



Advice current as at 8 March 2021

PARENTAL LEAVE MANAGEMENT GUIDE

Introduction

The aim of the Parental Leave Management Guide is to provide guidance and information on the entitlements for employees and their partners when eligible for parental leave.

It is a partner document to the Parental Leave sample policy.

The Management Guide provides an outline of an employer's legal obligations including:

- Statutory entitlements for employees and their partners taking parental leave;
- Avoiding discrimination and providing flexible work; and
- Managing the legal risks where organisational changes are made which impact employees on parental leave.

This document is intended for **HR/managers** only and is not for distribution amongst broader staff.

What Legislation Does This Fall Under?

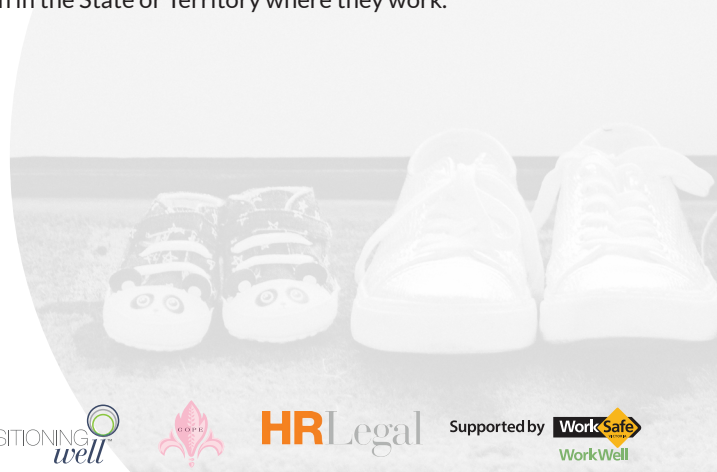
Under the Fair Work Act 2009 (FW Act), employees are entitled to unpaid parental leave (maternity, paternity, adoption and related kinds of leave).

The *Sex Discrimination Act 1984* makes it unlawful to discriminate against a person because of their sex, gender identity, intersex status, sexual orientation, marital or relationship status, family responsibilities, because they are pregnant or might become pregnant or because they are breastfeeding.

It is unlawful for an employer to take adverse or discriminatory action against an employee for a prohibited reason. Examples of adverse action include when an employer dismisses an employee, alters their position to their detriment, or discriminates between them and other employees because of their pregnancy or another prohibited reason.

Pregnant employees are entitled to the same access to work opportunities, such as promotions and transfers, as other employees.

In addition, Workplace Health and Safety laws apply in all States and Territories. An employer together with its employees have certain duties regarding safety under this legislation and other relevant legislation in the State or Territory where they work.





Sex discrimination occurs when someone is treated less favourably than a person of the opposite sex would be treated in the same or similar circumstances.

Unlawful Discrimination

It is unlawful to treat a woman unfairly, or not provide her with the same opportunities, because she is pregnant or might become pregnant.

Women who are pregnant should be able to continue to work in the same way and under the same conditions as other employees, unless there are valid medical or safety reasons.

Sex discrimination occurs when someone is treated less favourably than a person of the opposite sex would be treated in the same or similar circumstances. It can occur when employers hold assumptions about what sort of work women are capable, or not capable, of performing.

For example, it would be discrimination if an employer refused to employ a woman because she was pregnant or because she may become pregnant.

It is also unlawful to discriminate against women who are breastfeeding, including those who need to express milk. For example, it may be discrimination if an employer does not allow staff to take short breaks at particular times during the day. This may disadvantage women who are breastfeeding as they may need to take breaks to express milk.

Additionally, it is against the law for employers to directly discriminate against a person because of his or her responsibilities to care for a family member. This includes caring for a spouse or de-facto partner, child, grandchild, brother, sister, parent, or grandparent. It is good practice to take positive steps to help employees meet their family responsibilities.

It is also against the law to treat a person unfairly or deny a person opportunities because of their marital or relationship status, whether the person is single, married, in a de facto relationship, separated, divorced, widowed or never married. This includes people in same-sex relationships.

Employers have a legal responsibility not to discriminate against employees and to take all 'reasonable steps' to prevent discrimination. 'Reasonable steps' depend on the size of the organisation, current policies and procedures, and how it deals with allegations of discrimination.

Employers can be held legally responsible for sex discrimination by their employees.

What Are Our Legal Obligations Relating to Parental Leave?

There are a number of legal obligations on employers in respect of employees who are pregnant and/or take parental leave.

UNPAID SPECIAL MATERNITY LEAVE

A pregnant employee is entitled to unpaid special maternity leave if they are unfit for work because:

- Of a pregnancy-related illness.
- The pregnancy ends within 28 weeks of the expected date of birth.

Any period of unpaid special maternity leave that a pregnant employee takes will not reduce their entitlement to unpaid parental leave.

TRANSFER TO A SAFE JOB OR 'NO SAFE JOB LEAVE'

A pregnant employee's safety is very important. It will be important to ensure that fulfilling the inherent requirements of the employee's role will not expose that employee, or the baby, to a safety risk.

In order to determine whether there is a potential safety risk, an employer may request medical evidence from the employee's medical practitioner, for example, to ascertain whether there are any risks or hazards that could make it unsuitable or unsafe for the employee to continue in the current role while pregnant.

If it is unsafe for the pregnant employee to continue working in their usual job, the employee is entitled to be transferred to a 'safe job' if their pregnancy stops them from performing their normal position.

If there is no appropriate safe job available, and the employee is entitled to unpaid parental leave (see eligibility requirements below), then the employee is entitled to take paid 'no safe job leave' for the risk period, and be paid at their normal rate of pay during the risk period.

Employees who are not entitled to unpaid parental leave can take unpaid 'no safe job leave'.

UNPAID PARENTAL LEAVE

Who is entitled to unpaid parental leave?

An employee who has completed at least 12 months of continuous service with an employer is entitled to up to 12 months of unpaid parental leave, if the employee has, or will have a responsibility for, the care of a child, or adopted child under 16 years of age.

A casual employee who has been engaged on a regular and systematic basis and who has completed 12 months' continuous service will also be eligible for parental leave.

An employee who is taking a period of 12 months unpaid parental leave may also request one extension of a further 12 months (bringing the unpaid leave to 24 months in total). This request can be refused on reasonable business grounds.

Usually only one parent can take unpaid parental leave at a time. The exception is 'concurrent leave' during which both parents may take leave at the same time for a maximum period of 8 weeks. This leave must be taken within 12 months of the birth or adoption of the child.

COMPANY PAID PARENTAL LEAVE

Some employers provide for company paid parental leave under a policy or enterprise agreement. This is not an entitlement under the FW Act but may be a contractual obligation.

Some employers decide to offer their employees more generous entitlements and paid parental leave.

What Are Our Legal Obligations Relating to Parental Leave? CONTINUED

PAID PARENTAL LEAVE FROM AUSTRALIAN FEDERAL GOVERNMENT

Employees may also be entitled to Paid Parental Leave from the Australian Federal Government, which currently pays eligible employees up to 18 weeks' pay, at the national minimum wage. This payment is either made via the employer or directly to the employee, depending on the circumstances.

Dad or Partner Pay

Dad or partner pay is a payment for working dads and partners (including same-sex partners) who are on leave to care for a child born or adopted.

An eligible working dad or partner will currently receive up to two weeks of government-funded pay at the National Minimum Wage.

Dad or partner pay can be received at any time in the first year after the child's birth or adoption, as long as the dad or partner is on leave.

This scheme is managed by the Government. You can find more information via [MyGov](#) or [Centrelink](#), or via this link: <https://www.servicesaustralia.gov.au/individuals/services/centrelink/dad-and-partner-pay>.

Note: Companies must be registered to facilitate these payments.

Flexible Parental Leave

An employee may take up to 30 days of unpaid parental leave (flexible unpaid parental leave) during the 24-month period starting on the date of birth or day of placement of the child. Flexible unpaid parental leave may be taken as:

- A single continuous period of one or more days.
- Separate periods of one or more days each.

Flexible unpaid parental leave comes out of the employee's entitlement to 12 months of unpaid parental leave. Other unpaid parental leave must be taken before the flexible unpaid parental leave commences.

Stillbirths, infant Deaths and Premature Births

In the event an employee who is entitled to parental leave experiences:

- A stillbirth.
- The death of a child during the first 24 months of life.

The employee remains entitled to take 12 months' unpaid parental leave. Additionally, permanent employees may take paid compassionate leave while on unpaid parental leave.

Further, parents of premature babies, or newborns that experience birth-related complications that result in immediate hospitalisation, are able to go back to work while their child remains in hospital, and then restart their unpaid parental leave when their baby comes home.

Keeping in Touch (KIT) Days

The FW Act entitles employees to 10 paid 'Keeping in Touch Days' during their unpaid parental leave period. This assists employees with staying up to date with the workplace and their transition back to work.

Keeping in Touch Days can be worked as a part-day, 1 day or a few days at a time. This does not affect the unpaid parental leave entitlement. An employee receives their normal wage for each Keeping in Touch Day or part-day.

For more information, refer to [PWWP Resource Sheet: Staying Connected during Parental Leave](#).

Consultation with Employee

If the employer makes a decision that will have a significant impact on the employee's status, pay or location of the employee's pre-parental leave position, the employer must take all reasonable steps to give the employee information about, and an opportunity to discuss that decision. This only requires the employer to consult once the decision has been made.

Return to Work Guarantee

An employee is guaranteed to return to their pre-parental leave position immediately following a period of parental leave.

If there is a need to employ someone in the role during the parental leave period, that position must be advertised and filled as temporary parental leave replacement role (a maximum term contract is recommended in these circumstances).

If the returning employee moved to a safe job before the pregnancy, or they agreed to a flexible working arrangement (e.g. reduced hours), they are entitled to go back to the same job they had before the move or flexible arrangement.

If the employee's pre-parental leave position no longer exists, then the employee is entitled to any other available position which is nearest in status and pay to their pre-parental leave position, and for which they are qualified and suited.

Employees are entitled to request flexible work arrangements when returning to work from parental leave.

**NOTE TO EMPLOYER:**

Where making modifications to the policy/management guide, please seek legal advice to ensure it meets minimum legal requirements.

Who Can Request a Flexible Work Arrangement, by Law?

Under the Fair Work Act 2009, an employee who is a parent, or has the responsibility for the care, of a child who is school age or younger can request a Flexible Work Arrangement.

This may include an employee requesting:

- A reduction to working hours or days.
- Applying to work on a part-time or job-sharing basis.
- Applying for a change of responsibilities or duties, such as mentoring or training staff.
- Training opportunities such as upskilling or reskilling.

Employees may also wish to access accrued annual leave and/or long service leave.

For further information about requests for Flexible Work Arrangements, please see the Flexible Work Policy and the Flexible Work Management Guide.

What can we do to manage legal risks and create a positive work environment?

Employers should be mindful of actions and processes which may be of assistance to employees who are going to take parental leave.

The following are best practice recommendations which go minimum beyond legal requirements.

- Create a calendar of who is on leave to keep on top of team members who are currently expecting a child, are on leave or have recently returned from parental leave and their key dates in relation to commencing parental leave and returning from leave.
- Systematise alerts so that the appropriate people are automatically reminded of key dates.
- Keep in contact with employees on parental leave and advise them of their entitlement to 10 paid Keeping In Touch Days during their parental leave, to help them stay in contact with the team, and to maintain their professional skills and knowledge. Build a KIT plan prior to leave, asking employees about their preferred method of communication whilst they are on leave, such as text, a phone call or email.
- Train managers in Parental Leave, Flexible Work and Anti-Discrimination policies and ensure that employees are aware of their rights and entitlements.
- Consider different types of flexible working, include part-time work, job-share, reduced hours and allowing employees to utilise leave entitlements as they transition back into the workforce after taking parental leave. Ensure rostering and workload processes are in place where possible to cover employees who wish to work flexibly.

Resource: Process Checklist for Parental Leave Policies

The following is a checklist for supporting employees to take parental leave and what needs to be included in the Parental Leave Policy.

ELIGIBILITY REQUIREMENTS

Has the employee been employed for at least 12 months to be eligible under the *Fair Work Act*?

Is the employee otherwise eligible for parental leave under an enterprise agreement?

UNPAID PARENTAL LEAVE ENTITLEMENT

Confirm primary entitlement to unpaid parental leave is 12 months following birth/ placement, to be shared between both parents?

CONCURRENT LEAVE

Confirm parents who are married or in a de facto relationship can take up to 8 weeks unpaid parental leave at the same time ('concurrent leave')?

Confirm concurrent leave can be taken in separate periods (each period needs to be at least 2 weeks long; but company can agree to shorter lengths)?

Confirm concurrent leave is part of an employee's total unpaid parental leave entitlement (so any concurrent leave taken is deducted from the total unpaid parental leave entitlement)?

EXTENSION TO PARENTAL LEAVE

Confirm entitlement for one parent to request an additional 12 months of leave (in total 24 months of unpaid parental leave)?

Where request for extension to parental leave made, has request only been refused after discussing with the employee and based on reasonable business grounds?

UNPAID SPECIAL MATERNITY LEAVE

Confirm if pregnant employee (eligible for unpaid parental leave) can take unpaid special maternity leave if she has pregnancy-related illness or if pregnancy ends within 28 weeks of the expected date of birth?

Confirm period of unpaid special maternity leave will not reduce entitlement to unpaid parental leave?

FLEXIBLE PARENTAL LEAVE

Confirm whether the employee (eligible for unpaid parental leave) wishes to take flexible parental leave (up to 30 days during the 24-month period)?

WHEN PARENTAL LEAVE STARTS

Confirm when parental leave (excluding concurrent leave) starts, which is either:

- For a pregnant female employee, up to 6 weeks before the expected date of birth of her child, but no later than the date of the child’s birth;
- For an employee other than the pregnant female employee, unpaid parental leave starts on the child’s date of birth;
- For adoption leave, on the day of placement of the child;
- Immediately following the period of unpaid parental leave taken by the employee’s spouse under one of the options above, if one or both employees are employed by either the Company or another business; or
- If the employee’s spouse or de facto partner is not an employee of the Company or any other business, anytime within 12 months of the date of birth or day of placement of the child.

‘NO SAFE JOB LEAVE’

- Confirm whether the pregnant employee in a high-risk role and needs to be transferred to a safe position?
- Confirm if a safe position is available and is at the same ordinary hours of work?
- Confirm where the pregnant employee is unable to work their usual role and there are no appropriate safe jobs available, the employee is entitled to take ‘no safe job leave’ for the relevant risk period?
- Confirm if the employee is entitled to unpaid parental leave under the FW Act, and is to be placed on ‘no safe job leave’ that the leave will be paid (‘no safe job leave’ is paid by the Company). Where the employee is not entitled to unpaid parental leave under the FW Act, ‘no safe job leave’ will be unpaid.

OTHER FORMS OF LEAVE

- Confirm with employee whether they are entitled to Federal Government Paid Parental Leave and if this is to be made via the company?
- Confirm whether the partner of an employee is entitled to Dad or Partner Pay?

FITNESS FOR WORK

- Confirm if pregnant employee continues to work within six weeks before the estimated date of birth, if medical certificate is required to confirm fitness for work?
- Confirm if employee fails to provide the certificate within seven days, or if the certificate states that the employee is not fit for work, that the company may require the employee to start unpaid parental leave as soon as practicable?

NOTICE REQUIREMENTS AND EVIDENCE REQUIREMENTS

- Confirm notice requirements with employee for taking unpaid parental leave of at least 10 weeks' written notice before starting leave, or where not possible, as soon as practicable?
- Confirm the notice specifies the intended start and end dates of the leave?
- Confirm the intended start and end dates of the leave (or advise of any changes) with the employee to occur at least 4 weeks before the intended start date, unless it is not practicable to do so.

KEEPING IN TOUCH DAYS

- Confirm the employee has been advised that they are entitled to 10 Keeping in Touch Days?
- Confirm if the employee extends their period of unpaid parental leave beyond 12 months, they can take an additional 10 days.

FLEXIBLE WORK

Confirm whether flexible work options have been discussed with the employee for their return from parental leave?

Request for flexible work under the *Fair Work Act*:

- a. Eligibility requirements under the *Fair Work Act*:
 - » Has the employee making the request been employed for at least 12 months?
- b. Formal application made by the employee:
 - » Has the employee put the request for flexible work in writing and set out reasons?
- c. Formal response by employer:
 - » Has the employer provided a written response to the employee within 21 days stating if the request is granted or refused?
 - » If refused, has the employer provided reasonable business grounds for the refusal?
- d. Where the employee is not eligible to make a request for flexible work under legislation, or has their request declined, can the employer come up with an alternative to accommodate both employer and employee?
This is a legal requirement for employees to whom a modern award applies, and is otherwise considered to be best practice for other employees.



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