

Workplace Law Fact Sheet

Up to two years' parental leave now available under the Fair Work Act

Parental leave is changing. Since 1 January this year, new rules have given all employees in Australia a right to request up to two years' leave for the birth or adoption of a child. Combined with a return to work guarantee, this is a powerful addition to the options of employees facing parenthood – and a significant challenge for employers in managing their workflow and workforce.

The new rules on parental leave are one of the ten National Employment Standards, which apply to all Australian employees including those employed under State systems.

As before, employees are entitled to 52 weeks' unpaid leave for the birth or adoption of a child. This can be taken by either parent, or it can be divided between both parents. The law now explicitly applies to same-sex couples in the same way as heterosexual couples. If both parents take leave, they cannot take parental leave simultaneously except during the first three weeks.

However, as that initial 52 weeks of leave draws to a close, the employee on leave is now entitled to request up to 12 months' additional leave. Crucially, there is no right to the additional leave itself – the employee merely has a right to *request* it. It must be a written request and be made at least four weeks before the initial leave is due to finish.

The employer may only refuse the additional leave for "reasonable business grounds". The legislation does not specify what this means, but it is expected to include issues such as inability to obtain a replacement employee, inability to reassign workload, and the financial or productivity effect on the workplace.

Interestingly, however, there is no penalty if the employer refuses the additional leave request for reasons that are clearly not "reasonable business grounds".

At the end of the parental leave, the return to work guarantee still applies. This means that the employee is entitled to return to the position they held immediately before taking parental leave. If that position no longer exists, the employee is entitled to a position which is similar in status and pay and to which they are qualified and suited.

What do employers need to do about the new rules?

It is important to think early about what attitude to take to a request for additional leave. Ideally,

employers should do this well before any employee makes a request. Having an employee away for up to two years, with their previous position held open for them to return to, is a significant commitment which employers need to be prepared for.

For some employers, avoiding extended parental leave will be a priority. In this case, thinking early about reasonable business grounds for refusing a request for additional leave is important. On the other hand, there will be employers with workplace culture reasons for being as flexible as possible in agreeing to extended parental leave.

For many employers, this may not be an area which lends itself well to a formal policy, as much may depend on the particular role which would be vacant. However, it is always a good idea to have a broad set of guidelines in advance to help in deciding a particular request.

What about employees?

A request for additional parental leave needs to be made at least four weeks before the initial period ends – but giving as much notice as possible is likely to help. Employees should not assume that a request will be granted, so having a backup plan (including childcare) is vital. If a request is turned down, the employer should provide written reasons, but there is no straightforward mechanism to challenge the decision.

Fair Work Australia can assist employers and employees with basic issues. However, for more specific advice, it is always a good idea to consult a solicitor as early as possible.

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