

The Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Bill) was introduced by the government on 28 July 2022. If passed, the Bill will amend the Fair Work Act 2009 (Cth) (FW Act) to introduce 10 days of paid family and domestic violence (FDV) leave for employees.

New Entitlement

In introducing the Bill, the Minister for Workplace Relations referred to the key role workplaces play in supporting those people experiencing FDV situations and the concerns around disruption to employment and income that paid FDV leave may ease.

If the Bill passes, paid FDV leave will be available to employees experiencing FDV who need to deal with some aspect of the impact of FDV, and for whom it is impractical to do so outside their working hours.

The FW Act currently provides for five days of unpaid FDV leave. The Bill will extend the leave to 10 days, introduce an entitlement for an employee to be paid for the leave, and extend the definition of “family and domestic violence.” This definition will remain as “violent, threatening or other abusive behaviour that seeks to coerce or control the employee and causes the employee harm or to be fearful” but now will not only include behaviour by a close relative, but also behaviour by a member of an employee’s household, or a current or former intimate partner of an employee.

The legislative note to the definition, providing examples of when an employee may access this leave, will also be amended to include attending counselling and attending appointments with medical, financial or legal professionals, as well as attending “court hearings” rather than just “urgent court hearings”.

Notice requirements will remain as they are, that is, the employer can require the employee to provide evidence that would satisfy a reasonable person that the leave was taken to deal with FDV. The existing confidentiality requirements will also remain.

Potentially, paid FDV leave will initially be available to national system employees only (and state referral employees in certain situations). However, should the ILO Convention (No. 190) concerning violence and harassment come into force in Australia before 1 February 2025, the entitlement will be extended to employees not covered by the national system, in much the same way as parental leave and notice of termination entitlements currently operate.

Full Rate of Pay

If the Bill passes, the entitlement will come into effect on 1 February 2023 (or 1 August 2023 for small business employers). The 10 days will accrue immediately for existing employees (and reset on the anniversary of their commencement date), so employers will need to understand their obligations in relation to the payments.

This leave is to be at an employee’s “full rate of pay.” This means when accessing FDV leave, an employee is to receive the full remuneration that they would have received had they not taken the leave, so far as possible. Where amounts the employee would have earned can be identified and calculated with a reasonable degree of certainty, they are to be included in the calculation of FDV leave pay.

“Full rate of pay” is already defined in section 18 of the FW Act and includes incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and any other separately identifiable amounts.

Casuals

Unlike in the current FDV leave provisions of the FW Act, if the Bill is passed, casual employees will be entitled to the paid leave along with all permanent full- and part-time employees. Australia currently has 2.6 million casual employees, and research leading to the Bill’s introduction confirmed that workers in family or domestic violent situations are more likely to have a disrupted work history and to be in casual employment.

The Bill attempts to deal with the complexities involved in calculating the entitlements of casual employees, given they do not have the steady work hours of permanent employees. For casuals, the Bill provides that these employees’ full rate of pay is to be worked out as if the employee had worked the hours for which the employee was rostered. This would include any situation where the employer makes available, by any means, a list of shifts to be undertaken by casual employees in advance. To avoid doubt in less formal rostering scenarios, without limiting the ordinary meaning of rostered hours, an employee is taken to have been rostered to work hours in a period if the employee has accepted an offer by the employer of work for those hours. The offer and/or acceptance can, but need not, be in writing or by phone.

Enforcement

The new paid FDV leave will be part of the National Employment Standards and so will be a civil remedy provision. This means that if an employer unlawfully refuses the leave or applies employees' entitlements incorrectly, it can face penalties of up to AU\$66,600 for a corporation or AU\$13,320 for individuals knowingly involved in the contravention (or AU\$666,000/AU\$133,200 for "serious contraventions").

The entitlement will also be protected by the General Protections provisions of the FW Act. Accordingly, the "adverse action" provisions of the FW Act will be available for all employees accessing or proposing to access this leave, including casuals. For casuals this can include a day when perhaps they have not accepted an offer of a shift and so are not entitled to payment for the day, but they can still utilise a day of unpaid FDV leave and, thus, be protected against any adverse action as a result of not being available for such a shift.

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