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INFORMATION SHEET

PERSONAL, CARER'S AND COMPASSIONATE LEAVE

What is an Employee's Personal, Carer's and Compassionate Leave Entitlement?

Personal, carer's and compassionate leave forms part of the National Employment Standards (NES), and as of 1 January 2010 applies to all full-time, part-time and casual employees covered by the national workplace relations system, regardless of the applicable industrial instrument or contract of employment. Terms in awards, agreements and employment contracts cannot exclude or provide for an entitlement less than the NES and those that do, have no effect. An employer must not contravene a provision of the NES.

The NES establish minimum entitlements for employees to receive:

- i. Paid personal/carer's leave;
- ii. Unpaid carer's leave;
- iii. Paid or unpaid compassionate leave.

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

Frequently Asked Questions- Personal and Carer's Leave

1. How much paid personal/carer's leave is a full-time employee entitled to take?

Answer: A full-time employee is entitled to take 10 days paid personal/carer's leave for each year of completed service with an employer.

2. How much paid personal/carer's leave is a part-time employee entitled to take?

Answer: A part-time employee is entitled to a pro-rata amount equivalent to 10 days paid personal/carer's leave for each year of completed service with an employer.

For example, a part-time national system employee working 3 days per week is entitled to a pro rata amount equivalent to 10 days' leave, which is 6 days' personal/carer's leave for each year of completed service.

3. Do casual employees have an entitlement to paid personal/carer's leave?

Answer: No. Casual employees are not entitled to paid personal/carer's leave. A casual employee is entitled to take 2 days' unpaid carer's leave on each permissible occasion.

4. When can full-time and part-time employees take paid personal/carer's leave?

Answer: A full-time and part-time employee may take a period of paid personal/carer's leave:

- i. If they are unfit for work because of their own personal illness or injury (including a pregnancy-related illness); or

- ii. 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.

Immediate family of a national system employee means:

- i. A spouse, de facto partner, child, parent, grandparent, grandchild or sibling of the employee; or
- ii. A child, parent, grandparent, grandchild or sibling of a spouse or de facto partner of the employee.

De facto partner of a national system employee means:

- i. 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 (whether the employee and the person are of the same sex or different sexes); and
- ii. Includes a former de facto partner of the employee.

5. When is an employee eligible to take a period of unpaid carer's leave?

Answer: All employees (including casual employees) are entitled to take 2 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.

6. What payment is made to an employee that has taken paid personal/carer's leave?

Answer: When a full-time and part-time employee has taken paid personal/carer's leave, 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 that period.

7. What is an employee's 'base rate of pay'?

Answer: The base rate of pay of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:

- i. Incentive-based payments and bonuses;
- ii. Loadings;
- iii. Monetary allowances;
- iv. Overtime and penalty rates;
- v. Any other separately identifiable amounts.

8. Does a full-time and part-time employee's entitlement to paid personal/carer's leave accrue?

Answer: Yes. A full-time and part-time employee's entitlement to paid personal/carer's leave does accrue progressively during a year of service according to the number of ordinary hours worked, and accumulates from year to year.

An employee does not need to complete 12 months service with the employer before taking any accrued personal/carer's leave.

9. Does a full-time and part-time employee's entitlement to paid personal/carer's leave continue to accrue whilst the employee has taken a period of paid personal/carer's or annual leave?

Answer: Yes. A full-time and part-time employee's paid personal/carer's leave continues to progressively accrue if the employee has taken a paid period of personal/carer's or annual leave.

Personal, carer's and compassionate leave will not accrue on unpaid leave unless it is community service leave or it is provided in an award or agreement.

10. Does a full-time and part-time employee's entitlement to paid personal/carer's leave accrue whilst the employee has taken a period of long service leave?

Answer: Yes. Long service leave does not break an employee's service with the employer, and therefore an employee's entitlement to paid personal/carer's leave continues to accrue progressively based on their ordinary hours of work for each year of service.

11. What happens if a public holiday falls within the period an employee has taken paid personal/carer's leave?

Answer: If during the period during which a full-time and part-time employee takes paid personal/carer's leave includes a day or part-day that is a public holiday, the employee is not to be taken on paid personal/carer's leave on that public holiday or part-day.

12. What happens if an employee falls sick or injured on a rostered day off (RDO)?

Answer: A full-time and part-time employee is entitled to claim paid personal/carer's leave for the day/s they fell sick or injured whilst on a RDO. The employee cannot take the RDO at a later date.

13. Which periods of absence are counted as service with an employer?

Answer: For the purpose of calculating an employee's paid personal/carer's leave entitlement, all absences taken by the employee as paid leave are counted towards to accrual of this entitlement. For example:

- i. Paid annual leave;
- ii. Paid personal/carer's leave;
- iii. Paid long service leave;
- iv. Public Holidays
- v. Jury service.

14. What absences are not counted as service with an employer, for the purpose of calculating paid personal/carer's leave?

A period of **service** by a national system employee with their national system employer is a period during which the employee is employed by the employer, but does not include any of the following periods (an excluded period):

- i. Any period of unauthorised absence;
- ii. Any period of unpaid leave or unpaid unauthorised absence, other than a period of absence under community service leave or a period of stand-down under the NES, an agreement or contract of employment.

An excluded period does not break a national system employee's **continuous service** with his or her national system employer, but does not count towards the length of the employee's continuous service.

15. What happens if a full-time and part-time employee has exhausted their paid personal/carer's leave?

Answer: If a full-time and part-time employee has exhausted their paid personal/carer's leave entitlement and can provide evidence that they are unfit to work due to illness or injury, they are entitled to take a period of unpaid leave.

16. Is a full-time and part-time employee entitled to take unpaid carer's leave if they have not yet exhausted their paid personal/carer's leave entitlement?

Answer: No. A full-time and part-time employee is unable to take a period of unpaid carer's leave if they could instead take paid personal/carer's leave.

17. Can a full-time and part-time employee covered by an award or agreement cash-out their paid personal/carer's leave entitlement?

Answer: The *Fair Work Act 2009* provides that a full-time and part-time employee's paid personal/carer's leave may only be cashed out in accordance with the terms of a modern award or enterprise agreement. If the award or agreement is silent on this matter, no cashing out is permitted.

The *Fair Work Act 2009* additionally provides that if an employer wishes to include a clause in an enterprise agreement permitting the cashing-out of personal/carer's leave, this is subject to the following conditions:

- i. Paid personal/carer's leave must not be cashed out if the cashing out would result in the employee's remaining accrued entitlement being less than 15 days; and
- ii. Each cashing out of a particular amount of paid personal/carer's leave must be a separate agreement in writing between the employer and the employee; and
- iii. The employee must be paid at least the full amount that would have been payable to the employee had they taken the leave that they have foregone.

Caution: *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.*

18. Can full-time and part-time employees not covered by an award or agreement cash-out their paid personal/carer's leave entitlement?

Answer: No. The *Fair Work 2009* does not provide any provisions for employees covered by a modern award or enterprise agreement to cash out their personal/carer's leave entitlement.

19. What are the notice and evidence requirements if an employee requests to take personal/carer's leave?

Answer: If an employee requests to take personal/carer's leave, they must give their 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. 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.

20. What types of evidence can an employer request from an employee?

Answer: To take any personal/carer's or compassionate leave (whether paid or unpaid), an employee must, if required, provide evidence that would satisfy a reasonable person of their entitlement to take the relevant kind of leave. Medical certificates or statutory declarations are examples of acceptable forms of evidence.

21. Can an employer dispute an employee's proof of evidence to take personal/carer's leave?

Answer: A medical certificate is regarded as irrefutable proof of an employee's personal illness or injury. However, satisfactory evidence may vary from a statutory declaration for a single day's absence, to evidence from a suitably qualified registered professional relevant to the employee's illness or injury.

An employer wishing to challenge a medical certificate would normally seek another medical opinion in relation to the employee's state of health.

22. Can an employer terminate an employee's employment if they are absent on personal/carer's leave?

Answer: The *Fair Work Act 2009* provides that an employer must not dismiss an employee because they are temporarily absent from work due to illness or injury.

The *Fair Work Regulations 2009* provides that it is not a 'temporary absence' if the employee's absence from work extends for more than 3 months, or the total absences of the employee, within a 12-month period, have been more than 3 months, exclusive of any absence on paid personal/carer's leave. The employer, however, would still require a valid reason to dismiss the employee, even if the employee has been absent on unpaid leave in excess of 3 months.

Caution: Employers must be aware that the normal rules for termination apply and an employee may dispute the termination by making an unfair dismissal or general protections claim.

23. What happens if an employee falls sick or injured during a notice period of termination?

Answer: A full-time and part-time employee is entitled to take paid personal/carer's leave during the notice period. As soon as notice of termination has been given, the date of termination remains unchanged unless the employer and the employee agree to an extension.

24. Is a full-time and part-time employee entitled to take or accrue paid personal/carer's leave whilst on workers compensation?

Answer: The *Fair Work Act 2009* states that an employee is not entitled to take any paid or unpaid leave (except unpaid parental leave) or accrue any paid or unpaid leave provided under the NES during which a period when the employee is absent from work because of personal illness or injury, for which the employee is receiving workers compensation, unless provided otherwise by the relevant Commonwealth, State or Territory workers compensation law.

An employee's absence on workers compensation does not break an employee's service with the employer, meaning service prior to and subsequent to the absence on workers compensation is taken into account when calculating an employee's accrual of leave.

Caution: Employers must refer to the relevant workers compensation laws to ensure they are not in breach of their obligations.

25. Is an employee's accrued and unused personal/carer's leave paid out if the employee's employment is terminated?

Answer: No. An employee's accrued and unused personal/carer's leave is not paid out on the resignation or termination of an employee's employment. However, the applicable award or agreement may provide otherwise.

Caution: Employers must refer to the applicable modern award or enterprise agreement to ensure they are not in breach of their obligations as to whether an employee's personal/carer's leave entitlement is paid out on the termination of an employee's employment.

26. Is an employee's accrued and unused personal/carer's leave paid out if there is a transfer of employment?

Answer: Under the *Fair Work Act 2009* the transfer of employment provisions apply when an employee moves from one employer (i.e. the old employer) to another employer (i.e. the new employer) within 3 months, and there is a transfer of business involved (i.e. through a sale of business, transfer of assets, outsourcing, insourcing), or the two employers are associated entities.

If these conditions are satisfied, the period of service with the old employer will generally be counted as service with the new employer for the purpose of entitlements, and therefore the employee's accrued entitlements transfer to the new employer. The employee's transferring entitlement will be less the amount the employee had already taken or agreed to cash-out with the old employer.

However, if these conditions are not satisfied and the new employer is not an associated entity of the old employer, the new employer has the option to not recognise a transferring employee's previous service for the purpose of the NES entitlements to personal/carer's.

Frequently Asked Questions- Compassionate Leave

1. How much compassionate leave is an employee entitled to take?

Answer: All employees (including casual employees) are entitled to take up to 2 days compassionate leave on for each permissible occasion if the leave is taken:

- i. To spend time with the member of the employee's immediate family or household who has contracted or developed personal illness, or sustained personal injury; or
- ii. After the death of the member of the employee's immediate family or household.

2. How can an employee take compassionate leave?

Answer: An employee may take compassionate leave for each occasion as:

- i. A single continuous two day period; or
- ii. Two separate periods of one day each; or
- iii. Any separate periods to which the employee and his or her employer agree.

3. What payment is made to an employee who has taken a period of compassionate leave?

Answer: If a full-time and part-time employee takes a period of compassionate leave, they must be paid at their base rate of pay for the ordinary hours they would have worked during that period.

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

4. What is an employee's 'base rate of pay'?

Answer: The base rate of pay of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:

- i. Incentive-based payments and bonuses;
- ii. Loadings;
- iii. Monetary allowances;
- iv. Overtime and penalty rates;
- v. Any other separately identifiable amounts.



5. Can a full-time and part-time employee cash-out their compassionate leave entitlement?

Answer: No. Full-time and part-time employees are not entitled to cash-out their compassionate leave entitlement.

6. What are the notice and evidence requirements if an employee requests to compassionate leave?

Answer: If an employee makes a request to take compassionate leave, they must give their 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).

An employer is entitled to request evidence that would substantiate the reason for leave. 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.