



FACT SHEET

Personal/Carer's Leave, Compassionate Leave and Family and Domestic Violence Leave

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Personal/carers' leave, compassionate leave and family and domestic violence 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.

The NES provide for the following minimum entitlements for employees relating to personal/carers' leave, compassionate leave and family and domestic violence leave:

- Paid personal/carers' leave
- Unpaid carers' leave
- Paid and Unpaid compassionate leave
- Unpaid family and domestic violence leave.

PERSONAL/CARER'S LEAVE

Minimum Entitlements

The NES provides that employees (other than casuals) are entitled to 10 days' paid personal/carers' leave for each year of service. Paid personal/carers' leave accrues progressively during a year of service according to the employee's ordinary hours of work and accumulates from year to year.

The entitlement to 10 days' paid personal/carers' leave represents a full-time employee's entitlement and is based on 38 ordinary hours per week. A part-time employee's entitlement to paid personal/carers' leave is calculated on a pro rata basis and is a proportionate amount based on the employee's ordinary hours of work.

Taking Paid Personal/Carer's Leave

In accordance with section 97 of the NES, an eligible employee may take paid personal/carers' leave:

1. if they are unfit for work because of a personal illness or injury affecting the employee; or
2. to provide care or support to a member of their immediate family or household, because of a personal illness, injury or unexpected emergency affecting the member.

A member of the employee's immediate family means:

- a spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or
- a child, parent, grandparent, grandchild or sibling of the employee's spouse or de facto partner.

Please note that the Act defines de facto partner to include 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. De facto partner includes a person that is of the same sex or of different sex to the employee.

Unlike former legislation, the Act does not provide a cap on how much leave can be used per year for carer's leave.

Employee Not Taken to be on Paid Personal/Carer's Leave

If the period during which an employee takes paid personal/carers leave includes a day or part day that is a public holiday, the employee is not taken to be on paid personal/carers leave on that public holiday. The employer will be required to pay the employee for that public holiday for the ordinary hours of work they had on that day. The employee's personal/carers leave entitlements should not be deducted for that day.

Payment During Paid Personal/Carer's Leave

When an employee takes a period of paid personal/carers leave the employer must pay the employee for that time at their base rate of pay for the ordinary hours they would have worked during that period (this is subject to the notice and evidence requirements provided for below at page 3 of this fact sheet).

An employee's base rate of pay is the rate of pay payable to an employee for their ordinary hours of work, but does not include the following:

- incentive-based payment and bonuses;
- loadings;
- monetary allowances;
- overtime or penalty rates; or
- any other separately identifiable amounts.

Cashing Out of Paid Personal/Carer's Leave

The cashing out of paid personal/carers leave is only permitted where the applicable industrial instrument in the workplace, such as an Award or Agreement, allows for it. When cashing out of paid personal/carers leave is permitted by the industrial instrument, employers must ensure that the follow terms are complied with:

- there is a separate agreement in writing on each occasion;
- the employee retains a balance of at least 15 days of untaken paid personal/carers leave; and
- the employee is paid at least the full amount that would have been payable had the employee taken the leave they have cashed out

Members are reminded that the NES represents employee's minimum entitlements at work. Where an Agreement or an Award provides for conditions of employment which are less beneficial than that provided for in the NES, the NES provisions will prevail.

It is noted that the *Hospitality Industry (General) Award 2020* ('HIGA') does not allow for the cashing out of paid personal/carers leave. Additionally Award or Agreement free employees are not permitted to cash out paid personal/carers leave.

It is unlawful for employers to force or apply duress to an employee to make an agreement to cash out paid personal/care's leave. Employers who engage in such conduct may find themselves in breach of the general protections provisions in the Act.

Refer: QHA's General Protections Fact Sheet

UNPAID CARER'S LEAVE

Minimum Entitlements

All employees, including casual employees, are entitled to two days of unpaid carer's leave for each permissible occasion when a member of the employee's immediate family or household requires care or support because of a personal illness, injury or an unexpected emergency affecting the member. Please refer to the definition of immediate family provided on page 1 of this Fact Sheet.

Taking Unpaid Carer's Leave

Unpaid carer's leave may be taken for each permissible occasion as a single continuous period of up to two days, or any separate period to which the employee and their employer agree. An employee cannot take unpaid carer's leave during a period if the employee could instead take paid personal/carers leave (this does not apply to casual employees as they are not entitled to paid personal/carers leave).

COMPASSIONATE LEAVE

Minimum Entitlements

All employees, including casual employees, are entitled to two days of compassionate leave for each permissible occasion. Compassionate leave may be taken where a member of the employee's immediate family or household:

- contracts or develops a personal illness that poses a serious threat to their life; or
- sustains a personal injury that poses a serious threat to their life; or
- dies.

Please refer to page 1 of this Fact Sheet for the definition of immediate family.

Taking Compassionate Leave

Compassionate leave may be taken to either spend time with a member of the employee's immediate family or household who contracts or develops a personal illness or injury, or after the death of a member of the employee's immediate family or household.

Compassionate leave may be taken for each permissible occasion as:

- a single continuous two day period; or
- two separate periods of one day each; or
- any separate periods to which the employee their employer agree.

Payment During Compassionate Leave

An employee, other than a casual, taking a period of compassionate leave must be paid by the employer at their base rate of pay for the ordinary hours that they would have worked during that period. Compassionate leave is not deducted from an employee's personal/carer's leave accruals.

Casual employees are only entitled to unpaid compassionate leave.

FAMILY AND DOMESTIC VIOLENCE LEAVE

Minimum Entitlements

As a result of the *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018*, which took effect from 12 December 2018, the NES was amended to include unpaid family and domestic violence leave ('FDV leave'). Positions to which a modern award applies have been able to access this type of leave since August 2018, however the amendment of the NES means that this leave entitlement now applies to all employees, regardless of whether a modern award applies to their employment or not.

An employee is entitled to 5 days of unpaid FDV leave for each year of the employee's employment, if:

- they are experiencing family and domestic violence, and
- they need to do something to deal with the impact of family and domestic violence, and
- it is impracticable to do that thing outside of the employee's ordinary hours of work.

Family and domestic violence is violent, threatening or other abusive behaviour by a close relative of an employee that:

- seeks to coerce or control the employee; and
- causes the employee harm or to be fearful.

A 'close relative' of an employee for the purposes of this leave refers to a member of the employee's immediate family or someone who is related to the employee according to Aboriginal or Torres Strait Islander kinship rules. Please refer to page 1 of this Fact Sheet for the definition of immediate family.

Examples of things that an employee may need to do to deal with the impact of domestic violence are provided in the NES – these include arranging for the safety of the employee or a close relative (including relocation), attending urgent court hearings or accessing police services. Employees are not limited to these examples.

An employer must take steps to keep information given by an employee regarding FDV leave is treated confidentially, as far as it is reasonably practicable to do so. This would include the employee giving notice of their intention to take FDV leave, and any evidence they provide. An employer is not prevented from disclosing information about an employee's access to FDV leave if it is required by an Australian law or if it is necessary to protect the life, health or safety of the employee or another person.

Given that an employer needs to handle any information about an employee's experience of family and domestic violence sensitively, it is recommended that an employer works with any employee who needs to take FDV leave to agree on how the employee's information will be dealt with.

Taking Family and Domestic Violence Leave

The employee can take their entitlement to five days of unpaid family and domestic violence leave:

- all at once, or
- in separate periods of one or more days, or
- any separate period to which the employee and employer agree to, including periods of less than one day.

Nothing in these leave provisions prevent an employer from agreeing to provide additional unpaid family and domestic violence leave to an employee, on top of the five days of leave that an employee is entitled to under the NES.

The entitlement to five days is available in full to an employee at the start of each 12 month period of the employee's employment. Existing employees engaged at the time of the FDV leave entitlements becoming a feature of the NES (12 December 2018) are entitled to 5 days of FDV leave immediately, and then the entitlement will reset on the anniversary of the employee's employment. The leave does not accumulate from year to year.

NOTICE REQUIREMENTS

Notice and Evidence

For all periods of personal/carer's leave, compassionate leave, and family and domestic violence leave, an employee must give notice to their employer of the taking of such leave.

The notice must be given to the employer as soon as practicable (which may be a time after the leave has started) and must advise the employer of the period, or expected period, of the leave.

An employer may request from an employee who has provided notice of taking personal/carer's leave, compassionate leave, or family and domestic violence leave, evidence that would satisfy a reasonable person that the employee is taking leave for the prescribed reasons provided for in the legislation. The evidence should be requested to substantiate the reason for the leave.

The NES does not provide an example of what constitutes evidence that would satisfy a reasonable person, therefore a case by case assessment should be made to determine what evidence is reasonable in the circumstances. Common forms of evidence for personal/carer's leave or compassionate leave include, but are not limited to the following:

- Medical Certificate
- Statutory Declaration
- Death Notice
- Death Certificate

In relation to evidence for family and domestic violence leave, the NES also does not refer to specific examples of what constitutes evidence that would satisfy a reasonable person, however such evidence may include e.g. a document issued by a police service, or by a court or a family violence support service, or a statutory declaration.

Where an employee fails to provide either notice or, if required, evidence that would satisfy a reasonable person, the employee will not be entitled to receive the above leave entitlements. This is due to the notice and evidence requirements in section 107 not being satisfied.

Therefore the absence would be regarded as an unauthorised absence from the workplace. However a case by case assessment should be made to determine if the absence is of another form (e.g unpaid authorised absence).

Policies

Employers may implement workplace policies which provide for specific notice and evidence requirements that an employee must provide when taking personal/carer's leave, compassionate leave or family and domestic violence leave. Where such policies exist they must be based on genuine operational reasons and be non-discriminatory (either directly or indirectly).

In some instances an employee may be unable to comply with the notice and evidence requirements set out in the policy, therefore employers should use their discretion based on the facts of the case to determine whether the employee is in breach of the policy.

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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