



FACT SHEET

Parental Leave under the NES

Updated: March 2021
Replaces: July 2019

Unpaid parental leave forms part of the National Employment Standards ('NES'), which is enshrined in the *Fair Work Act 2009* (the 'Act'). The NES apply to all employees and represent the minimum entitlements of employment, regardless of the applicable industrial instrument or contract of employment.

Division 5 of the NES provides for unpaid parental leave and other related entitlements.

NOTE: this Fact Sheet does not address government funded 'Paid Parental Leave'.

Refer: QHA's Paid Parental Leave Scheme Fact Sheet

ENTITLEMENT

An employee (other than a casual employee) is entitled to a period of 12 months' unpaid parental leave if they have, or will have, completed at least 12 months of continuous service with the employer immediately before the commencement of the leave.

A casual employee is entitled to unpaid parental leave where:

- They are, or will be, a long term casual and have been employed by the employer on a regular and systematic basis over the last 12 months; and
- They have a reasonable expectation of continuing employment with the employer on a regular and systematic basis.

An employee is entitled to unpaid parental leave where it is associated with:

- The birth of a child to the employee or the employee's spouse or de facto partner; or
- The placement of a child under 16 for adoption with the employee; and
- The employee has or will have a responsibility for the care of the child.

Each eligible member of an employee couple may take a separate period of up to 12 months of unpaid parental leave.

Consequently, where an employee is not eligible for unpaid parental leave due to their length of continuous service, an employer does not have an obligation to grant the leave, or keep their position open. However, the QHA recommends such a decision to not provide approved leave must be made with caution due to the possible legal implications of doing so.

TAKING UNPAID PARENTAL LEAVE

One Parent Taking Unpaid Parental Leave

Where only one parent is eligible for and/or intends to take unpaid parental leave, the following provisions apply:

- The leave must be taken in a single continuous period (except where an employee is accessing flexible unpaid parental leave, as defined in the Act);
- The employee may also take other forms of paid leave, such as annual leave, during a period of unpaid parental leave. However, the employee is not entitled to take personal/carer's leave or compassionate leave while they are taking a period of unpaid parental leave. (Note: An exception in relation to

- compassionate leave applies, if the permissible occasion is the stillbirth or death of the child in relation to whom the employee is taking unpaid parental leave for);
- The leave must start no later than the date of the birth (for birth-related leave) or placement of the child (for adoption-related leave) or, in the case of a pregnant female employee, the leave may start up to six weeks before the expected date of birth (refer to the section titled 'Notice and Evidence Requirements' for further information); or
- The leave may start at any time within 12 months after the birth or placement of the child if:
 - The employee has a spouse or de facto partner who is not an employee; and
 - The spouse or de facto partner has a responsibility for the care of the child.

Both Parents Taking Unpaid Parental Leave

Where both parents are eligible for and intend to take unpaid parental leave, the following provisions apply:

- The leave must be taken in a single continuous period (except for the concurrent leave period, or where an employee is accessing flexible unpaid parental leave as defined in the Act);
- One employee's leave must start first;
- Where the employee who takes leave first is pregnant or gives birth, they may start their leave up to six weeks before the expected date of birth, (or earlier by agreement with the employer), but no later than the date of the birth of the child;
- If the employee who takes leave first is not pregnant, the leave must start on the date of the birth (for birth-related leave) or placement of the child (for adoption-related leave);
- The employee who takes leave second must start their leave immediately after the first employee's leave finishes;
- Both employees may at the same time each take up to 8 weeks unpaid parental leave ('concurrent leave'). The leave may be taken in separate periods of not less than 2 weeks in duration. A period of concurrent leave taken reduces the total available period of parental leave;
- The concurrent leave must not start before the date of birth or date (for birth-related leave) or placement of the child (for adoption-related leave);
- The remaining leave must be taken separately in a single continuous period. The employee may also take other forms of paid leave, such as annual leave, during a period of unpaid parental leave (except for paid personal/carer's leave or compassionate leave). Note: An exception in relation to compassionate leave applies, if the permissible occasion is the stillbirth or death of the child in relation to whom the employee is taking unpaid parental leave for;
- Both parents are entitled to a maximum of 24 months between them (refer to the section titled 'Extending a Period of Unpaid Parental Leave' for further information on how a period of parental leave may be extended from 12 months to 24 months).

New Unpaid Parental Leave Provisions Introduced in November 2020

Flexible unpaid parental leave

In relation to children born or adopted on or after 27 November 2020, an employee can access flexible unpaid parental leave. An employee can access up to 30 days out of their 12 month unpaid leave entitlement, on a flexible basis - either on the basis of:

- a single continuous period of 1 day or longer, or
- separate periods of 1 day or longer each.

The flexible unpaid parental leave period can be taken up until the child's second birthday or the second anniversary of the adopted child's placement. However, if the employee plans on taking a continuous period of unpaid parental leave, they need to take this first, before they can access the flexible unpaid parental leave.

Unlike a request for a flexible working arrangement made under section 65 of the Act (which can be refused, but only on reasonable business grounds), an employer cannot refuse an employee's request to take part of their unpaid parental leave in a flexible manner.

The notice requirements for taking flexible unpaid parental leave involve the employee giving notice of the total number of flexible days they intend to take:

- at the same time they give notice of their continuous parental leave period, *OR*
- at least 10 weeks before their flexible parental leave period begins, if they are only applying for flexible parental leave.

Separate to the notice required as to the *number* of flexible days the employee intends to take, the employee must also confirm any specific *day* they will take flexible parental leave, with at least 4 weeks notice prior to the relevant day (or if that is not practicable – as soon as practicable, which may be a time after the leave has started). If the employer agrees, the employee may change one of the days they already gave notice for.

There may be some employees who decide to utilise flexible parental leave to ease back into the workforce. As noted in the Explanatory Memorandum to the Bill that amended the Act to include flexible unpaid parental leave:

Parents may choose to access a portion of their UPL [‘unpaid parental leave’] entitlement flexibly for a number of reasons, for example, to facilitate a gradual return to work or shared caring responsibilities between parents. While employees could use flexible UPL in a structured manner to reduce their regular days of work, any such arrangement is not a ‘part-time’ arrangement, but a leave entitlement. The use of the leave in this manner would also be limited to a maximum of 30 days, which must be used within the first two years from the child’s date of birth or placement. Employees who wish to make a permanent change to their working arrangements after returning from UPL currently have an entitlement under section 65 of the Fair Work Act to request a flexible working arrangement, which an employer may only refuse on reasonable business grounds.

Stillbirth or infant death

In relation to children born or adopted on or after 27 November 2020, an employee will have the same entitlement to access unpaid parental leave, even if their baby is stillborn, as defined in section 77A(2) of the Act, or dies during the first 24 months of life.

The Act has been amended to *remove* the ability for an employer to recall an employee who has already started parental leave to go back to work in this scenario.

However, the employee can still decide to return to work, if they choose – they must give at least 4 weeks’ notice, unless the employer agreed to the employee returning to work at an earlier time, under section 77 of the Act. If the employee had yet to commence any period of unpaid parental leave in this scenario, they just need to give written notice about their return to work - there is no minimum notice period.

Section 104 of the Act, which deals with the entitlement to compassionate leave, has been amended to extend access to employees if a child is stillborn as defined in section 77A(2) of the Act. The entitlement to compassionate leave would apply if the if the child would have been a member of the employee’s immediate family, or a member of the employee’s household, if the child had been born alive.

Hospitalised children

A new section 78A has been inserted into the Act, which provides the ability for an employee and employer to agree to pause the employee’s unpaid parental leave, if the employee’s child has to stay in hospital after their birth, or has to be hospitalised immediately after their birth, including because of:

- the child being born prematurely, or
- the child developing a complication or illness during gestation or birth, or
- the child developing a complication or illness following their birth.

If an employee and employer agree to the employee pausing their unpaid parental leave under section 78A of the Act, the employee would be able to return to work, and the period of work (the ‘permitted work period’) would not be deducted from their unpaid parental leave entitlement. The end date for the originally agreed period of unpaid parental leave would then be extended by the period equal to the permitted work period.

The permitted work period would end at the earliest of the following:

- the time agreed by the employee and employer, or
- the end of the day of the child's discharge from hospital, or
- if the child dies, the end of the day when the child dies.

EXTENDING OR REDUCING A PERIOD OF UNPAID PARENTAL LEAVE

Sections 75, 76 and 77 of the NES provide for extending or reducing a period of unpaid parental leave. Section 75 will apply to employees seeking to extend their unpaid parental leave by another period within the first 12 months. An example of this would be where an employee has requested a period of 4 months unpaid parental leave and then seeks to extend this leave period, prior to its end by a further 4 months. Section 76 will apply where the employee is seeking to extend their unpaid parental leave beyond the initial 12 month entitlement for a further period of up to 12 months. Section 77 applies where an employee is seeking to reduce an amount of unpaid parental leave previously applied for and approved.

Extending Within the First 12 Months of Leave

Section 75 of the NES requires that where an employee is seeking to extend their period of unpaid parental leave within the first 12 months, the employee must give their employer written notice of the extension at least 4 weeks before the end date of the original leave period. The notice must specify the new end date of the leave.

There will only be one extension permitted under this section that the employer must provide, with any further extensions to be approved by the employer. It should be noted that the employee will not be entitled to extend the period of unpaid parental leave beyond the employee's available parental leave period under this section.

Extending After the First 12 Months of Leave

Section 76 of the NES provides that where one employee has taken 12 months of unpaid parental leave, they may request an extension of up to a further 12 months leave (maximum of 24 months in total). It should be noted that where both employees have taken 12 months of unpaid parental leave each, neither employee will be entitled to extend the period of leave.

Where the employee makes a request to extend their unpaid parental leave for a further period up to 12 months, the employee must give their employer written notice of the extension at least 4 weeks before the end date of the original leave period.

The employer must then provide a written response to the employee's request within 21 days stating whether the employer grants or refuses the request. An employer may only refuse a request on reasonable business grounds and must provide details to the employee about the reasons for refusal of their request.

An employer must not refuse the request unless the employee has been given an opportunity to discuss the request.

Reasonable business grounds for refusing a request may include, but are not limited to, the following:

- The effect the extended period of leave may have on the workplace. For example, the impact it may have on the business, including productivity, financial impacts or customer service;
- The inability to recruit a replacement employee or the practicality or otherwise of these arrangements that may need to be put in place to accommodate the employees request;
- The inability to continue managing the workload amongst other employees.

Reducing a Period of Unpaid Parental Leave

Where an employer agrees, an employee whose period of unpaid parental leave has started may reduce the period of leave they take.

Note: an employee may also reduce their period of unpaid parental leave under section 77A of the Act, which deals with the effect of stillbirth or death of a child within the first 24 months of their life, without needing to seek the employer's agreement.

SIX WEEKS PRIOR TO THE EXPECTED DATE OF BIRTH

Where a pregnant employee wants to work during the 6 week period before the expected date of birth of the child, the employer may request that the employee provide them with a medical certificate containing the following:

- A statement of whether the employee is fit for work during that period;
- If the employee is fit for work – a statement of whether it is inadvisable for the employee to continue in their present position because of:
 - illness or risks arising out of the employee's pregnancy; or
 - hazards connected with the position.

In order to assist the medical professional in making an assessment if the employee is fit for work it is advisable for the employer to provide the medical professional with a detailed copy of the employee's position description.

The NES provides that an employer may require the employee to take a period of unpaid parental leave (provided they are eligible) as soon as practicable if the employee:

- Fails to provide the requested medical certificate within 7 days of the request; or
- Provides a medical certificate within 7 days stating that the employee is not fit for work; or
- Provides a medical certificate stating they are fit for work, but it is inadvisable to continue in the present position due to illness, risk to the pregnancy or job-related hazards; or
- Is not entitled to transfer to a safe job or to 'no safe job' leave (refer to the heading 'no safe job leave' in this fact sheet for further information).

Where an employer directs an employee to take unpaid parental leave, this period of leave runs until the end of the pregnancy or until the planned parental leave was due to start. This period of leave is deducted from the employee's total entitlement to unpaid parental leave, with this period of leave being exempt from the rules about when the leave must start and that it must be taken in a continuous period.

NOTICE AND EVIDENCE REQUIREMENTS

Notice

An employee will only be entitled to take unpaid parental leave where:

- the employee gives their employer written notice of taking unpaid parental leave at least 10 weeks before starting leave, or as soon as practicable (which may be a time after the leave has started); OR
- if the notice is for concurrent leave (where the employee is a member of a couple where each of the employees intend to take unpaid parental leave), where the leave period is not the first of the periods of concurrent leave, give the written notice at least 4 weeks before starting leave; AND
- the notice specifies the intended start and end dates of the leave;
- the employee provides at least four weeks before the intended start date (unless it is not possible to do so):
 - confirmation of the intended start and end dates of the leave; or
 - advises the employer of any changes to the intended start and end dates.

Refer to the heading 'flexible unpaid parental leave' in this fact sheet, for information on the notice requirements for accessing flexible unpaid parental leave.

Evidence

An employer may request evidence from an employee that would satisfy a reasonable person of the actual or expected date of birth of the child (for birth-related leave) (for example a medical certificate) or the date of the expected date of placement of the child under 16 years of age (for adoption-related leave).

Where an employee fails to either provide notice or, when requested, evidence that would satisfy a reasonable person, the employee will not be entitled to take unpaid parental leave.

KEEPING IN TOUCH DAYS

An employee on a period of unpaid parental leave, or an employee on period of paid parental leave (as per the Government Payment Scheme) may access 'keeping in touch' days. For the purposes of unpaid parental leave under the NES, employers should be aware that the employee has the right to request 10 'keeping in touch' days during the course of their unpaid parental leave. However the employer must consent to an employee accessing one or more of these days.

The purpose of a 'keeping in touch' day is to enable the employee to keep in touch with his or her employment in order to facilitate a return to that employment once the period of unpaid parental leave ends. In line with this purpose, a keeping in touch day may be used by the employee to:

- Refresh their skills;
- Become familiar with new or updated processes;
- Participate in on the job training;
- Be involved in planning discussions or meetings that may affect their roles. Please note if the employee's position or role function changes or no longer exists, the employer will have the obligation to consult with the employee as they would if the employee was in the workplace as discussed above.

If the employee accesses a 'keeping in touch' day, this will not affect the employee's continuous period of unpaid parental leave, and will not extend the period of unpaid parental leave.

Employees who are receiving payment in accordance with the Paid Parental Leave Scheme are also able to access 'keeping in touch' days. However this will be subject to agreement between the employer and employee and in accordance with the provisions of the *Paid Parental Leave Act 2010*. If the employer and employee agree to 'keeping in touch' days whilst an employee is on a period of paid parental leave, this will not affect the employee's ability to access unpaid parental leave entitlements under the NES.

An employee accessing a 'keeping in touch' day will be regarded as engaging in paid work and therefore will be entitled to be paid in accordance with their contract of employment or industrial instrument for such time worked.

Section 79 of the NES provides that there is no obligation for an employer to grant the employee a 'keeping in touch' day. However if the employer and employee agree to a 'keeping in touch' day, it must be in accordance with the following:

- An employee cannot request to attend work on a 'keeping in touch' day within 14 days after the date of birth or day of placement of the child.
- An employer cannot request an employee to attend work on a 'keeping in touch' day within 42 days after the date of birth or day of placement of the child.
- If the parental leave is extended to beyond the initial 12 month entitlement, both parties may agree to arrange a further 10 'keeping in touch' days.

Time worked under the 'keeping in touch' provisions must be paid work, and will be counted as normal work for attracting employment entitlements and conditions including pay, leave accruals, and superannuation contributions.

Where an employee exercises their ability to return to work under the 'keeping in touch' provisions, an employer needs to keep a record of the days the employee does utilise these provisions to ensure that no more than 10 days are used, as well as for the above mentioned employment matters.

OTHER ENTITLEMENTS RELATED TO UNPAID PARENTAL LEAVE

Unpaid Special Maternity Leave

An eligible female employee will be entitled to a period of unpaid special maternity leave if she is not fit for work because:

- she has a pregnancy-related illness; or
- the pregnancy ends after a period of gestation of at least 12 weeks, otherwise than by the birth of a living child (i.e. through miscarriage or termination), and the child is not stillborn as defined in section 77A(2) of the Act.

The unpaid special maternity leave will end when:

- the pregnancy or illness ends, if the leave is sought due to pregnancy related illness, or
- when the employee is fit for work, if the leave is sought due to miscarriage or termination.

The employee must provide notice of taking special maternity leave as soon as practicable (which may be a time after the leave has started) and the expected period of leave. An employer may also require evidence (eg medical certificate) that would satisfy a reasonable person that the leave is taken for the reasons outlined above.

The entitlement to 12 months of unpaid maternity leave is not reduced by the amount of any unpaid special maternity leave taken by the employee.

Transfer to Safe Job and Paid No Safe Job Leave

A pregnant employee may be entitled to be transferred to an appropriate safe job where the employee:

- Is entitled to unpaid parental leave;
- Has complied with the notice and evidence requirements (as provided above); and
- Has provided evidence that would satisfy a reasonable person that they are fit for work, but that it is inadvisable for them to continue in their present position during a period because of:
 - illness, or risks, arising out of her pregnancy; or
 - hazards connected with that position.

Where the employee satisfies the above, they will be entitled to be transferred to an appropriate safe job. An appropriate safe job is where the job has the same ordinary hours of work as the employee's present position or a different number of ordinary hours agreed to by the employee. Where such an appropriate safe job is available the employer must transfer the employee to that job for the specified period with no other changes to their terms and conditions of employment – the employee must also receive their full rate of pay for the position they were in before the transfer, for the hours of work in that period.

However where the employer does not have an appropriate safe job for the employee, they will be entitled to take paid No Safe Job Leave for the risk period and be paid for at their base rate of pay for their ordinary hours of work in the risk period.

Where an employee is on paid No Safe Job Leave during the 6 week period before the expected date of birth of the child, the employer may ask the employee to provide a medical certificate stating whether the employee is fit for work. Where the employee does not provide the medical certificate within seven days after the request or provides a medical certificate stating they are not fit for work, then the employer may require the employee to take a period of unpaid parental leave. The No Safe Job Leave has no effect on an employee's entitlement to unpaid parental leave. No Safe Job Leave ends when the period of unpaid parental leave starts.

CONSULTATION REQUIREMENTS WHILE ON UNPAID PARENTAL LEAVE

The NES requires employers to keep employees on unpaid parental leave informed about decisions that will have a significant effect on the status, pay or location of their pre-parental leave position – that is the position the employee held prior to starting unpaid parental leave, or the position held before they transferred to a safe

job. The employer must take all reasonable steps to keep the employee informed about, and provide an opportunity to discuss, the effect of any decision that will affect the employee's pre-parental leave position.

RETURN TO WORK GUARANTEE

In accordance with section 84 of the NES, where an employee takes a period of unpaid parental leave the employer must guarantee a return to work (immediately following the period of leave):

- to their pre-parental leave position; or
- if that position no longer exists, a position as close as possible to the pre-parental leave position.

Employers should note if, prior to going on parental leave, the employee was transferred to a safe job, or reduced their hours due to pregnancy, the employee's pre-parental leave position will be the position the employee held prior to reducing their hours or transferring to a safe job.

REPLACEMENT EMPLOYEES

Where an employer engages a replacement employee for the purpose of covering the duties of the employee taking unpaid parental leave, section 84A of the NES requires the employer to ensure that the replacement employee is aware of the fact that the position of the replacement employee is temporary.

Additionally, the employer must advise the employee in relation to the rights of both the employer and employee on parental leave with respect to:

- cancelling leave where the pregnancy ends other than the birth of a living child or if the child dies after birth but prior to the end of the unpaid parental leave period; or
- early termination of the parental leave period; and
- the return to work guarantee to which the employee on parental leave is entitled; and
- the effect on the replacement employee's employment if the employee on leave ceases to have responsibility for the care of the child.

INTERACTION WITH PAID LEAVE

Paid parental leave is a separate entitlement to the unpaid parental leave entitlement under the NES. The *Paid Parental Leave Act 2010* provides for a paid parental leave scheme funded by the Commonwealth Government. Paid parental leave differs from the NES provided unpaid leave. Therefore eligibility for unpaid parental leave under the NES does not necessarily mean eligibility for paid parental leave, or vice versa. Where eligible, an employee may take both unpaid parental leave and the Government paid parental leave concurrently.

An employee may take any other kind of paid leave while they are taking unpaid parental leave and this will not break the continuity of the period of unpaid parental leave.

However, an employee is not entitled to take paid personal/carer's leave or compassionate leave while they are taking unpaid parental leave. (Note: An exception in relation to compassionate leave applies, if the permissible occasion is the stillbirth or death of the child in relation to whom the employee is taking unpaid parental leave for).

In addition, the employee is not entitled to any payment in relation to undertaking jury service while on unpaid parental leave.

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| <i>Refer: QHA's Paid Parental Leave Scheme Fact Sheet</i> |
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ALTERING THE POSITION ON RETURN

In some cases an employee may request that, when they return to work after a period of unpaid parental leave, their pre-parental leave position is altered. For example, an employee engaged as a full-time employee may request to return to work after unpaid parental leave in a part time capacity.

Employers should be mindful that the parental leave provisions of the NES do not give employees an automatic entitlement to request and be guaranteed to receive alternate work arrangements on return to work. However, if an employee has made a flexible working request under section 65 of the Act, an employer can only refuse the request on reasonable business grounds.

Best practice is to assess each situation on a case by case basis. Employers should also ensure that they take into consideration Division 4 of the NES (Flexible Working Arrangements) when making such an assessment.

Refer: QHA's Flexible Working Arrangements Fact Sheet

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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