

NATIONAL EMPLOYMENT STANDARDS – PERSONAL/CARER’S, COMPASSIONATE, FAMILY AND DOMESTIC VIOLENCE LEAVE

Personal/carer’s leave, compassionate leave and family and domestic violence leave form part of the ‘safety net’ of the National Employment Standards (NES). Personal/carer’s and compassionate leave entitlements came into effect on 1 January 2010. Family and Domestic Violence Leave entitlements came into effect on 12 December 2018. 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.

Overview

See *Fair Work Act* s. 95 - 107

The following outlines employees' entitlements:

- > Paid personal/carer’s leave – 10 days each year
- > Unpaid carer’s leave – 2 days per occasion, available to casual employees, or to permanent employees if paid leave is exhausted
- > Paid compassionate leave – 2 days per occasion
- > Unpaid compassionate leave (available to casual employees) – 2 days per occasion
- > Unpaid family and domestic violence leave – 5 days each year.

Personal/Carer’s Leave

See *Fair Work Act* s. 95 - 103

The Minimum Entitlements

The minimum entitlement to paid personal/carer’s leave for an employee (other than a casual employee) is 10 days per year. Part-time employees are required to the pro rata equivalent of 10 days per year.

An employee’s entitlement to paid personal/carer’s leave accrues progressively during a year of service according to the number of ordinary hours worked and accumulates from year to year.

Access to leave and definitions

An employee may take paid personal/carer’s leave when the employee is sick or injured or when the employee needs to care for an immediate family or household member who is sick, injured or has an unexpected emergency.

Immediate family is defined as an employee’s:

- > Spouse
- > De facto partner
- > Child
- > Parent
- > Grandparent
- > Grandchild
- > Sibling
- > Child, parent, grandparent, grandchild or sibling of the employee’s spouse or de facto partner.

Notification Requirements

An employee must give his or her employer notice of the taking a period of personal, carer's or compassionate leave. The notice:

- > Must be given to the employer as soon as practicable (which may be a time after the leave has started)
- > Must advise the employer of the period, or expected period, of the leave.

After giving such notice, an employer may require an employee to provide "evidence that would satisfy a reasonable person". A failure to either provide notice or, if required, evidence that would satisfy a reasonable person to substantiate the reasons for the leave, means the employee is not entitled to the leave.

The Explanatory Memorandum gives an indication that while it may not be reasonable to request a medical certificate on every occasion; in cases of repeated absences on particular days (e.g. before or after a public holiday or weekend) it may be reasonable. A policy or clear business guidelines may assist employers in managing this aspect of leave entitlements.

As with all terms of the NES, a modern award or enterprise agreement may contain terms that are supplementary or ancillary to the notice and evidence requirements that pertain to compassionate leave.

Payment

When paid personal/carer's leave is taken, the minimum requirement is that an employee must be paid at their base rate of pay for the ordinary hours they would have worked during the period. An employee's 'base rate of pay' (other than a pieceworker) is the rate of pay payable to an employee for his or her ordinary hours of work, which does not include the following:

- > loadings
- > monetary allowances
- > overtime or penalty rates
- > any other separately identifiable amounts.



>

Note: An employees' applicable award may provide a more favourable method of payment.

If the period during which an employee takes paid personal/carer's leave includes a day or part-day that is a public holiday, the employee would be taken to be accessing the public holiday entitlement for that day i.e. the personal/carer's leave would not be used.

Cashing out

For employees covered by an award or agreement, cashing out of paid personal/carer's leave is permitted if ALL of the following apply:

- > the employee is award or industrial agreement covered and the applicable instrument specifically allows the practice*
- > it is agreed in writing on each occasion
- > the employee retains a balance of at least 15 days of untaken paid personal/carer's leave
- > the employee is paid at least the full amount that would have been payable had the employee taken the leave they have cashed out.

*Note: At the date of producing this guide, 2 modern awards contain this provision: The Timber Industry Award 2010 and the Stevedoring Industry Award 2010.

Employers cannot force or try to force an employee to make an agreement to cash out personal/carer's leave.

Unpaid Carer's Leave

See *Fair Work Act* s. 102 – 103

Minimum Entitlements

An employee cannot take unpaid carer's leave during a particular period if the employee could instead take paid personal/carer's leave.

An employee (including a casual employee) is entitled to 2 days of unpaid carer's leave for each occasion. These occasions are defined as when a member of the employee's immediate family or household requires care or support because of a personal illness, injury, or an unexpected emergency.

An employee may take unpaid carer's leave for each occasion as a single continuous period of up to 2 days, or any separate periods to which are agreed between the employee and employer.

Compassionate Leave

See *Fair Work Act* s. 104 – 107

An employee is entitled to 2 days of compassionate leave for each occasion (a **permissible occasion**). Whilst a permanent employee may access an entitlement of 2 days paid compassionate leave per occasion, casual employees may only take unpaid compassionate leave.

A permissible occasion is defined as a circumstance where 'a member of the employee's immediate family, or a member of the employee's household':

- > Contracts or develops a personal illness that poses a serious threat to his or her life
- > Sustains a personal injury that poses a serious threat to his or her life
- > Dies.

It is important to note that the employee is entitled to 2 days for *each occasion*. Therefore, while it is unlikely, it is possible that an employee may take any number of compassionate leave days in any one year.

For example, an employee's mother may contract a personal illness that poses a serious threat to her life. Consequently, the employee would be entitled to 2 days of paid compassionate leave. If this employee's mother happened to pass away shortly after this period of leave, the employee would then be entitled to another 2 days compassionate leave.

Taking Compassionate Leave

An employee may take compassionate leave:

- > To spend time with the member of the employee's immediate family or household who has contracted or developed the personal illness, or sustained the personal injury
- > After the death of the member of the employee's immediate family or household.

If the reason for taking leave is due to the employee's immediate family or household member contracting or developing a personal illness (or sustaining a personal injury), the employee may take the period of compassionate leave (for that particular occasion) at any time while the illness or injury persists.

An employee may take compassionate leave:

- > In a single continuous 2 day period
- > In 2 separate periods of 1 day each
- > In any separate periods to which the employee and his or her employer agree.

The definition of 'immediate family or household' that applies to carer's leave also applies to the eligibility of an employee to take a period of compassionate leave.

Payments

There are different provisions that apply with regard to payment for compassionate leave; this is determined by whether the employee is a permanent or casual employee.

Accordingly, there are two provisions of this standard:

- > A permanent employee must be paid at the employee's base rate of pay for the employee's ordinary hours of work in that period; or
- > If the employee is engaged on a casual basis, a period of compassionate leave is unpaid leave.

Notification Requirements

The same notification requirements as for carer's and personal leave requirements apply to compassionate leave.

Frequently Asked Questions

What is the total entitlement of 'paid' Personal/Carer's and Compassionate leave for permanent employees?

10 days personal/carers leave and 2 days compassionate leave. Compassionate leave is not limited, does not accrue and is available on each separate occasion.

What is the total entitlement of 'paid' Personal/Carer's and Compassionate leave for casual employees?

No paid entitlements apply to casual employees. However, 2 days unpaid compassionate leave on each separate occasion is applicable and unpaid personal/carers leave where reasonable.

Family and Domestic Violence Leave

See Fair Work Act s. 106A – 106E

Family and domestic violence is violent, threatening or other abusive behaviour by a close relative of an employee that seeks to coerce or control the employee and causes the employee harm or to be fearful. All employees (including part-time and casual employees) will be able to access up to 5 unpaid days within a 12 month period, in the event they need to handle the impact of domestic and family violence and they are unable to outside of work.

The Minimum Entitlements

An employee is entitled to 5 days if the employee is experiencing family and domestic violence or needing to deal with the impact of family and domestic violence. This leave is available at the start of each 12 month period of employment and does not accrue progressively during the year of service. This means the 5 days will be available in full for full-time, part-time and casual employees upon the commencement of their service.

An employee may take unpaid family and domestic violence leave if:

- > they are experiencing family and domestic violence; and
- > the employee needs to do something to deal with the impact of the family and domestic violence; and
- > it would be impractical to deal with these impacts outside of work hours (i.e. arranging for the safety of the employee or a close relative, attending urgent court hearings or accessing police services).

Family and domestic violence leave may be taken:

- > as a single continuous 5 day period
- > separate periods of 1 or more days each
- > a period of less than one day

Access to leave and definitions

An employee may take unpaid family and domestic leave when the employee is experiencing family or domestic violence.

A member of the employee's immediate family means:

- > a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or
- > a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee; or
- > a person related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

A reference to a spouse or de facto partner in the definition of family member in clause 41A.2(a) includes a former spouse or de facto partner.

Notice and evidence requirements

Notice

An employee seeking to use their unpaid leave entitlement needs to provide the business with notice of taking the leave as soon as practicable (depending on the circumstances this may be after the leave has started). The employee also has an onus to advise the business of the expected length of the absence.

Evidence

An employee who has complied with the notice requirements must also give evidence that would satisfy a reasonable person that the leave is for the purpose of family and domestic violence. Such evidence can include: a statutory declaration, a document issued by the police/court or a document issued by the family violence support service involved.

Confidentiality

Employers have an obligation to treat any documentation (including notice and evidence) and/or information provided by an employee for the purposes of this leave as confidential.

Frequently asked questions

Does this leave apply if the employee is not covered by a modern award?

Yes. From 12 November 2018 family and domestic violence leave was included in the National Employment Standards (NES), allowing all National Systems Employees to access 5 unpaid days of family and domestic violence leave.

Can the employee take personal leave whilst accessing family and domestic violence leave?

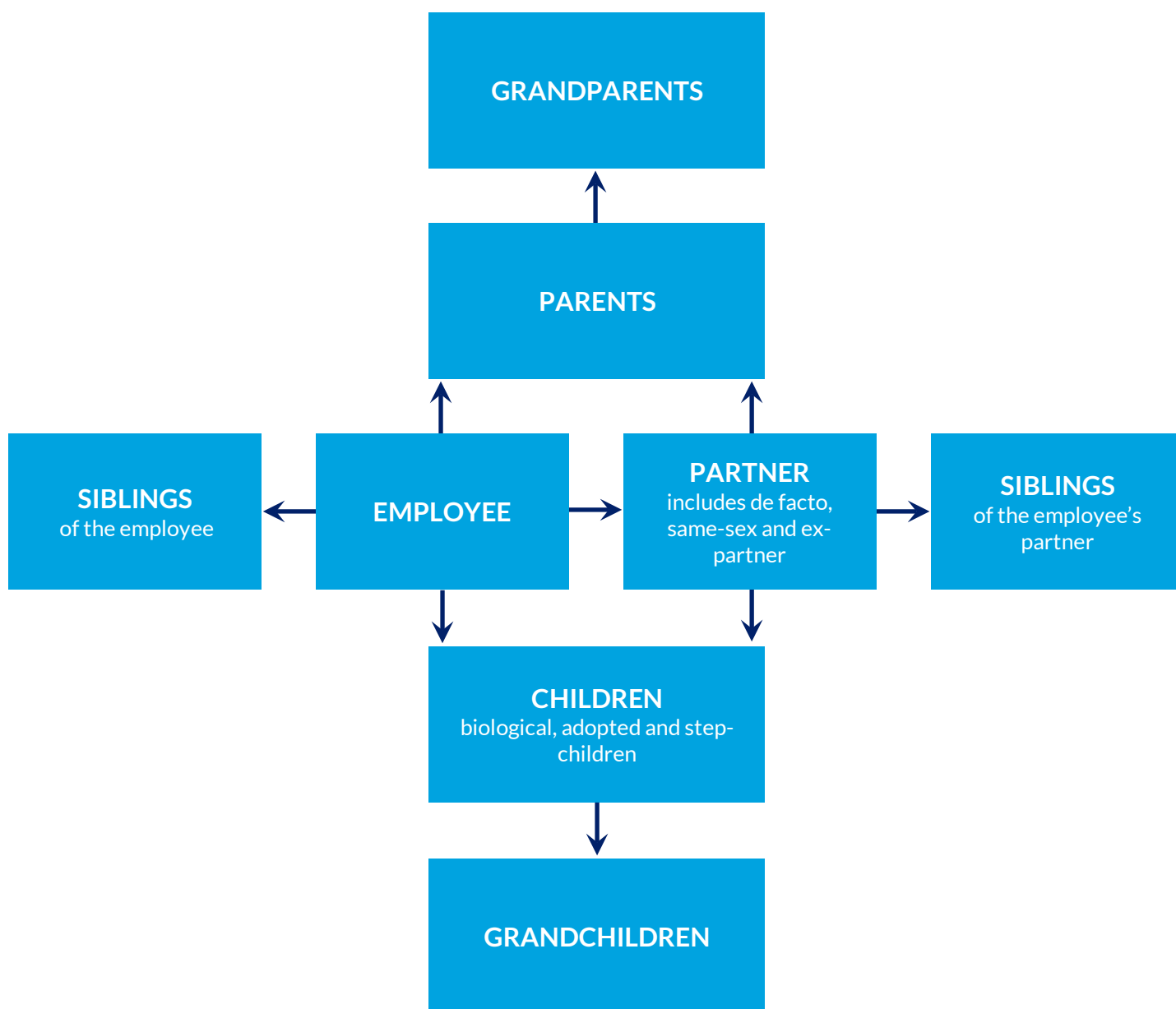
Yes. The employee will need to comply with the conditions of the National Employment Standards to access such leave. This would include notice and evidence requirements relevant for this entitlement and as guided by workplace policies and procedures.

Definition - Immediate family/Household members

The *Fair Work Act 2009* (Cth) defines *immediate family* as:

- (a) a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or
- (b) a child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.

These relationships are summarised in the below diagram:



Exclusions: Aunts, uncles, cousins, partners of an employee's sibling and pets.

For the purposes of personal/carer's leave, compassionate leave and family and domestic violence leave provided under Division 7 of the National Employment Standards (NES), an employee's entitlement to such leave extends beyond occasions solely in relation to 'immediate family' and also include occasions involving members of an employee's 'household'. Household members are those people who live with the employee at the time that such leave is requested.

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.