



Personal/carer's leave, compassionate leave and family and domestic violence leave and the National Employment Standards

On 21 August 2019, the Full Federal Court of Australia handed down a decision in *Mondelez Australia Pty Ltd v AMWU* [2019] FCAFC 138. The decision deals with the method of accruing and taking paid personal/carer's leave for the purposes of the National Employment Standards under the Fair Work Act 2009.

The FWO is reviewing and updating its advice in light of this decision. Although the decision may be appealed to the High Court if any special leave application is made and granted, the Full Federal Court's decision reflects the current state of the law. The majority of the Full Federal Court has determined:

- Full-time and part-time employees are entitled to 10 working days of paid personal/carer's leave for each year of employment.
- The leave protects those employees' income when they are entitled to be absent from work due to illness or injury (or providing care or support to a family or household member who is ill, injured or suffering from an unexpected emergency).
- The leave must be calculated in working days, not hours. A working day is the portion of a 24 hour period that an employee would otherwise be working.
- An employee's entitlement is expressly based upon time working for the employer and is expressly calculated in days. For example, every 5.2 weeks, an employee accrues an entitlement to another full day of leave.
- For every day of personal/carer's leave taken, an employer deducts a day from the employee's accrued leave balance. If an employee takes a part-day of leave, then an equivalent part-day is deducted from the employee's accrued leave balance.

We are in the process of updating our website in this regard. You can subscribe and we'll send you an email with the updated information when it is uploaded.

Read the Federal Court of Australia's decision in [Mondelez Australia Pty Ltd v AMWU \[2019\] FCAFC 138](#).

Overview

Personal/carer's leave, compassionate leave and family and domestic violence leave forms part of the National Employment Standards (NES). The NES apply to all employees covered by the national workplace relations system, regardless of any award, agreement or contract of employment.

The NES establish minimum entitlements for permanent employees to receive:

- paid personal/carer's leave
- unpaid carer's leave
- paid or unpaid compassionate leave.
- unpaid family and domestic violence leave

These forms of leave are designed to help an employee deal with personal illness, caring responsibilities, family emergencies, family and domestic violence, and the death or serious illness of close family members.

Casual employees are eligible for unpaid carer's leave, unpaid family and domestic violence leave, and unpaid compassionate leave.

Personal/carer's leave

What are the minimum entitlements to personal/carer's leave?

The term 'personal/carer's leave' effectively covers both sick leave and carer's leave. Employees get:

- 10 days each year for full-time employees
- 10 days each year for part-time employees.

An employee's entitlement to paid personal/carer's leave accrues progressively during a year of service, and accumulates from year to year.

Personal/carer's leave continues to accumulate when an employee takes a period of paid personal/carer's leave or paid annual leave. Personal/carer's leave will not accumulate on unpaid leave unless it is community service leave or it is provided for in an award or agreement.

When can paid personal/carer's leave be taken?

An employee may take paid personal/carer's leave:

- if they are unfit for work because of their own personal illness or injury (including pregnancy-related illness), or
- 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
- sibling of an employee;
- a child, parent, grandparent, grandchild or sibling of the employee's spouse or de facto partner.

What payments are required when personal/carer's leave is taken?

When paid personal/carer's leave is taken, the minimum requirement is that an employee must be paid at their base rate of pay for the ordinary hours they would have worked during the period. An employee's 'base rate of pay' (other than a pieceworker) is the pay rate an employee would receive for their ordinary hours of work, but not including any of the following:

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

Can paid personal/carer's leave be cashed out?

Award or agreement covered employees can cash out paid personal/carer's leave if all of the following apply:

- the award or agreement allows the practice
- there is a separate agreement in writing on each occasion
- the employee retains a balance of at least 15 days of untaken paid personal/carer's leave
- the employee is paid at least the full amount that would have been payable had the employee taken the leave they have cashed out.

It is unlawful for an employer to force (or try to force) an employee to make (or not make) an agreement to cash out personal/carer's leave under a term included in an award or agreement.

An award/agreement-free employee is not able to cash out paid personal/carer's leave.

Unpaid carer's leave

What are the minimum entitlements to unpaid carer's leave?

An employee (including a casual employee) is entitled to two days of unpaid carer's leave for each 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.

An employee may take unpaid carer's leave for each occasion

as a single continuous period of up to two days, or any separate periods to which the employee and his or her employer agree. An employee cannot take unpaid carer's leave during a particular period if the employee could instead take paid personal/carer's leave. (This does not apply to casuals who have no entitlement to paid personal/carer's leave).

Compassionate leave

What are the minimum entitlements to compassionate leave?

An employee (including a casual employee) is entitled to two days of compassionate leave to spend time with a member of their immediate family or household who has sustained a life-threatening illness or injury. Compassionate leave may also be taken after the death of a member of the employee's immediate family or household.

An employee may take compassionate leave for each occasion as:

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

What payments are required when compassionate leave is taken?

If an employee (other than a casual employee) takes a period of compassionate leave, the employer must pay the employee at the employee's base rate of pay for the ordinary hours they would have worked during the period.

As mentioned above, casual employees are not entitled to any paid personal/carer's leave or compassionate leave. However, casuals are entitled to unpaid carer's leave or compassionate leave.

Family and domestic violence leave

What are the minimum entitlements to family and domestic violence leave?

An employee (including a casual employee) is entitled to five days of unpaid family and domestic violence leave each year. Employees are entitled to the full five days from the day they start work. They don't have to build it up over time.

The five days renews each 12 months but doesn't accumulate from year to year if it isn't used.

Employees can take the leave if they need to do something to deal with the impact of family and domestic violence and it's impractical to do so outside their ordinary hours of work.

For example, this could include:

- making arrangements for their safety, or safety of a family

member (including relocation)

- attending court hearings, or
- accessing police services.

The leave doesn't need to be taken all at once and can be taken as single or multiple days.

An employer and employee can also agree for an employee to take less than one day at a time, or for the employee to take more than five days.

Are there notice and evidence requirements?

For all periods of personal/carer's leave or compassionate leave, an employee must give his or her employer notice 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 is entitled to request evidence that would substantiate the reason for leave. A failure to either provide notice or, if required, evidence that would satisfy a reasonable person to substantiate the reasons for the leave, means the employee is not entitled to the leave.

An award or agreement may include terms relating to the kind of evidence that an employee must provide in order to be entitled to paid personal/carer's leave, unpaid carer's leave or compassionate leave. For example, an employer may request that the employee provides a medical certificate.

Notice and evidence requirements for family and domestic violence leave

An employer can ask their employee for evidence that shows the employee took the leave to deal with family and domestic violence. If the employee doesn't provide the requested evidence, they may not get family and domestic violence leave.

The evidence has to convince a reasonable person that the employee took the leave to deal with the impact of family and domestic violence

Types of evidence

Types of evidence can include:

- documents issued by the police service
- documents issued by a court
- family violence support service documents, or
- a statutory declaration.

Employers can ask employees to provide evidence for as little as one day or less off work.

Confidentiality

Employers have to take reasonably practicable steps to keep any information about an employee's situation confidential, when they receive it as part of an application for leave. This includes information about the employee giving notice that they're taking the leave and any evidence they provide. Employers are not prevented from disclosing information if:

- it's required by law, or
- is necessary to protect the life, health or safety of the employee or another person.

Employers need to be aware that any information about an employee's experience of family and domestic violence is sensitive. If information is mishandled, it could have adverse consequences for their employee. Employers should work with their employee to discuss and agree on how this information will be handled.

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