

Managing Leave

A guide for employers

Annual leave

What is annual leave?

All full-time employees are entitled to at least four weeks of paid annual leave each year.

Part time employees are entitled to a proportion of their leave entitlement on a pro rata basis.

Casual employees are not entitled to any annual leave entitlements.

Personal or carer's leave

What is personal or carer's leave?

What was once known as sick leave is now known under the Fair Work Act as 'personal/carer's leave'. Such leave may be taken by an employee unfit for work on account of a personal illness or injury, or by an employee who wishes to care for a person in their household or immediate family who is ill, injured or affected by an unexpected emergency.

Full time employees are entitled to ten days paid personal/carer's leave. Part time employees are entitled to pro rata personal/carer's leave based on the number of hours they work. Casual employees are not entitled to paid personal/carer's leave. These entitlements accrue from year to year.

All employees are entitled to request an additional two-day unpaid carer's leave each time that person in their household or immediate family is ill, injured or is affected by an unexpected emergency.

Casual employees are entitled to request such unpaid leave.

An employee who is seeking to take personal leave must give notice to the employers as soon as is practicable. This notice must specify the expected period of leave.

Can I request that employees provide a medical certificate?

An employer may request that an employee provide evidence that would satisfy a reasonable person that the employee is not fit for work because of illness or injury. Such evidence most often takes the form of a medical certificate. Employees should always be given a reasonable opportunity to obtain a medical certificate.

What if I do not believe an employee's medical certificate?

There are a number of circumstances in which a medical certificate may be challenged. If a medical certificate is vague, in the sense that it does not show how the illness or injury could impact on the employee's fitness for work, an employer may request a further medical certificate or statutory declaration from the employee.

While submitting a false medical certificate as a pretence for an unjustifiable failure to attend work can constitute grounds for terminating an employee's contract, employers should be hesitant to adopt this course. Employment should only be terminated on these grounds if a properly conducted workplace

investigation finds evidence which proves that the employee was fit to attend work at the relevant time.

Can I request a medical examination or medical documentation?

Employers can require employees to attend reasonable medical examinations or to produce medical documentation where such steps are genuinely necessary to confirm the employee's continued fitness for work.

How should personal or carer's leave be managed by employers?

Generally, the best way to manage personal or carer's leave is to formulate a policy that is given to all employees and updated by the employer as required. The policy should:

1. Explain what personal or carer's leave is;
2. Outline how much personal or carer's leave an employee can request;
3. Request that all employees provide the employer with notice that they intend to take personal or carer's leave and the probable length of that leave as soon as they can;
4. Specify whom such notice is to be given to;
5. Direct all employees to provide a medical certificate within a reasonable time if they take personal leave because of illness or injury; and
6. Specify the circumstances in which a medical certificate may be challenged, and the process that will be undertaken as a result. There have been a number of recent cases in which requests to take leave have developed into emotive issues for employers. This is particularly the case where employers do not believe that employees are being honest about their fitness for work. In these situations, employers have often reacted by making unreasonable requests of employees and ignoring their workplace rights. Such reactions can leave employers open to costly adverse action claims.

Having a policy in place will help to take the emotion out of the issue and will ensure that employers do not inadvertently forget about their employees' rights. Requests for leave can also be stressful for employees who are burdened by an illness. A good policy will let them know where they stand.

Community service leave

What is community service leave?

Community service leave entitled employees to take leave if they are involved in a voluntary emergency management activity on behalf of a body such as the State Emergency Service, or if they are required to attend court for jury duty. Generally, community service leave is unpaid, although employers will be required to pay any employees away on jury duty for their first ten days of absence.

Employees are required to provide notice of their intention to take such leave and its expected period as soon as is reasonably practicable. Employers are entitled to request that employees provide evidence that would satisfy a reasonable person that they are engaging in a relevant community service activity.

Long service leave

What is long service leave?

All employees, be they full time, part time or casual, are entitled to two months' long service leave at their ordinary rate of pay after they have worked at the same employer for ten years. Many employees will be entitled to take pro rata long service leave after five years of work for the same employer in NSW, or after 7 years in SA.

Employees are not entitled to request payment instead of taking long service leave. However, employees must be paid their long service leave entitlements on termination.

Parental leave

What is parental leave?

All employees who have worked for their employer for at least twelve months are entitled to twelve months' unpaid parental leave. Parental leave can be taken by an employee if they have a responsibility for care of a child that has just been born or who has just been placed with the employee for adoption. The leave can be taken continuously, flexibly (up to 100 days within 24 months of birth or adoption), or a combination of both.

If the employee is a woman who is pregnant with a child, she is entitled to commence leave at least six weeks before the expected birth of the child. If such an employee wishes to work during that six-week period, the employer may request a medical certificate confirming that the employee is fit for work and that it is not inadvisable that the employee continue to work for the employer in her present role during that time. If it is inadvisable that the employee continues to work in their present role, the employer must transfer the employee to a safe job if one is available, or to be placed on paid leave for the period if one is not.

Generally, employees are required to give ten weeks' notice of their intention to take parental leave. Employees may provide a shorter period of notice if it is not practicable for them to give ten weeks' notice. An employer may require an employee to provide evidence of the date or expected date of the birth or placement.

Can parental leave be extended or reduced?

Employees who are on parental leave may request a further twelve months leave from their employer. Such requests must be made at least four weeks before the end of their first parental leave period. Employers are required to respond to such a request within twenty-one days and may only refuse it on reasonable business grounds.

Employees may also request that their period of parental leave be reduced.

What rights do employees have while they are on parental leave?

Employees cannot simply be left out of the loop while they are on parental leave. The employer must take all reasonable steps to give the employee information about, and an opportunity to discuss, any decision which will have a significant effect on the status, pay or location of the employee's pre-parental leave position.

Employees are also entitled to return to work for 'keeping in touch' days without affecting their leave entitlements.

Employees returning from parental leave

Employees on parental leave are entitled to return to their pre-parental leave position. If that position no longer exists, they are entitled to return to an available position for which they are qualified and suited, and which is the nearest in status and pay to their pre-parental leave position. This necessitates a degree of planning, particularly if the period of parental leave coincides with a restructure of your business.

Employers are also required to inform any replacement employees who are taken on to cover for an employee on parental leave that their position is a temporary one, and that the employee on leave is entitled to return to their position.

It is also worth keeping in mind that employees who are responsible for caring for young children have a right to request flexible work arrangements. You are required to respond to such a request within twenty-one days. You are only entitled to refuse the request on reasonable business grounds. It is a good idea to develop a policy on flexible work arrangements which outlines:

1. The types of flexible work arrangements that can be requested. These could include:
 - a. Changed start and finishing times;
 - b. Changing the number of hours or days worked each week;
 - c. Job sharing and other part time arrangements; and
 - d. Organising rostered days off;
2. The circumstances in which requests for flexible work arrangements might be refused.
3. The procedure for making requests for flexible work arrangements.

Family and domestic violence leave

What is family and domestic violence leave?

Family and domestic violence means violent, threatening or other abusive behaviour by certain individuals known to an employee that both:

- Seeks to coerce or control the employee; and
- Causes them harm or fear.

All employees can access 10 days of paid family and domestic violence leave each year. This includes full-time, part-time and casual employees. An employee's paid leave entitlement is available in full immediately and resets on their work anniversary. It doesn't accumulate from year to year.

To access paid family and domestic violence leave, the individual known to the employee could be:

- An employee's close relative;
- A member of an employee's household; or
- A current or former intimate partner of an employee.

Employees must be experiencing family and domestic violence to be eligible to take paid family and domestic violence leave.

Long term absences

Employees returning from long term leave

Employees returning from long term leave should be managed carefully and sensitively. If an employee has been absent on an approved Worker's Compensation Claim, the insurer and rehab coordinator will liaise with the employer to develop the most appropriate Return to Work plan.

If an employee has not made a successful Worker's Compensation claim, it will be a matter for the employer to consider and decide how best the employee's Return to Work can be facilitated.

Some key factors influencing the return to work plan

1. The duration of the employee's absence;
2. The reason for the employee absence;
3. Operational changes to the business during the employee's absence and any upskilling or further training required to be provided;
4. Whether the employee has been certified as fit to return to their pre-injury duties or whether they are to be placed on modified duties;
5. Whether the employee is returning to work on the same hours as they did pre-leave, or whether they are to be placed on a graduated return to work plan; and

6. The size of the workplace.

Depending on the available resources of the workplace, it may be advisable to assign the employee a mentor in the workplace. This mentor would be a suitably senior employee, who is not involved with the day-to-day management of the returning employee.

It is vital that any adverse issues with respect to the employee's conduct or performance in the workplace are kept separate from any issues with respect to their taking leave. In this respect, it is advisable to allow the employee a period of adjustment prior to making a decision to commence performance management against them.

If an employee believes that they are being treated unfairly or adversely because they exercised their workplace right to take leave, they may have grounds to bring a claim against their employer for a breach of the General Protections provisions contained in Part 3-1 of the *Fair Work Act 2009*.

Where an employee has been absent on parental leave or on personal leave as a result of health issues, employers should be mindful of their obligations to make "reasonable adjustments" for them on their return, if necessary.

Reasonable adjustments will be considered and assessed based on the business needs of the Company. For example, a request from an employee that they be permitted to work from home indefinitely would rarely be seen as reasonable. However, a request that an employee be provided with additional training or supervision on their return to work would generally be seen as reasonable.

Where the employer has access to an Employee Assistance Program (EAP), the employee should be provided with this information and encouraged to avail of it.

Finally, a mutually successful return to work scheme will largely depend on the level of communication and cooperation between the employer and employee prior to their return to work. It is very advisable to meet with the employee in person prior to their return, at an offsite location should they wish.

The requirements of a successful return to work plan should be discussed between the parties and, depending on the reason for the employee taking leave, a communication strategy should be agreed upon as to what will be said to colleagues and/or customers of the returning employee.

What next?

If you would like to speak to someone about managing an employee's leave, call us on (02) 9199 8597 or email us at wehelp@jfmlaw.com.au.

Further information can also be found on our website at www.jfmlaw.com.au.