

PARENTAL LEAVE

Under the National Employment Standards (NES) in the *Fair Work Act*, all employees in Australia are entitled to a period of 12 months' **unpaid parental leave** when a child is born or adopted with the right to request an additional 12 months leave.

Employees may also be entitled to paid parental leave through the federal government's **Paid Parental Leave Scheme**.

Both entitlements are covered in this guide.

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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UNPAID PARENTAL LEAVE

Eligibility requirements See *Fair Work Act* s. 67

All employees in Australia are eligible for unpaid parental leave under the NES if they:

- > have worked for their employer for at least 12 months before the date (or expected date) of birth of the child (or before the date of adoption); **and**
- > will have responsibility for the care of the child.

For **casual employees** to be eligible for leave, they need to have been working for their employer on a regular basis for a period of 12 months **and** have an expectation of continuing work.

Employees who have taken parental leave don't have to work for another 12 months before they can take another period of parental leave with the same employer.

Length of leave See *Fair Work Act* ss. 70, 72

The length of unpaid parental leave depends on:

- > if one parent takes leave; **or**
- > both parents take leave at the same time or different times

One parent taking leave

An employee is entitled to an initial period of up to 12 months' unpaid parental leave. The leave must be taken in a single continuous period.

In the case of a pregnant employee, the leave **must start** at any time within the six weeks before the expected date of birth (although it can start earlier, if the employer agrees). The leave cannot start after the birth of the child.

An employer can request a medical clearance from a pregnant employee if it has health and safety concerns about her working within the 6 week period before the birth. Please see the FAQ section below for further information.

An employee may request an additional 12 months leave, providing their partner has not already taken that amount of leave. An employer can reject such a request on reasonable business grounds, provided they have given the employee a reasonable opportunity to discuss the request.

Both parents taking leave

Working parents (not necessarily of the same employer) are each entitled to 12 months unpaid leave. However, the combined leave cannot be for more than 24 months.

Both employees can take up to 8 weeks unpaid leave at the same time. This is called '**concurrent leave**'.

Concurrent leave can start on the birth or adoption the child (or earlier, if the employer agrees) **or** later than this date, but it must be within 12 months of the birth or adoption

Concurrent leave can be taken in separate periods, each period being no shorter than 2 weeks (unless the employer agrees).

Notice requirements See *Fair Work Act* s. 74

An employee is required to provide **10 weeks' written notice** of their intention to take parental leave (unless this is not reasonably practicable). The notice must specify the intended starting and finishing dates of the unpaid parental leave. The employee must confirm these dates at least 4 weeks prior to going on leave. These requirements also apply to an employee taking 8 weeks concurrent leave. Where the employee wishes to take separate periods of concurrent leave, 10 weeks of notice for the first period is required and then 4 weeks of notice for subsequent periods.

Employers can request a medical certificate confirming the expected date of birth of the child.

If an employee wishes to **request an extension** of leave for a further 12 months (up to a total of 24 months), the request must be put in writing and be given to the employer at least 4 weeks before the end of the employee's initial period of leave. The employer must respond to the request in writing within 21 days and state whether the request is granted or refused.

Flexible Unpaid Parental Leave See *Fair Work Act* s. 72A

Employees can take up to 30 days of flexible unpaid parental leave during the 24-month period after the birth or date of placement.

It can be taken:

- > As a single continuous period of one or more days; or
- > Separate periods of one or more days each

The full entitlement is available to part time or and casual employees.

Keeping in touch days See *Fair Work Act* s. 79A


An employee on 12 months unpaid parental leave is entitled to 10 **keeping in touch days** to allow the employee to temporarily return to the workplace without affecting their period of parental leave. The purpose of these days is to allow an employee to remain connected with the workplace by, for example, attending an important meeting or participating in a training day.

Keeping in touch days are **paid** and can be worked as a full day or part day. If an employee works a part-day that will count as one keeping in touch day.

If an employee extends their period of unpaid parental leave beyond 12 months, they can take an additional 10 keeping in touch days.

Return to work guarantee See *Fair Work Act* ss. 83, 84

On completing a period of unpaid parental leave, an employee has a lawful right to return to their former position. If that job no longer exists, the employee has a right to return to a different position nearest in status and pay, and for which they are qualified. This is known as the **return to work guarantee**.

 **Note:** Employers have a legal obligation to consult employees on unpaid parental leave about any decision that will have an effect on the status, pay or location of an employee's position. If an employee's position no longer exists, this may mean it has been made **redundant**. Please call the Workplace Relations Advice Line on (03) 8662 5222 for further advice if this is the case.

Requesting flexible work See *Fair Work Act* s. 65


An employee (including a casual) returning to work from parental leave has a right to request a 'change in working arrangements' if they have the responsibility for the care of a child no older than school aged. An employee may request, for example, to:

- > return to work on a part-time basis; or
- > finish work earlier in the day in order to drop off or pick up children from school.

An employee must put a request for a flexible working arrangement to their employer in writing. The employer **must** respond within 21 days, stating whether the request is approved or refused.

An employer can refuse an employee's request on '**reasonable business grounds**'. These grounds can include:

- > the excessive cost of accommodating the request
- > that there is no capacity to reorganise work arrangements of other employees to accommodate the request
- > the impracticality of any arrangements that would need to be put in place to accommodate the request, including the need to recruit replacement staff
- > that there would be a significant loss of efficiency or productivity
- > that there would be a significant negative impact on customer service

 **Note:** There are risks in declining an employee's request for flexible work, including an adverse action or unfair dismissal claim. If you are considering declining a request, please call the Workplace Relations Advice Line on (03) 8662 5222 for further advice.

Related entitlements for pregnant employees

In addition to unpaid parental leave, there are two (2) further parental leave entitlements available to pregnant employees under the NES.

Special Maternity Leave See *Fair Work Act* s. 80

A female employee who is entitled to unpaid parental leave is also entitled to unpaid **special maternity leave** before the birth of her child if:

- > she is suffering from a pregnancy-related illness; **or**
- > if the employee loses the unborn child less than 28 weeks before the expected date of birth.

Special maternity leave does not affect an employee's entitlement to 12 months' unpaid parental leave. Employers can request a medical certificate as evidence of a pregnancy-related illness.

No Safe Job Leave See *Fair Work Act* ss. 81, 81A, 82A

Where a pregnant employee is fit for work but cannot continue to do her job because it poses a risk or hazard to the pregnancy, she is entitled to be transferred to an appropriate safe job or, if that is not possible, she can take no safe job leave. Employers may request a medical certificate as evidence.

If a 'safe job' is available, then the employee must be offered it on the same hours and pay as her current position.

If no 'safe job' is available, then the employee can take **paid no safe job leave** for as long as her current job is unsafe (or until the employee starts her unpaid parental leave). The employee would be paid at her base rate of pay for her ordinary hours of work.

Where an employee is not eligible for unpaid parental leave the employee is entitled to **unpaid no safe job leave** for as long as her current job is unsafe.

Example: Sally has been working for her employer, a manufacturer of pool chlorine, for 3 years. 6 months in to her pregnancy, a doctor advises Sally that her work handling chemicals poses a risk to her pregnancy. Sally's employer agrees to transfer her to a 'safe job' in the office for the remainder of her pregnancy. Sally continues to be paid the same wages.

Stillborn babies and hospitalised children

In response to a report from the Senate Select Committee on Stillbirth Research and Education, the Fair Work Act was amended on 26 November 2020 in relation to Unpaid Parental Leave and stillborn babies and babies that are hospitalised after birth.

Stillborn children and infant death See Fair Work Act s. 77A

If the child is stillborn, and the employee would have been entitled to unpaid parental leave, the employee is still entitled to the unpaid parental leave.

If the child is stillborn or dies within 24 months of the birth, the employee may cancel the unpaid parental leave by giving the employer 4 weeks written notice. Previously the employer was also able to give notice for the employee to return to work.

Hospitalised children See Fair Work Act s. 78A

If the child is required to remain in hospital after birth or is hospitalised immediately after birth due to premature birth or illness, the employee can agree to a **permitted work period** with their employer.

A **permitted work period** allows an employee to agree to not take unpaid parental leave for a period while the child remains in hospital and return to work. The employee can resume their unpaid parental leave at a date agreed by the employee, or once the baby has been discharged from hospital. An employee is only allowed one permitted work period in relation to the child.

Frequently Asked Questions

Can an employee be required to take parental leave early? See Fair Work Act s. 73

If a pregnant employee wishes to work in the six (6) weeks before the expected date of birth, the employer can require that the employee present a medical certificate confirming that she can continue to work. If a doctor declares the employee unfit to continue to perform her duties (or if the employee fails to provide a medical certificate within seven days of being asked to do so) then the employer may require the employee to commence her unpaid parental leave.

Can an employee on parental leave return to work early in the event of a stillbirth or infant death? See Fair Work Act s. 77A

If a pregnant employee loses her child after parental leave starts, she can give her employer 4 weeks notice of her intention to return to work. If the employee does not give notice, she would remain on unpaid parental leave for the agreed period. The employer is unable to request the employee to return to work.

Does an employee accrue annual and personal leave whilst on parental leave?  See *Fair Work Act* ss. 22, 87(2); Paid Parental Leave Act s 99

An employee does **not** accrue annual or personal leave whilst on unpaid parental leave (this includes when the employee is receiving paid leave from the federal government's Paid Parental Leave Scheme).

Can an employee take other forms of leave whilst on parental leave?  See *Fair Work Act* s 79

During unpaid parental leave an employee can take annual leave or jury service leave. This will not affect the length of the parental leave. Employees, however, cannot take personal leave or compassionate leave.

PAID PARENTAL LEAVE

Entitlement

Under the *Parental Leave Act 2010* the primary carer of a newborn or adopted child is entitled to apply for the federal government's **Parental Leave Pay**. This can provide employees with up to 18 weeks pay at the national minimum wage. Eligible working dads (or partners, including same-sex partners) can also apply for up to 2 weeks **Dad and Partner Pay**.

The national minimum wage is currently **\$753.90 per week** (1 July 2020). The payment is treated as taxable income, but superannuation is not payable.

Eligibility test – Parental Leave Pay

To be eligible for Parental Leave Pay, an employee must:

- > be the **primary carer** of a newborn or adopted child;
- > satisfy a **work test**:
- > be an Australian resident;
- > earn less than \$150,000 a year; and
- > be on unpaid parental leave from their employer.

Flexible Paid Parental Leave Pay

If your child's birth or adoption is on or after 1 July 2020, you'll still get up to 90 days parental leave. However, 30 of those days will be Flexible Paid Parental Leave days.

Your payment will include both:

- a continuous Paid Parental Leave period of up to 12 weeks, which is 60 payable days
- 30 Flexible Paid Parental Leave days.

You must get the Paid Parental Leave period as a continuous block of payment. Payment is made before you return to work and within 1 year of your child's birth or adoption.

You can claim Flexible Paid Parental Leave days by connecting them to your Paid Parental Leave period as a continuous block. Or, you can claim them at a later date. This can include both of the following:

- after you've returned to work
- up to 2 years after your child's birth or adoption.


Primary Carer

The primary carer of a child is the person that, above anyone else, meets the child's physical needs. This is normally the birth mother.

Work Test

To be eligible for Parental Leave Pay, an employee must have:

- > undertaken paid work for at least 10 of the 13 months before the birth; **and**
- > worked for at least 330 hours in that 10 month period (just over 1 day per week) without any break exceeding:
 - o 8 weeks if your child's birth or adoption is before 1 January 2020
 - o 12 weeks if your child's birth or adoption is on or after 1 January 2020

 **Note:** There are some exceptions to this work test in circumstances of pregnancy complications or a premature birth. If an employee is unsure whether they satisfy the work test, they should call the **Department of Human Services** on **136 150**.

Eligibility test – Dad and Partner Pay

To be eligible for Dad and Partner Pay, an employee must be either the:

- > biological father of the child;
- > partner of the birth mother;
- > adopting parent;
- > partner of the adopting parent;
- > parent in a surrogacy arrangement
- > partner of a parent in a surrogacy arrangement; or
- > same sex partner of the birth mother, biological father or adopting parent.

And the employee must

- > be providing care for a newborn or adopted child
- > satisfy a **work test**;
- > be an Australian resident;
- > earn less than \$150,000 a year; and
- > be on unpaid leave from their employer.

Frequently Asked Questions

Does an employee accrue annual and personal leave whilst receiving Paid Parental Leave?



See Parental Leave Act s 99

No. Neither Parental Leave Pay or Dad and Partner Pay count as 'paid leave' for the purposes of the National Employment Standards and, therefore, annual leave and personal leave does not accrue.

When should an employee apply for Paid Parental Leave?

An employee can apply for Paid Parental Leave up to three (3) months before the expected date of birth or adoption of the child. Employees should apply for the scheme as soon as possible to avoid any delay in payments.

What role does the employer play when an employee is approved for Paid Parental Leave?

It is up to the employee to apply for Paid Parental Leave with the Department of Human Services (DHS). If the application is approved, DHS will contact the employer requesting the business's pay cycle and bank details. Before the employee starts their leave, DHS will transfer the payment to the employer's bank account. The employer is then responsible for paying the employee through the normal pay cycle.