

## Parental Leave

This document has been created to provide Clubs with a summary of parental leave entitlements. Please note that this is not an exhaustive list that may apply to parental leave.

### What is Parental Leave?

Parental leave is a type of leave that can be taken where:

- an employee gives birth;
- an employee's spouse or de facto\* gives birth; or
- an employee adopts a child under the age of 16 years.

*\*under the Fair Work Act 2009 (Cth) a de facto means a person who, although not legally married to the employee, lives with the employee in a relationship as a couple on a genuine domestic basis (this is regardless of whether the people are the same or different sexes).*

### Who is eligible for this leave?

All types of employees are entitled to parental leave. For a full-time or part-time employee to be eligible they must:

- Have worked for their employer for at least 12 months prior to:
  - the date or expected date of birth where the employee is pregnant;
  - the date of the adoption; or
  - when the leave starts (if the leave is taken after another person cares for the child or takes parental leave).

They also must have or will have responsibility for the care of the child.

For a casual to be eligible they must:

- have been working for their employer on a regular and systematic basis for at least 12 months; and
- have a reasonable expectation of continuing work with their employer on a regular and systematic basis, were it not for the birth or adoption of a child.

## How much leave can be taken?

Someone who is eligible for parental leave is entitled to take up to 12 months unpaid parental leave. They can also request up to an additional 12 months (this request can however be rejected by an employer where reasonable business grounds exist).

Where a child is being adopted, employees are also entitled to 2 days unpaid pre-adoption leave to attend interviews and examinations. An employee can ask to use another type of leave for time at interviews and examinations instead however, such as annual leave.

## Requesting an additional 12 months leave

As stated above someone can request up to an additional 12 months leave and an employer can refuse this where they have reasonable business grounds to do so. Examples of this are where granting the request will be too costly for the employer and/or they have no capacity to change others working arrangements to accommodate the request.

When a request is made an employer must meet with the employee to discuss and should an employer reject a request then they need to detail the reasons for doing so in writing within 21 days. Employers are also obligated to inform the employee if there is any other period of extension they will agree to instead.

Details of the reasons for refusal including on what reasonable business grounds it is being refused must be included as well as details on the dispute resolution process set out in the *Fair Work Act 2009* (Cth). Clubs should refer to clause 34 in the *Registered and Licensed Clubs Award 2020* that sets out the process where a request is rejected and a dispute emerges.

The matter should firstly be discussed between the employee and their immediate supervisor and should a resolution not be reached then this should be discussed with more senior management in a timely manner. Should internal means be unsuccessful then an employee can go to the Fair Work Commission (FWC) for the matter to be conciliated or mediated. If this fails then mandatory arbitration can occur.

## What if an employee has another child?

Where an employee takes parental leave and then has another child they don't have to wait another 12 months to be eligible again. Where an employee has started work with a new employer however, they will have to work with the new employer for at least 12 months before they are eligible for parental leave with that employer.

## Taking of Leave

Whilst an employee is entitled to take up to 12 months of leave (or up to 24 months if an employer agrees to a request for additional leave) they may decide to take less e.g. an employee may elect to only take 8 months of leave before returning to work etc.

An employee who is pregnant has to start their leave within 24 months of the birth of the child or up to 6 weeks prior to the expected birth (or earlier if both parties agree). It also has to end within 24 months of the birth of the child.

If it is the non-pregnant partner who will be taking unpaid leave then it has to start when the child is born or start within 24 months of the child's birth (it also has to end within 24 months of the birth of the child). To start parental leave after the child's birth they have to have responsibility for the care of the child.

If the leave is due to adoption then it needs to start on the date of the child's placement unless they have responsibility for the care of the child in which case it can start after placement.

### **Flexible Parental Leave**

An employee can take up to 100 days out of their 12 month entitlement in a flexible manner although they could also elect to take 12 months all in one continuous period.

This flexible component (up to 100 days) can be taken at any point up to the child's second birthday or 2 years after a child's adoption. Additionally a pregnant employee is entitled to use flexible leave in the period up to 6 weeks before the expected birth.

Flexible leave may be taken before a period of continuous leave or it may be taken after this although the total of both can't be longer than 12 months unless an employee has extended their leave. The leave can be taken as a single continuous component or in separate components, each of which must be at least 1 day in length.

In terms of how flexible leave could be used, for example an employee may decide to take a continuous period of 6 months leave after their child is born and then they decide to return to work but maintain their 100 days flexible leave. 6 months after taking the continuous period and returning to work the employee decides they wish to utilise their 100 days flexible leave and they could do so for example by:

- taking the 100 days in one continuous period; or
- Decide to take the leave in separate periods e.g. they agree with their employer to use 2 days of leave each week until the 100 days of flexible leave runs out.

### **Both Parents Taking Leave**

After changes were made by the "Protecting Worker Entitlements" Bill there is no longer any restriction on employee couples who are married or in a de facto relationship from taking leave at the same time (which is known as concurrent leave).

Each parent is entitled to take up to 12 months unpaid parental leave each (or up to 24 months if agreed to) regardless of the amount taken by the other parent. Leave can be taken at the same or different times.

If an employee is pregnant then they have to take leave on the birth of the child or up to 6 weeks prior to the expected birth (or earlier if an employer agrees). In regards to the employee who is not pregnant the leave needs to start on the birth of the child or it can be within 12 months after the birth of the child if their pregnant partner isn't employed and they have responsibility for the care of the child.

If the leave is for adoption then the employee parent who is taking leave has to start leave on the date of placement. They can start leave after the date of placement though if they have responsibility of the child and the other parent isn't employed. The leave though must start within 12 months after placement of the child.

## **Paid Parental Leave**

An employee can be paid leave from the Australian Government via the paid parental leave scheme. An employee who is eligible can receive up to 20 weeks / 100 days paid leave which is based on the weekly rate of the National Minimum Wage (as of 1 July 2023 this is \$882.75 per 5 day week).

To be eligible an employee must be one of the following:

- the birth mother of the newborn child;
- the partner of the birth mother;
- the child's biological father;
- the partner of the child's biological father;
- the child's adoptive parent;
- the partner of an adoptive parent;
- gaining parents in a surrogacy arrangement;
- the partner of a gaining parent in a surrogacy arrangement; or
- a person caring for a child under exceptional circumstances.

They also must meet all of the below requirements:

- be caring for a child who is born or adopted;
- have met the income test (during the 2022-23 financial year this required someone to have an individual taxable income of \$168,865 or less);
- not be working on their parental leave days, except for allowable reasons;
- have met the work test (worked 10 of the 13 months before birth or adoption and minimum of 330 hours in that 10 month period); and
- have registered or applied to register your child's birth with your state or territory birth registry, if they're a newborn.

Partnered couples share the 100 days paid leave between them with each partner needing to take at least 10 days each (excluding some specific circumstances). If only one parent is eligible for paid parental leave then they will only be able to access a maximum of 90 days (as 10 days is reserved for the partner). Either parent can claim the leave first.

Single parents who are eligible will be able to claim the maximum of 20 weeks / 100 days per child.

An eligible employee can take all of this leave flexibly meaning it can be taken in separate blocks (as negotiated between employee and employer and taken within 24 months of the birth or adoption).

Further information on the paid parental leave scheme can be found here: [Services Australia - Paid Parental Leave](#).

Paid parental leave is often made to the employer who then pays it on to the employee. The amount of paid parental leave needs to be shown on the employees pay slip.

## Record Keeping

As well as the usual record keeping requirements there are additional requirements where an employee is receiving paid parental leave. An employer needs to keep the following records:

- the amount of funding received from the government for each employee and the period it covers;
- the date each payment was made to the employee;
- the period each payment covers;
- the gross amount of the payment;
- the net amount paid and the amount of income tax withheld (including other payments, if any were made);
- a statement identifying the payment as Parental Leave Pay under the Australian Government Parental Leave Pay Scheme; and
- the amount of any deductions made from each payment.

## Employer Funded Parental Leave

Employers are generally not required to pay employees for parental leave. Some employers however, may have provisions requiring paid parental leave in a registered agreement, policy etc.

Where such a scheme exists, this will not affect eligibility for the government based scheme.

## Stillborn Baby Payment

Where an employee sadly has a baby who is stillborn they could still look at getting paid parental leave pay if this was applied for. Alternatively though an employee who has a baby who is stillborn may be able to get the Stillborn Baby Payment which as of 1 July 2023 is a lump-sum tax free payment of \$4,059.17.

To be eligible the following must apply:

- you recently had a baby who was stillborn
- you or your partner would have been the baby's main carer
- you don't get Parental Leave Pay for the same baby
- you meet the residence rules about living in Australia
- you meet an income test.

More information on this payment is available [here](#).

## Requesting Leave

Where an employee wishes to take parental leave they need to give sufficient notice to their employer and confirm the dates of leave. If appropriate notice can't be given due to the circumstances e.g. where a baby is born prematurely this will not mean they aren't entitled to the leave so long as they provide notice ASAP.

## Notice

Where leave is being taken an employee has to give notice:

1. 10 weeks before starting leave in writing stating how much leave they want to take, the start and finish times for a period of continuous leave and if some flexible leave will be used, the total number of days they intend to take.

If 10 weeks can't be given for some reason then notice of the above needs to be given ASAP.

2. 4 weeks before starting a continuous period of leave confirm the start and end dates of this leave and any changes to dates from when they gave the 10 weeks' notice.

Again if 4 weeks' notice can't be given then it must be given ASAP.

### **Flexible Leave Notice**

Where someone wishes to take flexible leave then as well as the notice requirements above they have to give at least 4 weeks' notice of the specific flexible parental leave days they will be taking.

For example an employee notifies their employer 10 weeks prior to starting leave that they intend to use 50 flexible days which is to be taken after they return to work from their initial 6 months continuous leave. After returning to work the employee informs their employer that he would like to take 20 days of his flexible leave in 8 weeks' time and specifies the dates. They can take these days as they provided 10 weeks' notice of the total number of flexible days they intended to use and gave more than 4 weeks' notice of the actual dates.

An employee can change a flexible parental leave day after the 4 weeks' notice has been given however provided their employer agrees.

### **Pre-adoption Leave Notice**

If someone is taking pre-adoption leave then they have to notify their employer of the date this will occur ASAP and for how long it is expected to be.

### **Evidence**

An employer can ask for evidence of an expected date of birth or placement e.g. medical certificate. If this is not provided then the employee isn't entitled to parental leave.

### **Covering Employee**

If a Club wishes to hire a new employee to cover someone who is off on parental leave then they can do so provided that during the application process it is made very clear that:

- The job is only temporary;
- the employee on leave has a right to return to their role; and
- there are situations in which the employer and employee on leave can end the leave early e.g. where there has been a stillbirth.

### **Other Leave and Protections**

While pregnant, an employee can still take other leave where applicable e.g. annual leave and long service leave.

A pregnant employee not yet on parental leave can use personal (sick) leave if they are ill or injured.

Pregnancy in itself would not entitle someone to personal (sick) leave, however, they will be entitled if they have a pregnancy-related illness.

Whilst on unpaid parental leave an employee is also unable to utilise personal (sick) leave as they would not have been at work if they weren't sick anyway.

### **Special Maternity Leave**

Where an employee experiences a pregnancy-related illness or has a miscarriage (where the period of gestation is at least 12 weeks) they are entitled to unpaid special maternity leave which if due to an illness will end when the pregnancy or illness ceases.

If the leave was taken due to a miscarriage or termination then it can last for as long as needed until they are fit to return to work. Due to this an employee could still take the remaining time they had left of their unpaid parental leave and if they want to come back early an employer should get this in writing.

If a female employee has an entitlement to paid personal/carer's leave then she is entitled to take that instead of taking unpaid special maternity leave.

An employer can request evidence e.g. a medical certificate showing circumstances exist that entitles this leave to be taken and employee needs to let an employer know they wish to take this leave ASAP and an expected duration.

An employer should ensure they continue to support their employee during this time and stay in regular contact with them.

### **Compassionate Leave**

An employee is entitled to use compassionate leave not only for the regular circumstances e.g. a member of their immediate family or household dies or develops a life threatening illness or injury but also where:

- A baby in their immediate family or household is stillborn;
- they have a miscarriage; or
- their current spouse or de facto has a miscarriage.

This entitles them to 2 days paid leave and is separate from personal (sick) leave. This leave can be taken in a continuous period or in two separate 1 day components.

### **Discrimination**

An employee can't be discriminated against due to being pregnant, suffering a pregnancy related illness or having a miscarriage e.g. can't be terminated, demoted or treated differently from other employees due to being pregnant.

## **Stillbirths & Premature Births**

### **Stillbirths & Infant Deaths**

If an employee's baby is stillborn or dies within the first 24 months of life an eligible employee is still able to take unpaid parental leave and can take up to 12 months. As mentioned previously they can't be made to come back to work early or cancel their leave.

An employee however can elect to return to work if they want to or shorten their leave. If leave had not started then they can cancel the leave with written notice and if has started then at least 4 weeks' notice needs to be provided to the employer with a return to work date specified.

Compassionate leave will be able to be used by a parent who experiences a stillbirth or infant death as can people were or would have been members of their immediate family or a member of their household.

### **Premature Births**

Where an employee has a premature birth or has complications they can agree with their employers to put their parental leave on hold if the child has to remain in hospital. As such an employee can return to work whilst their baby is in hospital and this time will not be deducted from their parental leave balance. A parent can then resume their parental leave at the earliest of:

- A date agreed to with their employer;
- the end of the day when the child gets discharged from hospital; or
- if the child dies then the end of the day on which it dies.

Any period of work will not break continuity of unpaid parental leave and an employer can request evidence from an employee that would be reasonable to satisfy someone their child was in hospital.

### **Safe Jobs**

A pregnant employee is entitled to a safe job which is an alternate safer role where the employee can provide evidence that they are capable of working, but it isn't safe for them to continue in their current role e.g. due to an illness or the risks associated with their pregnancy.

The safe job will entitle the employee to the same pay rate, hours and other entitlements of their usual role. An employee can agree to a different number of ordinary hours though.

As well as needing to provide evidence that they can't do their usual role an employee also has to provide evidence of how long this will be for. An employee can stay in the safe role until it is safe to return to normal work, they commence parental leave / can no longer work at all, or until they give birth.

### **No Safe Job Leave**

If an employee is still capable of working but not in their current role and no safe job is available then they can take no safe job leave.

If an employee is entitled to parental leave then no safe job leave is paid. Paid no safe job leave for a permanent employee is paid at their base rate of pay for their ordinary hours of work during the period they are unable to work in their current role but can still work.

For a casual who is entitled to parental leave, the leave is paid at their base rate of pay (excluding casual loading) for the average number of hours they would have worked in the period they're on leave.

### **Directing an Employee to take Parental Leave**

If a pregnant employee wants to work in the 6 weeks prior to their due date an employer can ask for a medical certificate that states they can continue to work and it is safe for them to continue in their normal role (if they are still in their normal role and haven't moved to a safe job). This has to be provided within 7 days.

If they can work but not safely in their current role then they are entitled to a safe job or no safe job leave. If they can't work at all or don't provide a certificate then an employer can direct them to start their unpaid parental leave.

## While an Employee is on Leave

### Keeping in Touch Days

While an employee is on parental leave they are entitled to 10 keeping in touch days which are days they can work which will assist in keeping them up to date and fresh with what is happening at their workplace. If an employee extends their leave to another 12 months they are entitled to another 10 keeping in touch days.

Keeping in touch days can be worked as a part or full day and then 1 day at a time, a few days at a time or all in the one continuous period.

An employee will get paid their normal wage for each day or part day and will accumulate leave entitlements during this time.

In terms of what can be done on these days, it can include doing training and participating in planning. More info on what work can be done can be found here: [Centrelink - Keeping In Touch Days](#)

These days can be worked at least 42 days after birth or adoption but can be earlier if requested by the employee (but not earlier than 14 days after birth or adoption).

There is no obligation on an employee to use keeping in touch days.

### Accrual of, and Taking of Leave

An employee won't accrue paid leave entitlements (e.g. annual leave) during unpaid parental leave and while on the Australian Government Paid Parental Leave Scheme.

Continuity of service for long service leave won't be broken, however it will not count towards the length of continuous service e.g. if someone was employed for exactly 8 years and then took a year of parental leave, their service won't be broken but the length of continuous service will be 8 years, not 9.

While an employee is on unpaid parental leave they can take any annual leave they have accrued, long service leave (if applicable) and compassionate leave (provided circumstances allow this) in that period.

They can't however take any paid sick or carer's leave or community service leave.

An employee can use the paid parental leave pay before, after or at the same time as they use paid or unpaid leave entitlements.

### Extending Leave

If an employee initially elects to take less than 12 months leave then they can extend their leave up to 12 months should they so wish. They must however, give at least 4 weeks' notice of this before their leave is scheduled to end.

If an employee has taken 12 months then they can request to extend their leave up to 24 months and also must make this request in writing at least 4 weeks prior to the cessation of their 12 months leave. An employer then must respond in writing to this request within 21 days and they can reject this, however, they will need a legitimate business reason to do so.

Where a premature birth or birth complication arises that requires an employee's newborn to be hospitalised, an employee can have their leave put on hold and return to work. They can then resume their leave at whichever is the earliest of:

- the end of the day the child is discharged;
- a date agreed on; or

- if the newborn dies, the end of the day on which it passes away.

### **Going Back to Work Early**

Where mutually agreed on, an employee can return to work from parental leave earlier than planned. If it is the employee who wishes to do so though and the employer does not agree then they have to return on their original set date.

This is different however, when an employee has a stillbirth or their child dies, in which case the employee can cancel or reduce their leave in writing without the need for an employer's consent.

An employer can request that an employee returns without their consent, only where the employee clearly no longer has responsibility for the child. Notice must also be given in writing with the date being at least 4 weeks from the date this is requested and at least 6 weeks from the date of birth if the employee was pregnant.

An employer however is not allowed to require an employee to return to work early by virtue of the fact the employee's child is stillborn or dies during the 24 month period starting from the child's date of birth.

### **Ending Employment during Parental Leave**

While on parental leave, an employee must not be dismissed due to the fact they:

- have family or caring responsibilities;
- are pregnant;
- are on maternity or parental leave; or
- are temporarily absent from work due to illness or injury.

If an employee is terminated for any of the above reasons then they can lodge a general protections claim for discrimination where damages are uncapped. Again though, terminating an employee while on parental leave is a very risky thing to do and most not be done for a discriminatory reason.

Where an employee is terminated while on parental leave, they must be provided with notice which can be given while they are on leave or via a payment in lieu.

Should an employee's role be made redundant then the Club must follow any required consultation process and then pay them any applicable notice or redundancy pay. Consultation must occur during the period in which they are considering the decision and not when the employee returns from leave. The reason for the redundancy must be genuine and will likely attract greater scrutiny.

An employee is allowed to resign while on parental leave but still have to give the required notice period (although they can use their parental leave for the notice period).

### **Returning to Work**

An employee who has been on parental leave is entitled to come back to the job they had previously and this will still apply where someone is covering their role or a replacement was hired.

If they reduced their hours or moved to a safe job prior to going on leave then an employee can return to the job and hours they had before doing so.

There are some exemptions to the above as explained below:

1. Fixed-Term Contracts

If an employee is on a fixed-term contract then going on parental leave does not extend this, so if the term ends whilst they are on leave then they're not entitled to return to the role unless their contract specifies that they can.

2. Where the role no longer exists

If the job they held previously no longer exists or has been altered then the employee on leave must be offered a suitable alternate role that they are qualified and suited to work in and is nearest to their old role in pay and status.

This could mean there has been a redundancy and the correct procedure must be complied with. If the role does exist and someone else is now doing it then this is not a genuine redundancy and they are entitled to the old role.

Where there has been significant changes to an employee's role then an employer needs to discuss these with an employee and give them the opportunity to talk about these even if they are on leave at the time these changes occur.

### **Flexible Working Arrangements**

An employee who is returning after a period of parental leave has the right to request flexible working arrangements which can include such things as a full-time employee asking to work part-time instead of their usual full-time hours, changing starting and finishing times, working from home etc.

Where an employee wishes to request flexible working arrangements they need to provide the request in writing and specify what changes are being requested and why.

A Club then needs to meet and discuss the proposed changes with an employee and seek to find an agreement considering the needs of the employee, the consequences if no agreement can be reached and any reasonable business grounds that may be present to refuse the request.

An employer has to provide a written response within 21 days that states whether the request has been accepted or not. If the request is refused then as mentioned above, this can only be done on reasonable business grounds e.g. it would have a significant detriment to productivity, it isn't practical etc. The reasoning for refusal must be clearly stated as well as other changes the employer is willing to make to accommodate their request or if there aren't any that can be offered. The employer must also inform them that they can refer a dispute to the FWC.

Where an employee wishes to go the FWC to seek to have the matter resolved the FWC can make orders.

For further information please refer to the fact sheet on flexible working arrangements.