

NATIONAL EMPLOYMENT STANDARDS – LONG SERVICE LEAVE

Long Service Leave forms part of the 'safety net' of the National Employment Standards (NES), which came into effect on 1 January 2010. The NES applies 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 can provide more favourable terms and conditions in addition to the minimum entitlements set out under the NES

An employee is taken to be covered by the applicable state legislation for long service leave UNLESS either of below applies:

1. Entitlement in accordance with applicable award-derived long service leave terms

If there are applicable long service leave terms (as defined) that relate to an employee, the employee is entitled to long service leave in accordance with those terms.

Applicable award-derived long service leave terms means:

- > Terms of an award, or a State reference transitional award that
 - would have applied to the employee immediately before 1 January 2010 AND
 - would have entitled the employee to long service leave AND
- > Any terms of the award, or the state reference transitional award, that are ancillary or incidental to the terms referred to above.

An employee's entitlement is not derived from the applicable award if:

- > A workplace or an Australian Workplace Agreement (AWA), that came into operation before 1 January 2010 applies to the employee OR
- > One of the following kinds of instruments that came into operation before 1 January 2010 applies to the employee and expressly deals with long service leave:
 - An enterprise agreement
 - A preserved State agreement
 - A workplace determination
 - A pre-reform certified agreement
 - A pre-reform AWA
 - A section 170MX award
 - An old IR agreement

2. Entitlement in accordance with applicable agreement-derived long service leave terms

If there are applicable agreement-derived long service leave terms (as defined) in relation to an employee, the employee is entitled to long service leave in accordance with those terms.

Applicable agreement-derived long service leave terms means:

- > An order (from the Fair Work Commission) is in operation in relation to terms of an instrument AND
- > Those terms of the instrument would have applied to the employee immediately before 1 January 2010 if the employee had at that time, been in their current circumstances of employment AND
- > There are no applicable award-derived long service leave terms in relation to the employee

Enterprise agreements may contain terms DISCOUNTING SERVICE under prior agreements etc. in certain circumstances

This section will apply where one of the following kinds of instruments came into operation before 1 January 2010 and applies to an employee on or after that date:

- > An enterprise agreement
- > A workplace agreement
- > A workplace determination
- > A preserved State agreement
- > An AWA
- > A pre-reform certified agreement
- > A pre-reform AWA
- > An old IR agreement
- > A section 170MX award

AND

- > The instrument states that the employee is NOT entitled to long service leave

AND

- > The instrument ceases, for whatever reason, to apply to the employee

AND

- > Immediately after the first instrument ceases to apply, a replacement enterprise agreement starts to apply to the employee.

The replacement agreement may include terms to the effect that an employee's service with the employer during a specified period (the excluded period)(being some or all of the period when the first instrument applied to the employee) does not count as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave to which the employee is entitled, under this Division or under a law of a State or Territory.

If the replacement agreement includes terms as permitted above, the excluded period does not count, and never again counts, as service for the purpose of determining whether the employee is qualified for long service leave, or the amount of long service leave they are entitled to, unless a later agreement provides otherwise.

Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on (03) 8662 5222.

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