

GUIDE TO

Parental Leave Entitlements

UNDER THE FAIR WORK ACT



Clyde Industrial

PARENTAL LEAVE AND RELATED ENTITLEMENTS



At its most basic level, the National Employment Standards (NES) provides for a period of unpaid parental leave for a period of 12 months, with a right to request an additional 12 months unpaid leave.

The NES does not provide for paid parental leave, although the Australian Government do provide a Paid Parental Leave scheme for working parents. This scheme provides for payment at the national minimum wage for a period of 18 weeks, following the birth or adoption of the child, and must be taken in one single continuous period within 12 months of the birth or adoption. The Australian Government's scheme does not create a new NES entitlement, rather it is taken in conjunction with the employer's unpaid leave. Under this scheme, the Department makes payments to the employer, who in turn provide the payments to the employee through their payroll system.

Division 5 of the NES deals with Parental Leave and related entitlements.

GENERAL RULES

Permanent employees (full-time and part-time) must have completed 12 months continuous service (except in relation to unpaid pre-adoption leave or unpaid no safe job leave see below) as of:

- If the leave is birth related – the date or expected date of the birth; or
- If the leave is adoption related – the date of placement or the expected date of the placement of the child

Casual employees are not entitled to leave (except in relation to unpaid pre-adoption leave or unpaid no safe job leave see below) unless the employee will be a long term casual employee of the employer immediately before:

- If the leave is birth related – the date or expected date of the birth; or
- If the leave is adoption related – the date of placement or the expected date of the placement of the child

And but for the birth or adoption would, or related leave entitlement would have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

GENERAL RULES FOR ADOPTION RELATED LEAVE

'Day of placement' under division 5 of the NES refers to the earlier of the following:

- (a) The day on which the employee first takes custody of the child for the adoption;
- (b) The day on which the employee starts any travel that is reasonably necessary to take custody of the child for the adoption.

An employee is not entitled to adoption-related leave unless the child is or will be on the date of or expected date of placement, under the age of 16.

Further, an employee is not entitled to adoption-related leave if the child has lived continuously with the employee for a period of six (6) months or more as at the date of placement or expected date of placement, or the child is (otherwise because of the adoption), a child of the employee or the employee's spouse or de facto partner.



PARENTAL LEAVE



The General Entitlement

Under the NES, eligible employees are entitled to up to 12 months unpaid parental leave if:

1. The leave is associated with the birth of a child or the employee's spouse or de facto partner; or
2. The placement of a child with the employee for adoption; and
3. The employee will have responsibility for the care of the child.

The employee has access to up to 12 months of unpaid parental leave (known as the available leave period). Pursuant to s 75 of the Fair Work Act, if the employee requests less than the available leave period, they may, by providing the employer with at least four (4) weeks' notice, extend the period of leave to utilise more of the available leave period. Note that only one extension is permitted under s75 of the Fair Work Act, and further extensions within the available leave period must be agreed to by the employer.

The General Entitlement

Pursuant to s76 of the Fair Work Act, following the period of 12 months unpaid leave (the available leave period), an employee may request an additional 12 months of unpaid leave to commence at the end of the available leave period.

That request must be in writing and must be given to the employer at least four (4) weeks prior to the end of the initial parental leave period.

This request can be refused by the employer, but only on reasonable business grounds.

If the employee is a member of an employee couple (i.e. both parents are National System Employee's under the Fair Work Act), the second period of unpaid leave may be used by the other member of the employee couple (see further below).

A request for an additional 12 months for a member of an employee couple, must also be in writing but must also specify the any amount of unpaid parental leave taken or will have taken by the other member of the employee couple, when the extension period starts.



One Parent taking Leave

When only one employee parent is seeking leave, the entitlement is straight-forward. The employee is entitled to the 12 months unpaid leave, followed by an additional period of up to 12 months unpaid leave if agreed to by the employer.

The leave must be taken in a single continuous period (in other words, they cannot take a multiple leave periods that total up to 12 months).

If the person taking the leave is the pregnant person, they can commence the leave either upon the birth of the child, or up to six weeks prior to the expected birth date of the child. Earlier commencement may be agreed mutually between the employer and the employee.

If the leave commences earlier than the birth of the child, the 12-month period of unpaid leave will commence from that date.

If the leave is adoption-related, then the leave must commence from the date of placement of the child.

Partner taking the primary leave

If the employee who is not pregnant is the parent who is taking the leave, the leave must commence from the birth date of the child. It may commence later if that parent has responsibility for the care of the child, and the other partner is not an employee (of any business).

Both parents taking leave

Concurrent Leave

Parents who are both employees, whether working for the same or different employers, can both take periods of unpaid parental leave. Whilst the primary care giver will have access to the full period of 12-months, both employee parents can take up to 8 week's unpaid parental leave concurrently.

Concurrent leave can start:

- On the birth date or placement date of the child;
- Earlier than the birth or placement date, if agreed between employer and employee; or
- Later than the birth date, but it must be within 12 months of the birth or placement of the child.

Concurrent leave can be taken in separate two-week periods (or shorter periods by agreement). For example, this might mean that the non-caregiving partner takes a four-week period of unpaid leave at the birth of a child, and then a second four-week period later on.

Concurrent leave forms part of the employee's total unpaid leave entitlement, meaning that this period of concurrent leave is deducted from the individual's total entitlement.

Both Parents taking parental leave at different times

By utilising an extension under s 76 of the Fair Work Act, both parents, within an employee couple, may take a separate period of 12 months unpaid parental leave. The combined leave cannot be for more than 24 months, which includes concurrent leave already taken (see above) and keeping in touch days (see below).

If a pregnant employee takes the first period of leave it must start:

- On the birth date or expected birth date of the child; or
- Up to six (6) weeks prior to the expected birth date of the child (or earlier by agreement).

If the employee who is not pregnant take unpaid parental leave first, it has to start on the birth of the child.

If the leave is adoption related, one parent has to start the leave period on the placement of the child.

In both cases, leave has to be taken in a single continuous period. This means that the other parent has to start their unpaid parental leave the next working day after the first parent's leave ends.



OBLIGATION TO RETURN TO PRE-PARENTAL LEAVE ROLE

On completion of a period of unpaid parental leave, the employee has a right, pursuant to s84 to return to their pre-parental leave position; or if that position no longer exists, an available position for which the employee is qualified and suited nearest to the status and pay to the pre-parental leave position.

In other words, unless the position has been removed from the business (through a restructure and redundancy process), the employee still “owns” that position, and is entitled to return to it.



NOTICE AND EVIDENCE PROCESS

The notice and evidence requirements relating to unpaid parental leave are provided for at s74 of the Fair Work Act.

Below is a summary of s74:

Notice

- Employees wishing to take unpaid parental leave must give notice to their employer:
 - At least 10 weeks before starting the leave, unless
 - The leave is being taken in separate periods of concurrent leave and the leave is not the first of those periods - in that case, 4 weeks of notice must be given
 - If the two points above are not practicable, then notice must be given as soon as is practicable (which may be a time after the leave has started) – This would only be suitable in circumstances where the pregnancy or adoption was not something the employee was aware of in a time that allowed them to comply with the above two notice requirements.
- The notice must specify the intended start date and finish date of the leave – Note that this is the intended start date, and in practice the employee may have cause to start the leave earlier than that. Starting the leave earlier will naturally vary the end date of the leave. Further, whilst the employee is entitled to 12 months leave, they may not apply for the full period and instead seek a shorter period (remembering that they may extend it once to use more of the 12-month entitlement). This is a very important component of the notice process, as once you know the intended start and end date, you can start to plan for the back-filling of the position. If the employee is only seeking six months' unpaid parental leave for example, you would only provide the back-filling employee with a six-month fixed term contract.
- Confirmation or change of the intended start and end dates: At least four (4) weeks before the intended start date specified in the notice, the employee must:
 - Confirm the intended start and end dates of the leave; or
 - Advise you of any changes to the intended start and end dates of the leave;
 - Unless it is impracticable for the employee to do so.
- Note that this confirmation does not apply to notice given for a period of concurrent leave, that is not the first period of concurrent leave.

Evidence

- The employee who has given notice that they are taking unpaid parental leave must, if required by the employer, provide evidence that would satisfy a reasonable person:
 - If the leave is birth-related – of the date, or expected birth date, of the child; or
 - If the leave is adoption-related – of the date of placement or expected date of placement; and that the child is or will be, under 16 years of age at the day of placement or expected day of placement.
- The employer may require this evidence to be a medical certificate, if the leave is birth related.

Compliance

- Employees' are not entitled to take unpaid parental leave if they fail to comply with the notice and evidence requirements under s 74 of the Fair Work Act 2009.

In order to ensure that employee fully comply with these notice and evidence requirements, it is encouraged to have a specific workplace policy in place which deals with the taking of unpaid parental leave. Having a clear policy with a process which clearly outlines the notice and evidence procedure avoids disputes arising.



OTHER RELEVANT SECTIONS TO BE MINDFUL OF

Reducing period of unpaid parental leave – s 77

If the employee wishes to end their period of unpaid leave earlier than advised when they gave notice, this can be done by agreement between employer and employee. If, as a result of the employee's notice, you are bound by a fixed-contractual agreement to another employee, that may be grounds to refuse an early return. Alternatively, if you are bound by a notice period with an external agency or fixed-term employee, you may negotiate an end to the leave upon completion of that notice period.

Pregnancy Ends (other than by birth of a living child) or child born alive dies – s 77A

This section deals with unpaid leave in a situation where the pregnancy ends with the loss of the child, or the child dies after being born alive. This section only applies to leave which is birth-related leave.

Cancellation of leave before it commences – Before the leave starts, either the employee or the employer may give written notice of cancellation of the planned unpaid parental leave. If this is done, the employee is no longer entitled to the unpaid parental leave. If the employee is the female employee who was pregnant, and she is unfit to return to work, she can utilise personal leave or special maternity leave (see below).

Cancellation of leave after it commences – the employee may give the employer written notice that the employee wishes to return to work.

The employer must give that employee written notice requiring them to return of a specific date, which must be within four weeks of the employee giving written notice.

If the employee has not given notice, the employer may still issue written notice requiring the employee to return on a specified date, but that specified day must be at least six weeks after the notice is given.

If the employee is unfit to return to work, they may utilise personal leave, compassionate leave (and by agreement, annual leave) to cover any necessary absences.

The entitlement to unpaid parental leave will cease immediately prior to the employee's return to work.

OTHER RELEVANT SECTIONS TO BE MINDFUL OF

Employee who ceases to have responsibility for care of child - s 78

This section applies to an employee who has taken unpaid parental leave in relation to a child, if the employee ceases to have responsibility for the care of the child.

This section is not to be used in a situation where the cessation of care relates to the death of the child (use section 77A).

Under this section, the employer may give the employee written notice requiring the employee to return to work on a specified day.

The specified day:

1. (a) must be at least 4 weeks after the notice is given to the employee; and
2. (b) if the leave is birth-related leave taken by a female employee who has given birth--must not be earlier than 6 weeks after the date of birth of the child.

The employee's entitlement to unpaid parental leave in relation to the child ends immediately before the specified day.

Interaction with Paid Leave - s 79

Employees may utilise other forms of leave (with the exception of the leave listed below), whilst they are on unpaid parental leave. If the employee does so, the taking of that other paid leave does not break the continuity of the period of unpaid parental leave.

For example, if the employee has paid annual leave available, he or she may (with the employer's agreement) take some or all of that paid annual leave at the same time as the unpaid parental leave.

Exemptions:

1. (a) An employee is not entitled to take paid personal/carer's leave or compassionate leave while he or she is taking unpaid parental leave.
2. (b) An employee is not entitled to any payment under Division 8 (which deals with community service leave) in relation to activities the employee engages in while taking unpaid parental leave.

OTHER RELEVANT SECTIONS TO BE MINDFUL OF

Keeping in Touch Days – s 79A

Keeping in Touch Days are designed to allow the employee to remain connected with the employer's business activities and allow the employee to gradually ease back to work from a period of unpaid parental leave. In other words, they are there to assist the employee to 'keep in touch' with the employer.

The employee and employer can mutually agree to a maximum of ten (10) keeping in touch days for each period of unpaid parental leave (i.e. 10 days during initial 12 months on unpaid parental leave, and an additional 10 days during extended unpaid leave).

These days must be paid, in accordance with the employee's ordinary remuneration agreement or award minimum entitlement, however they do not break the continuity of the unpaid parental leave period.

Keeping in touch days must be at least 42 days after the birth or placement of the child (or at least 14 days, if the keeping in touch day is at the employee's suggestion or request).

The duration of a 'day' is not relevant to the keeping in touch day provision. In other words, each 'day' irrespective of the number of hours actually worked on that day, is a 'day' for the purposes of the 10-day maximum cap on keeping in touch days.

It is not necessarily expected that the keeping in touch day will be a full, ordinary day of work, although it may be. It may however, simply be an opportunity for the employee to attend some meetings, perform some light work or participate in some skills training.

Unpaid parental leave not extended by paid leave or keeping in touch days – s79B

This section states that a period of unpaid parental leave is not extended by the employee taking a period of paid leave or performing work on a keeping in touch day.

OTHER RELEVANT SECTIONS TO BE MINDFUL OF

Unpaid Special Maternity Leave – s80

A female employee who is:

1. (a) not fit for work because she has a pregnancy related illness;
2. (b) or she has been pregnant, and the pregnancy ends within 28 weeks of the expected birth date of the child otherwise than by the birth of a living child.

Will have an entitlement to unpaid Special Maternity Leave.

This type of leave is separate than the employee's unpaid parental leave period and is generally utilised where the employee is too early in their pregnancy to commence their unpaid parental leave or is no longer entitled to parental leave due to the birth of a non-living child.

The employee must provide the employer with notice of the taking of unpaid special maternity leave. The notice must be given as soon as practicable (which may be after the leave has commenced) and must advise the employer of the period or expected period of the leave.

If requested, the employee must provide the employer with evidence that would satisfy a reasonable person, of the reasons the leave is being sought. The employer may request that evidence to be a medical certificate.

Unless the employee gives the required written notice, and provides evidence upon request, they are not entitled to special maternity leave.

It is important to remember that the employer may require the employee to commence their unpaid parental leave six weeks prior to the expected birth date of the child. Therefore, if the special maternity leave relates to an illness, the employer may wish to commence the leave as early as allowable.

OTHER RELEVANT SECTIONS TO BE MINDFUL OF

Transfer to a safe job – s81

This section applies to the pregnant employee if she gives her employer evidence that would satisfy a reasonable person that she is fit for work, but that it is inadvisable for her to continue in her present position during a stated period (the risk period) because of:

1. (a) illness, or risks, arising out of her pregnancy; or
2. (b) hazards connected with that position.

Note that an employer may request that the evidence be a medical certificate.

This is distinct from unpaid special maternity leave, because the evidence provided suggests that the employee is still able to perform work, however not the work connected with their current position.

As a first step, employers should seek to determine whether there are any obvious modifications to the employee's position that would make the position safe. For example, if there are only one or two incidental tasks within an employee's position description which present a risk, the employer could agree to an arrangement whereby the employee performs all of their ordinary task, except for those risky or hazardous ones.

If this is not possible, then s82(2) would apply, which requires the employer to transfer the employee to a safe job, if a safe job is available. This transfer must last for the duration of the risk period, and not include any variations to the employee's terms and conditions of employment.

An **appropriate safe job** is a safe job that has:

- (a) the same ordinary hours of work as the employee's present position; or
- (b) a different number of ordinary hours agreed to by the employee.

If the employee is transferred to an appropriate safe job for the risk period, the employer must pay the employee for the safe job at the employee's full rate of pay (for the position she was in before the transfer) for the hours that she works in the risk period.

If the employee's pregnancy ends before the end of the risk period, the risk period ends when the pregnancy ends.

If there is no appropriate safe job to transfer the employee to, the employee will be entitled to paid or unpaid no safe job leave (see below).

OTHER RELEVANT SECTIONS TO BE MINDFUL OF

Paid no safe job leave – s81A

If the pregnant employee has complied with the notice and evidence requirements under s81 and that employee is entitled to unpaid parental leave, and there is no safe job to transfer them to, then the employee is entitled to paid no safe job leave for the risk period.

If taking paid no safe job leave, the employer must pay the employee the base rate of pay for the employee's ordinary hours of work for the duration of the risk period.

Pursuant to s82, the employer may request a further medical certificate if the employee is on paid no safe job leave in the six-week period before the expected birth date of the child.

The medical certificate must state whether the employee is fit for work. If the employee does not give the certificate to the employer within seven days, the employer may require the employee to commence the unpaid leave period. Alternatively, if the medical certificate states that the employee is not fit for work, the employer may require the unpaid parental leave to commence.

The paid no safe job leave ceases upon the commencement of the unpaid parental leave period.

Unpaid no safe job leave – s82A

This provision applies similar to the paid no safe job leave, however can only be applied to employees who are not entitled to unpaid parental leave.

Therefore, if a pregnant employee is not entitled to unpaid parental leave, but they are unable to perform their role under s81, and there is no safe job for them to be transferred to, they can be placed on unpaid no safe job leave.

The same evidence requirements apply to this leave, and the employer can request that the evidence be a medical certificate.

Consultation with employee on unpaid parental leave – s83

This provision creates a positive obligation on the employer to consult with employees who are on unpaid parental leave, about changes in the workplace that will have significant effect on the status, pay or location of the employee's pre-parental leave position.

The requirement under this section requires the employer to take all reasonable steps to give the employee information about, and an opportunity to discuss, the effect of the decision on that position.

OTHER RELEVANT SECTIONS TO BE MINDFUL OF

Unpaid pre-adoption leave – s85

Unpaid pre-adoption leave is an entitlement to two (2) days unpaid leave, to attend any interviews or examinations required in order to obtain approval for the employee's adoption of the child.

This entitlement is affected by the qualifications under s68. Specifically:

(a)The child the leave relates to is, or will be, under 16 as at the day of placement, or the expected day of placement, of the child; and

(b)has not, or will not have, lived continuously with the employee for a period of 6 months or more as at the day of placement, or the expected day of placement, of the child; and

(c)is not (otherwise than because of the adoption) a child of the employee or the employee's spouse or de facto partner.

Despite the entitlement to unpaid pre-adoption leave, the employee is not entitled to take the leave if the employee could take some other form of leave; and the employer directs them to take that other form of leave.

The unpaid pre-adoption leave is a total of two days which must be taken as a single continuous period, or in separate periods if agreed between the employee and the employer.

Notice must be given by the employee to the employer as soon as is reasonably practicable (which may be after the leave has commenced) and must advise the employer of the period of the leave or expected period of the leave.

The employee must also provide the employer evidence that would satisfy a reasonable person, if requested to do so.

This evidence must demonstrate that the leave is associated with the attendance at an interview or examination.

The employee is not entitled to the leave, if they fail to provide the required notice or give the required evidence.

BACK-FILLING POSITIONS – THINGS TO BE AWARE OF

Obviously, you will need to someone to perform the role in the absence of the employee who is on parental leave. However, because of the legal obligation to keep the position for the employee, the back-filling of that role can only be on a temporary basis.

When seeking to back-fill a role you can either:

- Temporarily promote from within (i.e. have someone acting in that position whilst the occupier of that position is away); or
- Hire a new employee on a fixed-term basis (Parental Leave-cover position);
- Use a third-party labour-hire firm or agency to cover the absence.





Temporary Promotion

Promoting from within, even if only temporarily, is a great way to expose your current employees to new experiences and challenges and will untimely help in up-skilling your workforce. This clearly has ancillary benefits; however, you need to be mindful that it may take some time to bring that employee 'up-to-speed' with the new role. Additionally, it will create a temporary vacancy lower down the chain (i.e. that employee's substantive position will become vacant).

If you do proceed with filling a temporary vacancy from within, this should be documented in the form of a written agreement or temporary contractual variation. Specifically, you need to make it clear:

- What the upgraded position entails (attach a Position Description);
- How that upgraded position is classified and remunerated (if it is a higher award or agreement classification, you should not this clearly);
- When the temporary promotion will commence (a specific date – which will likely be based on the commencement date of the employee who is taking parental leave);
- When the temporary promotion will end (a specific date which will be the last day of the substantive employee's parental leave period); and
- A notice period to allow for an earlier termination of the temporary arrangement.

Hiring a new employee

There may not be anyone suitable in your business to temporarily take-over the position, in which case you will need to externally recruit. It is important that this engagement is a fixed-term engagement, for the duration of the parental leave period. You may wish to build in a clause in the fixed-term contract that allows for an extension by mutual agreement (to allow for a circumstance where the employee elects to extend their unpaid parental leave).

Hiring a new employee is sometimes unavoidable, however, promotion from within is often a more advantageous arrangement. Whilst temporarily promoting from within will take some time to adjust, the 'upgraded' employee at least has an internal knowledge of the business and its systems. It often takes a brand-new employee some months to get accustomed to the internal operation of a business and in all likelihood that employee will not continue past their temporary engagement, so the development of that employee is lost.

Labour-hire or agency worker

If need be, using a labour hire firm may be a good alternative to externally recruiting. Ordinarily, labour hire firms will connect you with a person who is of suitable quality and experience to get started immediately. Under a traditional labour hire arrangement, the employee is an employee of the labour hire firm, and therefore they can be 'seconded' to your business for as long as is required. This option removes much of the hassle that you may otherwise be exposed to, however it will almost certainly be more expensive as a result.



REDUNDANCY

Whenever a restructure occurs in a business, there is a risk that it will result in some positions being made redundant.

For a detailed breakdown of the redundancy process, see [Contact Clyde Industrial](#)

For these purposes however, you should know that a genuine redundancy is unaffected by the fact that an employee may be on unpaid parental leave. Ultimately, if the position is no longer required to be performed by anyone (which is the threshold for a genuine redundancy), then their current leave arrangements are not a relevant consideration.

Despite this, in practice making a position redundant when the holder of that position is on unpaid parental leave does present some risks.

The obligation under s84 of the Fair Work Act remains in place, which entitles an employee to return from unpaid parental leave to either their pre-parental leave position, or if that position no longer exists an available position for which the employee is qualified and suited nearest in status and pay to the pre-parental leave position. When a position has been made genuinely redundant, the obligation under this section will be focused on finding a suitable alternative position.



REDUNDANCY

Where no such position exists, which is common enough in down-sizing scenarios, and the employee's contract of employment is terminated (i.e. the employment relationship comes to an end), then the level of scrutiny will naturally be higher. Namely, you may be exposed to the following risks:

1. Unfair dismissal: which involves the employee arguing that the redundancy was not a 'genuine redundancy', which may include a failure to provide them with suitable alternative employment if it is available;
2. General Protections – Adverse Action claim: which involves the employee alleging that the reason they were dismissed was contrary to a general protection provided to them under the Fair Work Act (e.g. discrimination, adverse action in response to enforcing a workplace right etc.)
3. Discrimination Claim

In order to avoid these potentially costly legal problems, care should be taken when making redundant the position of an employee who is on unpaid parental leave, and the redeployment process should be exhaustive.

Clyde Industrial is a specialist workplace relations consultancy designed to assist small to medium sized businesses in handling all issues related to employing people.

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