner). Alternatively, it may be taken in relation to the placement of a child with the employee for adoption if the employee has or will have responsibility for the care of that child. An entitlement to pre-adoption leave does not arise if the employee could instead take some other form of leave (e.g. paid annual leave) if the employer directs the employee to take that leave.

Adoption related leave is only available in relation to a child under 16 years of age as at the date of placement, who has not lived continuously with the employee for six months as at the date of placement. Unpaid parental leave must be taken in a single continuous period. Couples will be entitled to take up to 3 weeks parental leave at the same time after the birth or placement of a child. Concurrent leave is parental leave and reduces the entitlement an employee otherwise has to unpaid parental leave.

Requirements for taking leave

Unpaid parental leave must start:

- for a pregnant female employee no earlier than 6 weeks before the expected date of birth of the child (unless the employee is eligible for special maternity leave – see below) and no later than the date of the child's birth;
- for an employee other than the pregnant female employee, on the date of the child's birth; and
- for adoption leave, on the day of the child's placement.

Where the employee's spouse or de factor partner has responsibility for the care of the child (and is not also an employee) the employee's leave may start anytime within 12 months after the date of birth or day of placement of the child. An employer may direct a pregnant employee to start unpaid parental leave up to 6 weeks before the expected date of birth of the employee's child if the employer considers (based on medical evidence) that there is a risk to the employee in working in their present circumstances. This risk might arise because of a pregnancy related illness and/or hazards connected with the employee's work.

An employee is required to give the employer at least 10 weeks' written notice before starting parental leave or, if that is not practicable, to provide the notice as soon as practicable (which may be a time after the leave has started). An example of when it might not be practical for an employee to give notice is in relation to the premature birth of a child. Employers may require evidence of the expected date of birth or the day or expected day of placement for adoption (and in relation to parental leaving relating to adoption, whether the child is under 16 years of age at the date of placement).

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Requesting an extension to unpaid parental leave

An employee may request an additional period of unpaid parental leave of up to 12 months. The employee must first have taken their full entitlement to 12 months parental leave before making that request. Any proposed extension must be continuous with the employee's unpaid parental leave. The employee must provide at least 4 weeks' notice in writing before the end of the employee's initial period of leave requesting an extension. The employer must respond in writing to the written request as soon as practicable and not later than 21 days after the request is made. A request may only be refused on reasonable business grounds. The employer must give reasons for refusal. Reasonable business grounds may include, for example:

- inability to organise work among existing staff; or
- inability to recruit a replacement employee.

Unpaid special maternity leave

An eligible pregnant employee may take unpaid special maternity leave if the employee is not fit to work because of a pregnancy related illness, or because the pregnancy ends otherwise than by the birth of a living child within 28 weeks of the expected date of birth.

Transfer to a safe job

If an employee entitled to unpaid parental leave provides evidence that she is fit for work, but it would be inadvisable for her to continue in her present position during a period because of illness or risks arising out of a pregnancy, or hazards connected with her work, the employee must be transferred for that period to an appropriate safe job with no other change to her terms and conditions of employment. The employer must pay the transferred employee at the full rate of pay for the position she was in before the transfer, for the hours that she works 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.

Consultation with employee on unpaid parental leave

If the employer makes a decision that will have a significant effect on the status, pay or location of an employee's pre-parental leave position, the employer must take all reasonable steps to inform the employee of that decision and give the employee an opportunity to discuss the effect of the decision on his or her position.

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Return to work guarantee

When a period of unpaid parental leave ends the employee is entitled to return to their pre-parental leave position. If that position no longer exists, the employee is entitled to return to an available position for which the employee is qualified and suited that is nearest in status and pay to the employee's pre-parental leave position.

Tips for Compliance

- create a form for employees to use to request an extension to unpaid parental leave;
- when employees embark on parental leave make sure you have agreed on a way to contact the employee whilst on leave if there is a need to inform them of a development affecting their employment;
and
- develop internal management guidelines as to how to deal with requests to extend unpaid parental leave.



Find out more at:
www.fairworkaustralia.ahri.com.au