

LONG SERVICE LEAVE ACT 2018 (VICTORIA)

Part 2 – 2, Division 9 of the *Fair Work Act 2009* (Cth) (FW Act) contains the Long Service Leave (LSL) National Employment Standard (NES). This is a transitional entitlement pending the development of an Australia-wide set of entitlements to be developed in the future. Currently, employers are required to continue providing LSL to employees in accordance with the applicable industrial instrument or State legislation as was required immediately prior to 1 January 2010.

What entitlement to LSL will apply in Victoria?

Employees who were covered by a Federal instrument of employment (i.e. Federal Awards) immediately prior to 1 January 2010, or are currently covered by an enterprise agreement, Australian Workplace Agreement (AWA) or Individual Transitional Employment Agreement (ITEA) that contains their own LSL provisions, will continue to be bound by those provisions.

Additionally, independent contractors and business owners do not fall under the definition of ‘employee’ in the Act and are excluded from its operation.

Employees covered by the State legislation

Employees in Victoria who are not covered by a Federal instrument of employment containing LSL provisions as above will be covered by the *Long Service Leave Act 2018 (Vic)* (the LSL Act). The below information applies to employees who derive their entitlement to LSL from the LSL Act in Victoria.

The LSL entitlement

The entitlement to LSL is calculated according to the following formula:

Leave entitlement (weeks) = Period of **continuous service** with **one employer** (weeks) ÷ 60



Note: an employee will accrue one week of LSL for every 60 weeks of continuous service

Example: An employee who serves 12 continuous years of service with the same employer has worked 624 weeks (52 x 12 = 624 weeks). This means this employee is entitled to 10.4 weeks of paid LSL (624 ÷ 60 = 10.4 weeks).

Taking LSL

Any time after completing 7 years of continuous employment (*See factsheet: Continuous Service for definition*), an employee is entitled to take any LSL accrued, less any period of leave already taken.

Rules - taking LSL

LSL is usually taken when the employer and employee agree when and how it is to be taken.

In the absence of such an agreement, the employer can require the employee to take their LSL by giving them at least 12 weeks’ written notice.

The employee cannot refuse this direction. However they can take action in the Magistrates Court challenging the direction to take leave.

Public holidays and annual leave

Public holidays that occur during a period of LSL will not be counted. A public holiday that falls during this period will act to increase the period of leave by the duration of the holiday.

Similarly, LSL will not operate over a period of annual leave – they are mutually exclusive.

Leave in advance

An employer may agree to an employee the ability to take their LSL before it falls due (i.e. before completing the 7 years of continuous service). If an employee takes this advanced leave they are not entitled to any further LSL or payment in lieu for the period of employment for which the leave was granted.

If the employee is dismissed after the advanced period of LSL ends, the employer may deduct from any payment as a result of the termination the amount of leave that the employee took but will not become entitled to.

Separate periods of leave

An employee can request to take long service leave for a period of not less than 1 day.

Leave at half pay

An employee can request that they be allowed to take double their amount of leave but at half the ordinary rate of pay. An employer must grant an employee's request if it is reasonable to do so having regard to the needs of both the employee and the employer's business.

Cashing out LSL strictly forbidden

The LSL Act strictly prohibits the act of cashing out LSL. The only time an employer can give pay in lieu of LSL is on termination of employment.

Termination of employment

Paying LSL - termination of employment

If an employee's employment ends (other than because of the employee's death) before the employee has taken all the long service leave to which the employee is entitled, the employee is taken to have started LSL on the day that the employment ended.

On the day referred to above, the employee's employer must pay the employee the full amount of the employee's LSL entitlement as at that day.

An employee will only be entitled to be paid out their LSL entitlements if they have been employed with the same employer for at least seven years.

An employee who is terminated after serving between seven to 15 years of service will be entitled to be paid out the pro-rata amount of pay they would have received while on LSL (weeks ÷ 60 x ordinary rate of pay). See below for a discussion on 'ordinary rates of pay'.

An employee who has served for more than 15 years and has taken their accrued LSL for that first 15 year period will also be entitled to a pro-rata payment but only in respect to the period of work immediately following the last period of LSL.

Employee death before LSL is used

If the employee dies before they have taken out all their entitled LSL, the employer must pay the employee's personal representative the full amount of LSL still owed.

For calculation purposes, the ordinary rate of pay will be the amount the employee was entitled to receive for working his or her normal hours, averaged over a 52 week period.

Payment of LSL

Ordinary Hours

If no normal weekly number of hours are fixed for an employee's work (such as a casual employee) or the normal weekly number of hours are fixed but have changed one or more times in the last 104 weeks immediately before the employee takes long service leave, the employee's normal weekly hours is taken to be the greatest of the following:

- > the average weekly hours over the 52 weeks immediately before the employee starts long service leave; or
- > the average weekly hours over the 260 weeks immediately before the employee starts long service leave; or
- > the average weekly hours over the entire period of employment before the employee starts long service leave.

Ordinary rate of pay

While on LSL, an employee is entitled to be paid the amount they would normally have received on the day on which the employee starts long service leave, calculated according to the employee's normal weekly hours at the employee's ordinary time rate of pay.

The employee's **ordinary rate of pay** includes the cash value of any boarding or lodging that is usually received by the employee from the employer.

If the employee's rate of pay is not fixed under the relevant employment agreement, the greater of the following amounts will apply:

- > the average weekly earnings in the 52 weeks immediately prior to the leave; or
- > the average weekly earnings in the 260 weeks immediately prior to the leave; or
- > the average weekly earnings over the entire period of employment.
- >

If the employee defers their period of LSL with the employer by written agreement then the rate of pay they will receive when they ultimately take their LSL will be determined by that written agreement. This agreed rate of pay cannot be less than the amount of pay the employee would have received had they taken their LSL at the time the employee became entitled to it.

Pay increases

Any pay increases that affect the employee who is on LSL must be passed on to them from the date of the increase.

Methods of payment

An employer can pay the employee their long service leave pay in any way that is agreed upon by both parties before the leave commences.

If no agreement exists, then the employee is entitled to be paid in one of the following methods:

- > in full at the commencement of the leave or
- > at the same time and in the same manner as if the employee was not on leave.

A failure to comply with these rules of payment may result in a fine.

Entitlement for completed years and months of service

Years	Completed Months											
	0	1	2	3	4	5	6	7	8	9	10	11
0	-	0.0722	0.1444	0.2167	0.2889	0.3611	0.4333	0.5056	0.5778	0.6500	0.7222	0.7944
1	0.867	0.9389	1.0111	1.0834	1.1556	1.2278	1.3000	1.3723	1.4445	1.5167	1.5889	1.6611
2	1.733	1.8055	1.8777	1.9500	2.0222	2.0944	2.1666	2.2389	2.3111	2.3833	2.4555	2.5277
3	2.600	2.6722	2.7444	2.8167	2.8889	2.9611	3.0333	3.1056	3.1778	3.2500	3.3222	3.3944
4	3.467	3.5389	3.6111	3.6834	3.7556	3.8278	3.9000	3.9723	4.0445	4.1167	4.1889	4.2611
5	4.333	4.4055	4.4777	4.5500	4.6222	4.6944	4.7666	4.8389	4.9111	4.9833	5.0555	5.1277
6	5.200	5.2722	5.3444	5.4167	5.4889	5.5611	5.6333	5.7056	5.7778	5.8500	5.9222	5.9944
7	6.067	6.1389	6.2111	6.2834	6.3556	6.4278	6.5000	6.5723	6.6445	6.7167	6.7889	6.8611
8	6.933	7.0055	7.0777	7.1500	7.2222	7.2944	7.3666	7.4389	7.5111	7.5833	7.6555	7.7277
9	7.800	7.8722	7.9444	8.0167	8.0889	8.1611	8.2333	8.3056	8.378	8.4500	8.5222	8.5944
10	8.667	8.7389	8.8111	8.8834	8.9556	9.0278	9.1000	9.1723	9.245	9.3167	9.3889	9.4611
11	9.533	9.6055	9.6777	9.7500	9.8222	9.8944	9.9666	10.0389	10.111	10.183	10.2555	10.3277
12	10.40	10.472	10.5444	10.6167	10.6889	10.7611	10.8333	10.9056	10.978	11.050	11.1222	11.1944
13	11.27	11.339	11.4111	11.4834	11.5556	11.6278	11.7000	11.7723	11.845	11.917	11.9889	12.0611
14	12.13	12.206	12.2777	12.3500	12.4222	12.4944	12.5666	12.6389	12.711	12.783	12.8555	12.9277
15	13.00	-	-	-	-	-	-	-	-	-	-	-

Entitlement for completed years and months of service

Completed Weeks	Completed Days						
	0	1	2	3	4	5	6
0	-	0.0024	0.0048	0.0072	0.0095	0.0119	0.0143
1	0.0167	0.0191	0.0215	0.0238	0.0262	0.0286	0.0310
2	0.0333	0.0357	0.0381	0.0404	0.0428	0.0452	0.0476
3	0.0500	0.0524	0.0548	0.0571	0.0595	0.0619	0.0642
4	0.0667	0.0691	0.0715	0.0738	-	-	-

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**.

Disclaimer

The information contained in this document has been prepared by the Victorian Chamber of Commerce and Industry in this format for the convenience and benefit of its members and is provided as a source of information only. The Victorian Chamber does not accept responsibility for the accuracy of the information or its relevance or applicability in particular circumstances. The information does not constitute, and should not be relied on, as legal or other professional advice about the content and does not reflect the opinion of the Victorian Chamber, its employees or agents. The Victorian Chamber and its employees, officers, authors or agents expressly disclaim all and any liability to any person, whether a member of the Victorian Chamber or not, in respect of any action or decision to act or not act which is taken in reliance, whether partially or wholly, on the information in this communication. Without limiting the generality of this disclaimer, no responsibility or liability is accepted for any losses incurred in contract, tort, negligence, or any other cause of action, or for any consequential or other forms of loss. If you are uncertain about the application of this information in your own circumstances you should obtain specific advice.