



LAWYERS & ASSOCIATES

ENTITLEMENT TO PARENTAL LEAVE

What is parental leave?

Parental leave is a period of unpaid leave which an employee is entitled to when they are expecting or will adopt a child.

The National Employment Standards ("NES") sets the minimum standards for parental leave. The NES replaces terms previously used in employment legislation such as "maternity", "paternity" and "adoption" leave.

When is an employee entitled to parental leave?

A full-time or part-time employee is entitled to unpaid parental leave if they are a permanent employee and they have completed at least 12 months of continuous service with an employer before the date or expected date of birth of the child or in cases of child adoptions, the date of placement of an adopted child. However, in relation to adoption leave, an employee is not be entitled to unpaid parental leave unless the child is or will be under the age of 16 years at the date, or expected date of placement of an adopted child, and has not lived continuously with the employee for a period of 6 months or more as at the date, or expected date, of placement of the adopted child. In addition, the adopted child cannot be a child of the employee or of the employee's spouse or de facto partner.

"Spouse" only applies to a former spouse, whereas "de-facto partner" includes a person who resides with the employee in a relationship as a couple on a genuine domestic basis and a former de-facto partner of the employee.

Casual employees may also be entitled to parental leave, if they have been employed by their employer on a "regular and systematic" basis during a 12 months period, and who would have a reasonable

expectation of being employed by that employer on a "regular and systematic" basis, had they not taken parental leave.

Same sex couples are also entitled to parental leave.

For female employees, parental leave may commence at any time within 6 weeks before the expected date of birth of the child and maybe for a period of up to 12 months. The employee may also request that the employer extends this period for an additional 12 months and if the employer agrees this period will be extended. If the employee takes a period of unpaid parental leave that is less than the parental leave period of 12 months and they wish to take a longer period of parental leave, they must provide the employer at least 4 weeks' notice.

In cases where a female employee is ill due to pregnancy-related illness or their pregnancy has prematurely ended within 28 weeks of the expected date of birth, they are also entitled to unpaid special maternity leave.

An employee must make a request for parental leave in writing at least 10 weeks (or if this is not practical as soon as practical) before the commencement date of the parental leave.

Are male employees entitled to parental leave?

Where male employees are responsible for the care of a child they are entitled to similar parental leave entitlements as female employees. Both partners can take a period of up to 3 weeks at the same time from the date of birth or placement of an adopted child. After this period only one partner can take parental leave.

When is an employee entitled to paid parental leave?

The national paid parental leave scheme funded by the Federal Government commences on 1 January 2011, however employers will not be obliged to make payments until 1 July 2011. An employee will be entitled to paid parental leave in the first 12 months after the birth or adoption of a child, as long as they satisfy certain conditions for eligibility. Paid parental leave at the national minimum wage will be paid to the primary carer of a child for up to 18 weeks.

Employees who are entitled to paid parental leave from their employers may also be eligible to the Federal Government funded paid parental leave.

Does an employee accrue other entitlements during parental leave?

Annual and personal leave entitlements do not accrue during a period of unpaid parental leave. However, any leave accrued prior to the employee taking parental leave will remain with the employee and the employee can use their leave when they return to work. The employee can utilise their annual leave, but not personal leave while on unpaid parental leave

Is the employee entitled to return to the same position?

When an employee returns to work after a period of unpaid parental leave, they are entitled to return to the same position they held before taking parental leave, or for female employees the position they held before any transfer or change in their duties were implemented due to

pregnancy. If the employee's position no longer exists in the business, the employee must be offered a suitable position similar in remuneration and status as their original position.

From 1 January 2010, under the NES employees who commenced or applied for parental leave before 31 December 2009 have a right to request changes to their working arrangements (e.g. different working hours or place of work) to assist them to care for the child as long as the child is below school age, or the age of 18 years and has a disability. However, an employee is not entitled to make a request unless they have completed at least 12 months of continuous service with the employer before submitting their request. Such requests should be made in writing. An employer must respond to a request in writing within 21 days of receiving the request and if they wish to deny a request the employer must explain the reasons for doing so. Employers can only deny an employee's request on "reasonable business grounds".

CONCLUSION

To avoid discrimination claims regarding parental leave or requests for alternative working arrangements, employers should ensure that they are aware of the current employment law changes and have employment contracts in place that comply with the NES. Employees must ensure that they follow the necessary procedure (including timelines) to apply for parental leave. If you have any queries regarding parental leave, please contact MLB Lawyers & Associates.

MLB Lawyers & Associates, Level 1, 441 South Road, Bentleigh Victoria 3204

Telephone 1300 688 421 - Facsimile 61 3 9580 6962

Email: enquiries@mlblawyers.com.au

Disclaimer: The information in this publication is not intended to be a complete statement of the law or authoritative advice on the issues raised and accordingly, no person should rely on this information without seeking legal advice from MLB Lawyers & Associates. No responsibility is accepted for any action or inaction taken by readers on the information contained in this article.

© MLB Lawyers & Associates is the owner of the copyright in this article. This article was made/published by MLB Lawyers & Associates in December 2010. Information contained in this article cannot be used or reproduced without the written permission of MLB Lawyers & Associates.